CONCILIATION

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Text of portion of a paper delivered at the Institute's General Arbitration Course in Brisbane, Queensland, May 1986

What is Conciliation?

In the industrial dispute context, conciliation connotes the *intervention* of a mediator with a view to bringing the parties to agreement. The "rules" for the conduct of such are contained in the various Industrial Acts and related Rules.

In the commercial dispute context, conciliation connotes the *interposition* of a mediator with a view to bringing the parties to agreement.

You may well ask—what is a mediator? Mr J.B. Dorter has defined a mediator as a person who 'relies on assistance and persuasion rather than power to make binding decisions but he should be more at arm's length than the conciliator. He should be impartial". In his view, "conciliation is more in the nature of pacification, winning over to goodwill and settlement of differences in a friendly and non-adversarial way. The conciliator is not necessarily impartial. He may have to get 'beside' one party and then the other".

Despite its theoretical attraction as a means of resolving commercial disputes quickly, fairly and cheaply, conciliation has had limited application in Australia up to now. In practice, conciliation has had its difficulties. A prerequisite for success is that the parties must want to settle their dispute. They then have to agree the rules which are to govern their particular conciliation.

They also have to agree on a conciliator. Even when these matters are settled, a party generally can walk away at any time and, in any event, any settlement reached by conciliation cannot be enforced as can the award of an arbitrator.

The Commercial Arbitration Act (the Act) contains provisions which help to alleviate these difficulties. Where a dispute arises under a contract which contains an arbitration agreement, a party only has to give a Notice of Dispute to put into motion the machinery for the *intervention* of a mediator by statute. For example, section 27 of the Act provides the arbitrator with power to seek settlement of disputes otherwise than by arbitration. Subsection (1) provides:

> **Power to seek settlement of disputes otherwise than by arbitration.**
> 27. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which the agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

This can be a useful tool to achieve a settlement of, or to narrow down,

a dispute. The arbitrator has a discretion as to whether or not he uses the power and he should be reasonably sure of at least partial success before invoking it. Better that he invite the parties to agree to such a conference where it seems to him that it could be beneficial. Best he conduct the conference as a mediator rather than as a conciliator.

Where settlement occurs, a consent award can be published by the arbitrator and it can be enforced as a judgment of the Court. Until such time as judicial guidelines are available on the application of this section, it would be prudent for the arbitrator to obtain the parties' agreement in writing that they have no objection to him proceeding to arbitration in the event that settlement does not occur.

The importance given to section 27 is highlighted by subsection 34(6) of the Act. It provides that an arbitrator shall, in exercising his discretion as to the costs of the arbitration, take into account a refusal or failure of any party to attend a section 27 conference ordered by an arbitrator.

There is another provision in the Act which is useful for those who prefer to settle their disputes by conciliation. Subsection 22(2) provides:

> (2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement as *amiable compositeur* or *ex aequo et bono*.

The arbitrator's role when acting as *amiable compositeur* is to try to effect a reconciliation between the parties so that they make a settlement of their differences. He is acting as a conciliator and hence has a wide discretion and licence to obtain settlement. Of course he still has to observe the rules of natural justice and conform with the arbitration agreement as supplemented. The resulting award can be enforced pursuant to section 33 (1) of the Act.

There are parties who would rather have their disputes settled by an arbitrator applying his own ideal of what is just and fair rather than his determining them strictly in accordance with the rules of law. The other arm of subsection 22 (2) provides for them. The arbitrator's role when acting *ex aequo et bono* is to test his conclusions against what he considers just and fair and bring down an award which gives the most equitable result.

Subsection 22 (2) now permits UNCITRAL arbitrations which contain such provisions to be safely held in those parts of Australia where the Act applies. It should attract non-domestic disputes to the Disputes Centres which have been established in Melbourne and Sydney. ■

Mr John A. Morrisey is President of The Institute of Arbitrators Australia.

Chapter Library Facilities

The following publications have been added to Chapter libraries:-

Commercial Arbitration—Sharkey and Dorter.

Course Notes. 1986 General Arbitration Course. Brisbane, May 1986. ■

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