ARBITRATION, EXPEDITION AND ADR[1]

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ARBITRATION, EXPEDITION AND A.D.R.[1]

At the risk of appearing iconoclastic, it is important to remember that alternative dispute resolution is not at all new. One can be forgiven for observing that the concept has been recently embraced as though it were the newest thing under the sun. But it must be remembered that, for a long time, procedures have been available in the Courts to enable the more expeditious resolution of disputes by the use of persons who are neither lawyers nor judges. The fact that the procedures might not have been used frequently might be the fault of either lawyers or judges.

The Court may, if it wishes, appoint assessors to sit with the judge and assist him in determining complex or technical issues. Courts of Marine Inquiry, for example, very frequently comprise a judicial officer and two assessors, who usually have shipping or seagoing experience and qualifications. The Courts also have the capacity to appoint referees to determine technical matters. I shall return later to procedures for appointing referees.

Outside the curial system, the commercial community developed arbitration as a means of resolving disputes more quickly. The arbitrators might be lawyers or they might be persons experienced in the field or industry in which the dispute arose. Arbitration has been and is still being used frequently in the resolution of disputes in commerce, insurance, banking or building and construction.

The Courts have responded to the calls for more expeditious resolution of disputes. Commercial courts were established in the United Kingdom in the last century and more recently in most of the Australian States. Other developments, some older than others, are—

- reference to arbitration
- reference of particular issues to referees or court appointed experts
- the use of conciliators to attempt to bring the parties together
- the use of mediators
- reference of issues or disputes to expert appraisal
- short hearings before a body constituted by a retired judge and a skill expert.[2]

The division between the Courts on the one hand and arbitration and other procedures on the other hand has led to calls for re-examination of the means for determining disputes with suggestions that the competition between the two

should cease. Instead of separation, it is suggested, there should be a unity of dispute resolution procedures which provides to the disputing parties the advantages of the systems previously regarded as alternatives.[3]

One important factor often overlooked in discussions concerning ADR is that the ability of a non-curial method of resolving disputes depends upon at least two fundamental propositions. First, it relies on the willingness of the parties to engage in ADR. Second, is the willingness of the parties to accept and comply with the decision or award. The ability of the courts to enforce parties to proceed with the resolution of the dispute and to enforce their decisions are the ultimate advantage which courts have over non-curial dispute resolution procedures.

Another factor to remember is that arbitration is not necessarily either quicker or cheaper than litigation. Long arbitrations concerning substantive building or engineering contracts are not unknown.

These factors lend weight to calls for a greater degree of unity of dispute resolution procedures. What I wish to examine with you today is how the Courts might make greater use of experts in the litigious process, particularly in the resolution of complex and technical issues. Whether the result is a true marriage of the two procedures or a de facto relationship is not important: of more importance is the fact that, at least, the offspring might be legitimate. If it produces no offspring but results in—

- reducing delays in obtaining a trial date,
- reducing costs of litigation,
- producing a quicker resolution and better determination of complex technical issues,
- avoiding the need for involvement in lengthy processes of discovery and an endless inquiry among copious facts, or
- a fair and just result

the attempt will have been worthwhile.

Referees

A procedure which has considerable potential to facilitate a more expeditious resolution of disputes involving technical issues is the use of referees. It is a procedure which has in at least the last 30 years been little used in South Australia. (Notwithstanding the inherent fallacy, if not vice, in presuming one's own experience is indicative of the general position, I presume to say I am not aware of any significantly prevalent use of the procedure since at least 1960. I note also that Judge Lunn in his *Civil Procedure—South Australia* at para 76.00.1 describes the procedure as being little used.) The experience in South Australia probably reflects the position in other States.

The procedure is not novel or revolutionary. It is a procedure which has been long available in Australian Courts and its ancestry extends at least as far back as 1854 to the Common Law Procedure Act, 1854 (U.K.). (This history of references to arbitrators or referees is comprehensively reviewed by Stephen J and Jacobs J in *Buckley v Bennell Design and Construction Pty Ltd* (1978) 140 CLR 1 and

see also Cole J in *Astor Properties Pty Ltd v L'Union des Assurances de Paris* (1989) 17 NSWLR 483 and *Xuereb v Viola* (unreported, Supreme Court of NSW, 27th November 1989.)

