

Cost-Effective Resolution of Construction Disputes: Wishful Thinking or Emerging Reality?

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INTRODUCTION

Until at least the late-1980s, most commercial and construction disputes in Australia, New Zealand, the UK and most other developed countries were determined either by litigation in the Courts, or by arbitration. Arbitration was traditionally seen as having a number of significant advantages over litigation, one of which was that the arbitrator would be someone who was an acknowledged expert in the subject matter of the dispute, such that an arbitration should (at least in theory) be able to be conducted more quickly and efficiently than the hearing of a technical issue by a non-technically qualified judge.

Over the past decade or so, there has been an increasing trend in Australia and overseas away from traditional litigation as a means of determining commercial and construction disputes. By the late-1980s, the practice of arbitration in the common law world had become bogged down with processes derived from litigation and which, unfortunately, made the practice of arbitration much less efficient than it should otherwise have been.

It is fair to say that litigation or arbitration of construction disputes in the traditional manner became enormously time-consuming and expensive. Of their very nature, construction disputes are usually complex. Claims by contractors often involve large numbers of disputed variation claims or extra-contractual claims, as well as claims for extension of time to recover amounts deducted as liquidated damages for late completion. Such claims are usually met with substantial claims by proprietors for damages for defective and/or incomplete works, and claims for liquidated or general damages for late completion. Attempts by drafters of contracts to limit liability by insertion of contractual clauses restricting the circumstances in which claims for additional payment could be made were countered by a good deal of inventiveness in the

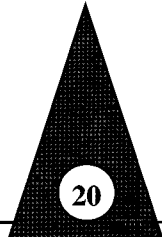
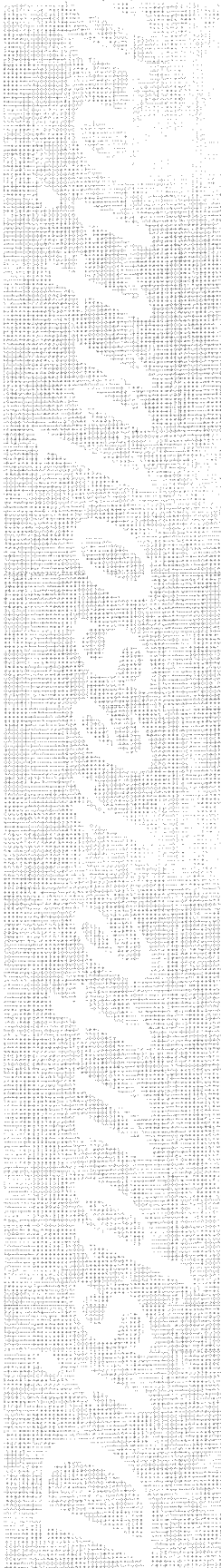
framing of extra-contractual claims, invoking the provisions of the *Trade Practices Act* or *Fair Trading Acts*, implied terms of good faith and reasonableness, and principles of estoppel and unconscionability – to name but a few.

In an attempt to reduce hearing times and the load on judicial resources, Courts introduced requirements for evidence in chief to be given by written statement or expert report served before the hearing. Most arbitrators followed suit. As experienced practitioners are aware, the time and cost involved in preparation of written statements and expert reports is considerable, and these requirements arguably increased (rather than decreased) the cost of construction litigation and arbitration.

In construction and other technical disputes, the time and costs associated with experts' reports form a very significant part of the overall time and costs of preparing a matter for hearing, with costs often approaching (or even exceeding) the legal costs. By way of illustration, in the 1996 John Keays Lecture Justice Drummond of the Federal Court of Australia referred to a study by the Australian Institute of Judicial Administration in 1992 which found that, in a major class of litigation in Victoria involving relatively simple technical issues, expert witness expenses accounted for between 16% and 27% of the cost of cases.¹

From the late-1980s, mediation and other forms of ADR gained popularity at the expense of litigation and arbitration, because they were seen as less formal processes (often with no lawyers involved) which offered substantial savings in time and legal costs.

It is only since that time that, in recognition of the growing unpopularity of arbitration because of the resultant increase in cost, there have been concerted efforts throughout the common law world to conduct arbitration in a manner which is not a



mere imitation of Court processes, and thereby to make use of arbitration's natural advantages.²

Faced with a decline in the use of arbitration, the Institute of Arbitrators and Mediators Australia took a number of initiatives from the mid-1990s to encourage its practising arbitrators to become more proactive in determining the arbitral procedure, with a view to saving time and cost, and thereby making the arbitration process an attractive option for disputants. Detailed attention has been given to this issue at conferences, seminars, members forums and master classes conducted by the Institute, as well as in *The Arbitrator* and other Institute publications.

In an address delivered at the opening of the new IAMA/ACICA Dispute Resolution Centre in Melbourne on 27 July 1999, the Honourable Justice Michael Kirby AC CMG of the High Court of Australia said:

*... in Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts. That is why the educative work of the Institute and of the centre are so important. Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.*³

In this article I hope to demonstrate that, if parties, their lawyers, arbitrators and mediators bear in mind Justice Kirby's remarks that 'mediation and arbitration are not just court proceedings conducted in a different place,' then cost-effective resolution of construction disputes is not only possible, but likely.

There are two particular areas on which I would like to concentrate in demonstrating the sort of innovative approaches and different techniques which can lead to a substantial reduction in time and cost, namely:

1 Arbitration under the new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* of The Institute of Arbitrators and Mediators Australia;

2 Employing a multifaceted approach involving the selective use of a combination of dispute resolution processes, as a means of reducing the contested issues in the disputes for which an arbitrator or mediator is appointed.

