# Creating efficient dispute resolution processes: Lessons learnt from international arbitration


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# Contents

Arbitration was intended to be an alternative to litigation, enabling contracting parties to agree how their dispute is to be determined. The objective was to allow for a more efficient and commercially fair system which contracting parties could opt into and which would be final and binding in most circumstances. But, the current view is that most domestic arbitrations in Australia could not be said to be significantly different to litigation. Why? Because of the conservative approach taken by arbitrators as to what is required to ensure the parties are accorded natural justice (arising out of undue concerns as to what will amount to misconduct), the general reluctance of arbitrators to veer from the 'norm' (that is, litigation procedure), and the tendency of parties (and their lawyers) to adopt standard tactics and insist upon adoption of Supreme Court practices. This article[1] deals with possible reforms to arbitration practice which can make arbitration, as originally intended, a real alternative to litigation in the Supreme Court.

# 1 Creating efficient dispute resolution processes — lessons learnt from international arbitration

There is general dissatisfaction in the commercial community relating to the cost and inefficiency of litigation and domestic arbitration. Significant reform of the legal process is still some time away and in some respects will always be limited by the role of courts in the common law countries such as Australia. However, by close attention to the drafting of an arbitration agreement, many efficiencies can be introduced into domestic arbitration which are not available pursuant to current Supreme Court practice. Current domestic arbitrations, in the main, model themselves on Supreme Court practice. Accordingly, they provide no real procedural efficiencies and will, of necessity, be more expensive than Supreme Court proceedings (if for no other reason, the parties must meet the real costs of the arbitrator, transcript and venue).

International arbitration practice provides an alternative model which is significantly different from litigation in the Supreme Courts of Australia.

This article identifies some of the procedural options currently being used by international arbitrators to improve efficiency, the adoption of which should be considered by parties opting in to domestic arbitration in Australia.

For many parties, particularly those who are likely to have disputes arise in respect of factually or technically complex matters, it is important that there be an efficient, final and binding dispute resolution process stipulated. For the reasons outlined below in this article, the processes available in the Supreme Courts of Australia are (by and large) not suitable for such disputes. They consume much time and place other heavy demands on resources. Accordingly, in most jurisdictions, it is difficult to get these matters set down and when they are, the hearing date can be a significant time after the conclusion of the interlocutory steps, which can in turn take years to complete. As a consequence, in complex matters trials may not commence until three

[1] This article has been adapted from a paper presented to the 2003 Annual Conference of AMPLA and has also been published in the 2003 AMPLA Year Book.

years after the writ was filed. Even then there remains a possibility of an adjournment if there is a later amendment.

Commercial people have tried to reduce the risk associated with the potential for protracted disputes by devising techniques to promote settlement. Such techniques include mediation (non-binding), mini trials, expert boards of review and expert determination (both binding and non-binding). Recently, some Australian States have introduced legislation which provides for quick interim decisions to be made by an adjudicator in respect of construction contractors' disputed claims for progress payments.[2] The adjudicator's decision may then be the subject of further court or arbitration processes (depending upon the agreement between the parties), but until overturned by such process, is binding on the parties.

Notwithstanding these innovations, parties are usually reluctant to abandon their usual rights to litigation or arbitration where the dispute is the subject of a detailed examination and a final judgment or award. Accordingly, there remains a need for an efficient final and binding determination process. This article concerns itself with the options available to the parties to an agreement to create a final and binding dispute resolution procedure with improved efficiency to that currently available in the courts.

# 2 Choice of arbitrator/judge

## 2.1 Judges generally

To date, appointments to superior courts in Australia have been recognised leaders of the Bars of each of the States. Persons so appointed have usually had extensive trial experience and can be expected to have the forensic skills necessary to perform the task at hand.

However, as life has got more complicated, many at the Bar have specialised in disputes of a particular subject type (for example, corporate law, personal injuries, tax, crime, construction and technology, intellectual property and environmental law — to name but some). Even with the most successful counsel, it is unlikely that they will have an even level of experience across all of these areas of specialisation.

Where it is possible that a contract will give rise to a dispute with a large technical factual matrix, the resolution of the dispute will often require the weighing of expert evidence. A judge, inexperienced with the subject matter, may have difficulty in understanding or weighing the competing evidence.

When matters are filed in the Supreme Courts of Australian states, the parties generally do not get an opportunity to choose the judge. Accordingly, while the court may have a person among its number who is well experienced in the subject matter of the dispute, it is not a foregone conclusion that that person

[2] See *Building and Construction Industry Security of Payment Act 1999* (NSW) and *Building and Construction Industry Security of Payment Act 2002* (Vic).

will hear the case. This is so even in circumstances where the court has a specialist list (such as the Building Cases List found in the Victorian Supreme Court).

## 2.2 Arbitrators generally

On the other hand, arbitration does provide an opportunity for the parties to choose an individual or tribunal especially skilled in the subject matter of the contract in which the arbitration clause is to be found.

In the past, it has been argued strongly (particularly by technical people) that, in a technical arbitration, the arbitrator should *not* be a lawyer, but an engineer or other technically qualified person with appropriate qualifications. Experience has shown that the appointment of an engineer arbitrator is not often successful, unless that engineer has extensive experience in dispute resolution. Such experience should, ideally, arise from practical experience such as being involved in the preparation of cases, assisting with cross-examination and otherwise being involved in formalised, adversarial dispute resolution processes.

