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Commercial Dispute Resolution in Australia : some trends and misconceptions

Abstract

As 1990 approaches, commercial litigation has streamlined its processes to meet its critics. It is also providing some useful controls over, and lessons for, arbitration and 'alternative dispute resolution' (ADR), which, although promising, have their own potential for delay and manipulation. Interestingly, some courts have also moved to adapt for their own purposes some of the so-called alternatives for non-judicial resolution of disputes, such as delegating factual issues to arbitrators or referees, and also compelling litigants to explore settlement through forms of ADR such as mediation. As a result, ADR should no longer be viewed as always being a voluntary, non-binding and confidential process, independent of the court system and having no impact on subsequent litigation should negotiations fail. Arbitration and ADR are games played in the 'shadow of the law', and in the shadow of litigation, and cannot work well without a strong court system. There is also a need for lawyers who know how to use the various processes well, so that they complement each other.

Keywords

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Articles

COMMERCIAL DISPUTE RESOLUTION IN AUSTRALIA SOME TRENDS AND MISCONCEPTIONS



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As 1990 approaches, commercial litigation has streamlined its processes to meet its critics. It is also providing some useful controls over, and lessons for, arbitration and 'alternative dispute resolution' (ADR), which, although promising, have their own potential for delay and manipulation. Interestingly, some courts have also moved to adapt for their own purposes some of the so-called alternatives for non-judicial resolution of disputes, such as delegating factual issues to arbitrators or referees, and also compelling litigants to explore settlement through forms of ADR such as mediation. As a result, ADR should no longer be viewed as always being a voluntary, non-binding and confidential process, independent of the court system and having no impact on subsequent litigation should negotiations fail.

Arbitration and ADR are games played in the 'shadow of the law', and in the shadow of litigation, and cannot work well without a strong court system. There is also a need for lawyers who know how to use the various processes well, so that they complement each other.

In Australia as in most other 'Western' legal systems, litigation has traditionally been regarded as the appropriate means for resolving commercial disputes which cannot readily be settled by agreement, with arbitration as a valuable adjunct in technical matters.

That image has now been shattered by major changes in arbitration and 'alternative dispute resolution', and in commercial litigation itself, in the space of the last few years. This article will provide a brief overview of some of those changes in Australia, the trends they indicate for future development, and some considerable misconceptions about what is happening.

Traditions and reforms

Reform stemmed partly from increasing criticism in recent years, of the cost, delay and technicality of the traditional dispute resolution mechanisms, especially litigation. The following factors are all involved in this problem, and its solution:

- Crowded court lists.
- The technicality and time-consuming nature of interlocutory court procedures and rules of evidence.

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- The traditional adversary procedure itself, which can increase costs and foster hostility.
- Lack of senior executive involvement at a sufficiently early stage of dispute resolution.
- An ingrained attitude that an early approach to settlement is a sign of weakness.
- The expectation that a judge can and should resolve all issues in a case, including highly technical factual matters.
- Concern by parties and their legal representatives that arbitration, while providing finality, may not provide the qualities expected from courts, especially fairness, sound application of law, and appeal avenues.

The reforms designed to address these issues in Australia seek to provide for speedier, cheaper, and more flexible commercial dispute resolution.

This article will focus on commercial dispute resolution in New South Wales, for a number of reasons. Mention will also be made of some similar and illuminating developments which are occurring elsewhere in Australia, in Queensland and Victoria. In New South Wales, the arbitration reforms already in place include the Commercial Arbitration Act 1984 (NSW); and the litigation reforms involve the new Commercial Division and the Building and Engineering list of the Supreme Court, and the power given to the Supreme Court by Part 72 of its Rules to 'refer' or delegate matters to arbitrators or referees. Also, since 1986, the Australian Commercial Disputes Centre ('ACDC') in Sydney has been providing facilities and resources for so-called alternative dispute resolution ('ADR'). The term ADR is often used to include mediation, conciliation, appraisal and other non-curial 'settlement' or resolution techniques, as well as arbitration.

Litigation

The Commercial Division of the Supreme Court, and its predecessors and equivalents elsewhere, has long displayed an innovative and flexible approach to combat the problems mentioned. Of course, commercial matters can also be dealt with expeditiously in the Federal Court, and in other divisions of the Supreme Court.¹

As a result of reforms during the 1980s it is now difficult to describe commercial litigation as truly adversarial in the traditional sense, given its emphasis on pre-trial information exchange, avoidance of trial by ambush and, increasingly, insistence by the court that the parties reach agreement not only on as many issues as possible, but also on settlement of the case wherever possible.

