- Project Management
- Property Finance Packages
- Property Joint Ventures
- Property Refurbishment
- Property Trust Update
- Realising The Design, Contractual Choices And Responsibilities
- Reducing + Resolving Construction Claims
- The Revised FIDIC Conditions of Contract
- Scheduling For Claims + Project Control
- Specifications For Construction Projects
- Subcontractors' Conference

Attendance at all of the above seminars and conferences would have involved 57 days out of the office and a total direct cost (not including salary and overheads) of $19,145. The cheapest conference was $80 for an half day seminar and the dearest was $1,250 for a three day course. The majority of conferences were of two day duration and cost in the order of $675 - $795. Generally, the speakers are not paid.

4. EXPEDITED ARBITRATION

The significant advantages of arbitration as a system of resolving disputes are privacy and the finality of the process, subject to limited recourse to the court.

However, the process is not necessarily more time or cost effective than litigation. There are horror stories of the costs of particular arbitrations, which led disputants to settle on the basis that continuance of the arbitration was not an option. There are also stories of extraordinary periods of time involved in cross examination of project managers. Often these problems arise from the aggressively adversarial manner in which disputants conduct their cases. However, the problems also arise from the difficulties arbitrators have in controlling the process, due to the potential for challenge to the arbitrator or the arbitral award, on the basis of misconduct or denial of natural justice.

Whatever the causes, these problems have led to some questioning of the efficiency of the process and to the use of Alternative Dispute Resolution strategies.

There can be limitations on Alternative Dispute Resolution methods, where there is a need for a binding independent determination of the dispute. Accordingly, AFCC made a submission to The Institute of Arbitrators, Australia suggesting the need to develop a streamlined or "fast-track" system of arbitration to overcome the problems of costs and delay in arbitration. This submission was supported by the National Building and Construction Council.

In August 1988, the Institute of Arbitrators, Australia published Expedited Commercial Arbitration Rules, which give a great deal of power and flexibility to the arbitrator to conduct the proceedings in an efficient manner. These Rules can be invoked by the agreement of the parties.

However, once the disputants have agreed to invoke these Rules, the control of the detail and nature of the proceedings is in the hands of the arbitrator. Rule 18 provides that "the arbitrator may conduct the arbitration proceedings in such manner as he thinks fit and, in particular, **he may in his absolute discretion** direct that:

- there be no pleadings;
- there be limited pleadings;
- there be limited discovery;
- there be no opening address by the parties or that opening addresses be limited in time;
- there be no final addresses or that final addresses be limited in time;
- pre-hearing submissions to be lodged by the parties accompanied by sworn statements of witnesses and documentation upon which the parties wish to rely with the parties having a right of reply and to require that any deponent of a sworn statement attend for cross examination;
- the number of expert witnesses to be called to be limited in number;
- the report of experts to be relied upon in the arbitration be exchanged at least seven days prior to the hearing com mencing;
- there be no oral evidence;
- the above steps to be taken within strict time limits"

(Note, emphasis added.)

Rule 19 provides that the arbitrator may determine any question which arises by reference to general justice and fairness. This may not suit the parties, who may wish for a determination strictly in accordance with the law.

Rule 20 provides that the arbitrator shall have power to attempt to achieve a settlement by conciliation and/or mediation and that such attempts shall not be adduced in any subsequent Court proceedings as evidence of partiality or bias or a breach by the arbitrator of the rules of natural justice.

Rule 21 provides that the arbitrator shall not be required to include in the award a statement of the reasons for making the award. This may not suit the parties.

No doubt many of these provisions would have the effect of expediting the arbitration and of controlling costs. However, the disputants may be comfortable with some, but not all of them.

The Institute's Rules will be most helpful in situations where the parties choose to rely upon the arbitrator's experience for guidance as to the most efficient manner of conducting the particular dispute.

However, in most instances, the parties would probably choose to retain control of the process themselves and consciously decide the manner in which the dispute should be resolved. Consequently, the approach taken in the Institute's Rules, in its current form, may mitigate against its use. It is questionable whether many disputants will choose to empower the arbitrator to the extent that these Rules allow and, more particularly, to divest themselves of control of the process. Nevertheless, the Institute's Rules may serve as a checklist for the parties to develop an agreement (perhaps in conjunction with the arbitrator) on a procedure for expedited arbitration in relation to a particular dispute, or perhaps to be inserted in the agreement.

