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