ARBITRATION UNDER THE INSTITUTE'S NEW RULES FOR THE CONDUCT OF COMMERCIAL ARBITRATIONS

The Institute of Arbitrators and Mediators Australia has sought to provide the structural framework for prompt and cost-effective arbitration of commercial disputes in its new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)*, which were adopted by the Institute's Council in August 1999. The new Rules replace the 1978 *Rules for Conduct of Commercial Arbitrations* and the 1989 *Expedited Commercial Arbitration Rules*.

The objective of the new Rules is to provide an arbitral framework for the just resolution of disputes in a manner which:

- ▶ is both expeditious and cost effective;
- ▶ is consistent with the statutory requirements for the conduct of arbitrations;
- ▶ preserves the fundamental right of parties to a dispute to agree on the manner in which their arbitration is conducted, by providing default provisions which are expressed to be subject to the contrary agreement of the parties.

The new Rules, as well as the Institute's *Rules for Conduct of Commercial Mediations* and the *Rules for Expert Determination of Commercial Disputes*, are available at the Institute's Website at: www.iama.org.au.

The new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* are arranged in three Parts, as set out below.

PART 1: PRELIMINARY

This Part contain various machinery provisions, which include:

▶ Exercise by various officers of the Institute of Arbitrators & Mediators Australia of the power to nominate arbitrators, while reserving to the parties the right to agree on an arbitrator or arbitrators of their choice (Rule 1);

▶ Triggering the commencement of the arbitration process, by a Notice of Dispute or otherwise (Rule 2);

▶ Nomination of arbitrators by the Institute, including the steps to be taken by the parties and the Institute respectively, and when those steps are to be taken (Rule 4);

▶ The steps to be taken by the Nominee Arbitrator (a term defined in Rule 16) in entering on the reference, including when and by whom those steps are to be taken (Rule 5);

▶ The steps to be taken if the Nominee Arbitrator does not enter on the reference to arbitration within the prescribed time, including when and by whom those steps are to be taken (Rule 6, paragraph 1);

▶ The steps to be taken if, after entering on the reference to arbitration, the Arbitrator (a term defined in Rule 16) becomes incapable of continuing on the reference to arbitration, including when and by whom those steps are to be taken (Rule 6, paragraph 2);

▶ Provision of security for the costs of the reference (a term defined in Rule 16) as directed by the Arbitrator, and the consequences of default in complying with any such direction (Rule 8).

PART 2: THE ARBITRAL PROCEDURE

There is a distinction to be drawn between two types of provision contained in Part 2, namely:

▶ Rules which impose duties on the Arbitrator and the parties, and which are expressed in mandatory terms (Rules 10 and 11);

▶ the remaining Rules which set out various procedural provisions, and which

are expressed to be subject to the contrary agreement of the parties or any applicable statute law.

Rules 10 and 11 are as follows:

RULE 10 General Duty of Arbitrator

1. The Arbitrator shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the matters in dispute.

2. The Arbitrator shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.

RULE 11 General Duty of Parties

1. The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the arbitral proceedings.

2. Without limiting the generality of the foregoing, the parties shall comply without delay with any direction or ruling by the Arbitrator as to procedural or evidentiary matters and shall, where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law.

Rules 10 and 11 are expressed in mandatory terms so that parties who choose to adopt the Rules for the resolution of their disputes can be confident that there is an express written commitment by the Arbitrator and the other party or parties to achieve a just resolution of the dispute as expeditiously and cost-effectively as possible.⁴

The provisions contained in the other Rules in Part II are expressed to be subject to the contrary agreement of the parties or any applicable statute law. Those other provisions include:

▶ Extension of the arbitration beyond the particular dispute notified, to other disputes under the Agreement (a term defined in Rule 16) by right or on terms (Rule 9);

▶ Waiver of a right to object to jurisdiction or the manner in which the Arbitrator

conducts the arbitration, unless that objection is taken expeditiously (Rule 12);

▶ The power of the Arbitrator to make such directions as to procedural and evidentiary matters as he or she sees fit (Rule 13, paragraph 1);

▶ Incorporation of the default procedural provisions contained in Schedules 1 & 2 (Rule 13, paragraph 2);

▶ The use which the Arbitrator may make of views, and obtaining of technical and legal assistance by the Arbitrator, subject to complying with the requirements of natural justice (Rule 14);

▶ The time at which, and the circumstances in which, the Arbitrator shall deliver the arbitral Award (Rule 15).

The default provisions contained in these Rules are also directed to ensuring that disputes are determined expeditiously and cost-effectively.

Under Rule 13, paragraph 2, unless the parties agree otherwise, the default procedure in Schedule 2 applies to arbitrations conducted under the Expedited Arbitration Rules, and the default procedure in Schedule 1 applies to arbitrations other than those conducted under the Expedited Arbitration Rules. Schedule 2 provides a default procedure with a pre-determined timetable for the arbitration to be, as far as possible, conducted on documents. In contrast, the default procedure in Schedule 1 maximises the flexibility of the arbitrator and the parties in devising a procedure which is tailor-made for a particular dispute after it arises.

This article deals with Schedules 1 and 2 in more detail below.

PART 3: GENERAL

This Part of the Rules contains various facilitative provisions, which include:

▶ Definitions of various terms used in the Rules (Rule 16);

▶ Application of the Rules being subject to the Statute Law which governs arbitration in the place where the arbitration is held and any other agreement of the parties (Rule 17, paragraph 1);

▶ Application of the Rules to domestic

arbitrations and, subject to Rule 21, to international arbitrations, terms which are defined in Rule 16 (Rule 17, paragraph 2);

▶ The counting of days (Rule 18);

▶ Procedure when there are multiple Arbitrators (Rules 19 and 20);

▶ Application of the Rules to international arbitrations, subject to the UNCITRAL Rules, a term which is defined in Rule 16 (Rule 20).

