New Directions in Arbitration

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Arbitration today is facing a number of challenges which have threatened its once pre-eminent status as the preferred mode of dispute resolution as an alternative to the courts. This has prompted a search for new directions which can revive the flagging fortunes of arbitration in competition with the court system and the proliferating new forms of alternative dispute resolution.

The Heyday of Arbitration

When the Institute was founded in 1975 as the Institute of Arbitrators Australia, it was focused almost entirely on arbitration as its preferred dispute resolution alternative to litigation. The process of arbitration was governed by State Arbitration Acts, mostly modelled on the UK *Arbitration Act 1889*.[2] An English text, *Russell on Arbitration*, was the standard reference source. Proceedings were, on the whole, very relaxed and informal.

Many arbitrations were what were described as "look and sniff" arbitrations, where the arbitrator was in truth expected to act largely as an expert on the basis of his own professional training and experience. This was particularly the case in arbitrations dealing with defects in construction work.

The only significant alternative form of dispute resolution was expert appraisal or early neutral evaluation, where (often in connection with a proposed or pending arbitration) the contending parties called in a third person (often an arbitrator) to provide a non binding opinion as to the likely outcome of the proceedings, based upon strictly limited submissions. This type of approach, in which the view of the neutral was based on a "snap shot" rather than a detailed evaluation of the entire case of the contending parties, embodied the concept which later, in binding form, evolved as statutory adjudication as set out in the *Security of Payment* legislation.[3]

The various Arbitration Acts enabled one to mount an attack on an award only by reason of an error of law on the face of the award, or some procedural slip such as a failure to accord natural justice. Since arbitrators were not obliged to put their reasons on the face of the award, generally preferring to put their thoughts about the case in the form of notes and observations delivered informally, it was generally impossible to attack an award once given, if the arbitrator had conducted the proceedings in accordance with the rules of natural justice.

Clouds on the Horizon

With the introduction of the *Uniform Commercial Arbitration Acts*[4] the giving of reasons by arbitrators became mandatory, unless both parties agreed to dispense with reasons, something they

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2 Eg, the *Arbitration Act 1895* (WA).

3 Eg, the *Construction Contracts Act 2004* (WA).

4 eg, the *Commercial Arbitration Act 1985* (WA).

rarely did. Formal reasons accompanying the award therefore tended to become much lengthier and more complex documents than were the notes and observations which were informally issued under the previous legislation.

This is not a phenomenon unique to arbitration. For example, the Australian Institute of Judicial Administration in a recent publication[5] dealing with juries notes that the instructions given by trial judges to juries are too often adopted for the purpose of avoiding reversal of decisions on appeal, and that procedures which are optimal to avoid appealable error may not be the same as those which would be optimal for the understanding and efficient performance of a jury. Similarly, although it used to be said that the arbitrator wrote his reasons for the losing party, he or she may well now be tempted to write instead for the Court of Appeal.

At the same time, it was observable that arbitrations themselves were becoming more complex, much lengthier involving the testimony of more witnesses and the production of far more documents than had previously tended to be the case. Sums in dispute were larger and the proceedings became more formal, aping litigation.

Again, this was not a circumstance unique to arbitration. The Australian Institute of Judicial Administration publication[6] on juries noted the increase in the duration of trials and the amount of complexity of the evidence, resulting in an increase in the average length of criminal trials over the past 50 years from 1 or 2 days to two weeks or more, a factor of 10. However, the Criminal Courts have a monopoly of their jurisdiction, which arbitration does not.

In response to these trends, some members of the legal profession began to promote what they called "expert determination", although in practice it did not appear to have much in common with what was previously known as determination by an expert. Many of these "expert determinations" involved procedures very similar to arbitrations, such as the use of pleadings, calling of witnesses. It was a far cry from the original concept of expert determination, in which the expert would rely upon his own expertise, typically by reading documents and carrying out inspection of works, to produce a report which the parties would accept as conclusive.

A strange phenomenon which I have noticed is that many of the legal practitioners, loudest in condemning arbitration and calling for expert determination, are often those who, if appearing as counsel in an arbitration, are most unhappy where there is any departure from the procedures which they would expect to encounter in court and with which they are familiar.

If such "expert determinations" are able to escape judicial scrutiny and be considered to be expert determinations in the strict sense rather than disguised arbitrations, then they do have the advantage that appeals from the determinations are much more circumscribed. On the other hand, curiously enough many of the practitioners with whom I have discussed this matter who favour expert determinations are also proponents of appeals to the court from arbitrators' awards and, where they have lost at first instance, further appeals to appellant courts, luxuries in which they could not indulge in the case of expert determinations.