In New South Wales, the deliberate endeavour of the Supreme Court to expedite the resolution of complex commercial disputes as well as engineering and construction disputes has seen a revitalisation of the use of referees by the Court.

In the past four years, the procedure has been both revived and revised. Part 72 of the Supreme Court Rules of New South Wales, which contains the current procedure, was amended following the repeal in that State of the Arbitration Act 1902 and the introduction of the Commercial Arbitration Act 1984. The new rules give a general discretion to the Court to appoint a referee or referees or to refer matters to an arbitrator. In that respect the new rule did not make any significant advance on the proceeding rule. A development to be noted was that the discretion of the Court was freed of the fetters with which the former rule was hedged about. The Supreme Court of NSW is now able to exercise its discretion to appoint referees or an arbitrator whenever the interests of justice require. It is a procedure which enables the Courts to deal with the legal issues and experts to assist in the resolution of complex technical issues. The relevant provision is Rule 2 of Part 72 which provides:

> "The Court may, in any proceedings in the Court, subject to this rule, at any stage of the proceedings, on application by a party or of its own motion, make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings."

The development is one which we could usefully adopt in South Australia. An appreciation of the value of the New South Wales development will be assisted by a comparison with the South Australian procedures, which are contained in Sections 65-70 of the Supreme Court Act, 1935 and Rule 76 of the Supreme Court Rules, 1987.

Section 65 of the Supreme Court Act 1935 enables the Court to "refer to an official or special referee for inquiry or report any question arising in any cause or matter". Section 66 provides:

> "In any cause or matter, other than a criminal proceeding by the Crown—
> (a) if all the parties interested who are not under disability consent;
> or
> (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made by the Court or conducted through its ordinary officers;
> or
> (c) if the question in dispute consists wholly or in part of matters of account, the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties, or before an official referee or officer of the Court."

It will be perceived at once that the Court's discretion is more limited by the South Australian provisions than is the case with the New South Wales rule. Section 65 limits the Court's powers of appointment to an official or special

referee. Section 66 limits the appointment to a special referee or arbitrator agreed by the parties. Failing agreement the Court may only appoint either an official referee or officer of the Court. Furthermore, the circumstances in which a referee might be appointed are limited. No doubt, the Court could exercise a certain degree of persuasion to encourage agreement on a special referee or arbitrator. Whether a Court is able to order a determination by a referee against the wishes of the party is not entirely clear.[4]

Further, the rule does not, on its face, have the same apparent width or flexibility as Rule 2 of Part 72 of the New South Wales Rules, which enables an appointment of a referee at any stage of the proceedings with the Court able to act of its own motion.

There is some room perhaps for amending the South Australian rule to bring it into line with the New South Wales rule. Such an amendement would not only provide a wider and more general discretion for South Australian judges but would achieve uniformity in an area where a standard approach is highly desirable.

The range of questions on which referees might report is obviously quite extensive. In New South Wales referees have been appointed to report on matters such as—

- construction and engineering disputes,
- whether sulphuric acid supplied for use in electrical accumulators have excessive chloride levels,[5]
- whether work done in enlarging a dam on one rural property had removed the support to a dam on an adjoining property,[6]
- the extent of damage to insured premises and the cost of restoring the damaged premises.[7]

In March 1990, in 21 of the cases in the Construction List in the Supreme Court of New South Wales, the Court had referred technical issues to referees for determination. Some references had taken up to three weeks. The procedure would appear to enable a building dispute involving say $½ million to $1 million to be resolved to the stage of judgment within three months. A by-product is the considerable saving of judicial time consequent on referees instead of judges inquiring into technical factual matters.[8]

When ordering a matter to be sent to a referee for report, the Court determines the issue on which the expert should report and may, and usually does, give directions as to the manner in which the reference should be conducted. In *Chloride Batteries Aust Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60 the question referred to the expert for inquiry and report was—

> "The issue arising in the proceedings as to whether, assuming sulphuric acid contained in the electrical accumulators supplied by the plaintiff in 1982 and 1983 for use in power stations at Eraring and Bayswater when calculated to 100% concentration had a chloride content in excess of 30 parts per million, such chloride content caused or contributed to damage to such electrical accumulators and, if the latter, to what extent it contributed to the damage."

