DISPUTE RESOLUTION, THE OPTIONS, THE OBSTACLES AND THE OPENINGS

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Extracts from an address delivered at an Alternative Dispute Resolution colloquium in Adelaide summer of 1989.

I have listened with great interest to the ideas, the comments, criticisms, the outrageous suggestions, the comical suggestions and the serious ones that have been put forward. You seem to have dealt very adequately with the topic that I have been given, and it is for that reason that I resolved during the course of this Colloquim to concentrate on one aspect of the options (and indeed the obstacles and openings) which does not seem to have received very much treatment, except to have been totally rejected by everyone as being a feasible possibility, that is, Litigation.

I have given considerable thought to this topic, of Dispute Resolution; 'The Options, the Obstacles and the Openings.' It appears that despite all the bandaids that have been applied by Parties in resolving disputes, there are still cases, in which the parties remain at loggerheads, their disputes incapable of resolution.

That is the stage we are at now. We have talked a lot about the form of the contract, the wording of the contract, the actual performance of the contract and the management of it and so on, and all of those discussions have been very productive, and very useful. But, the stage at which I am concentrating on is a stage where all has failed in the resolution of the dispute, and whether there are ways and means of making the whole dispute resolution process work smoothly and as economically and expeditiously as possible. There are the options.

COMMERCIAL ARBITRATION

The system of arbitration in England for civil disputes including building and construction and the like, probably preceded the litigation system. It is indeed well tried in our system of jurisprudence. But, it still remains to ask, is it in the words of Serastro, The High Priest in Mozart's Magic Flute, the Hallowed Place that we might at times believe it to be.

Our commentator says that the litigation system is the Rolls Royce system. Interpret that to mean a lot of fine engineering and smooth running giving a secure passage. Well, I can only say as a minor player in that orchestra that litigation and indeed, arbitration doesn't always run as smoothly as a Rolls Royce, nor as smoothly and precisely as a Bach composition. It is the parties to the dispute who say not only when to

begin, but what to play, and that is the question. That is the running cost and performance output.

LITIGATION

We've really not said much about litigation at this Colloquim. It is costly; yes, certainly. Well tried?: yes and thorough, in the main. Certainly there are statutes, rules of court and so on which govern the proceedings in Court. These factors are both restrictive and at times costly. We are all familiar with the cases where the parties string out the litigation (sometimes for years).

Lengthy?—Is litigation lengthy? I think it has been said at this Colloquim that it is assumed to be lengthy. But I would venture to suggest to you that that is not necessarily so.

Non-negotiable and unsettleable? The answer to that is no. Certainly not. The number of cases that are settled at a comparatively early stage is certainly well over 50%. So it cannot be said that the actual issue of the Writ or as we call it in South Australia the Issue of the Summons is the final crossing of the Rubicon which means that you have to go all the way to Rome. Litigation is capable of settlement at any stage after the issue of the proceedings.

The point is that the Courts are a combined and orderly system of Arbitrators, Mediators and Conciliators in so far as the rules of Court permit them to be flexible in the handling of the actual litigation. It should be emphasised, that the Courts are a service provided by the community to the community. The Courts are not there to compete with the other institutions; it is after all a branch of the whole system of Government itself. The Judicial branch is providing a service to the public and I think that is often forgotten perhaps because of certain impressions, certain feelings, and a lack of understanding by many people when they come to Courts. It's not the fearsome place or even the remote place that it is sometimes made out to be.

CHANGES IN COURT SYSTEM

Let me dwell then on some aspects of the Court services which have changed quite considerably throughout Australia, and indeed probably throughout the English speaking Judicial system over the last 10 to 20 years. One of the most measurable changes is the introduction of what we call Commercial Causes, which I will discuss briefly in a moment. When the disputant enters the Court room it is not a structure of endless passages leading to no goal. Once the Summons or the Writ has been issued and the claim has been put in place after an appearance has been entered, which is a fairly short time from the issue of the proceedings, the Court takes control of the action by giving directions. This is heard and determined by a Master of the Court. A Master is a legal practitioner

of a number of years experience, and very experienced in handling what we call the interlocutory steps of an action. This can be a very fruitful stage for delaying the proceedings and for that very reason we have introduced rules of court in South Australia known as a Summons for Directions, whereby the Master takes control by some sort of a checklist. If a party is sitting on the action and not doing anything about it, and not getting on with it, then orders can be made to expedite the proceedings. This is a form of procedure, to try and prevent delay. Other States have similar procedures.