While the adversarial approach to litigation may not, perhaps, have been abandoned in favour of a Continental inquisitorial or investigative system, it is clear that the court will adopt a greater 'supervisory' or managerial role.

To date, the Federal Court of Australia appears to have hung back from publicising an activist approach, although in fact the procedures

1. For example, see the comments by McLelland J in *Giorgi v European Asian Bank AG* (unreported, NSW Supreme Court, 3 March 1986).

are in place, and used, to streamline commercial litigation in that court in ways similar to those discussed below in relation to the Commercial Division.²

Arbitration

At one time arbitration was seen as providing a less procedurally hidebound and more efficient means of dispute resolution, using an expert versed in the field of dispute. In Australia, during the 1970s and early 1980s, the main theme of the reform movement was to stem the growing tide of criticism that arbitration had itself fallen prey to the same problems for which criticism was most commonly levelled at litigation: cost, technicality, and delay.

An attempt was made to meet some of these criticisms by the enactment of various reforms in uniform state legislation in the mid-1980s, such as the Commercial Arbitration Act 1984 (NSW) which will be considered here.

Traditional settlement

Of course, it always was true that the vast majority of matters consigned to the litigation process were resolved by negotiated settlement.

Inability to settle may be due to the real or subjective importance to the parties of the issues or subject matter involved, and the distance between the parties' respective positions. The prospect of settlement increases markedly as the day of hearing approaches. The possibility of earlier hearings by arbitrators was for that simple reason alone regarded as an argument in favour of increased use of arbitration.

The proponents of alternative dispute resolution understandably regarded the threat of a hearing as a somewhat blunt weapon. They perceived negotiated settlements as bedevilled by the very defects typifying the litigation and arbitration systems which provided a somewhat grudging setting for such negotiation. Thus they pointed to long—and therefore costly—delay before settlement was considered; an adversarial and often hostile build-up not conducive to ultimate settlement; and settlement by attrition because of mounting massive costs,³ loss of executive and management time, and wasted resources.

Alternative dispute resolution (ADR)

In addition to the growing disquiet about traditional dispute resolution processes amongst jurists and practitioners, not to mention commercial men and women, an interesting combination of social influences has helped shape attitudes to the ADR movement. These factors include

2. See, for example, Federal Court Rules Order 4 Rule 8; and regarding court experts, see Order 34 Rule 2 and *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350. See generally Pincus J, 'Court Involvement in Pre-Trial Procedures' (1987) 61 ALJ 471, 478.
3. The Anglo-Australian system of awarding costs to the successful litigant is now envied by some US observers as a useful incentive to settlement: see R Posner, 'The Summary Jury Trial and Other Methods of Dispute Resolution: Some Cautionary Observations' (1986) 53 University of Chicago Law Review 366, 392. See generally A Katz, 'Judicial Decision Making and Litigation Expenditure' (1988) 8 International Review of Law and Economics 127, 175.

developments in communication and bargaining theory,⁴ the influence of international organisations (such as UNCITRAL) and the influence of other cultures less accustomed to adversarial dispute resolution techniques, particularly the impact of Asian experience on Pacific Basin jurisdictions such as Australia.⁵

To some extent, at least in theory, ADR is intended to reflect a move away from competitive 'winner takes all' strategies to more co-operative approaches, which seek negotiated solutions, producing some benefits for both disputing parties. Put another way, the aim is to take a preventive approach and avoid escalation of disputes, rather than wait until costly major surgery is required when relations have broken down. ADR also reflects a willingness to shift emphasis away from purely rational or logical debate of the perceived merits of a dispute, to a more in-depth analysis of the personal and commercial needs and values of the parties.⁶ Another theme of the ADR movement is a degree of distaste for the over-protection of clients by lawyers, and a preference for greater 'empowerment' of the parties, despite—or perhaps because of—the bewildering complexity of modern law, society, and litigation.

Whatever its genesis, there has been an increasing movement in recent years in the United States and elsewhere, and now in Australia, towards greater use of streamlined arbitration processes, and ADR techniques of 'structured negotiation'. In Australia, agencies such as the Australian Commercial Disputes Centre ('ACDC') and (for arbitration) the Australian Centre for International Commercial Arbitration have been set up.