The directions required:

1. The plaintiff to serve upon the defendant a statement of facts and contentions relied upon by the plaintiff in respect of each of the technical issues supported by such experts' reports as the plaintiff desires.
2. Subsequent to service of the document referred to in 1 above, the defendant to serve upon the plaintiff similar documents in reply to the plaintiff's documents.
3. The above documents to be made available to other parties to the proceedings.
4. Any disputed matter arising out of the above documents to be proved formally to the satisfaction of the referee.
5. The plaintiff to prepare and make available to all parties a schedule setting out what happened to both the accumulators subsequent to their manufacture and the acid supplied by Glendale subsequent to its delivery to the plaintiff.
6. A further conference to be held subsequent to the referee's consideration of the abovementioned documents.

Having conducted his inquiry the referee reports to the Court in writing. The report does not decide the issues between the parties, for that is the function of the Court. The Court must determine whether to adopt, vary or reject the report: SCR 76.07, see also *Chloride Batteries Australia Limited v Glendale Chemical Products Pty Ltd* (supra), *Nicholls v Stamer* (1980) VR 479 and *Interger Computing Pty Ltd v Facom Australia Limited* (unreported, Marks J, Supreme Court of Victoria, 10 April 1987). However, a Court will not lightly reject a report. If it were contended that the expert had missed the point, failed to answer the questions asked, failed to give adequate reasons or provided inconsistent reasons, the Court might refuse to act on the report: see *Xuereb v Viola* (supra). Litigation of technical issues cannot be endless and, where the requirements of justice have been met and the parties have had a full opportunity to place all their material before the referee, the Court will be dis-inclined to re-open the issue.

In *Chloride Batteries*, Cole J applied the reasoning of earlier decisions in the Supreme Court of Victoria and refused an application to reject the referee's report. In that case, the referee had reported to the Court and to the parties. The plaintiff asserted that the referee had misunderstood or misinterpreted the work of two experts furnished to him in the course of his enquiries. Cole J referred the matter back to the referee for further consideration. The referee reconsidered the matter and made a supplementary report adhering to his initial decision. In the circumstances, Cole J believed that he should act on the report.

The experience in *Chloride Batteries* illustrates the flexibility of the procedure. Not only might the Court refer the matter back to the referee for further consideration generally or any particular aspect, the Court may also refer one aspect to another referee for report: SCR 76.05 and SCR 76.07. For his part, the referee may, before making the report, submit any question to the Court for its decision: SCR 76.05. The advantages are obvious. The appellate process is not kindly disposed to appeals on questions of fact. Factual issues are given

a full and complete examination by the referee before a final decision is made by the judge. Instead of a judge who might not be expert in the technical area of the dispute making a final decision, there is an opportunity for reconsideration by the referee before the final decision is made by the Court. The parties have an opportunity to make further submissions before the final decision. If the referee requires assistance on a legal or other issue, he can obtain the directions of the Court.

The procedure provides a most useful structure for the interests of the litigants to be served by an interaction of professional skills and qualifications. It is a structure which recognises the technical sophistication and complexity of some disputes and seeks to resolve them expeditiously by a combination of different fields of expertise. Those who are working with it might be forgiven for eulogising it as "a felicitous arrangement"[9] or as "the best of both worlds".[10]

The procedure has been available in South Australia for a long time. It has a potential which has not been fully realised. Its potential will be enhanced by amendment of the Supreme Court Rules to gain the flexibility provided in the New South Wales Rules.

The climate for following the NSW model is becoming more propitious. It is, I believe, possible to say in South Australia as has been said in New South Wales[11]:

> "The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that difficult questions of law or complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause: *CF Gillingham Constructions Pty Ltd v Downes* (1969) 90 WN Pt 1 NSW 258. That approach should be treated now as a relic of the past. The Courts should be astute in ensuring that, where parties have agreed to submit their disputes to arbitration, they should be held to their bargain even if this may involve additional cost and expense."

The procedure in Part 72 enables parties to commence proceedings in the Supreme Court confident that technical issues will be reported on to the Court by a competent independent person qualified in the area of the dispute.[12] Cole J points to further advantages:[13]

> "Coupled with that, legal issues remain within the immediate control of Judges of the Court. Thus disputants have the dual advantage, never previously available to them, of having legal issues resolved by Judges, accompanied by a Court considering a report upon technical issues by a Court appointed referee having special expertise in the area of the technical dispute. This felicitous arrangement overcomes the previously perceived alternate disadvantages of lawyers resolving technical issues, and persons technically qualified resolving legal issues. A further advantage of resolution of matters in the Supreme Court, using Pt 72 referees, is that the Court is able to control and direct the speedy preparation and determination of the dispute. Lengthy interlocutory procedures can be eliminated with resulting expedition and reduced costs. The advantages of this system of dispute resolution when compared with a consensual arbitration appears to have been recognised by litigants as the volume of work in the Construction List is increasing."