DELAY

The bug bear of all dispute resolutions is *delay*. The Summons for Directions in South Australia is now applicable to all types of action or claim. The Master directs the parties to proceed, or, if I may put it in Layman's language, to get on with the job. Although there are few sanctions other than the ordering of costs against the delaying party, which may, or may not, be a real sanction to that party, nevertheless, it appears that this Summons for Directions procedure has been reasonably successful.

COMPULSORY CONFERENCE

After a certain period of time, and this is usually a matter of months I am talking about, the Master can order what is called a Compulsory Conference. Now one of the things that has come out of our discussions in the last two days is the undoubted fact that under our system of Law, Judges and Courts have always refused to enter into the negotiating field. This is because the Courts must remain independent. The Courts must appear to be completely unbiased by such things that the Judicial Officer who is rostered to hear the case may be told by either party in the course of negotiating a settlement.

Of course that does not apply to a master, because a Master of the Court doesn't hear the case. We have found in our Court, after certain teething problems, that this has resulted in a considerable number of settlements in the last two years. The parties and their counsel can say things to the Master which will not be passed on to the Judge.

What I have said in the main relates to personal injury cases. They have in the past constituted the vast majority of the cases. But I see from some statistics that I received the other day, that in the twelve months up to the end of December 1988 in the Supreme Court of South Australia there were 208 motor vehicle accident cases, 456 industrial accident cases (not all of them were tried) 25 commercial cases and 1232 other cases. Those other cases could be property cases, contract cases, building disputes and all sorts. The Supreme Court has not had a great many building and construction cases in recent years.

There is an obligation on the parties to attend the Compulsory Conference and put to the Master what their problem is, what the issue is. What is the real dispute?

I know that Members of the Bar say that it is very difficult to go into the matter in any great detail because normally the parties are simply putting their best offer and then the Master sees how far apart they are. But I see no reason why in a building or construction case, more time should not be allocated for the Compulsory Conference so that parties really can get down to the issues in the case. If the Compulsory Conference does result in a settlement or even a partial settlement, it would certainly reduce the trial time. When the case actually comes to trial the Judge is told—what has been agreed and what has not. The Compulsory Conference has obviously worked to reduce the time of the hearing of the litigation and to reduce costs.

Perhaps the other thing I should mention from the South Australian statistics of December 1988, is that the time between the filing of the first appearance approximately and the hearing date of the compulsory conference was 5 months, which is not a great deal of delay in a court system. Indeed in cases of applications under special Acts, and in some cases including building cases, it's only one month. The average time between the date of setting down and the matter actually coming to trial in our Court last year was eleven months. So in South Australia we do appear to be a bit better off, perhaps because we are much smaller than larger jurisdictions such as New South Wales, but no doubt there are other reasons as to why we are in a better position. I am pointing out to you that there are alternatives, there are options, there are procedures available in the litigation process itself whereby you can speed up dispute handling.

SUMMONS FOR IMMEDIATE RELIEF

The next proceeding which I want to mention is called a Summons for Immediate Relief. It's peculiar to South Australia. It's a form of summary judgement procedure with which the lawyers will be familiar. The peculiar advantage of the Summons for Immediate Relief is that you can take out an interlocutory application after the issue of the summons, even before appearance when acting for a plaintiff.