Writers have debated the semantics of whether ADR comprises all dispute resolution alternatives to litigation, in which case binding arbitration forms part of the ADR armoury; or whether ADR should be confined to explorations of settlement rather than binding adjudications. In any event, an essential difference between the newer forms of ADR as promoted by its proponents on the one hand, and litigation and arbitration on the other hand, is that ADR does not produce a result binding on the parties. In some cases the impartial third party 'facilitator' will be asked to give an opinion, rather than merely assisting the parties by putting up suggestions about common ground between them or possible proposals for settlement. However, his views are not binding, unless and until the parties enter into a binding settlement agreement recording that they will abide by a particular result, whether it be a result he has proposed or which they select.

One recent Australian definition of ADR is found in the New South Wales Law Society's Guidelines for solicitors acting as mediators:

Mediation is a voluntary process in which a mediator independent of the disputants facilitates the negotiation by disputants of their own solution to

4. See generally J David, 'Alternative Dispute Resolution: Introduction to Concepts and Overview of Position in Australia' 6 October 1987, The University of Sydney Faculty of Law, Continuing Legal Education Papers 1987.

5. As to mediation in China see (1988) 2 ADRR 398, 399: the irony is that China is now developing lawyers trained in the more formal Western alternatives. See also A Rogers J, 'Dispute Resolution in Australia in the Year 2000' (1984) 58 ALJ 608, 610-611; D Hunter, 'Conciliation, Publicity and Consolidation' (1988) The Arbitrator 121.

6. Cf Kheel, 'Dispute Resolution Forum—Where is Dispute Resolution Today? Where Will it be in the Year 2000?' (1985) 2DR Forum, National Institute for Dispute Resolution at 4-5; J David, above n 4 at 7 (Table 1) and 8ff.

their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants.⁷

Structured settlement negotiations have begun to be used to a significant degree in Australia. Indeed many corporations have signed pledges that they will endeavour to use ADR in their future commercial disputes. Parties are beginning to insert ADR clauses in commercial contracts.

Some misconceptions

To some extent all of the above is commonplace, and this is not the place to canvass the details of the many variations and possibilities for ADR. Rather, this article seeks to bring to light some misconceptions about this web of alternatives for resolving commercial disputes.

First, there is a common failure to perceive how litigation, arbitration and ADR can and should inter-relate and complement each other, rather than being mutually exclusive or competing alternatives. It is often desirable to use them in parallel or in tandem. Secondly, and implicit in this, is the fact that the role of the courts is far from finished in dispute resolution. Indeed, it is vital to the effective development of arbitration and ADR.

Thirdly, notwithstanding the euphoria about a new era of peaceable dispute resolution, there is considerable potential for abuse of ADR. This is something of a cloud on the ADR horizon, and has not been fully acknowledged. Indeed, some probably regard ADR as a continuation of old war-making habits by other means. However, the mutually supportive or complementary use of litigation, arbitration and ADR may also provide some assistance in diminishing this potential problem.

Fourthly, despite the perception of lawyers as part of the problem, their role in this new era of dispute resolution has considerable positive potential. One example of this is the growing and welcome trend for barristers, solicitors and retired judges to make themselves available as arbitrators, mediators and conciliators.⁸

Whether for good or ill, lawyers will undoubtedly have a major role to play in the shaping of ADR processes, and the re-shaping of the more traditional processes. The details of their involvement remain to be seen. Those lawyers reluctant to abandon traditional approaches, overlook the last part of the comments made in 1850 by Abraham Lincoln, which have today found a new audience:

Discourage Litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peace maker, the lawyer has a superior opportunity of being a good man. There will be business enough.⁹

However, there are far more significant misconceptions than the failure to grasp the scope for synergy between litigation and ADR, or to recognise

7. Paragraph 2.1, 'Guidelines for Solicitors who Act as Mediators', approved by the Council of the New South Wales Law Society on 19 May 1988, *Law Society Journal*, July 1988, p 9.

8. For example, regarding the use of several eminent judges to arbitrate the Weeks/Esso-BHP Royalties dispute, and ADR generally, see Bronwyn Young, 'To Arbitrate or Litigate' *Financial Review*, Monday 17 August 1987, p 10.