However, it is uncommon to find individuals with such experience.

## 2.3 Factors relevant to choice of arbitrator

Therefore, it is recommended, in major technical arbitrations (such as those which arise out of construction or technology related matters) that the arbitrators appointed:

(a) are, or have been, senior lawyers, with the authority and culture to ensure that the process is run efficiently;

(b) have a consciousness of recent developments in dispute resolution from overseas, which allow the proceeding to be conducted in the shortest possible time; and

(c) have extensive experience of the subject matter of the dispute.

Candidates for consideration come from a wide pool and include ex-judges from the Supreme and Federal Courts (including the High Court of Australia).

## 2.4 Timing for choice of arbitrator

Once a dispute arises, the interests of the parties will inevitably diverge. Co-operation to achieve a speedy resolution will evaporate. Unless there is a serious counterclaim with significant prospects of success, the respondent to the claim will usually wish to slow the process down. Accordingly, the respondent may resist the appointment of a pro-active arbitrator, likely to run the arbitration quickly.

Similarly, a party may perceive its legal case (correctly) to be weak but that its 'moral' position is stronger. In such cases, that party is likely to seek the appointment of a non-lawyer (or perhaps a lawyer which may be unsuitable) as arbitrator.

Notwithstanding such tactics, the appointed arbitrators often may not behave in a predictable way, and therefore the perceived tactical advantages are often illusory.

For these reasons, it is best that a class of arbitrator be agreed up front at the time of contract, before such tactical considerations become relevant. This will accelerate the appointment of the arbitrator if a dispute arises, and enhance the likelihood of the parties choosing a person (from a class of persons) who is suitable.

While the chosen person from the nominated class may subsequently disappoint, the prospects of a suitable person being appointed will be better than if left to agreement at the time the dispute arises (where there is an arbitration clause), or the random element of court choice (where there is no such clause).

# 3 Procedural Advantages of Court/Arbitration

## 3.1 Arbitrator can control procedure

If the arbitrator mimicks the process of the Supreme Court of any jurisdiction then, irrespective of who might be the arbitrator, the process is unlikely to provide any improved efficiency (although the parties may be more satisfied with the decision if the decision-maker has obvious knowledge and expertise in the subject matter of the dispute).

The real advantage of arbitration is that the arbitrator is in control of the procedure and can therefore streamline the processes which are usually adopted in court (provided that the arbitrator complies with the rules of natural justice).[3]

Section 14 of the *Commercial Arbitration Act* of each state (collectively referred to as 'the Act 'in this article) provides:

> 'Subject to the terms of this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit' (Emphasis added)

It can be noted that the last words of the section give the arbitrator a very wide power to regulate the way in which the arbitration is to be conducted. That power is obviously subject to the Act and for present purposes, more importantly the arbitration agreement. This second qualification gives the parties a significant opportunity to design a dispute resolution process which will suit them. Again, it is best that such design be done before the dispute arises, otherwise tactical considerations will prevent optimal solutions being agreed. Such tactical considerations should not feature largely in the parties' thinking prior to any such dispute having arisen (and without certain knowledge as to who will be claimant and respondent in any future dispute).

[3] *Commonwealth v Cockatoo Dockyards Pty Ltd* (1995) 36 NSWLR 662 (CA).

The court's power to review a procedural decision of an arbitrator is extremely limited. The general proposition is that arbitrators should be given a free hand in relation to procedural issues. If the arbitrator falls into significant error, the award can be challenged by way of appeal pursuant to s 38 of the Act. This avenue of review is, however, strictly limited and it is unlikely to be available if the error is merely procedural. If a procedural error is significant, it may amount to misconduct. Again, however, review of an award on this basis is unlikely to be available except in the most extreme cases, such as a failure to follow the rules of natural justice.[4]

In addition, the court retains an inherent jurisdiction outside the Act. Where a court considers that arbitrators' decisions adversely affect public or private interests (of third parties not involved in the arbitration), it may intervene at an interlocutory stage. These cases will be extremely rare.[5]

Section 47 of the Act gives the court 'the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in Court'. It has been suggested that this section gives the courts the power to overturn decisions of arbitrators. However, the authorities make it clear that this provision will be given narrow scope and will *not* give the court the power to review procedural directions of an arbitrator.[6]

## 3.2 Certainty of hearing date

In court proceedings, a trial date is usually not set until all of the interlocutory steps have been concluded, as courts are anxious to ensure that the parties are given every opportunity to conclude these steps prior to allocating court resources to the trial. However, such considerations, coupled with a very liberal attitude to late amendments to pleadings (even if an adjournment is necessary as a consequence of such lateness), give rise to considerable frustrations. The courts' approach also allows the legal profession (solicitors and barristers — not judges) to adopt habits when conducting litigation which might be considered undisciplined, inefficient and expensive. In many of the supervised lists, directions given in relation to the steps to be taken are regarded as aspirational rather than mandatory. The courts have contented themselves with the proposition that the vice which arises with such delays in concluding the interlocutory steps or granting an adjournment to accommodate a late

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[4] It is certainly the case that an error of law will not be sufficient. What is usually required is a want of procedural fairness. However, the want of procedural fairness will usually need to be substantial (see *Qenos Pty Ltd v Mobil Oil Australia (No 2)* [2002] VSC 524). What constitutes misconduct cannot be succinctly defined, but as stated by Brooking J in *Stannard v Sperway Construction Pty Ltd* [1990] VR 673 'It (misconduct) is like the elephant — we know it when we see it.' See also generally, *Bank Mellat v GAA Development & Construction Co* [1988] 2 Lloyd's Rep 44.