By the issue of the Summons for Immediate Relief a party can by the use of affidavit material get before a Master, and if it's a complicated matter, ask that it be referred to a Judge in Chambers. There is very little delay; it will come before the Judge's hearing Chamber applications during that month. We are all rostered to our various duties and there is a Chamber Judge each month who reads the affidavits. What the applicant has to show is that there is a case of urgency, and secondly most importantly it must be shown that there is *no trialable issue.*

The reason why I mention this is that there has been discussion at this Colloquim of bogus claims, of unmeritorious and unjustified claims. Now this is a matter that concerns defendants more than plaintiffs/claimants. But this procedure is equally available to a defendant. If the Principal is satisfied that the claim is unjustified, is unwarranted and cannot be substantiated, then the *defendant*, after entering an appearance, which can be done very quickly, can immediately file its/his/or her affidavits and substantiate that there is no trialable issue.

I'll quote as an example of an actual decided case concerning the building of a new Popeye; Popeye is the name of the boat which runs cruises for children on the Torrens River here, in the summer. The proprietors found that their new boats were not being delivered; the builder had stopped building them. They took out proceedings for the completion of the boats so that they could have them delivered for the summer season. An order was made by a Judge for the completion of the boats. The Judge held that there was no trialable issue, in other words, to put it bluntly in layman's language there was no reason, no justifiable reason for the delay. The summons for Immediate Relief had the effect of getting the new Popeyes completed and delivered onto the River Torrens.

So this procedure for dealing with unjustified claims is a very useful procedure and it is certainly very speedy. Normally one finds that it is used when there is a lot of money involved and interest is being incurred at high rates on a daily basis. The summons for Immediate Relief can bring the matter to a head, and mounting interest debts can be avoided while waiting in the ordinary course for the case to be heard.

If the applicant, whether it be plaintiff or defendant is unable to establish that there is no trialable issue, then the Court has alternative extensive powers for speeding up the proceedings by ordering an early trial. If there is, a lot of money involved, then a trial can be obtained reasonably rapidly. Obviously there are certain interlocutory steps, discovery and so on which can be attended to and times for compliance shortened by orders made at the hearing of the application.

The other aspect of all these pre-trial proceedings that I have been talking about is that there is virtually no publicity because everything is heard in Chambers. Nothing heard in Chambers is open to the public; it is only hearings in open Court which are accessible to the press. If publicity becomes an issue, and lack of publicity is often said to be one of the advantages of arbitration. But the same immunity from publication applies to hearings in Chambers.

It has been held in a recent case that an Order made on the Summons for Immediate Relief is a final Order. It is a final judgement. In that recent case it was argued that the affidavits were insufficient. It was argued that the application for immediate relief was interlocutory. The case related to a fire in a winery where the Insurance Company was refusing to pay up. The proprietors of the winery wanted to rebuild. It was found by

the Court that there was no trialable issue; the Insurance Company, as it turned out, did not have any evidence that they said they had; they were unable to substantiate any defence to the claim for the sum of money. The Court on appeal held that it was a final order. In other words, it's just as good as a judgement after a full hearing of evidence and cross examination.

POWER OF JUDGE TO ACT AS CONCILIATOR

Finally, as far as the interlocutory proceedings are concerned, there is the existence of an Act which is very rarely used called the Conciliation Act (1928). The Act in effect gives the Judge full power to act as a Conciliator. The reason why it's not often used is obvious, mainly that the Judge may compromise himself/herself if he/she conciliates. Anyway, that Act is on the Statute books, and it is available. If the construction dispute, or whatever it is, is suitable for inviting the Court to conciliate, then there is statutory power to do just that. I have actually used it once; it related to a building case, a bakery out at Norwood. There were a number of difficulties that arose during the course of the litigation and the parties invited me to conciliate. We had a full day where we just went into Court, closed the Court, and discussed everything. We worked out a plan for the completion of this building and I never heard about it again. But of course if it had come back to Court, I am quite sure, that I would have disqualified myself.