Schedule 1

Schedule 1 provides that the Arbitrator may make such directions and rulings as the Arbitrator considers reasonably appropriate, including in relation to such matters as:

▶ Defining the issues in dispute (paragraphs 1 and 2);

▶ Narrowing the issues by various means, including meetings, Experts' Conclaves and the preparation of joint experts' reports (paragraphs 3 and 4);

▶ Providing factual information to enable the issues to be narrowed (paragraphs 5, 6 and 7);

▶ Hearing of the remaining issues, and preparation for this (paragraphs 8 and 9);

▶ Service of offers of settlement without prejudice except as to costs (paragraph 10)

In making such directions and rulings, the Arbitrator is bound by the duties imposed by Rule 10.

Schedule 1 is intended to give the Arbitrator, in consultation with the parties, the utmost flexibility in determining a procedure which is fair, expeditious and cost-effective according to the circumstances of the particular dispute, rather than imposing a defined procedure as set out in Schedule 2.

Schedule 2

In contrast to Schedule 1, Schedule 2 is intended for disputes which can, by and large, be determined based on documents, such as disputes where issues of credit either do not arise or are minimal.

Schedule 2 sets out a timetable for the

various steps to be taken in providing the Arbitrator with the documentary information necessary for determination of the dispute expeditiously and cost-effectively. It expressly provides that the times fixed under Schedule 2 may be varied by agreement of the parties or, in the absence of agreement, on proper cause being shown to the Arbitrator.

Schedule 2 contains some flexibility, in providing that:

► the Arbitrator may, if he or she considers it appropriate, modify the timetable to enable issues which would otherwise be the subject of experts' reports to be narrowed by meetings, Experts' Conclaves and joint reports in terms which are similar to those contained in Schedule 1 (see paragraphs 5 and 6 of Schedule 2);

► the Arbitrator may make such other directions or rulings as he or she considers appropriate, including rulings for defining issues, narrowing issues, providing factual information to enable the issues to be narrowed, and service of offers of settlement without prejudice except as to costs (see paragraph 7 of Schedule 2).

The Arbitrator is then to determine the matter based on the written material, unless the Arbitrator determines that an oral hearing is necessary to explain or resolve conflicts in the written material in relation to one or more of the issues in dispute, with any such oral hearing being limited to that extent and conducted as soon as practicable and at a time and in a manner determined by the Arbitrator (see paragraphs 8 and 9 of Schedule 2).

The Institute of Arbitrators and Mediators Australia is committed to integrity, innovation and standards of excellence in the provision of expeditious and cost-effective dispute resolution services. The new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* reflect that commitment. Another demonstration of that commitment is our Professional Development Program which stresses the importance of achieving that result, and is designed to equip practitioners with the necessary skills.

From January 2001, the Institute is introducing a mandatory Continuing Professional Development requirement for its graded arbitrators and accredited mediators, of 120 hours of eligible activities per triennium, with a target of 40 hours per annum. This mandatory requirement will also apply to applicants for re-grading as arbitrators or for transfer to Member or Fellow.

By choosing to determine their disputes under the Institute's new Rules or by appointment of an arbitrator graded by the Institute, parties or lawyers can be confident that the arbitrator will be committed to determining the dispute fairly, expeditiously and cost-effectively.

EMPLOYING A MULTIFACETED APPROACH INVOLVING THE SELECTIVE USE OF VARIOUS DISPUTE RESOLUTION PROCESSES

This approach involves the appointee (whether appointed as arbitrator or mediator) adopting the role of dispute manager in providing the parties with the opportunity to reduce time and cost by narrowing the issues in dispute. This goal is achieved by using a combination of dispute resolution mechanisms on differing components of a single overall dispute as and when appropriate.

I propose to deal with the issues involved as follows:

- 1 Dispute resolution clauses;
- 2 A multi-faceted approach – perceived advantages of various dispute resolution processes;
- 3 A multifaceted approach – one appointee acting as arbitrator/mediator/expert determiner or appointment of further third party neutrals;
- 4 Case Studies illustrating the benefits of a multi-faceted approach;
- 5 The consent of the parties.

1: Dispute Resolution Clauses

In most commercial and construction matters, the dispute resolution process is specified in the contractual agreement between the parties, the later performance of which gives rise to the dispute.

These days, large commercial or construction contracts commonly prescribe a ‘tiered’ dispute resolution process. For example, in New South Wales, most contracts for major government construction work contain special conditions imposing a contractual regime for determination of disputes by, firstly, submitting the dispute to the superintendent (nominated in the contract) and then to the principal (nominated in the contract) and, if a party is dissatisfied with the principal’s determination, thereafter to expert determination. The contract clause provides that the expert determination is final and binding unless the expert determines that one party pay the other party not less than A\$500,000, in which case either party may elect to submit the dispute to arbitration.

Other fairly common forms of ‘tiered’ dispute resolution processes in modern large commercial or construction contracts require direct negotiation between nominated senior executives and/or mediation in place of (or after) submission to the superintendent or principal as mandatory prerequisites to reference to expert determination and (thereafter) to arbitration or litigation.

It is axiomatic that determination of disputes can involve questions of law and/or questions of fact, and that the determination of questions of fact may involve questions of credit (e.g. which of the competing versions of a particular conversation should be accepted). It follows that it is highly unlikely that any ‘catch-all’ dispute resolution procedure agreed at the time of contract will always provide the most efficient and cost-effective means of resolving every dispute which later arises.

For example, if a particular dispute arises in respect of the quality of work which has been performed, a binding expert determination or a ‘sniff and smell’ arbitration would yield a far more efficient resolution, in terms of time and cost, than a formal arbitration (or a tiered dispute resolution process, involving further time and cost before arbitration).

