"EXPEDITING ARBITRATIONS"

Text of a Paper delivered to Members of The Institute of Arbitrators Australia at Brisbane on 9th August, 1988 by the Honourable Mr Justice de Jersey, Supreme Court of Queensland

INTRODUCTION

THE traditionally perceived advantages of commercial arbitration over litigation have been these: first, the arbitrator may be a person with high technical proficiency in relation to the subject matter of the arbitration; second, the arbitration is conducted in private, which may be of great importance to the preservation of commercial reputations; third, the arbitration proceedings may be conducted with comparative speed; and fourth, the expenses should be less. The first two of these advantages are still enjoyed. My own view is that having an arbitrator qualified in the area of the dispute is the real value of arbitration these days.

No longer however can arbitrations be considered generally less expensive than litigation. In this area, litigants have the advantage of the provision of the court facilities free of charge: the court room and associated facilities, the transcription service, and the Judge. Parties to arbitrations have to pay substantial amounts of money for such things. Large complex arbitrations can be extremely expensive, and if they go on for too long, the absurd position may be reached where the costs exceed the amount in issue.

This brings me to the question of the time taken to bring arbitration proceedings to a conclusion. With the revitalisation of the commercial causes lists in the court, the position with commercial litigation and commercial arbitration is now comparable in this regard. Until the early 1970s, delay with civil litigation in the court was inordinate. Then with the rejuvenation of the commercial lists, the position gradually improved. Today a trial can be had for a commercial cause in the Supreme Court of Queensland within approximately three months of readiness for trial. To run through the interlocutory steps to the point of readiness for trial would on average take another three or four months.

But even this time lapse with litigation and arbitration can sometimes

be too much. Often there is real urgency about commercial dispute resolution: rapidly changing market conditions, for example, may necessitate the very early resolution of a point of conflict. So may the desirability of preserving if possible the commercial relationship between the disputants, in the interests of future business. Long term litigation or arbitration will irreparably fracture such relationships. Such concerns have led some business people to turn to the so-called methods of alternative dispute resolution, such as the mini trial, which developed in the United States in the 70's in response to the clogging of the civil lists of the courts.

There is great interest being shown in these methods in Australia. They are really no more than sophisticated forms of the settlement techniques which sensible solicitors have for years employed in the interests of their clients. But that parties should be turning, or considering turning, to these alternative mechanisms, should provoke analysis of the sufficiency of present trends in litigation and arbitration.

Litigation and arbitration are highly developed and sophisticated methods of dispute resolution. In litigation, the prospect of an ultimately fair and just resolution is as assured as it possibly can be. And the position with arbitration is much the same, the role of arbitrators being defined by centuries of precedent. I think it important that these remain the predominant modes of commercial dispute resolution, although I readily acknowledge that the currently fashionable methods of ADR have an important potential role, either alone or utilised in conjunction with litigation.

Since the minimisation of delay and expense has led to the current interest in these alternative mechanisms, we should be looking towards achieving more expedition, and reducing costs, in the conduct of both litigation and arbitration. In the courts, there is the revitalisation of the commercial lists. Steps are being introduced to reduce the length of trials, such as the exchange of statements of evidence in advance of trial, the presentation at trial of evidence in chief in statement form, and the exchange of experts' reports prior to trial. Some of these steps are designed to heighten the prospect of settlement before trial. As well, we have introduced formal provision for settlement negotiation, presided over if appropriate by a Judge. These and many other procedural changes directed towards streamlining the trial of commercial causes in the court were implemented last November, and have already had good effect. It is timely then that you as arbitrators should be turning your minds towards the more expeditious conduct of arbitrations. The question I am to address is how you can achieve greater expedition without imperilling the legitimacy of the arbitration.

Now I will be dealing principally with the usual type of arbitration, which resembles a court action in many respects. There are of course much less formal arbitration proceedings sometimes conducted, and the

possibility of them should not be overlooked. In some cases for example, the parties may agree that there be no pleadings or discovery or interlocutory steps or even any oral hearing: the arbitrator may simply be asked to examine some documents and pronounce his view in the form of an award. A dispute concerning the quality of goods may be determined by an arbitrator's merely inspecting the goods and expressing his conclusion. But in the usual case, the procedure adopted is similar to that of a court action. Hence one wonders about the applicability to arbitrations of the steps being adopted in some courts to reduce the scope of litigation. Such steps are designed to limit the interlocutory steps and reduce the oral content of any hearing. I will revert to these matters.