9. Notes for Law Lecture, 1 July 1850 in Stern, *Writings of Lincoln* 328.

the possibilities for abuse of ADR, or to perceive the future roles for courts and lawyers. There is currently a lack of critical awareness of some other significant trends. These stem mainly from the growing efforts to give ADR a formal and compulsory place within the traditional litigation and arbitration processes.

In order to understand these trends, it must be borne in mind that most observers initially saw ADR as having four essential features. This was hardly surprising since these features were what proponents of ADR claimed for it. However, as will be seen, each of these now represents a significant misconception: each is now debatable, outmoded or in a process of transition or change, at least as applied to the advent of court-ordered ADR, as opposed to consensual or 'private' ADR. The four fundamental elements, which excluded binding adjudication, such as arbitration and litigation from the definition of ADR were:

- First, ADR was seen as being conducted by a neutral facilitator or mediator, outside the court system and largely independent of it.
- Secondly, entry into the ADR process by disputants was voluntary, not mandatory or compulsory.
- Thirdly, the outcome or result, if any, was not binding on the parties unless and until they agreed on it.
- Fourthly, the ADR process, and all that occurred in it, was confidential and under no circumstances to be admissible, or directly used in subsequent litigation.¹⁰ Related to this is the notion that the court in subsequent litigation should be impartial in the sense of not being influenced by what occurred during, or resulted from, the ADR process.

These four themes or strands will run throughout this article. In summary, the four corresponding misconceptions are as follows.

First, while the courts have interfered little in consensual ADR, they have increasingly incorporated ADR techniques, that is, techniques for resolution other than by judges, into the court system. This trend to draw ADR into the 'public sector' after the initial enthusiasm for 'privatising' it has had two principal manifestations. The first manifestation will be the one focused on in this article, because of its relevance to commercial dispute resolution. This in turn involves two aspects: the referral by the court of part or all of major complex commercial cases to arbitrators or referees for an expert opinion, and referrals to mediation to explore settlement prospects.

Another manifestation of 'court ADR', here and overseas, is not directly relevant to commercial dispute resolution in Australia. This involves

10. See, for example, paras 4.1, 4.7, 6.5, 6.6, NSW Guidelines, above n 7 at 30-31. However, if subpoenaed, the mediator's only clear obligation seems to be to notify the parties immediately (para 6.3).

'court-annexed' arbitrations of comparatively small claims, in commercial terms.¹¹

Secondly, despite the voluntary nature of ADR in theory, there is a trend to compel the use of alternative dispute resolution techniques, at least within the court system.

Thus, in New South Wales matters may be 'referred out' or delegated by courts to referees or arbitrators for their opinion or decision, with a report back to the court, without the consent of the parties. In some cases courts also order mediation to take place in order to explore settlement. It has been mooted for the future that court-ordered ADR, in the sense of compulsory mediation, may be increasingly utilised.

Thirdly, in cases which the court delegates or refers out, the result (such as an expert's opinion) is likely to become binding, with little review in practice. In addition, some forms of non-court or 'private' ADR now also provide, by prior agreement, for binding results, much like a binding arbitration award.

Fourthly, the results of court-ordered settlement mediation may become 'open' to the court in various ways. The results may be reported to the court, as the results of court delegations certainly are, and (assuming the case has not settled) they may be utilised to narrow the issues in the case. It has also been mooted that the ADR process should be used as a basis for visiting cost or interest penalties on parties who subsequently fail to achieve a better result in court than they were offered during ADR.

As will be seen, many of the reasons for these further ADR innovations are laudable. But some observers view trends to refer cases out to ADR as denying access to judicial resolution of disputes and damaging the judicial system itself. They claim that this is far removed from the worthy ADR objective of merely providing an alternative to litigation, at the free option of the parties, namely recourse to binding consensual arbitration, or non-binding consensual ADR such as mediation.