Conversely, if a dispute arises which involves questions of credit (e.g. should I accept witness A who says ‘We agreed Black’, or witness B who says ‘We agreed White’) an expert determination clause in a contract would provide a less satisfactory resolution of that particular issue than an arbitration, because there is no testing of evidence by cross-examination in expert

determination. If there is cross-examination, a Court would probably hold that it is an arbitration.⁵

Where a dispute arises and there is no dispute resolution clause already in place, it is obviously open to the parties to agree on a mechanism for resolution of the dispute in lieu of traditional litigation in the Courts. Where there are no agreed dispute resolution procedures in place beforehand, one needs to rely on the knowledge and professionalism of the parties’ respective legal advisers to agree on something to the mutual advantage of their clients, in terms of saving time and money. Often this recognition is facilitated by a ‘gentle nudge’ from the Court.

It is similarly open to parties who have agreed on a particular dispute resolution procedure in their contract to agree subsequently on some modification of that procedure after the dispute arises, so as to achieve a mechanism which is better suited to efficient resolution of that particular dispute. The multifaceted approach involves the arbitrator or mediator being pro-active in identifying where some modification of the agreed procedure would be beneficial for the prompt and cost-effective resolution of the particular dispute, and then endeavouring to persuade the parties and their legal advisers to adopt that course. Success will, of course, partly depend on the knowledge and professionalism of the parties’ respective legal advisers in agreeing on a proposal which should be to the mutual advantage of their clients.⁶

2: A Multifaceted Approach – Perceived Advantages of Various Dispute Resolution Processes

In advocating the use (in appropriate circumstances) of a combination of dispute resolution mechanisms on components of the one dispute, the dispute resolution mechanisms to which I am referring are:

- ▶ Negotiation (with or without the appointed arbitrator or mediator being present);
- ▶ Mediation;
- ▶ Binding (or non-binding) expert determination;
- ▶ Arbitration;

► Court determination.

Putting aside for the moment arbitration and Court determination (the features of which are undoubtedly well known) I should say something about the other dispute resolution processes which I suggest are appropriate for use in a multifaceted approach.

Negotiation can obviously take various forms. To illustrate properly the perceived benefit of a form of negotiation in a multifaceted approach, I should explain the form proposed in more detail.

This form of negotiation involves informed discussions between persons who were not directly concerned in the genesis of the factual dispute or disputes. These discussions are directed towards narrowing the issues in dispute between the parties, and thereby minimising the time and cost which will later be required for ultimate resolution of the overall dispute. Commonly, these discussions will be held between the experts respectively engaged by the parties, and will deal with technical or quantum issues.

For various reasons, I suggest that it is preferable the discussions be held without the arbitrator or mediator being present, namely:

- the significant saving in time and cost if the discussions can be satisfactorily conducted informally without the arbitrator or mediator and lawyers;
- where those discussions are held between experts in a particular discipline, conducting themselves in a professional manner, they are usually able to ‘cut to the chase’ more effectively without the arbitrator or mediator and lawyers (or parties) present; and
- in an arbitration, this would avoid the arbitrator being put in a position where he or she becomes aware of material which is not subsequently led in evidence.

There are three important requirements for effective use of this type of negotiating process to which I would particularly draw attention, namely:

- (1) The need for ‘fresh’ negotiators, namely persons other than those who have previously been unable to agree on the particular issue or issues.

- (2) The need to arm the negotiators with sufficient information on the relevant facts (or each party’s version, if those facts cannot be agreed) to enable them to agree on the issue or issues as far as possible on the facts as agreed (or assumed, if those facts cannot be agreed).
- (3) Recording of any agreement reached, and the reasons for any disagreement. Where there are competing versions of the relevant facts, that should take the form of:

On Issue No. 1, if the facts are A, B, and C (as contended by the Claimant), then we agree X. On the other hand, if the facts are A, D, and E (as contended by the Respondent), we agree Y.

If this sort of approach is used, the issue ultimately to be resolved is then narrowed to the factual contest between C on the one hand and D and E on the other.

The arbitral procedure set out in Schedule 1 of The Institute’s new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* demonstrates how this type of process may be used. Schedule 1 relevantly provides as follows:

The Arbitrator may make such directions or rulings as he or she considers to be reasonably appropriate, including in respect of the following:

3. *The holding of further Preliminary Conferences, meetings between experts and/or representatives of the parties, or Experts’ Conclaves chaired by the Arbitrator, so as to narrow issues in dispute, including the time at which and manner in which they are conducted and who may attend, and preparation of any written document recording the results thereof.*
4. *The preparation of joint reports by experts engaged by the parties following any meetings between such experts or any Experts’ Conclave, recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and their respective contentions in relation to same.*

5. *The preparation of joint bundles of documents for use in the arbitration, including at any meetings between experts and/or representatives of the parties and any Experts' Conclaves, or preparation of any joint report of experts.*
6. *The provision of factual information to experts for the parties for use in their joint deliberations or preparation of any joint report.*

I should perhaps explain the reference in the Rules to 'Experts' Conclaves'. Notwithstanding that the *Concise Oxford Dictionary* defines 'conclave' as 'meeting place or assembly of cardinals for election of pope; private meeting', the term is increasingly used in Australian dispute resolution circles as a term of art for a meeting between technical experts, chaired by the arbitrator or mediator, to narrow the technical issues which will ultimately require resolution (where the parties and their lawyers may be present, but do not usually participate actively).

My own practice, in relation to Experts' Conclaves, is usually to hold a Conclave only if earlier meetings between experts have not been productive in narrowing the issues (for whatever reason). In those circumstances, if appointed as an arbitrator, I would usually require that a transcript be taken of the Conclave and tendered in the arbitration, so that it could not later be said that the arbitral Award was based on matters not properly in evidence.