ARBITRATORS'S OBLIGATIONS

In approaching the question, one must bear in mind the arbitrator's basic obligations. He must act judicially throughout the arbitration. He must exercise a judicial discretion in relation to any interlocutory steps. There must be a hearing. The parties must be given the opportunity to call evidence and present argument in each other's presence. The arbitrator must not receive evidence privately. The evidence received by him must be admissible evidence. And he must take a timely award. The parties may agree to modify these basic obligations. A formal hearing may be dispensed with. But failing agreement, there are constraints on an arbitrator with the usual sort of arbitration which deny him the capacity to be greatly creative in devising methods for shortening the arbitration.

The arbitrator will often first meet the parties and their representatives at a preliminary conference or meeting. This is his opportunity to seek to impose a tight timetable on them. Of course, if the parties do not want a tight timetable, there is no value in imposing one. But if, as is usually the case, one party is very anxious for an early resolution, although the other may be not averse to delay, this is the arbitrator's opportunity to set a pattern which will maximise the chances of an expeditious overall resolution. In the court, where the case suits, days only are sometimes allowed for interlocutory steps where the parties want quick resolution. One must of course be sensible about the matter. Very extensive discovery cannot be carried out in a day, and where long complicated pleadings have to be allowed, it may be counter productive to be too limiting in the time allowed. But this is, notwithstanding these features, the arbitrator's first opportunity to set the pattern for the arbitration into the future.

THE PRELIMINARY CONFERENCE

Questions should arise at the preliminary meeting as to which interlocutory steps need to be gone through. Are pleadings required? There

is a predisposition towards having pleadings on the basis that they define the issues which may otherwise remain unclear. However pleadings frequently obfuscate the issue. They are often too long, repetitive and non-responsive. The tendency of a respondent is to put everything into issue from the start. Rarely when parties subsequently agree on matters in issue are the pleadings appropriately amended to reflect the change in position. In the result, the arbitrator will often gain more assistance from the opening than from the pleadings. Now if parties are asked at the preliminary meeting whether pleadings are necessary, they will usually automatically reply yes. But the reference itself will often sufficiently identify the matter in dispute, and the better course may sometimes be to dispense with pleadings, and to adopt some alternative method of securing any further necessary definition of the issues. The parties could be directed to lodge a joint statement of issues after discovery has been completed. There could be discussion at the preliminary hearing of what issues were really in dispute, with the result being recorded. Another alternative is to direct the parties to exchange brief normal letters setting out the parties' respective cases. Another possibility sometimes used in southern litigation is ordering the parties to deliver full written statements of their cases, including the facts and legal argument, and annexing copies of relevant documents. I think it is wrong to approach arbitrations with a firm conviction towards pleadings. A cleverly drawn pleading can conceal more than it reveals. Utilising such other methods—the joint statement of issues, the exchange of informal letters, the determination orally of what is in issue with its being recorded at the preliminary conference, and the exchange of comprehensive written cases—may more successfully define and limit the scope of the arbitration and result in the presentation of the issues in a more candid and informative way than would be the position with pleadings. This is a matter for the arbitrator's discretion. Subject to the arbitration agreement, he is not bound to require pleadings, and would be at liberty to direct the parties to participate in one or other of these alternative approaches. It is worth remembering that under s. 18(1) of the Queensland Act, the parties are obliged to do all things which the arbitrator may require during the proceedings on the reference.

DISCOVERY OF DOCUMENTS

Under s. 18, the parties are obliged to make discovery of documents if required of them. Discovery is a useful and important process and I have doubts as to whether it should be limited. It is sometimes suggested that an arbitrator should limit discovery to certain areas. My view is that discovery of relevant documents should not be limited. But the time within which discovery and inspection are to be carried out should be strictly controlled. The interlocutory step which should be subject to very strict control is the administration of interrogatories. The answering of interrogatories rarely reduces the scope of disputes. Their administration

and their answering rather tends to prolong the proceedings, particularly if they are extensive, not only because of the time taken in their preparation and answering, but also in relation to contests about the sufficiency of answers. My own view is that interrogatories should be sternly discouraged on the ground that they are rarely necessary and usually productive of delay. Sometimes interrogatories in concise form may be allowed with respect to a confined area in which proof would otherwise be lacking, but this is I think an aspect on which an arbitrator can and should be robust. The arbitrator's power to require answers to interrogatories comes I think from the concluding lines of s. 18(1), but interrogatories are a formal and inflexible device which I think rarely appropriate to arbitration. There are much better ways of limiting the issues and securing admissions.