[5] *Commonwealth v Cockatoo Dockyards Pty Ltd* (1995) 36 NSWLR 662.

[6] *Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 655, *Nauru Phosphate Royalties Trust v Mathew Hall Mechanical and Electrical Engineers (1992) Pty Ltd* (1994) 10 BCL 193 and *Commonwealth v Cockatoo Dockyards Pty Ltd*, n 5. However, contrary views have been expressed *Aerospatiale Holdings Australia v Elspan International* (1992) 28 NSWLR 321 and *South Australian Superannuation Fund v Leighton Contractors Pty Ltd* [1990] 355 SASR. Notwithstanding these contrary decisions, the narrow reading of the *Commercial Arbitration Act*, s 47 should be preferred as it is consistent with principle.

amendment to the pleading, can be overcome with orders for costs and awards of interest.

Such thinking:

(a) assumes that plaintiffs have unlimited capital and that any delay in a judgment can be overcome by interest. Where (as is true in the vast majority of cases) this assumption is unfounded, an unscrupulous defendant can seek to delay and otherwise increase costs so as to force an undercapitalised plaintiff to settle not by having regards to the prospects of success, but the need to satisfy its needs for capital and to rid itself of the costs of the legal proceedings. While such conduct is unethical and may have adverse consequences for the lawyers engaged by the defendant,[7] it is very difficult in practice to distinguish between legitimate and illegitimate uses of the interlocutory process. Further, it is often the case that interlocutory steps taken by a party can genuinely be motivated by both a desire to progress a legitimate purpose (such as discovery) but in a manner which is also deliberately designed to be expensive for the other party;

(b) assumes that costs are an adequate remedy. This is obviously not so, and is a consequence of deliberate policy considerations. In the vast majority of cases costs are awarded on a 'party and party' basis. This, in reality, means that costs will provide relief of between 50-70 per cent of the actual legal costs incurred. Further, such orders provide no relief whatsoever in respect of the parties' internal costs which in technical cases can be very expensive indeed;

(c) encourages parties, in those jurisdictions where witness statements are only required (if at all) after pleadings, particulars and discovery (that is, just before the hearing), to delay preparation. After all, the matter may settle and therefore costs can be avoided. While such thinking is more likely to be adopted by defendants, it also pervades the thinking of many plaintiffs. If the courts provided a certain and demanding timetable, the procrastination seen in many cases, particularly the complex, would be avoided. Neither party could in those circumstances delay without being at high risk of losing the case. Such certainty would accelerate the costs being incurred but would not increase them. In fact, they would tend to be reduced as experience shows that legal work done over a short timeframe is more efficient. Further, if work was done early then both parties are likely to reach better informed positions regarding their respective cases well before they reach the courtroom steps.

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[7] See *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134. It can be noted, it was only possible for the plaintiff to bring the subsequent action against the defendant's lawyers because the plaintiff had been able to purchase from the liquidator of the defendant the company's documents including advices, which would otherwise have been the subject of a claim for privilege and therefore precluded the plaintiff from proving its case. It is unlikely that the conduct of Flower & Hart, the subject of significant criticism, is unique. However, it is unlikely to become apparent because the real purpose and motives of a party to litigation are likely to be hidden from view because they are only ever directly recorded in privileged material.

(d) Cases such as *State of Queensland v JL Holdings*,[8] are regarded by many in the profession as authorising judicial tolerance of very late changes in pleadings (even if an adjournment is required). If this interpretation is correct litigants are insulated from what might otherwise be adverse ramifications of a failure to prepare (whether as a function of instructions or not). However, *JL Holdings*[9] has little relevance to an arbitration, particularly where the arbitration clause expressly provides that the reasoning of the court in that judgment is not to apply.

## 3.3 International arbitration

In international arbitration the practice is significantly different to that adopted in courts and domestic arbitration. At the preliminary conference, after the arbitrators enter upon the reference, directions are made including the setting down of any and all anticipated hearings. The arbitrators at this level are very busy people with practices of their own. The time for the hearing of the substantive dispute is set in diaries which often do not have any space (depending upon the length of the hearing) for nine to 12 months from the preliminary conference. It is obvious that if adjournments were readily tolerated then later adjournment could adversely affect the hearing date by a further nine to 12 months. Therefore, there is an expectation that interlocutory steps will be completed by the time stipulated by the initial orders at the preliminary conference. A failure to do so puts the party in default of severe risk of not being able (despite having been given an opportunity) to present or fully present its case. Not surprisingly, where the parties are properly advised, the timetable will be complied with.

Such procedures and culture can be brought to bear in domestic arbitrations. Section 14 of the Act gives arbitrators wide discretion. Therefore, there is no need to blindly follow court practice. To the contrary, if domestic arbitration is to provide a commercially satisfying alternative, it must deviate from court processes and be more sensitive to the commercial context of the dispute resolution process.