Where the discussions are held between the experts respectively engaged by the parties, and a document is prepared as a joint report which records the extent of their agreement and the reasons for any disagreement, the saving in cost will be substantially greater than merely the reduction in the time required of the arbitrator (or mediator) and the lawyers.⁷

Mediation is well known as a structured negotiation process in which a neutral third party (the mediator) who is independent of the parties helps the parties to agree on their own solution to the dispute. The mediator assists the parties to isolate systematically the issues in dispute and to develop options for their resolution, and to reach an agreement which, as far as possible, accommodates the interests of all of the disputants.

Theorists (and many practitioners) perceive mediation as being directed towards achieving solutions based on the 'wants and needs' of the parties, rather than the merits of particular claims, which is said to lead to a substantial reduction in the time required for resolution. In my opinion, this perceived benefit is somewhat illusory. Firstly, in construction or commercial claims, the 'wants and needs' of the entity providing the services almost inevitably involves the recovery of money beyond that which the recipient of the services is prepared (or able) to pay, but recognition of that fact is unlikely to accelerate resolution of a dispute for payment of that money. Secondly, usually the mediation process involves gaining an appreciation of the respective strengths and weaknesses of the case propounded by each party. Indeed, one tool commonly employed by experienced mediators is 'reality testing,' whereby the mediator engages in a process (usually in private caucus) directed to encouraging the parties and their lawyers to a frank assessment that the argument advanced by the other party is not entirely devoid of merit.

In large commercial or construction disputes, it is extremely rare in my experience that there are a small number of issues involved. These types of disputes often involve a complex amalgam of factual, technical and legal issues, such that the 'reality testing' exercise is both long and complicated. Where the technical or legal issues are complex, it is not uncommon for the 'reality testing' exercise to fail because the legal or technical advisers cannot be persuaded to the merit of a particular argument, and the client is not prepared to act contrary to the opinions expressed by its legal or technical advisers.

Independent Expert Determination is an adjudicative process in which an independent expert in the subject area of the dispute is appointed to investigate and deliver a finding on a nominated issue or issues. Expert determination is appropriate for use where issues cannot be resolved by consensus (i.e. by negotiation or mediation) and the issues for determination do not involve questions of credit.⁸

Sometimes parties agree that the independent expert determination will not be binding, in which case they will commonly use the expert's finding as the basis of settlement or, at the very least, as a basis for clarifying or narrowing the issues between them.⁹ On other occasions, parties submit to

a binding expert determination, whereby the parties agree that the independent expert's finding will be determinative of the issues between them.

Expert determination is normally conducted on the basis of written submissions only, although it is common for there to be at least one face-to-face meeting to resolve any queries which the expert may have in relation to the written submissions. Unlike the other adjudicative processes of litigation and arbitration, expert determination does not require a rigorous application of the rules of natural justice, as the expert may rely on his or her own expertise in determining the issue which has been referred without giving the parties an opportunity to comment on those views. There is no hearing in a formal sense. Accordingly, expert determination should result in substantial savings in time and cost of determining the issue in dispute, by comparison with litigation or most forms of arbitration.

3: A Multifaceted Approach – One Appointee Acting as Arbitrator/Mediator/Expert Determiner or Appointment of Further Third Party Neutrals

One threshold issue is whether the different processes involved in a multifaceted approach should all be conducted by the original appointee wearing different hats (as it were) as arbitrator, mediator or expert determiner in different components of the dispute.

In my view, it is highly desirable that this course is *not* adopted and that other third party neutrals be appointed, particularly where mediation is used in combination with either arbitration or expert determination. It is an essential part of the mediation process that the parties are able to communicate with the mediator in confidence, and that the views of the parties and the mediator expressed in that confidential dialogue remain confidential, and not be perceived as having some possible bearing on a later determination if the mediation is not successful. In the course of '*reality testing*,' experienced mediators often express fairly robust views in an effort to persuade parties to the possible merits of the opposing party's case. Clearly, there may well be a reasonable perception of bias if that mediator then removes his or her mediator's hat and replaces it with that of an arbitrator

or expert determiner.

4: Case Studies Illustrating the Benefits of a Multifaceted Approach

To illustrate the circumstances in which a multifaceted approach to dispute resolution could be used appropriately, I have set out below various Case Studies drawn directly or indirectly from my own experiences and what I have learned from other practitioners.

CASE STUDY 1

The Facts

An experienced structural engineer has been appointed as the arbitrator in a dispute concerning major upgrading works performed on a large power station in New South Wales, pursuant to an arbitration clause in the contract between the parties. The contractor/claimant has claimed several million dollars for a large number of variations to the work originally specified, as well as prolongation costs for delays pursuant to a contractual term for payment of delay costs in certain restricted circumstances.

The statutory power authority/respondent has denied the contractor's claims, putting the variations and delays in issue on the grounds of both liability and quantum, and further asserting that, on the proper construction of the contract, the contractor was not properly entitled to payment of the prolongation costs claimed. It has also cross-claimed approximately A \$500,000 for the cost of rectifying a large number of alleged defects (including replacing an allegedly defective computer software program regulating the supply of fuel to the various turbines, at a cost of about A \$125,000) and damages for late completion (including holding costs and the loss of opportunity to sell power to other power authorities) caused by delays for which the contractor/claimant was allegedly responsible (including the replacement of the software program).

The contractor/claimant has denied the cross claims, asserting that a large number of the alleged defects (including the computer software) were design defects for which the power authority was responsible, and putting in issue the quantum of the damages claimed for late completion and the loss of opportunity alleged.