AGREED MATTERS

If a party believes that certain matters which he has to prove would not really be contested, he should write a letter to the other party requesting admissions, and warning that if the admissions are not forthcoming and the matters have to be proved, the party proving them will rely on the correspondence subsequently in relation to costs. An arbitrator could take such correspondence into account with respect to the costs of proving those issues. A party may raise the prospect of such agreement at the preliminary conference, and the arbitrator might suggest the use of such a procedure, or the delivery of a more formal notice to admit. Attention must continually focus on the need to restrict the arbitration, especially the hearing itself, only to matters truly in issue between the parties, for that is essential to ensure that time and money are not wasted.

Having set a timetable, having determined what interlocutory steps are to be gone through, and having made any relevant suggestions as to ways of shortening the proceedings, the arbitrator will usually go on to appoint a day for a further pre-hearing meeting at which the course of the arbitration can be reviewed. Before that meeting comes around, the parties will have been attending to their interlocutory obligations. They are obliged, by s. 19(2) of the Act, to do all things which the arbitrator may require to enable the just award to be made, and they are not to do anything, either wilfully or wrongfully, to delay the making of an award. If a party falls behind with the timetable, as often occurs without substantial fault, the other party may ask the arbitrator to bring the timetable up to date. An arbitrator faced with interlocutory squabbles about other matters, like the sufficiency of discovery or particulars, should not allow the question to become prolonged: it should be resolved decisively and quickly. Rarely should an interlocutory hearing last more than, say, an hour, and a decision should usually be given on the spot, although it will be better for the arbitrator to reserve his decision and

compile short reasons if he lacks the confidence to give a decision on the spot, provided the decision is not unduly delayed.

THE HEARING

This brings me to the further review hearing. One hopes that by this stage, the interlocutory steps will have been finished. Consideration can now be given to the likely length of the hearing, the representation of the parties, the manner of adducing evidence, ways of narrowing the issues, the preparation of documentary exhibits, the exchange of evidence in statement form, and the appointment of trial dates. In considering the arbitration at this stage, the prospect of securing a fair hearing must predominate. The procedure adopted must ensure that each party has a full opportunity to present his own case, each party must be made aware of his opponent's case and have a full opportunity of testing and rebutting it, and the parties must of course be treated alike, each being given the same opportunity of putting his own case forward and testing the other side's case. Against this background, what specific steps can be taken to shorten and accelerate the hearing?

LEGAL REPRESENTATION

Some arbitrators may say, exclude the legal representatives. That is not possible in Queensland except by agreement. Frequently the involvement of lawyers will ensure that only relevant matters are considered. Under the Commercial Arbitration Acts of New South Wales, Victoria and South Australia, parties must appear without legal representatives, unless otherwise agreed in writing. But arbitrators may allow a legal representation, and should do so if satisfied that otherwise, the parties would be unfairly disadvantaged or if the involvement of legal representatives would likely shorten the hearing and reduce costs.

Can the issues be narrowed? By now, the parties may have taken up the suggestions made initially about confining the arbitation only to the matters really in issue. The true scope may have been defined helpfully by the non-pleading methods raised earlier. Admissions may have been sought and forthcoming. Can the issues be further limited? Examination of the issues as defined to that stage may throw up a discrete point which if resolved one way may lead to a resolution of the whole proceeding. For example, a defence that a prolongation claim is bad for want of notice may be met by a contention that the need for notice was waived specifically at a meeting of which there are minutes. Resolving that particular issue before the rest of the matter may, if resolved one way, obviate an otherwise lengthy and expensive arbitration hearing. The cases abound of course with warnings about preliminary points being determined this way. It can only be done where the point is discrete, where the evidence relating to it does not substantially overlap with the

evidence on other issues, and where the resolution of the point one way will probably lead to an overall resolution of the proceedings, or at least a substantial reduction in their scope. If the point is a point of law, and the parties, in Queensland, want a case stated to the court in relation to it, and it is a case where on the authorities the arbitrator should state a case, that should be done promptly. Of course, as with every application for the stating of a case in this State, the arbitrator should ensure that it is made bona fide and not a mere delaying tactic. Having concluded that the application is made in good faith, however, an arbitrator is under a heavy constraint, on the authorities, to state the case as requested.