## 3.4 Statement of contentions delivered with evidence in chief

Usual practice in international arbitration is that a statement of contentions (or statement of claim) is required. It is common practice that such a document be delivered with the evidence in chief of the plaintiff. Similarly the respondent delivers its contentions with evidence. While this means that there will be considerably more time spent preparing the statement of contentions and evidence (rather than a traditional statement of claim), the statement of contentions need not contain the particularisation which might be necessary in

[8] (HC) (1997) 141 ALR 353 — in the author's view this case is often quoted as authority for the proposition that justice requires that late amendments to pleading should be allowed with appropriate orders for costs. However, that case is really about the appropriate balance between the interest of the parties and the interests of the court, particularly the disruption to the court when a matter is adjourned. In any event, it is now applied in many circumstances which are distinguishable from and significantly more extreme than those considered by the High Court of Australia. The proper ambit of the principle discussed will have to await further appeal court clarification.

[9] *Queensland v JL Holdings*, n 8.

a Supreme Court. In the Supreme Court, pleadings are to put the other party on notice of the case that it is to meet. While the statement of contention is required to put the other party and the arbitrators on notice of the claimant's case, it need not contain the degree of particularisation often required by the Supreme Courts. This is because the accompanying evidence should set out the claimant's case in full. If it is insufficient, the claimant will lose its case.

The usual practice in Australia requires parties to file their pleadings relatively early. The result is that these pleadings are prepared at a time when the lawyers have not had an opportunity to interview potential witnesses or engage experts. Accordingly, for practical reasons (and sometimes also tactical) lawyers take great care to express the case in as general a fashion as is possible. In doing so, the lawyers give as broad a scope as is possible to the evidence which will follow. Naturally, the respondent to such broad allegations seeks to narrow the issues by seeking further and better particulars. The answering of such requests are often driven by the same considerations as applied when preparing the original pleadings, that is that the answers should be in the most general form possible.

Notwithstanding the close of pleadings and the provision of detailed particulars, late amendments to those pleadings are commonly made. This often occurs while the lawyers are preparing the detailed evidence when, for the first time, it becomes apparent that pleadings and particulars fail to identify their client's best case. It is also at this time that lawyers can form a reasonable view about prospects and unsurprisingly, some cases settle at this time also.

In those States where evidence is not required to be put on until relatively late in the process, the parties can limit their legal costs by only doing sufficient work to plead and particularise their cases. However, in international arbitration and those jurisdictions which require evidence early in the process, the parties must expend more time (and therefore money) preparing their case. The obvious effects of this alternative way of proceeding is that:

(a) while the ultimate costs of the proceeding are unlikely to increase (they should decrease because of increased efficiency) the cashflow in the early stages will be higher;

(b) by the close of the delivery of contentions and supporting evidence, both parties will understand their own and the other side's case much better than if they had exchanged conventional pleadings;

(c) late amendments to the pleadings are less likely as the statement of contentions will have been prepared concurrently with the factual evidence. Insofar as amendments are necessary they are usually in the nature of fine-tuning;

(d) as amendments are less likely to occur, the hearing date can be set with certainty and with less prospect that an adjournment will be necessary;

(e) the opportunity for early settlement is promoted;

(f) the need for detailed particulars is eliminated as the statement of contentions and evidence will set out the whole case;

(g) as much of the evidence is in writing and the arbitrator is required to read it, the best advocacy will be that which is as succinct as possible. In particular, advocates must be careful about delivering substantial material in support of marginal alternative arguments.

## 3.5 Flexible approach to discovery

The arbitrator can have a more flexible approach in relation to discovery. The general rules of court require that all 'relevant' documents be discovered (although in some jurisdictions the test has been changed to require that only 'directly relevant' documents be discovered, for example, see the Supreme Court rules of Queensland).

The general test for relevance for the purposes of discovery was established over 100 years ago in *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Co*.[10] In that case, the court set down the test in the following terms, Brett LJ:

> 'It seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.'

This relatively wide approach has been further explained in the Australian context in *Mulley & Marney v Manifold*[11](High Court) where Menzies J stated:

> 'Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or could lead to a train of enquiry which would either advance a party's own case or damage that of his adversary.'[12]

As indicated, these rules were developed over 100 years ago, before the advent of the photocopier, wordprocessor or email.

In recent times, cases where the parties have discovered to one another in excess of 5 million pages have not been uncommon. The cost of discovery in these cases can run into the millions of dollars. The volume of discovery can be quite unrelated to the amount in dispute. Therefore, particularly in small cases, the burden of discovery can (in a cost sense) render the dispute resolution process completely uncommercial. Even where significant sums of money are involved the discovery process can represent a very significant component of the cost.

[10] (1882) 11 QBD 55.
[11] (1959) 103 CLR 341.
[12] *Mulley & Marney v Manifold*, n 12 at 345.

To balance against these issues, discovery does (less often than one might think) provide opportunities to advance a case.

As a consequence of the Woolfe Reforms undertaken in England and Wales, the degree of discovery required in those jurisdictions is now dependant upon questions of proportionality. This means that the level of discovery required in a particular case depends upon the circumstances and is determined by reference to what is reasonable having regard to the nature of the dispute (including, but not limited to, its size). Therefore, the obligation to discover becomes more flexible.