In response to similar concerns in the United Kingdom with respect to costs, delays and problems arising out of arbitrations, the U.K. Joint Contracts Tribunal published Arbitration Rules in July 1988, which provide three optional approaches to arbitration. These are:

1. Arbitration **without hearing**, based upon provision of statements of particulars to a strict timetable, rather than pleadings and a hearing. If the timetable is not met, then the claim or counterclaim can be dismissed.
2. Arbitration based upon a **short procedure with a**

hearing, no evidence except the documents necessary to support oral submissions, with each party bearing its own costs.

3. Arbitration - **full procedure with hearing**. If the timetable is not met, then the claim or counterclaim can be dismissed. Costs at the arbitrator's discretion.

It is also worth noting that in 1983, the U.K. Institution of Civil Engineers developed a simplified Arbitration Procedure, which provides the arbitrator with a great deal of power to control the process and proceedings. This Procedure also contains a short procedure, which is intended to further shorten and simplify the proceedings.

It is suggested that disputants should consider agreement upon steps to expedite arbitration to control the costs and time involved in the resolution of disputes. The Australian and U.K. approaches referred to above should assist.

5. ARBITRATION - COURT REFERENCE

In *Pinas Constructions Pty Ltd v Metropolitan Waste Disposal Authority* (1988) 12375 of 1988, Brownie J. 4 August, 1988, the Supreme Court of New South Wales had occasion to consider the obligations of an arbitrator, or referee, appointed to determine a matter referred by the Court under Part 72 of the Supreme Court Rules.

At the time that the matter came before the Court, the hearing had been proceeding before two referees, who had been appointed by the Court, for some 27 days. It was alleged that, on or about the 27th day, one of the parties made a complaint about the behaviour of one of the referees. That complaint precipitated certain comments by the referee, which resulted in the referred proceedings being adjourned and the making of an application to the Court seeking an order that one of the referees be removed on the basis that he had "descended into the arena" and had made statements which would suggest to a reasonable observer that certain issues had been determined against the plaintiff, prior to the conclusion of the case.

There was little dispute between the parties as to the proper principles to be applied and that those principles were as stated by the High Court in the matter of *Livesey v The New South Wales Bar Association*, namely

> "That principle is that a judge should not sit to hear a case if in all circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

The question then for the court was whether or not the matters relied upon by the plaintiff constituted any basis for the forming of a reasonable apprehension that the referee's mind might not be impartial and unprejudiced.

The events relied upon by the plaintiff were examined by the court as were other authorities in the area where comments have been made as to the requisite behaviour of the judiciary, or persons acting in a judicial capacity.

The question raised was a difficult one, particularly as there is a fine line between a person in a judicial capacity maintaining control of the proceedings and directing the carriage of the proceedings in such a way as to minimise the time and costs involved, and "descending into the arena".

In the case under consideration by the Court, an order to remove the referee was in fact made. That should be considered against the fact that there were two referees hearing the case, and the order made by the court did not result in aborting the proceedings. The matter was able to continue to be heard by the remaining referee.

The Court confirmed that a referee, or arbitrator is bound by the same rules as a judge and should act in accordance with the standards required. These standards were further referred to in the matter *Tousek v Bernat* 77WN 838 at 84-3. There Mr Justice Owen quoted Denning LJ as he then was:

> "The judges part in this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancy and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and that the end make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the roll of advocate; and the change does not become him well."

His Lordship continued:

> "Such are our standards. They are set so high that we cannot hope to attain them all of the time."

If an application to remove an arbitrator as referee is to be made, it should be made at the time of the occurrence of the events which the party seeks to rely upon to demonstrate the misconduct or bias or prejudice. Certainly, a party would have little chance of success if the application to remove was made after the bringing down of an unfavourable award.

It would be disappointing if the Court's recent decision to remove an arbitrator was seen to temper the powers of an arbitrator/referee. Rather arbitrators should be encouraged to use the methods available to them, as suggested by Lord Denning above with a view to ensuring the proceedings can be disposed of with the minimum of time and cost.

- From Colin Biggers + Paisley, Solicitors, News Vol. 22 (with slight modifications).

6. ARBITRATION - LEGAL REPRESENTATION

The involvement of lawyers in arbitrations is a topic which attracts a good deal of discussion in the construction industry. This article discusses the issues involved in legal representation in arbitration.

Experience indicates that it is essential to involve lawyers, at least in the preparation of the case for arbitration, as a wrongly framed claim or counterclaim may lead to failure, as the arbitrator is obliged to find on the issues presented for determination.

It should also be considered that some arbitrators have a policy of refusing involvement, if lawyers haven't been involved in preparation, due to the lack of focus of the facts and issues by the parties and the lack of control over presentation of arguments, which frequently occurs in such circumstances.

One approach, used by a number of construction lawyers to minimise the costs of the arbitration (which, according to John Dorter, was originated by Adrian Bellemore), is for the lawyers