In the United States the debate about compulsory court ADR was highlighted in the *Strandell* case by a Chicago lawyer who refused to comply with a court order for ADR (in the absence of appropriate court rules), was committed for criminal contempt for his pains, but was subsequently vindicated on appeal.¹²

All of this is not to suggest that there is something sinister about the trend towards mandatory ADR: merely that its parameters are still only but dimly perceived, that ADR innovations—particularly within the

11. These 'court-annexed arbitrations' are designed to reach a binding award or result, although there is often scope for review of the award by the court, and the award may require registration as a court judgment. In fact, there are very few appeals from these decisions back to the courts. See generally R Banks, 'Alternative Dispute Resolution: A Return to Basics' (1987) 61 ALJ 569, 571, 574-575; J David, above n 4 at 12, 14, 15, 24-25; Domke, *Commercial Arbitration* (Rev Ed, Wilner) 1988 Cumulative Supplement, paras 1.02, 1.03; F Herron, 'Rent a judge: ADR la USA' Law Society Journal, June 1987, p 51; F Herron: 'Arbitrate or Litigate?' Law Society Journal, September 1987, p 52 regarding the Arbitration (Civil Actions) Act 1983 (NSW); cf Edwards, below n 97. In the United Kingdom, cf R Bernstein QC, 'Court-annexed arbitration' Law Society Gazette, Wednesday 25 January, 1989.

12. See below n 128.

court system—can be expected to increase, and that careful consideration needs to be given to their ramifications.¹³

Policy issues and aims

Private resources and public resources

There have been many significant reforms in both arbitration and litigation processes since the mid-1980s, designed to reduce delays, and technicality. Whether they also reduce costs, at least for the litigants, is debatable. Cost reductions for the parties are no more than a possible outcome of these reforms. Many of the reforms in commercial litigation are—so far as legal practitioners and clients are concerned—labour intensive, and costly, efforts to reduce trial by ambush. These efforts include exchange of experts' reports, documents and written witnesses statements prior to hearing to narrow and clarify the issues in dispute.

The principal benefits of such reforms are first, the reduction of time and therefore public resources spent on the final hearing of the case, and secondly, earlier clarification of issues and evidence. The latter may promote the prospects of pre-trial settlement for the minority of cases which would not have settled in any event, and the prospects of earlier settlement in other cases. Whether the burdensome preparatory costs for litigants, and the greater demands on executive involvement at an earlier stage, result in a compensatingly higher proportion of pre-trial settlements is questionable.¹⁴

This philosophy of saving the valuable time of the courts, primarily hearing time, and thus reducing court delays does not necessarily entail a corresponding justification that the courts will thereby become more available for non-commercial cases, or for less wealthy litigants. The intensive reforms which will be considered here are largely confined to those forums, such as the Commercial Division, catering exclusively for commercial litigants. These are the litigants who will benefit from reduction of delays in providing hearings.¹⁵ The fact that commercial dispute resolution is already said to swallow a vast proportion of legal services is not likely to change.¹⁶

Related to this, basic policy issues have been raised about whether public expenditure—by providing the court system—should be vastly increased to allow judicial determination of all commercial cases where the parties seek it, or whether some 'user pays' system is needed.¹⁷ While many will find the latter proposition troubling, this debate seems to be moving (and not too imperceptibly) in favour of a degree of 'privatisation', at least in regard to commercial disputes.

13. See R Enslin, 'ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences' (1988) 18 New Mexico Law Review 1, 28, as to the goals of ADR.

14. L Street CJ, 'Containing the Costs of Litigation', Law Society Journal, June 1987, p 37; see also Steyn J, 'Arbitration in England: The Current Issues' Arbitration, November 1988.

15. Marks J, below n 34 at 113.

16. J O'Hara, 'The New Jersey Alternative Procedure for Dispute Resolution Act: Van Guard of a 'Better Way'?' (1988) 136 University of Pennsylvania Law Review 1723, 1724.

17. See *Qantas Airways Ltd v Dillingham Corporation* [1985] 4 NSWLR 113, 122.

Judicial investigation and management

The reforms in commercial litigation require a more active, interventionist judicial approach, and a less adversarial philosophy in the management of litigation. We do not yet have a European 'inquisitorial' approach in the sense that Continental judges play a direct investigative role in evidence gathering.¹⁸ But commercial litigation today certainly entails a more investigatory approach in case 'management' and preparation than before. The judge is no longer a 'prisoner' of the adversary system.¹⁹ The whole tenor of these reforms is towards better judicial management of cases—not only those before the courts, but also those before arbitrators.

Critics who contend that the courts are abdicating their public responsibility to adjudicate are no doubt too harsh, but certainly the indications are that the courts will increasingly oversee and manage the resolution of many commercial disputes, rather than fully hearing and determining them. A business administrator might compare this process to the trend in many industries by which those best qualified for the tasks in hand instead become delegators and administrators (and, perhaps one might add, promoters).