This procedure backed by a requirement (as in New South Wales) that the Court receives the matter into its list within three weeks of the issue of the writ, statements

of issues within a short time, and an early reference to a referee must assist litigants in the early resolution of a dispute.

The procedure is no panacea. Much depends on the commonsense and initiative of the parties and their legal advisers. There will be occasions when referees fail properly to discharge their function. It is important to ensure that the questions referred to a referee will be capable of answer. The experience in *Xuereb v Viola*[14] provides a cautionary tale, reminding us that different training might produce different approaches to issues, which will require adjustment and understanding on both sides. In that case, the referee, a professor of engineering, was having difficulty with the legal concept of the balance of probabilities. At one stage of his inquiry, he said: "I'm not prepared to answer on the balance of probabilities". Shortly before the referee had said:

> "Question 3 in the second set worries me—
> 'Prior to the construction of the larger dam upon the first and second defendant's land was there a probability of the plaintiff's dam having been—.'
> Are you asking there about a mathematical probability? There is a probability of everything. That does not tell anybody anything. Even if it (is) only one in a million, it is a probability.
> Mr Kerr: You could say that.
> Referee: I would be saying that a lot of times. You have asked questions to which no one has finite answers."

As Cole J notes:

> "It is apparent that the Referee was adverting to the engineering concept of the law of probabilities, as distinct from a legal test of whether an event was more probable than not. The Referee's subsequent comment—"I am not prepared to answer on the balance of probabilities. I do not know what is the answer to that question. I was not there. That is why it can be such an idiotic set of questions that lawyers produce. It does not get a practical man anywhere. Anything is liable to do something"—was held by Cole J to be understood as being an answer by an engineer referring to his unwillingness to answer in accordance with engineering concepts of the law of probabilities, as distinct from determining the existence of a fact or circumstance upon the balance of probabilities."

It is important that the Courts, litigants and their legal advisers recognise the width of issues which might be sent to referees for report. The issues suitable for determination in this way are not limited to questions arising in contractual or engineering disputes.

In this increasingly technical age, there might be more and more issues which would be suitable for resolution in this way. Scientific questions in patent actions as well as in other disputes, complex accounting enquiries and technical issues in sale of goods cases are three areas which spring to mind. The procedure provides a vehicle by which lawyers and the Courts, with the assistance of technical experts, cannot only move with the times but also serve the litigant more expeditiously and consequently less expensively.

COURT APPOINTED EXPERTS

Calls for the use of court appointed experts have been reflected in a new rule in the South Australian Supreme Court Rules. Rule 82 enables the Court on its own motion or upon the application of a party to appoint one or more expert witnesses to enquire into and report on any question of fact or opinion not involving questions of law or of construction. The procedure is not unlike the appointment of a referee. The Court will (in the absence of the agreement of the parties) frame the question to be decided. The Court might direct further or supplementary reports if they are required.

However, unlike the referee, the expert might be ordered to submit himself for cross-examination: SCR 82.05. Further, it is possible, after the cross-examination of the expert and on proper notice to the other party, to call another expert on the same issue: SCR 82.07. The procedure seems to have been little used so far in South Australia and there is no reported authority on its operation. The need for the appointment of experts in this way might be less if more frequent use is made of the appointment of referees. But it is not appropriate to seek to choose between the procedures or prefer one over another. Each has its own place in seeking the more prompt resolution of disputes.

The procedure might be suitable where the costs of litigation might substantially outweigh the small amount which is at stake in the action. In *Newark Pty Ltd v Civil & Civil Pty Ltd* (1987) 75 ALR 350, Pincus J in the Federal Court appointed an architect to determine whether misrepresentations had been made as to the sale of sheets of tiles supplied to a tiling company, the plaintiff in the proceedings. The plaintiff was in liquidation, there were applications for security for costs, and if the actual litigation ran its course one of the parties believed its costs would amount to about $50,000 and another $30,000. The architect appointed by the Court to report as an expert was available to do the report for a fee of $600, about one-half of 1% of the anticipated costs of the whole of the action. While Pincus J recognised that the report would not necessarily resolve the action he did believe it would assist the Court in determining the issues, if not bring about a settlement of the case.