EVIDENCE

Two other practical matters may fall for consideration at this meeting. The first is the manner in which the evidence is to be adduced. The trend with commercial causes in the court is for experts to present their reports in writing, and exchange them before the hearing, and for the evidence in chief of lay witnesses to be given in statement form, the oral evidence being confined to cross-examination and re-examination. The statements have to be read, but this consumes much less time than is taken generally in the giving of the evidence orally. Critics of this approach say that the tribunal is denied the opportunity of assessing the credibility of the witness as he spontaneously gives his account, and that it becomes more difficult to detect a dishonest witness. I do not accept these criticisms. A dishonest witness will in my view be as readily uncovered as if he gives all of his evidence orally. And the tribunal has the advantage of seeing the witness cross-examined, cross-examination being a potent weapon for uncovering a witness whose evidence is too vague to be reliable or a witness who is not telling the truth. But could an arbitrator require evidence in chief to be given in statement form? Expert evidence is usually received in this form in arbitrations. But what of other witnesses? The procedure can shorten the proceedings very substantially. Subject to the arbitration agreement, the authorities tend to support the view that the parties are entitled to a full oral hearing. It may be however that the parties would in the interests of expedition agree to the preparation and exchange of statements of their evidence in chief, especially if aware that the arbitrator wanted that to occur. The point of exchanging in advance of hearing is the possibility of limiting cross-examination, reducing the matters in issue, and possibly promoting negotiation and settlement. I might mention that the court has power under s. 18(11)c) to order the giving of evidence by affidavit. But that this power is specifically mentioned with respect to the court, and not listed among the arbitrator's powers, tends to confirm that in Queensland the arbitrator probably lacks the power to direct that evidence in chief be furnished in statement form. I note that the Commercial Arbitration Acts in New South Wales, Victoria

and South Australia specifically provide that evidence may be given orally or in writing. My own view is that parties to arbitrations in Queensland should be strongly encouraged to agree to the presentation of evidence in this form, in the interests of shortening the hearing, possibly reducing the issues, and even enhancing the possibility of settlement.

PROOF OF DOCUMENTS

The other practical matter concerns the proof of documents. If documents are proved and tendered individually, a lot of time is needlessly absorbed. It is far preferable for the parties to collaborate in agreeing which documents can be tendered by agreement, and placing them in a folder which can be tendered and received by consent as one exhibit. Remaining documents, about which there is contention, can then be proved individually as necessary. Unless only a small number of documents is involved, the parties should be directed to prepare a book of agreed documents and furnish a copy of it to the arbitrator in advance of the hearing. This is frequently done now in the court, and I imagine with arbitrations, so that the parties will not be surprised by such a requirement and should be prepared to co-operate in meeting it. It goes without saying that the next step is the appointment of early hearing dates, based on the parties' estimates of the likely length of the hearing.

The arbitrator may by this stage have heard a deal of argument about the respective claims and cross claims. No doubt disparaging submissions will have been made about the opposite party's position in at least some regard, for what purpose one sometimes does not know. The question arises what should happen if the arbitrator perceives, on some sufficiently comprehensive basis to lend him confidence in his preliminary view, that some claim or defence is hopeless, incapable of success. The point may be significant, if striking out the claim or defence will cut short the reference. Should the arbitrator go through the charade of full interlocutory steps and a comprehensive hearing, or deal with the matter summarily? I doubt that an arbitrator can bring an arbitration to a premature end, in view of the observations in the House of Lords in the *Bremer Vulcan* case (1981) A.C. 909. The better course is to invite the party likely to succeed on the point to raise it for preliminary determination as a point of law, either by the arbitrator or on case stated, preferably of course the former. There is no harm in an arbitrator's hinting at the possibility of preliminary argument about the sufficiency in law of certain claims or defences as raised, provided he is careful to avoid any appearance of possible partially or pre-determination. It is obviously very much in the interests of justice that hopeless claims and defences be nipped in the bud as soon as possible, and that time and financial resources not be wasted in running a full scale hearing which should probably be unnecessary. The arbitrator can properly play a role in ensuring that

such aspects are canvassed early in the piece.