On analysing the issues disclosed in the pleadings and submissions which he has invited from the parties in relation to those issues, the arbitrator notes that:

▶ There are 60 variation claims between approximately A\$500 and A\$10,000, which total approximately A\$240,000;

▶ There are 20 variation claims between approximately A\$10,000 and A\$25,000, which total approximately A\$380,000;

▶ There are 5 variation claims which exceed approximately A\$25,000, which total approximately A\$1.75 million;

▶ The contractual interpretation issue raised by the power authority is of some complexity, because the contract is comprised of a large number of documents containing various provisions which are not entirely consistent;

▶ There are more than 800 alleged defects of varying types and quantum, including general building defects, serious structural defects, electrical and mechanical defects, and the computer software defect;

▶ The cross-claim for damages for late completion will involve complex accountancy issues, in relation to both holding costs and the loss of opportunity claimed.

The arbitrator has no legal or accounting qualifications, and only a rudimentary knowledge of computer science.

The Traditional Approach

If the arbitration proceeds in the traditional manner, it seems obvious that there would be a lengthy hearing, and that each of the parties would need to expend a large amount of money beforehand in the preparation of lay witness statements and experts' reports.

When the matter comes on for hearing, the lay arbitrator (who has no legal or accounting qualification or any significant knowledge of computer science) can then expect that there will undoubtedly be lengthy cross-examination on the accounting and computing issues, and detailed submissions on the law, as well as submissions aimed at persuading him to accept the expert evidence led by each of the parties.

In relation to the contractual interpretation issue, it should be noted that the arbitrator's duty to determine the legal issue goes beyond merely choosing between the competing submissions put to him by counsel. As Byrne J said, in *Re Tiki Village International Ltd* (1994) 2 Qd. R. 674 at page 678:

*Like the judge, the arbitrator is no mere selector between rival views of the law.*¹⁰

The Multifaceted Approach

There are various ways in which negotiation, mediation, expert determination and Court determination could be used effectively to minimise the time and cost of the resolution of this particular dispute by reducing the ambit of the issues which will ultimately need to be heard and determined by the arbitrator.

There are two possible alternatives for dealing with the contractual interpretation issue. Either a declaration could be sought from the Court as to the proper construction of the contract or, alternatively, the issue could be submitted to a lawyer for expert determination.

In relation to the 60 variation claims which total approximately A\$240,000, the least expensive approach would involve informed discussions between senior executives of the parties to attempt to (as it were) 'cut the baby down the middle', particularly for those claims at the lower end of the range. Another alternative would be mediation along the same lines. If those processes were unsuccessful, then perhaps the best course would be for a fresh round of negotiations between the experts respectively engaged by the parties. Although there would obviously be some costs involved in engaging the experts for this process, those costs should be significantly lower than the cost of the respective expert(s) each subsequently preparing a separate report on each variation claim.

A further alternative (which may be even less expensive than negotiation between the experts respectively engaged between the parties) would be to use binding or non-binding expert determination, conducted by an expert either agreed between the parties or nominated by the arbitrator subject to ratification by the parties.

In a similar manner, the processes of negotiation between experts, or expert determination, could also be used as a means of

resolving (or narrowing) some or all of the issues involved in the larger variation claims and the cross claim for defects. If the expert determination process were used for the defects issues then, given the wide range of defects, it would be appropriate for the issues relating to electrical and mechanical defects to be referred to an electrical or mechanical engineer, and the issues relating to the computer software defect to be referred to an expert in that field.

Similarly, in relation to the issues raised on the cross-claim for holding costs and loss of opportunity (which will require an evaluation of detailed and complex accounting evidence), there would be an obvious benefit in having those issues referred for expert determination by an accountant.

If the expert determination process were to be used on the various technical issues or on the accounting issues, and the documents submitted by the parties included experts' reports, then the process could include holding of an experts' conclave, chaired by the independent expert, prior to reporting his or her findings to the arbitrator. If the expert determination was agreed to be non-binding, then the parties should have the opportunity to test the contents of the expert's report to the arbitrator by, for example, using the type of procedure set out in Part 39 of the *New South Wales Supreme Court Rules* (which deals with the appointment of a Court Expert) whereby, upon application of the parties, the Court Expert may be cross-examined by the representatives of the parties.¹¹

CASE STUDY 2

The Facts

A retired Judge (with an international reputation as a mediator) has been appointed as mediator in a multi-million dollar dispute between a statutory authority and a manufacturer of railway rolling stock, pursuant to a mediation clause in the contract between the parties.

In the course of a lengthy mediation process, during which significant progress is made in narrowing the issues between the parties, it becomes apparent that the mediation process is in danger of failing to achieve an overall settlement because:

► Senior counsel engaged by the parties hold diametrically opposed views on an important point of contractual interpretation,

which they are unable to resolve (notwithstanding the best efforts of the mediator) and neither party is prepared to disregard the view expressed by its counsel.

► Technical experts engaged by the parties hold diametrically opposed views on a number of important technical issues in relation to the suitability for purpose of particular components, more particularly concerning wear and tear over the design life of the rolling stock, and neither party is prepared to disregard the view expressed by its experts.

► Because of the large amount in issue, and concerns regarding accountability if the advice of their respective counsel and experts is not followed, the authorised representatives of the parties are not prepared to compromise their respective positions.

The Traditional Approach

The mediator, drawing on his considerable persuasive skills developed as a Queens Counsel many years before, conducts a series of meetings to achieve some compromise. After caucusing separately with the parties and their respective legal representatives, he then convenes a meeting between the senior counsel, in which each firmly (but politely) refuses to modify the view previously expressed to his client.

When that meeting proves unsuccessful, the mediator convenes a meeting between the representatives of the parties, without the lawyers present. At that meeting he points out that, notwithstanding the eminence of the legal and technical advisers retained by the parties, if the mediation fails, then the parties will each be required to expend a considerable amount of further time and expense in litigating issues on which only one party will succeed. Then the unsuccessful party would normally be ordered to pay costs, and the successful party will probably not recover all of the additional costs which it has incurred in litigating the issue.