USE OF REFEREES AND ARBITRATORS

I want to say something more about the trial, and this arises out of something that John Callaghan said, and indeed in relation to a comment of Mr Justice Smart's. When the case comes to trial, in our Court cases are rostered to particular judges who are sitting in that Division at that particular time, and then of course the actual hearing is directly under control of the Judge who's been rostered to hear it. John Callaghan referred to the use of referees and arbitrators in the litigation process itself, and he made the comment with which I personally agree, that it is a procedure which should be used more extensively than in fact it is. Under our Supreme Court Act, and certainly in at least some if not all the other States as well, there is power, subject to rules of Court, for a Judge to refer the matter or a question to an Official or Special Referee for enquiry or report on *any* question arising in *any* cause or matter *other than* criminal proceedings. If all the parties interested, who are not under a disability, consent, *OR* if the cause or matter requires any prolonged examination of documents, *OR* any scientific or local investigation which cannot in the opinion of the Court or Judge conveniently be made by the Court or conducted through its ordinary offices, *OR* if the question in dispute consists wholly or in part of matters of the . . . . . , the Court

or Judge may at any time order the whole cause or matter or any question or issue of fact arising therein to be tried before a Special Referee or Arbitrator agreed on by the parties, or before an Official Referee or Officer of the Court.

Under the rules of Court it is provided, since the 1st of January, 1987, that an action or proceeding or a question or issue therein may be referred to a Referee for (a) trial or hearing (b) enquiry and report. Then there are further provisions that the Referee or Arbitrator has all the powers of subpoening witnesses, and so on. There is a procedure laid down in the rules as to how that has to be done. This procedure or a similar one has been in existence for a very long time but it hasn't been used very much.

I have used it once, very successfully; Mr P. Fargher was one of the experts whom I asked to conduct an enquiry into the latent defects in the concrete structure of a building, together with another engineer who was to be called as an expert by the other side. The two engineers were sent off by me together to look into this particular structural problem, and it certainly saved a considerable amount of time. Their enquiry was of a very technical nature, something which I'm quite sure I wouldn't be able to fully master myself, but the two engineers were able to come back and report to me within a week. It is a very useful procedure.

I do have quite a bit of material here relating to the situation in Victoria where such references by the Court have been used more successfully. The material I have is a paper that was delivered by Mr Justice Murphy of the Supreme Court of Victoria. It appears that in that State they have used this procedure or a similar one (I think it's Order 50 of the Victorian Rules) whereby the Court can in effect determine that the issue or fact, or part of a case can be referred to a "Referee" or an "Arbitrator"; that is a technical expert who can then proceed to *determine* that technical question. The Court then uses that Report as part of the findings for determination of the case. In other words, it becomes part of the Judgement for the purpose of finding those technical facts, and it is then for the Judge to determine the questions of law if there are any. I have here in the Volume 7 No. 2 of *The Arbitrator* a brief report of a case decided by Mr Justice Pincus of the Federal Court. His Honour made an Order for an architect to carry out an investigation and report back to him in relation to some defective tiling. The interesting part in the report in *The Arbitrator* is on page 60. Mr Justice Pincus said this:

"1. That there was no need for any special circumstances to exist in order to invoke the particular power that was invoked to order that a Referee or Specialist be appointed.
2. That even if the expert's report does not resolve the case and proceedings continue, such a report would be admissible in evidence and would assist the Court in determining the issues in dispute in proceedings.

3. Further it was hoped that the report would assist towards settlement of the case."

I note that his Honour further ordered that the expert could go about his enquiry and report in such fashion was seemed to him appropriate, and shall inform himself on the matters relevant to the enquiries as he sees fit, for example, by making telephone enquiries of persons who appear to him to have information necessary for the purpose of his report. I notice with some amazement in Mr Justice Murphy's paper, that in one case where he was in somewhat of a quandary as to how to go about it, he rang up an accountant friend of his during the course of the hearing, and said in effect, 'Who do I get to look into this particular question; the parties don't seem to know who's suitably qualified." It was a particular accounting problem and the accountant said all you want is not a quantity surveyor but some sort of specialised accounting person, and so he went back into Court told the parties that and they appointed an accountant as an expert to report back to the Court.

So there are many and varied ways in which this procedure can be used. The use of an expert in the trial process itself can be used, and of course, it has the obvious advantage of reducing the length of the trial, reducing the cross-examination in Court. It is still possible for one of the parties to apply to cross-examine the expert on that report. The Court can so order in appropriate cases.