In international arbitration there is usually an obligation to disclose the documents on which a party intends to rely and only those other documents which are relevant to the matter in dispute and which the other party specifically requests (whether by identifying a particular document or class of documents). Obviously, the process is subject to ultimate supervision by the arbitrators. Where documents requested are not discovered the arbitrators are likely to draw a negative inference from the failure to disclose.

Accordingly, provided that the arbitrator is willing to proactively manage the discovery process, a more efficient and realistic discovery process can be undertaken in domestic arbitrations. The prospects of this occurring will improve if the parties legislate in the arbitration agreement that discovery will be limited in some manner or other, perhaps by reference to the concept of proportionality discussed above.

## 3.6 Limited time hearings

Hearings are obviously the most expensive aspect of any litigation. They are more expensive if the dispute resolution is by way of arbitration. This is because the parties, in addition to the usual costs incurred in a court, have to pay:

(a) a market price for the services of an arbitrator(s) (which will be significantly more than the relevant court costs); and

(b) for the venue.

Additionally in both litigation and arbitration there are significant out-of-pocket costs (that is, other than the costs of the arbitrators, transcript and venue) in presenting and defending claims, such as the fees of lawyers and experts. In complex disputes these costs can be in excess of $20,000 per day.

Therefore, if the hearing can be made shorter, significant cost savings can be achieved.

The current practise of Supreme Court judges and most arbitrators is to allow cross-examination to progress without restriction (or alternatively with very limited interference by the judge or arbitrator). Further, arbitrators have shown enormous tolerance in allowing an advocate to run a case in the way in which that advocate wishes. In fact, less than two years ago one party in an arbitration run in Victoria opened its case for 50 sitting days (that is, 10 weeks).

The author was also involved in a case in the early 1990s where two witnesses were cross-examined for 68 days (over a 17-week period) and 60 days (over a 15-week period) before an ex Supreme Court judge. While no doubt a case may be able to be made that each question had some relevance to the matters in issue, the cross-examination was not surgical and raises the question of whether the cost of this process was out of all proportion to the real dispute between the parties.

As a consequence of the International Chamber of Commerce's requirement that arbitrators be paid on a lump sum basis, and the fact that hearings are held (often) away from the arbitrator's home, the arbitrators may be usually anxious to ensure that the hearing is as efficient as possible. Accordingly, such arbitrations are often heard on a ‘stop clock’ or ‘chess clock’ basis.

This method of arbitration requires that the hearing be set down for a limited time (for instance, four weeks). Usually, the time available is allocated between the tribunal (for it to ask questions) and the parties. The parties' time is then (subject to the rules of natural justice) usually shared on an equal basis. Each party is entitled to present its case as it sees fit within the time allowed. This usually means that each party will limit itself to a very short opening and cross-examination of the witnesses. All other aspects of the advocacy are in writing. When the allotted time has expired, no further oral presentation or examination of witnesses is permitted.

The recent case of *Anaconda Operations Pty Ltd v Fluor Australia* (discussed below) involved two separate hearings, both run on a stop clock basis, took place over 30 and 20 sitting days respectively. In the first of these hearings evidence was received from 114 witnesses of whom 75 were subjected to cross-examination. In the second hearing evidence was received from 127 witnesses of whom 79 were subjected to cross examination. Thus, each individual hearing was conducted in less than half the time of either of the cross examinations referred to above.

# 4 Rights of appeal

## 4.1 Domestic arbitration

One of the reasons often cited for preferring litigation to arbitration is that with litigation a dissatisfied party can appeal. However, much of this concern can be dealt with by an appropriately drafted arbitration clause.

Pursuant to s 38 of the Act the right of appeal is limited because, where the respondent to the appeal does not otherwise agree, leave must be obtained. Section 38(4) and (5) of the Act provides:

> ‘(4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement -
>
> (a) with the consent of all the other parties to the arbitration agreement; or

(b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is:

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.'

As will be appreciated, leave will not be granted to appeal in relation to mere errors of fact. However, while in extreme cases there is potential to appeal findings of fact by a trial judge, that right is severely limited as a consequence of both principle and practice. Accordingly, at a practical level the difference between the ability to appeal a finding of fact in litigation as opposed to arbitration is not as great as one might at first imagine.

In relation to errors arising from questions of law in an arbitration, it is necessary to show (before leave to appeal will be given) that the error is one that could 'substantially affect the rights' of a party. If that hurdle is overcome, it is then necessary to show that either the error is a manifest error of law *on the face of the award* or there is strong evidence that the arbitrator made an error and the correction of that error may add substantially to the certainty of commercial law. Accordingly, the right of appeal from an arbitrator on questions of law is narrower than that from a court at first instance.

Whether this is a disadvantage depends upon the outcome of the arbitration. The successful party is unlikely to view it as a disadvantage. Therefore, if there was a suitable mechanism for the appointment of a first class arbitrator, a party may be willing to take its chances on the limited right to appeal.

Alternatively, as is anticipated by s 38(4)(a) of the Act, the parties can consent to the decision being subject to an appeal, thereby avoiding the leave to appeal process. Section 38(4)(a) of the Act is similar to s 39(1) of the Act, which gives the Supreme Court jurisdiction to determine any question of law if an application is brought 'with the consent of the parties'.

In the case of both ss 38(4)(a) and 39(1)(b), the question arises whether the required consent can be given at the time the arbitration agreement is signed. Nothing in the Act suggests a limitation as to when the agreement can occur.