Because of his reputation as a jurist, the mediator is requested by the parties to express his views on the contractual interpretation point but, in accordance with his usual practice, declines to do so.

Because these issues are unable to be resolved, the mediation fails.

The Multifaceted Approach

As noted in Case Study 1, the legal issue of contractual interpretation could be dealt with by the parties seeking a declaration from the Court, or obtaining an expert determination by a lawyer either agreed between the parties or nominated by the mediator and subject to ratification by the parties.

The expert determination process would be particularly suitable for determining the technical issues relating to the suitability for purpose of the rolling stock components. As noted in Case Study 1, if the expert determination process was used for those issues, then:

- ▶ the expert determination process may well include the expert convening an experts' conclave with the respective experts for the parties, prior to submitting his or her report to the arbitrator;

- ▶ if the expert determination was agreed to be non-binding, then the parties should have the opportunity to test the contents of the expert's report to the arbitrator by, for example, using the type of procedure set out in Part 39 of the *New South Wales Supreme Court Rules* whereby, upon application of the parties, a Court Expert may be cross-examined by the representatives of the parties.

Depending on how the determination of those issues impacted on the resolution of the overall dispute by mediation, the reference to the Court and expert determination processes could be conducted either before or after the remainder of the mediation. It may be practicable to conclude the mediation process with figures agreed for insertion in the calculation of the overall settlement depending on the outcome of the reference to the Court and/or expert determination.

CASE STUDY 3

The Facts

In 1997, a dispute arises in Australia between a statutory authority and an unincorporated association of approximately 600 agents contracted to provide services to the authority, in respect of a multi-million dollar remuneration claim lodged by the association on behalf of the agents.

The agreement between the authority and the agents in 1982 provides a scale of remuneration for the various services provided by the agents, and for periodical review of the various rates of remuneration. The agreement further provides that, on review, the parties are to endeavour to agree on the appropriate rates of remuneration and, failing agreement, 'fair and reasonable' rates are to be determined by an arbitrator appointed in accordance with the mechanism prescribed in the agreement. Revised rates of remuneration are agreed on review in 1987 and 1992, including rates for some services which were not referred to in the 1982 agreement.

On review in 1997, the association claims increases in the rates agreed in 1992 for the services, as well as remuneration for a number of additional services which it says result from new technology in the industry and the authority's instructions to provide those new services to the customers. The parties are unable to agree on revised rates of remuneration.

Following a request to the Institute of Arbitrators & Mediators Australia for the names of lawyer arbitrators who are 'numerate', the parties agree on the appointment of a particular lawyer as arbitrator, and he enters on the reference to arbitration.

In its points of claim on behalf of the agents, the association contends that, amongst the matters which the arbitrator should properly take into account in determining what rates are 'fair and reasonable,' consideration will need to be given to the increased cost to the agents of providing the services since 1982, 1987 and 1992, and the increased profitability of the authority (which the association says is basically due to the efforts of the agents and the introduction of the new technology). The authority denies that its increased profitability is a matter to be properly taken into account by the arbitrator, and puts in issue the quantum of the increased cost to the agents of providing the services and the increase in the authority's profitability, and well as the cause of the increased profitability.

At a further preliminary conference convened after the close of pleadings, the parties indicate that they each propose to lead a large amount of detailed accounting evidence on these issues. The legal representatives of the parties estimate that, if the evidence in chief is provided in accountants' reports and then there is oral cross-

examination at a formal hearing, each party will require 3-4 months for preparation of the accountants' reports and about 11 weeks of hearing time will be required for the accounting issues alone.

The arbitrator has no accounting qualifications.

The Traditional Approach

As in Case Study 1, conducting the arbitration in the traditional manner, involving preparation of witness statements and experts' reports and a subsequent hearing, will obviously be extremely expensive and time consuming.

The Multifaceted Approach

This is a case where there would obviously be a considerable saving in time and cost if the parties could be persuaded to agree to an expert determination of the accounting issues by an accountant either agreed between the parties, or nominated by the arbitrator subject to ratification by the parties.

In those circumstances, as noted in the First and Second Case Studies:

- ▶ the expert determination process may well include the accountant convening an experts' conclave with accounting experts for the parties, prior to submitting his or her report to the arbitrator;

- ▶ if the expert determination was agreed to be non-binding, then the parties should have the opportunity to test the contents of the expert's report to the arbitrator by, for example, using the type of procedure set out in Part 39 of the *New South Wales Supreme Court Rules* whereby, upon application of the parties, a Court Expert may be cross-examined by the representatives of the parties.

Because of the amount at issue, it is probably unlikely that the parties could be dissuaded from engaging separate experts. Even so, there would undoubtedly be considerable savings in the costs of those experts if they are not required each to produce a separate report at the outset dealing with all of the accounting issues. Accordingly, as an adjunct to (or in place of) the expert determination process, the accounting experts engaged by the parties could be directed to negotiate and produce a joint report along the lines referred to earlier in

this article¹², identifying areas of agreement and disagreement, and their respective positions on issues on which they disagree (with reasons for same).

5: The Consent of the Parties

Because mediation is a consensual process, it is axiomatic that the consent of the parties must be obtained to any variation of that process involving the use of other dispute resolution mechanisms.

Relevantly, arbitration is also a consensual process, to the extent that the parties initially agree to submit their disputes for determination by arbitration. Even if an arbitrator had the power to do so, it is obviously not desirable to insist on measures which are unanimously opposed by the parties and their lawyers. If only some of the parties consent, then an arbitrator's power to direct this sort of approach is somewhat restricted, according to the applicable arbitration legislation, the common law, and the arbitration agreement between the parties which may incorporate particular institutional procedural rules.¹³

In Australia, section 14 of the *Uniform Commercial Arbitration Acts* provides as follows:

Subject to 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.