The arbitrator may not reach the view that a claim is probably hopeless, but he may reach the conviction that the parties should nevertheless negotiate. No negotiation will necessarily have occurred before the matter comes to the arbitrator. It is foolish in the extreme that a dispute should go to a full hearing if it can be settled. Most can. Mediation and conciliation are two of the areas of great interest in the alternative dispute resolution methods to which I referred earlier. Under the Commercial Arbitration Act, the arbitrator may order the parties to take steps he considers fit to achieve a settlement, including attending a conference to be conducted by him. There is similar provision now applying in the Supreme Court's Commercial Causes jurisdiction. I have found it a fruitful mechanism. There is no power in an arbitrator in Queensland to compel the parties to negotiate. But where a case cries out for negotiation, there is no harm and a great deal of good in an arbitrator's suggesting that the parties should negotiate. Indeed, I think that that is the responsible thing to do in such cases, having regard to the interests of the parties.

Well, the issues have been narrowed as far as possible, there is no preliminary point outstanding, the evidence is in writing, the documents are ready in book form, experts' reports have been exchanged, the possibility of negotiation has been explored unsuccessfully, and the case must go on. The best way of limiting the hearing is for the arbitrator to do his utmost to exclude irrelevant evidence, and to have the parties acknowledge his relevant expertise and limit their evidence and submissions accordingly. As to evidence, the parties do not have an unrestricted right to press upon the arbitrator whatever evidence they choose. An arbitrator need only receive relevant evidence, and evidence which is admissible. Much of the evidence will be in statement or report form by this stage. Reading that evidence in advance of the hearing will save a lot of time. So will reading the proposed documentary exhibits. The arbitrator is usually paid for doing this. The point is that he saves the time of the parties and the expense associated with their legal representation if he does the reading out of the arbitration room and before the proceeding formally commences. Doing this work in advance will also enhance the arbitrator's own appreciation of the case, and give him greater confidence in dealing with questions of the relevance of evidence when they arise at the hearing. At the hearing, an arbitrator should intervene if he sees time being wasted, or if he sees the parties proceeding on a misconception about the evidence or the technical issues. The arbitrator may ask the witnesses questions, and not necessarily wait until the legal representatives have asked all of their questions. Sometimes considerations of the utmost courtesy should yield to the desirability of shortening the hearing. In some cases, the arbitrator must intervene. He must do so, for example, if he proposes to make a finding based on his own knowledge, to give the witnesses a chance to comment on his

stated knowledge. If he intends to make a decision based on a factual or legal view not previously raised, he should give the parties the opportunity to make submissions about it. During submissions after the conclusion of the evidence, the arbitrator should feel free to intervene as extensively as he wishes, if he feels this will aid his appreciation of the matters being put and as to the way he should decide the case. If legal representatives are addressing comprehensively on an area in which the arbitrator favours them anyway, the arbitrator should discretely stop them, possibly reserving to them a right of reply after any response by the other side of the point.

THE ARBITRATOR'S AWARD

Then it falls to the arbitrator to make his award. An interim award should be made where requested and where that would be in the parties' interests. The final award must of course be made with reasonable dispatch. It should rarely be necessary for an arbitrator to re-read much of the evidence given at the hearing. It is prudent to take notes of important points as the evidence is given. If the decision is mapped out immediately following the hearing, when the evidence is fresh in the arbitrator's mind, the parties' interests will be much better served than waiting for months to elapse in the hope of preparing a more mature judgment. The best decision, I think, is the decision prepared at once. Delay usually serves only to diminish the memory and diminish the accuracy of the ultimate judgment. Of course, there is not much a party can usefully do if an arbitrator delays in giving his award. The party can move to have the arbitrator removed and denied his fees. But then another arbitration must take place. Arbitrators who delay unreasonably bring arbitration into disfavour generally, and can cause immense harm to the interests of the parties. They simply should not arbitrate. Fortunately, decisions are almost invariably given quickly.

There is little I can add. As I said initially, the arbitrator's capacity to be creative in designing methods to hasten and shorten arbitrations is constrained. There are however some methods which are open and which the arbitrator may confidently and robustly employ as appropriate. I think that the future of arbitration depends to a large extent on the pairing down of hearings and interlocutory steps, so that those who promote arbitration can again say with assurance that it has the great advantages of promptness and a minimum of expense.