By contrast, s 40 states that an exclusionary agreement (that is, an agreement to exclude all rights of review) is only effective in a general domestic arbitration to the extent that it is signed after the commencement of the arbitration in question (see s 3(5) of the Act for definition of deemed commencement). The absence of similar words in ss 38(4)(a) and 39(1)(b) strongly suggests that the required agreement of the parties can occur at the time of entering into the contract.

In fact, in *WMC Resources Ltd v Leighton Contractors Pty Ltd*,[13] points of law were referred to the Supreme Court pursuant to s 39(1)(b) (that is, with the consent of the parties). The relevant contract required that the respondent (Leighton) sign a consent when directed to do so by WMC. Notwithstanding the clause, Leighton refused to sign the consent. The judge concluded that the respondent could not 'be heard to say that it did not consent'. This issue was not dealt with in the subsequent appeal.[14]

Accordingly, it seems that if a party wanted to retain a general right to appeal on questions of law it could do so by requiring consent be given pursuant to s 38(4) at the time of contract and well before any dispute could arise. While this means that leave to appeal would not be required, any appeal would still be limited to questions of law (see s 38(2)).

## 4.2 International arbitration

If the arbitration agreement is an International Arbitration Agreement within the meaning stipulated by the International Arbitration Act (Cth) (IA Act), the UNCITRAL Model Law (as amended by the IA Act) will apply. In such cases, the grounds upon which to resist[15] enforcement of, or seek review of, an arbitral award[16] are extremely limited. Matters which may permit a party to resist the enforcement of or seek review of the award include:

(a) incapacity of the parties;

(b) invalidity of the agreement to arbitrate;

(c) lack of due process;

(d) award is in excess of jurisdiction;

(e) the composition of the tribunal or the procedure used was not in accordance with the agreement; and

(f) award contrary to public policy.

[13](1999) 15 BCL 49; [1998] WASC 280.
[14] (2000) 16 BCL 53; [1999] WASCA 10.
[15] *International Arbitration Act* (Cth), s 8.
[16] *International Arbitration Act* (Cth), s 34.

Again, if the arbitration agreement is international, then it seems that the parties can, pursuant to Australian law, opt out of the international legal regime back into the domestic scheme.[17]

## 4.3 Can the agreement promote efficient dispute resolution?

The question then is whether it is possible, by way of an arbitration agreement, to design a process which will have good prospects of producing more efficient, quick and less expensive process than the court. Standard arbitration clauses used in Australia have not achieved this goal.

This can be achieved by taking the following steps:

(a) providing in the arbitration agreement, a mechanism for the appointment of an arbitrator who is likely to promote an efficient process. This can be done relatively easily by adopting one or more of the following courses:

  (i) nominating in the agreement, up front, a panel of arbitrators with the desired attributes from which one or more may be chosen at the time of the dispute. For example, the arbitration clause may provide that the party referring the matter to the arbitration is entitled to choose the arbitrator from the list specified in the clause;

  (ii) providing (perhaps in default of the process in (i)) that the arbitrator must be a practising barrister from a particular set of Chambers (or floor) in Australia or overseas;

(b) providing that the arbitrator will be paid a lump sum, to be determined by reference to the scale of lump sum fees promulgated from time to time by the International Chamber of Commerce (ICC) (this could also be achieved by having the ICC administer the arbitration);

(c) require that the hearing date will be set at the first preliminary conference;

(d) stipulate that the High Court decision in *JL Holdings* does not apply, however leaving the arbitrator with a power (to be exercised only in extreme circumstances), to allow amendments to the case with or without an adjournment;

(e) stipulating in the arbitration agreement that it will be conducted on a 'stop clock' or 'chess clock' basis;

(f) requiring that statements of case and evidence in chief be delivered in writing (thereby avoiding the need for extensive particularisation);

(g) limiting discovery by reference to agreed concepts (perhaps the English concept of proportionality);

(h) promoting a speedy delivery of the award by providing that the arbitrator will not be paid a significant part of their fee until delivery of the award;

[17] If the award is to be enforced in a foreign jurisdiction, it will be necessary to consider the law in that jurisdiction, to determine what adverse effects such 'opting out' may cause to potential enforcement rights.

(i) providing, if required, for right of appeal.

### 4.4 Effect on cost

The total cost of the arbitration (that is, including, obviously, the parties' costs) will be a function of the following:

(a) the length of time between the commencement of the proceedings and the date of hearing to determine the substantive matters in dispute; and

(b) the length of the hearing.

In addition to the out-of-pocket expenses which a party incurs as a consequence of engaging lawyers and other people to assist it in the arbitration, it obviously incurs other costs associated with:

(i) its employees retained to manage the lawyers, provide instructions and do other research in respect of the hearing (that is, the direct cost of those employees);

(ii) its resources being distracted by the dispute resolution process, who could otherwise be engaged in productive profit earning work (i.e. the opportunity cost associated with these employees).

Accordingly, in addition to the out-of-pocket expenses, significant internal expenses must be considered in the equation.

In sophisticated matters, an arbitration conducted by a first class arbitrator adopting the international practices discussed is significantly cheaper than the dispute resolution process offered by the Supreme Court (principally because of savings in party costs).