My message is that the Court itself, in determining the litigation process, is in effect doing what Mr Justice Smart said the other day he had never heard of any third party doing, namely, the Court determines the process by which the parties will resolve their dispute. If an appointment of an arbitrator is suitable, then the Court can do it at the trial stage. This is something that I think we all ought to bear in mind as one of the options or alternatives.

ARBITRATION

Arbitration is something that has now been streamlined. I would suggest, although there are no doubt still difficulties that will arise, the Commercial Arbitration Act assists in this regard. At least the legislation relating to arbitration is now uniform throughout Australia, except in Queensland. But the Queensland provisions are not really substantially different. Of course there are some slight differences between the various States. Up until 1986 when our Commercial Arbitration Act was passed, we had a provision in the South Australian Arbitration Act which outlawed many arbitrations other than major building disputes. But the Act has now been abolished, and therefore the commercial arbitration system, the same as in the other States applies in South Australia. The option of commercial arbitration is now available on the same basis as it is in the other States. We haven't had any applications under the Commercial Arbitration Act

yet. But I'm sure that we will use the precedents laid down by the other Courts in the interpretation of the Commercial Arbitration Act. I see no reason why we shoudn't proceed in this State on the assumption that the Act will operate in a similar way here as elsewhere.

When dealing with obstacles, one of the problems with alternative dispute resolution is that it is not binding and conclusive. Therefore anything that is being said, except if there is agreement to exclude it, can be used as evidence. This gives rise to a number of problems which have been referred to by the speakers who have reported this morning. I am not condemning the alternative dispute resolution system, but I feel that there are a number of questions that no doubt we will have to ask ourselves. It won't come to us in the Courts unless of course we hear evidence arising out of discussions which have taken place during the course of Mediation, Conciliation, or even some short track arbitrations.

Conciliation and mediation are other avenues which have also been discussed and you will find a number of useful articles again in *The Arbitrator* about those proceedings. I should have said that as far as arbitration itself is concerned the Institute of Arbitrators issued a little booklet containing what are called notes on the expedited Commercial Arbitration Rules and the arbitration process, and some notes on the basic law of contract. These are very useful. On costs, they provide a very good guide for those parties who are contemplating arbitration and their legal advisers and of course arbitrators themselves. One of the obstacles I suppose is the high interest rate level which has been prevailing in Australia and elsewhere over the last decade or more.

The other thing which hasn't been said so far is that the adversarial system that we adopt in our courts and which applies to a certain extent in arbitrtion particularly when you have lengthy probing cross-examination is a lengthy process and it is of course consequentially very costly. The arbitration process can however be far more inquisitorial than the Courts. The Civil law countries in Europe adopt an inquisitional approach in their Courts, and consequently in their arbitrations.

One other obstacle that has been mentioned, is the shortage of arbitrators. I believe it is being attended to by The Institute of Arbitrators Australia which train and educate Arbitrators. Another question concerns the availability of barristers and solicitors who know what they are about and are capable of grasping problems and putting them in an orderly fashion for presentation to the Conciliator, Mediator or to the Arbitrator. Legal services are now better equipped to assist and guide Arbitrators in resolving both factual and legal issues.

Another obstacle which I think has not been touched on very much is the difficulty of making appropriate findings of fact in the case of arbitrations. Arbitrators, like Judges, are now required to give reasons. Those reasons of course must include a satisfactory summary and

conclusions as to the relevant facts in issue. Judges are used to this; I can't say that we are trained because a barrister is doing just the opposite of what he does when he becomes a Judge! But on the Continent of Europe Judges *are* trained for this very thing, but we have to pick it up as we go along. I think it was Mr Justice Smart who commented that for that reason one finds that the better arbitrators are the more experienced ones. Certainly we can learn a lot from our colleagues in the Eastern states where they seem to have been more exposed than we have, as I heard confirmed this morning, to the arbitration process. So, the making of satisfactory findings of fact to satisfy the requirement under the Commercial and Arbitration Act and the giving of reasons is something that must be borne in mind when selecting arbitrators suitable for determining the particular dispute.