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5 R P Olgoff, A Clough J Goodman-Delahunty and W Young "The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges" (The Australian Institute of Judicial Administration Incorporated 2006).

6 R P Olgoff, A Clough J Goodman-Delahunty and W Young "The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges" (The Australian Institute of Judicial Administration Incorporated 2006).

Adjudication

The process of arbitration seems to have declined markedly over the last 10 years. That decline may well be deepening as a result of the rise of adjudication. Since its commencement in 2000 when the *Building and Construction Industry Security of Payments Act 1999* (NSW) came into operation, adjudication as a statutory dispute resolution procedure in the building and construction industry has spread from New South Wales to most of the States and Territories.

Adjudication is described in the various statutes giving rise to it as being essentially of an interim nature. In dealing with cash flow difficulties associated with delay in progress payments, it is not intended to provide any final determination of the rights of the parties. This is consistent with the limited time available for the adjudicator to bring down a determination and the need to decide the issues on the papers submitted. While the submissions may include statutory declarations (as has occurred during the writer's experience as an adjudicator) the limited time simply does not allow for any kind of formal hearing in which witnesses are cross examined. A detailed testing of the evidence which can take place in an arbitration is both unattainable and, under the statutory scheme, superfluous.

At first glance, it might be assumed that where there is a genuine dispute, the opposing party in an adjudication would take his grievance to a definitive form of dispute resolution such as arbitration. In practice, this does not seem to have occurred. Instead, in New South Wales at least, losing parties seem to be trying to attack the determination in the courts on legal grounds, a progressively more difficult task.

While there seems to be no statistical evidence, the feedback from the field suggests that parties whose submissions have not found favour with an adjudicator do not seem to be going on to re-fight the issue before an arbitrator in proceedings where evidence can be subjected to a far more rigorous scrutiny than is possible in the adjudication process. Why should this be so?

It has been suggested that parties are daunted by the cost and time likely in an arbitration conducted in the usual manner. There is some support for this view, as already there are calls for the spread of adjudication more widely into other industries and some are looking at the possibility of incorporating a private adjudication process into their standard form documents.

The writer's own view is that parties who have been through a determination see how an independent third party views their respective contentions and are inclined to think that the outcome would have been much the same if the parties had fought out their case to the utmost before an arbitrator. It may well be the situation that a general impression of the credibility of a case is likely to be unaffected by protracted testimony of witnesses, unless those witnesses unexpectedly falter when cross examined. Early neutral evaluation was quite often successful in bringing about a resolution of a dispute for the same reasons.

Proposal for New Rules

On the basis of the maxim "if you can't beat them, join them", IAMA is looking at a proposal for new rules for time restricted arbitration, particular in the construction field, although not necessarily so limited. The contemplated Time Restricted Arbitration Rules, if adopted, would involve arbitration proceeding under a similar scheme of time restrictions for that applicable in adjudication.

At the first or second preliminary meeting, parties who adopted the time restriction arbitration rules would agree upon a program which included specific durations for the conduct of the arbitration, including (where applicable):

- the service of pleadings
- the service of statement of evidence
- the service of expert reports
- the conduct of joint meetings of experts
- the actual date for the commencement of the hearing of the arbitration and the days to be set aside
- any other directions required for the preparation.

The durations specified in the Rules and the dates agreed to between the parties are not to be extended except by agreement between the parties or an application to the relevant court under section 48 of the uniform *Commercial Arbitration Act*. Just as the adjudicator cannot extend time periods involved either of his own motion or at the request of one party, so the arbitrator would not be able to extend the times concerned unless both parties agreed.

The proposed new Rules are intended to include a comprehensive list of the matters to be dealt with by directions and by agreement. There may also be some specific references as to how the hearing time is to be allocated between the parties, to obviate a not unusual situation where the claimant takes up the greater part of the time allowed, causing an adjournment when the respondent is unable to complete his case during the compressed duration left available out of the originally allocated time for hearing.

At present, the Time Limited Arbitration Rules are being drafted and are to be reviewed by the Practice, Publications and Rules Committee of IAMA. When a settled draft is available, feedback on those Rules will be widely sought.

The process of adjudication has been making inroads into arbitration but this expedited arbitration procedure is conceived as a response to that challenge. The expedited procedure contains certain aspects of adjudication which clearly appealing, particularly to claimants.

It remains to be seen whether time limited arbitration will have much appeal to the likely respondents, who often think in terms of a dispute procedure which will deter or delay potential claimants. However, if both parties to a dispute do contemplate taking matters further after adjudication with which, inevitably, one of them is dissatisfied, the time limited arbitration procedure offers a process which should deliver a final outcome of greater speed and economy.