## 5 The Anaconda arbitration - the application of these principles to domestic arbitration

The recent domestic arbitration, *Anaconda Operation Pty Ltd v Fluor Australia Pty Ltd* (the *Anaconda* Arbitration), conducted before three international arbitrators (Paulsson, Uff QC and Naughton QC), gives insights into how international arbitration processes can provide marked procedural efficiencies compared to domestic court procedures. This case also provides assistance to domestic arbitrators when considering procedures which should be adopted so that domestic arbitrations achieve their marketed objectives of:

(a) speed; and

(b) efficiency.

In the *Anaconda* Arbitration, the preliminary conference took place in Scotland on 30 August 2000. The procedural steps agreed by the parties included:

(a) the claimant simultaneously delivering written contentions and all factual witness statements on which it intended to rely;

(b) the respondent simultaneously delivering its written defence and all factual witness statements;

(c) the exchange of expert evidence;

(d) the opportunity to provide reply expert evidence dealing with issues which had been the subject of the earlier exchange;

(e) discovery which was relatively conventional, although in some respects the English rules in relation to proportionality were adopted. A 'fourth arbitrator' was engaged to deal with disputes in relation to discovery;

(f) The time for the hearing was limited to six weeks, with that time split between the tribunal and the parties. The time available to the parties was split equally between them.

The matter was set down for a hearing to commence on 28 January 2002, some 16 months after the preliminary conference.

By about September 2001 it became apparent that the ambit of the arbitration was far greater than the parties or the arbitral tribunal had previously understood. Accordingly, at the tribunal's initiative, the arbitration was split into two, with the first phase of the arbitration to take place on the originally allotted days beginning 28 January 2002.

Notwithstanding this bifurcation, the January hearing (the phase 1 hearing) considered the evidence of 114 witnesses, of whom 75 were called for cross-examination (35 were witnesses of fact with the other 40 being experts).

The phase one hearing entailed consideration of key contentions relating to two of the 15 discrete areas of the processing plant the subject of the arbitration. The remaining contentions relating to each of the 15 areas were considered in a second hearing (phase two hearing), conducted in September 2003).

The phase two hearing commenced on 22 September 2003 and considered the evidence of 127 witnesses, of whom 79 were called for cross-examination (37 were witnesses of fact, with the other 42 being experts).

To assist in narrowing the issues associated with the expert evidence, the arbitral tribunal appointed two 'independent assessors' in relation to both hearings. Despite their title, the role of the assessors was not to express a professional opinion as to the correctness of the expert testimony which had been filed by the parties, but to convene and chair meetings between experts of like discipline. The assessors then produced schedules which identified the relevant issues and stated the respective party-appointed experts' views in respect of those issues. Significant areas of agreement were identified, thereby reducing the scope of the dispute. The remaining areas of disagreement were ultimately the issues on which the arbitrators had to determine. The hearing time also concentrated on the contentious issues so identified.

The discovery process required the production of an enormous amount of documentation. Most of this documentation was exchanged by way of

electronic images with a simple database. It is estimated that in total (both electronic and hard copy material) 1.4 million documents (in excess of 5.6 million pages) were exchanged.

## 5.2 The hearings

### 5.2.1 Phase One Hearing

The phase one hearing, which occupied 30 sitting days, was conducted over an eight-week period because one of the arbitrator's pre-existing commitments required a two-week break after four weeks of hearing. Accordingly, the arbitration commenced, as originally scheduled at the first preliminary conference of 30 August 2000, on 28 January 2002. It concluded, as planned, on 22 March 2002.

Each sitting day was approximately six hours from 9.30 am-5.00 pm, with 1.5 hours of breaks. This gave a total hearing time of 180 hours to be shared between the tribunal and the parties. The tribunal allocated to itself approximately 30 hours (initially) and gave each of the parties 75 hours each for the presentation of their case. Each party was entitled to use the time allocated to it in any manner it saw fit. Due to the nature and size of the dispute each party spent the vast majority of its time in cross examination of their opponent's witnesses. The claimant alone chose to open but did so in a few hours.

The limitation of hearing time placed significant strains on the parties in determining what issues were absolutely critical to their respective clients' positions. Neither party was limited in the amount which it could submit in writing. Accordingly, submissions played a significant role in the advocacy.

As the matter progressed, the tribunal:

(a) agreed to sit longer on occasions, thereby providing a few extra hours over the 30-day duration of the hearing;

(b) ‘gifted’ 10 hours of tribunal time to the parties which was split between them in equal proportions. Ultimately, the parties consumed the following time:

  (i) Claimant — 79 hours and 52 minutes; and

  (ii) Respondent — 79 hours and 25 minutes.

The hearing concluded early on the last day of the scheduled time with neither party using the whole of the time allocated. In theory, either party could have made application to use the remaining four to five hours. Neither did, presumably because both had regarded the time as sufficient, notwithstanding the obvious size and complexity of the case.

The parties then retired to prepare written final submissions with an oral presentation of two days in May 2002.

The arbitral tribunal, displaying significant efficiency, and notwithstanding the European summer break in August, delivered its award in early September 2002, approximately two years after the preliminary conference.

### 5.2.2 Phase Two Hearing

Phase two of the arbitration commenced upon receipt of the phase one award, with the hearing commencing on 22 September 2003. This hearing occupied 20 sitting days and concluded on 17 October 2003. As with the phase one hearing, each sitting day was approximately six hours from 9.30am to 5.00pm, with 1½ hours of breaks. Each party was therefore originally allocated 50 hours in which to present its case, with 20 hours set aside for the Tribunal.