There has been surprisingly little published debate regarding 'managerial judges' and case management in Australia,²⁰ unlike the United States. Ironically, it is antithetical to the ADR notions of empowering the parties that greater control should now be passing to judicial managers. Nevertheless the readiness and capacity of parties to take the initiative and manage their cases (for example, by narrowing the issues and controlling discovery) may flower again in the new judicial climate.²¹

Efficiency or justice?

Many other philosophical concerns about ADR and judicial delegation have been raised, which will be considered later in this article. These include fears that ADR may stunt development of the law; that it involves an abdication of judicial responsibility; and, generally, concern as to the proper balance between the competing dictates of justice and efficiency. As will be seen, the legislative and judicial response to these issues in Australia has already precluded much of this debate, although many lawyers have not yet fully grasped this.

In any event, justice which is inefficiently 'delivered', or delayed, may be justice diminished or denied, notwithstanding the power of Australian courts to compensate for delay by awarding interest and a large part of the successful party's legal costs. Thus, whatever the criticisms of the reforms, it was and is clear that some solutions must be found to court delays. This article suggests that the innovative approaches of the Commercial Division of the New South Wales' Supreme Court, in particular, are a welcome and practical opening response to the issues raised in the debate, provided the experiment is sensitive to basic legal traditions such as the requirements of fairness.

18. Rogers J, above n 5 at 618.

19. Rogers J, above n 5 at 619.

20. See P Sallmann, 'Musings on the Judicial Role in Court and Case Flow Management' (1989) 63 ALJ 98; see also the Australian Institute of Judicial Administration Inc, Papers Presented at the Sixth Annual AIJA Seminar, 25-26 September 1987, Perth, 1988. Cf R Enslin above n 13.

21. Cf Pincus J, above n 2 at 475.

The intractable nature of the problem is in the end due to the fact that commercial dispute resolution is caught on the horns of a dilemma: on the one hand, the courts simply cannot handle the volume of commercial and construction disputes requiring resolution; and, on the other hand, arbitrators often lack the experience and personal authority to manage cases effectively, especially in the face of delaying or obfuscating tactics by the parties or their lawyers.²²

In the view of Mr Justice Rogers, the philosophical justification for new techniques is found quite simply in the perceived wishes of the community and the practicalities of the situation:

The reasons why more dispute resolution options are needed include the ever increasing number of disputes, the *community requirement* that disputes be resolved cheaply and expeditiously and the fact that more sophisticated social and technical matters will be posed for determination (emphasis added).²³

Commercial litigation

The streamlining of procedures in the Commercial Division of the Supreme Court in the last few years, by its Chief Judge, Mr Justice Rogers, has gone a long way towards meeting previous criticisms of technicality, delay and unduly adversarial procedures. It has made it more flexible, focused and efficient than arbitration. The ultimate irony may perhaps be that, to some extent, arbitration's flaws stem from the fact that many arbitrators (and lawyers) lack the resolve or skills to ensure that similar improvements are made to arbitration procedures, but instead retain the traditional and less efficient forms of litigation which the Commercial division has abandoned.

Despite this, the modern bias towards arbitration in some areas, as opposed to litigation,²⁴ has lately been fed by some new factors. First, there is an increased tendency for the courts to uphold arbitration agreements, and to stay litigation in favour of arbitration.²⁵ Second, the court in New South Wales has increased powers to refer matters to arbitration, even where there is no arbitration agreement and the Commercial Arbitration Act does not apply. Third, the bias toward arbitration has been fed also by the reluctance of most judges to embark on lengthy and factually complex cases, such as computer cases and

22. Cf Smart J, 'Aspects of Construction Industry Contracts and Disputes' Notes of address delivered in Adelaide, 27 September 1988, p 7.