ATTITUDES AND ETHOS—THE LEGAL CULTURE

Another significant by-product of the more expeditious handling of litigation is likely to be that the attitude of the legal profession will change. Nothing is so likely to produce an attitude of procrastination or delay as the realisation that, no matter how one bustles about, the action will not be listed for trial for a long time. The Courts in South Australia have substantially reduced delay and this work is continuing. Shorter lists and the stricter requirements of Courts to adherence to time limits have already produced changes in the ethos of those in the legal profession involved in litigation. It will continue to do so.

In these days of continual inquiry into the legal profession and legal procedures, might I simply note that the legal profession is adapting to new circumstances. The profession is willing to co-operate with the Courts in devising techniques to expedite hearings and shorten trials. Some seeds identified by Cole J[15] have

fallen on fertile ground in South Australia and are already being implemented by some members of the profession, eg—

1. Solicitors should prepare statements of witnesses in admissible form which can be tendered to avoid the time in oral evidence in chief.
2. Parties should agree bundles of documents which can be tendered as an exhibit, leaving debate to those documents in dispute.
3. Chronologies should be agreed, thus saving time in opening and closing addresses and avoiding repetition of evidence as to undisputed facts.
4. Parties should identify and clarify issues before trial. Statements of issues should be prepared in addition to pleadings.

There are no doubt other measures, which will have to be examined and tested. The legal profession has acknowledged its willingness to do so.[16] The profession has recently submitted proposals to the Commonwealth Attorney-General[17] for mediation of disputes. There are plainly areas where the legal profession can work with other professions in expediting the resolution of disputes. The willingness of the Courts to adopt and implement procedures of the kind noted in this paper will not only enhance the status of the Courts as arbiters of disputes but also, and more importantly, provide a better justice system to the community.

[1] I am grateful to Mr N.G. Hosking AO for suggesting the topic of this paper and to Cole J of the Supreme Court of NSW for his assistance in providing materials on the operation of Part 72 of the Supreme Court Rules in NSW. The responsibility for error is mine alone.

[2] Kirby P, *New Approach to Engineering and Construction Problems*, (1990) 6 BCL 81.

[3] Cole J, *The Commercial Court and Arbitration—A Marriage not a Separation*, speech delivered at Institute of Arbitrators Advanced Arbitration Course, Sydney, 24-27 November 1988; Kirby P (supra), and Mr Robert Martin *Construction Industry Disputes* (1989) 5 BCL 89.

[4] See *Honeywell Pty Ltd v Austral Motors Holdings Limited* (1980) Qd.R. 355 at 359 and *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* (1982) VR 762. The note in Lunn, *Civil Procedure—South Australia* might overstate the position. *Parke Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123 is a decision turning on the New South Wales rule.

[5] *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60.

[6] *Xuereb v Viola* (unreported, Cole J, Supreme Court of NSW, 27th November 1989).

[7] *Astor Properties Pty ltd v L'Union des Assurances de Paris* (1989) 17 NSWLR 483.

[8] Cole J, speech to Court Delay Reduction Summit in NSW, 3rd March 1990.

[9] Cole J in *Hooper Bailee Associated Ltd v Natcon Group Pty Ltd* (unreported, Supreme Court of NSW, 17th November 1989).

[10] Kirby P op.cit. at 82.

[11] Rogers J in *Qantas Airways Ltd v Dillingham Corporation* (1985) 4 NSWLR 113, 118.

[12] Cole J in *Hooper Bailee* (supra).

[13] op.cit.

[14] Unreported, Supreme Court of NSW, 27th November 1989.

[15] Cole J, speech to Court Delays Reduction Summit in NSW, op.cit.

[16] The Law Council of Australia, Submission to Senate Cost of Justice Inquiry, December 1989.

[17] Law Council of Australia, Submission on Mediation to Attorney-General (Commonwealth).

PRELIMINARY NOTICE

General Residential Arbitration Course
16-19 May, 1991

1991 Institute Conference
19-21 May, 1991

Fourth John Keays Memorial Lecture
20 May, 1991

PLACE: Darwin, Northern Territory

The dates should be reserved now. Details of the venue, programmes, and pre and post tours will be mailed to all members later on.