The limited amount of time meant that, as in the phase one hearing, both parties dedicated the majority of their time to the cross-examination of their opponent's witnesses. Written submissions also played a crucial role in the advocacy.

As the hearing progressed the parties requested that they each be awarded a further 2 hours in which to present their cases. This request was granted by the Tribunal. The time was ultimately divided up as follows:

(a) Lessons learnt Claimant - 51 hours and 58 minutes;

(b) Respondent - 51 hours and 54 minutes; and

(c) Tribunal - 17 hours and 14 minutes.

## 5.3 Lesson Learnt

(a) At a very early stage in the interlocutory steps it became apparent that the arbitrators were serious about maintaining the original timetable. Accordingly, both parties applied the necessary resources to ensure that the various interlocutory steps were completed as near to the specified time as possible. This discipline improved in the second phase of the hearing.

(b) Despite the enormous factual and opinion-based evidence provided by both parties, the arbitration started on the allotted date and concluded within the allotted time. This is in stark contrast to court proceedings where the start date is not set until the interlocutory steps are concluded. These steps are also often delayed because of the courts' tolerance to parties' failures to comply with the ordered timetable. Even then, courts have shown a very generous attitude to allowing amendments which can give rise to adjournments.[18] The fact that in the *Anaconda* arbitration the timetable was maintained is a credit to the arbitrators who managed the process and the parties who generally complied with the timetable.

(c) There was no need for extensive requests for further and better particulars or interrogatories which significantly slow down domestic arbitrations and court proceedings in Australia (particularly outside New South Wales). Further and better particulars are designed to put a party on notice of the case that it will meet at the trial. The concept was developed when written evidence was not delivered. The delivery of full written witness statements early in the process means that the need for

[18] See *Queensland v JL Holdings* (1997) 141 ALR 353.

particulars is severely limited. However, the parties need to be careful to draw their contentions so that the relevance of the evidence is immediately apparent and, preferably, so that the contentions cross-refer (by footnote or other device) directly to the evidence said to support the contention.

(d) One of the major hurdles in the case was the volume of discovery. The parties did agree that English rules of proportionality should apply in some cases. However, given the nature of the issues and the amount in dispute, this probably did not provide much relief to the parties, who otherwise followed a conventional discovery process (unlike most international arbitrations).

(e) A limited time hearing is an enormous advantage in disputes of this nature. It requires both legal teams to narrow their cases and to jettison marginal and poor arguments. While there is no limit to the written material which can be provided to the tribunal it is important for the parties to closely consider the volume which they expect the tribunal to read and digest. Any party wasting time at the hearing did so at severe penalty to the presentation of its own case. Accordingly, openings were short and cross-examination surgical. This is in stark contrast to the usual domestic arbitration experience described above. Some of the people who have reviewed the nature of the evidence have suggested that in a Supreme Court or domestic arbitration the hearing would have exceeded one year.

(f) From the parties' point of view such processes have significant advantages over the traditional court or domestic arbitration processes because of their speed and, ultimately, cost. A case such as the *Anaconda* Arbitration is no doubt expensive in absolute terms. However, in relative terms, it remains significantly cheaper than conducting the matter by way of court proceedings or pursuant to usual domestic arbitration practice. This occurs because, first, the time for the interlocutory processes prior to a hearing is significantly shorter. In courts and domestic arbitration, adjournments are too readily given, resulting in parties generally approaching timetables set at interlocutory hearings or preliminary conferences as not mandatory. The domestic process, which is burdened with highly technical rules about particularisation and discovery, is significantly slower. These rules rarely result in any additional value being added to the process.

(g) The costs of court proceedings and domestic arbitration are such that many matters settle not by reference to their merits but rather the capacity of the parties to endure the legal costs associated with the process. Accordingly, the *Anaconda* Arbitration is an example of how efficient processes can be adopted and a result achieved which, while expensive, is within the means of the parties and within a timeframe which is acceptable from a commercial perspective.

# 6 Conclusion

For the reasons discussed in this article, contracting parties should consider incorporating the following provisions in their contractual arbitration clause:

(a) the arbitrator be a lawyer with expertise in the subject matter of the contract and come from a culture of procedural efficiency (for the moment this may require the appointment of an arbitrator from outside Australia or an Australian arbitrator with extensive international experience);

(b) stipulate that the hearing be set down at the first preliminary conference and that the reasoning in *JL Holdings*[19] is not to apply.

(c) the arbitrator be paid a lump sum fee (such as one calculated in accordance with the ICC scale);

(d) the arbitration be conducted on a stop clock basis, with duration of the arbitration to be determined by the arbitrator, having regard to an explanation of the nature of the dispute by the protagonists at the preliminary conference;

(e) discovery in the proceedings be limited in some manner (perhaps by reference to the English concept of proportionality, which increasingly has a body of decided cases to which reference can be made);

(f) the amount of expert witness evidence which can be given be limited, such that a party may (unless it receives leave from the arbitrator, with good cause) only call one witness for each area of expertise; and

(g) there is an agreed position in relation to appeal.

[19] *Queensland v JL Holdings*, n 18.