The 100 Day Arbitration Procedure

Inspiration for the proposed new Rules comes from the 100 Day Arbitration Procedure devised for the Society of Construction Arbitrators in the United Kingdom for use in England and Wales.[7]

The 100 Day Arbitration Procedure applies where the parties and the appointed arbitrator agree to adopt it. The arbitrator has an overriding duty to make his award, deciding all matters submitted (excluding liability for cost) within 100 days either:

7 Society of Construction Arbitrators' Web Site www.arbitrator-society.org

a) the date on which the Statement of Defence or Defence to Counterclaim, if there is one, is served or;

b) if a Statement of Defence or Defence to Counterclaims has already been served, from the date upon which the directions for the procedure are given.

It is envisaged that usually this will be an interim award dealing with all matters except costs and thereafter, parties may make submissions on costs having regard to the outcome. Those submissions and the final award dealing with the costs may be made after the expiry of the 100 days.

Reference to days are calendar days although any period set by the procedure which would end on a Saturday, Sunday or public holiday would be deemed to end on the following working day. To achieve the period of 100 days, there is to be a procedural timetable which is compatible with the proposed 100 day period. That timetable would have some resemblance to the construction schedule for a typical building project.

The directions, to be brought down within seven days of the arbitrator's appointment or of the adoption of the procedure (if later), would typically provide the following:

1. Service of any outstanding pleadings and statements of witnesses and experts' reports, if not already served with the pleadings, within seven days.
2. Service of all further documents relied upon by the parties, replies to statements of witnesses and experts' report and service of any request for disclosure of specific documents within 14 days thereafter.
3. Subject to any ruling by the arbitrator on any issue as to the disclosure of documents, service of copies of those documents specifically requested within seven days of the request.
4. No further documents or other evidence to be served by either party unless requested or permitted by the arbitrator.
5. Dates for the oral hearing or hearings not exceeding 10 working days are to commence not more than 28 days after the conclusion of the foregoing steps.
6. The final written submissions (be forwarded by the arbitrator) are to be served simultaneously within seven days from the end of the hearing.
7. The arbitrator is to make his award within 30 days of the end of the oral hearing.

To make a program like that work, the parties must have already done a fair amount of preparation and must be prepared to agree to cooperate and to take every opportunity to save time where possible. Although the arbitrator can shorten the times available, only the parties can agree to extend it, except that the arbitrator or any party may apply to the court for that purpose.

The arbritator's powers include the following;

1. Order that any submission or other material be delivered in writing or electronically.
2. Take the initiative in ascertaining the facts of the law.
3. Direct the manner in which the time of the hearing is to be used, eg, by apportioning it between the parties.
4. Limit or specify the number of witnesses and/or experts to be heard orally.
5. Order questions to witnesses or experts to be put and answered in writing.
6. Conduct the questioning of witnesses or experts himself.
7. Require two or more witnesses and/or experts to give their evidence together.

Delivery of material electronically certainly saves a lot of time. At one time, even in arbitration,

all correspondence was all sent by post or if urgent, by facsimile with confirmation by post, but exchange of emails is much more expeditious. Similarly, delivery of documents by email is usually more effective unless they are very large or involve numerous annexures.

To secure his fees, the arbitrator is to send to the parties not later than 14 days before the award is due a reasonable estimate of total fees and expenses incurred and likely to be incurred up to the making of the award. Provided the parties have paid this sum to a stakeholder acceptable to the arbitrator with the money held to his account (or to the arbitrator himself) the arbitrator shall have no lien over the award. This avoids the delay which often occurs when an award is brought down but cannot be collected until the parties make arrangements to pay the arbitrator his fees, unknown to them until the making of the award.

To make sure that costs do not delay the procedure unduly after the delivery of the award, unless the parties agree otherwise they shall make simultaneous submissions on costs to the arbitrator within 14 days of the date that the award is published and the arbitrator is to make his award on costs within 14 days of receipt of those submissions.

Concurrent Evidence

Embodied in each of the 100 Day Arbitration Procedure and also the proposal presently before the IAMA Practice Publications and Rules Committee is the concept of concurrent evidence from expert witnesses. The IAMA proposal looks at concurrent evidence only of experts, which is where our present experience of concurrent evidence is to be found, whereas the 100 Day Procedure does contemplate the giving of concurrent evidence even by non-expert witnesses.

A DVD recently issued by the Australian Institute of Judicial Administration gives something of the history of that development and illustrates the procedure in action.[8] Chief Justice McClelland (Chief Justice in Common Law in the New South Wales Supreme Court) is shown in the DVD conducting a replay of an actual case involving the giving of concurrent expert evidence by four experts in the Land and Valuation Court of which he was formerly Chief Justice. Excerpts from the transcript of the case itself were used as the script.