The common law position is that an arbitrator cannot delegate to some other person his or her decision on some issue referred to the arbitrator for determination.¹⁴

In my view, in the absence of consent, the arbitrator could direct negotiation between representatives for the parties along the lines suggested above. Beyond that, an arbitrator would require the consent of the parties to any process for determination of disputes referred to arbitration other than by arbitration.

There is no doubt that, like proactive arbitration, a multifaceted approach to dispute resolution will demand considerably more commitment, time and effort on the part of individual arbitrators or mediators, at least until the users of commercial arbitration and mediation (and their lawyers) are

persuaded of the potential benefits in saving time and cost, and adapt their thinking and conduct accordingly. As Justice Drummond said in the 1996 John Keays Lecture, in relation to proactive arbitration:¹⁵

Informed parties can be expected to contribute to structuring an arbitration so as to deliver, quickly and economically, a measure of final justice that is acceptable to them. But arbitrators have a special responsibility to educate and encourage the parties who have appointed them to pursue those objectives. The arbitrator who adopts that approach, in an attempt to give the parties the best service, will take up a heavier burden than is borne by the arbitrator conducting an old-style arbitration, i.e., one that mirrors equally old-style court processes. But it is that pathway which I believe is most likely to lead to the arbitration system achieving a high degree of acceptability, across the whole community, as a valuable means of resolving disputes that is truly alternative to litigation and ADR.

It is to be expected that many lawyers, and possibly those of their clients who have experienced the traditional passive approach to determination of arbitral procedures, may well view this sort of multifaceted approach with some degree of apprehension. To overcome this, the arbitrator must 'sell' the benefits of the process proposed to the parties and their lawyers.

One way of doing this (which I have used in arbitrations, with a high rate of success) is that, after explaining to the parties the procedure proposed and why that procedure should save time and cost, the appointee then asks the lawyers to take instructions from their respective clients on the proposed procedure. The appointee indicates that if, contrary to the view he or she has expressed, the parties thereafter agree on a process which is likely to be significantly more time-consuming and expensive, then the appointee will require an express acknowledgement to that effect from the parties or their representatives (not the lawyers) which will be recorded in the Minutes of the Preliminary Conference.

An alternative (if it appears that the procedure referred to in the preceding paragraph may not be successful) is the 'try before you buy' approach, whereby the appointee seeks to persuade the parties to try the approach on a limited number of the contested issues (e.g. negotiation between experts, or non-binding expert determina-

tion on a number of the smaller claims) before deciding whether or not to extend the suggested procedure to other claims.

CONCLUSION

If disputes cannot be avoided, then we as professionals should be mindful of the need to ensure that dispute resolution is conducted as expeditiously and cost-effectively as possible.

I suggest that, if parties, their lawyers, arbitrators and mediators bear in mind Justice Kirby's remarks that '*mediation and arbitration are not just court proceedings conducted in a different place,*' and '*require distinct skills, novel approaches, different techniques and a new psychology,*' then cost-effective resolution of construction disputes is not only possible but likely.

The use of a multi-faceted approach to dispute resolution and arbitration under the Institute's new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* are two means by which cost-effective resolution of construction disputes can be a reality.

References

1. See Volume 15.2 of *The Arbitrator* (August 1996), at p. 80.
2. Recent examples include the *Arbitration Act 1996 (UK)*, the *Arbitration Act 1996 (NZ)*, and the *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)* adopted by The Institute of Arbitrators & Mediators Australia on 13 August 1999.
3. See Volume 18.2 of *The Arbitrator* (September 1999), at p. 107.
4. Rules 10 and 11 are based on sections 33 and 40 of the *Arbitration Act 1996 (UK)*.
5. It is the form of the inquiry conducted by the expert (rather than the contents of the agreement for appraisal or assessment) which will be determinative of whether or not what has been conducted was an arbitration rather than an independent expert ap-

praisal. If an inquiry of a judicial or quasi-judicial nature is conducted, then that constitutes an arbitration (e.g. *Hammond v Wolt* (1975) VR 108, at pp. 112-13).

6. Some techniques which the appointed arbitrator or mediator might use to persuade the parties and their advisers to such agreement are suggested later in this paper.

7. See the reference on page 2 of this paper to the study by the Australian Institute of Judicial Administration in 1992, as noted in Volume 18.2 of *The Arbitrator* (September 1999), at p. 107.

8. As noted in footnote 5 above, if an inquiry of a judicial or quasi-judicial nature is conducted, then that constitutes an arbitration, notwithstanding that parties may choose to label it 'expert determination'.

9. Non-binding expert determination is often called Expert Appraisal.

10. See also *Autodesk Inc. v Dyason* (No.2) (1993) 176 CLR 300 at page 317; and *Accident Towing & Advisory Committee v Combined Motor Industries Pty. Ltd.* (1987) VR 529, at page 547.

11. See Part 39, Rule 4 of the *NSW Supreme Court Rules*.

12. See above.

13. Such as, for example, *The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)*.

14. See, for example, *Louis Dreyfus & Co v Arunchala Ayya* (1930) L.R. 58 Ind. App. 381; *Neale v Richardson* [1938] 1 All ER 753; *R v Smith & Harley*; *ex parte Crugale* (1970) WAR 43, at p. 51; and *William Essery & Sons Pty. Ltd. v South Australian Housing Trust* (1980) 24 SASR 213, at pp. 215-16.

15. See Volume 15.2 of *The Arbitrator* (August 1996), at p. 87. ■

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'If parties, their lawyers, arbitrators and mediators bear in mind Justice Kirby's remarks that 'mediation and arbitration are not just court proceedings conducted in a different place,' and 'require distinct skills, novel approaches, different techniques and a new psychology,' then cost-effective resolution of construction disputes is not only possible but likely.'