Four experts sat in two rows of two and were questioned by the Judge and counsel. One of the difficulties in dealing with a number of experts is to prevent them from all speaking at once, shown in the DVD as being achieved by having a roving microphone, with the experts clearly understanding that only the person holding the roving microphone is allowed to speak.

The disadvantage of the conventional method of taking evidence from witnesses is their evidence is often separated by many days or even weeks. This makes it difficult to keep the threads of their evidence together.

The adversarial process was perceived as giving little opportunity to the expert to explain his position, since he is closely confined to responding to counsel's questions. Re-examination does not always provide the answer to this difficulty.

The expert may consider that the process is not "a search for truth", but simply a contest between two sides, each of whom wants to get its own picture across.

8 Dvd "Concurrent Evidence – New Methods with Experts" Judicial Commission of New South Wales/Australian Institute of Judicial Administration.

Frequently, the expert knows the questions which should be asked, whereas counsel may not. Equally, the advocate may not know that the answer given is wrong.

The procedure suggested by McClelland CJ envisages the experts exchanging their reports beforehand and then meeting to discuss them, ultimately providing a joint statement which shows where they agree and where they differ. This serves as an agenda for a subsequent joint hearing which McClelland CJ says he has seen successfully conducted with as many as eight people.

It is suggested by McClelland CJ that counsel should then suggest the topics to be discussed, working from the joint statement. In an arbitration, it may well be that the arbitrator would be better placed to do this.

Concurrent evidence, where each expert is in a position to listen not only to the questions provided by counsel and the arbitrator but to each other's responses, enables them to respond immediately and directly. There can thus be an ongoing discussion in the form of enquiry more directed to the truth, with each expert having a fair opportunity to put forward his views.

Of course, there is a risk that the discussion could drift off the key topics and it will be necessary to moderate the discussion to prevent any tendency for this to happen. Counsel (or the parties if unrepresented) would also need to have a fair opportunity to raise any questions which arise out of the discussion.

Apparently this method of dealing with witnesses was first used in the Australian Competition and Consumer Commission and then introduced by Lockhart J in the Federal Court. It has since been used at times in arbitrations, with varying degrees of success.

In practice, one of the difficulties is going to be getting the timing right, so that all the experts are available at one and the same time. It is often difficult enough in arbitration processes to arrange a series of dates in which witnesses and counsel can be fitted to the availability of the arbitrator.

How would this work with witnesses who are not experts? Obviously this would pose greater difficulties, since concurrent evidence could easily degenerate into a slanging match. Expert witnesses should at least have a degree of impartiality and an obligation to assist the tribunal which is not necessarily recognised by other witnesses.

Amendments to the Uniform Commercial Arbitration Acts

Uniform Commercial Arbitration Acts have their origin in the Standing Committee of Attorneys General ("SCAG"). SCAG has under consideration amendments to those acts and has delegated the task of looking into those amendments to the New South Wales Attorney-General's Department.

There is an expert advisory group advising the New South Wales Attorney-General's Department of possible amendments. We are fortunate enough to have two nominees in the expert advisory group, Ian Bailey SC and Robert Hunt.

My own preference is strongly in favour of an "overriding purpose" provision stating the objectives of arbitration in philosophical terms along the line of the introductory part of the 1996 *Arbitration Act* in the United Kingdom. To me, the shortcoming of uniform legislation is that there are many provisions dealing with specific points but nothing in the nature of a general observation. A new member of our Institute once remarked that he had read the uniform legislation but still did not realise what arbitration was or what it was for.

Industrial Relations

Whilst not everybody is pleased with the new Federal Industrial Relations legislation and its very hasty introduction, there is no denying that it creates a significant opportunity for this Institute. The legislation opens up to private alternative dispute resolution a whole range of industrial disputes.

The IAMA IR ADR Committee has been active in preparing for this new field and has finalised in a remarkably short period of time new Workplace Dispute ADR Rules which set out a framework for the conduct of workplace disputes by a number of modes of alternative dispute resolution, including arbitration.

A panel of ADR providers has been set up, with the arbitration of workplace disputes being handled by our graded arbitrators with IRADR training.

Where to from Here?

To combat decline in arbitration, the IAMA is pursuing a number of initiatives which it is to be hoped demonstrate that arbitration still has much to offer in final determination of outstanding disputes. These focus on the following:

(a) to set up innovative new rules which will guide parties into quicker and cheaper outcomes;
(b) encouraging improvements in existing processes, such as concurrent evidence and electronic transmission of documents;
(c) branching out into new areas previously little devoted to private arbitration;
(d) encouraging constructive amendment to the legislation under which we work, particularly with the view to expanding the philosophy underlying arbitration rather than simply tinkering with specific provisions.

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