23. Rogers J, above n 5 at 610.

24. For example, in building dispute cases where the standard form contracts usually require arbitration.

25. See, for example, *Roux v Kevin J Makin Pty Ltd* (unreported, Supreme Court of Victoria, Nicholson J, 7 August 1986); *Muirfield Properties Pty Ltd v Hansen & Yuncken Pty Ltd and Ors* [1987] VR 615; *Giallussi v Chan* (unreported, Supreme Court of New South Wales, 15 May 1986). See also *Qantas Airways Ltd v Dillingham Corporation* [1985] 4 NSWLR 113, 118; *Qantas Airways Ltd v Joseland & Gilling* [1986] 6 NSWLR 327 and *Cooper v Brighton and Bayside Renovations Pty Ltd* (unreported, Supreme Court of Victoria, Hampel J, 20 October 1986). However, as to the Federal Court's approach to stays, see *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) ATPR 40-771. French J refused to stay the court proceedings although the matters were within the scope of the arbitration agreement, given the presence of questions of law, the possibility of inconsistent findings and the need to avoid multiplicity of proceedings. For a response to this decision, see Rogers J, below n 43 at 25.

construction cases. These require an enormous investment in digesting, synthesising and pronouncing upon competing expert evidence. The courts are also simply too hard-pressed to hear most construction cases.²⁶ Fourthly, there is an increased availability of retired judges to sit as arbitrators (and also as mediators), which gives some greater comfort to those who are concerned that major legal issues will be determined outside the courts.

The very success of the reforms in the Commercial Division has led to increasing demands on its time. This has created, or strengthened, the need for it to turn away litigants it had attracted, and direct them to other forms of dispute resolution. This is doubly ironic, because commercial causes lists had, historically, sought to attract back from arbitration commercial litigants who had deserted the courts.²⁷

The extent to which the court will control or supervise the subsequent course of those proceedings which it 'delegates' in various ways to ADR processes will be considered later. For the moment, it need merely be noted that the very process of referral is one way of implementing a 'user pays' system, as is the higher court 'entry' fee recently introduced for the Commercial Division.²⁸

Commercial Division

In the Commercial Division,²⁹ pleadings are designed to be more informative and to the point, coupled with statements of issues, contentions and agreed issues.³⁰ Discovery and interrogatories are tailor-made to the case, rather than being automatic and exhaustive. Hearing time is reduced by early issue of subpoenas, exchange between opponents of signed statements of proposed evidence in chief, and expert reports. Agreed bundles of documents and other written aids are provided for the court.

Various other innovations include conferences of experts to narrow the expert issues, which are 'without prejudice' except when they reach agreement; discouraging interlocutory and summary judgment applications, in favour of speedier hearings; insistence on satisfactory preparedness of legal counsel or, failing that, greater involvement of the lay client; exercise of the power to dispense with the rules of evidence and require admissions (with costs penalties);³¹ and other approaches tailored for the purposes

26. See Smart J, 'Resolution of Construction and Associated Disputes' *Building & Construction Law*, March 1987.

27. J Forbes, 'Commercial Courts: Less Expense as Magic Wanes?' (1988) *Commercial Law Quarterly* 15.

28. \$800 compared to \$300 in other divisions.

29. As to the Commercial Division's practice and procedure since January 1987 see Supreme Court Act 1970 (NSW) ss 53(3E), 76A; Supreme Court Rules ('SCR') Part 14, and Practice Note 39 (1986) 6 NSWLR 119. This approach was closely followed in Queensland later in 1987: Practice Direction 4 of 1987, [1988] 1 Qd R 74. For comparable developments and proposals in the United Kingdom, see Civil Justice Review, *Report of the Review Body on Civil Justice*, London, Cmnd 394, presented to Parliament in 1988: for example, the Unified List of Recommendations at paras 21, 22, 23, 24, 87, 88, and 90.

30. Amending these documents is relatively simple, but penalised in costs. As to the respectable antiquity of summary statements of issues see the comments of Lord Esher MR in *Hill v Scott* (1985) 1 Com Cas 200, 203-204; *Tyser v Ship Owners Syndicate (Reassured)* (1895) 1 Com Cas 224.

31. Section 82(1) of the Supreme Court Act 1970 (NSW).

of particular cases,³² such as calling at an early stage for affidavits to verify defences which appear unimposing.

All of this process is kept on an expeditious path by the manner in which it is managed at regular directions hearings. Commercial judges are astute to reduce delay, clarify issues and make both the preparatory process and the hearing itself more efficient. A date for hearing will be fixed as soon as possible in the sequence of directions hearings.

In New South Wales, the Commercial Division's power to give directions for the speedy determination of the real questions in issue in commercial proceedings, whether or not consistent with the rules, is especially provided for by amendment to the Supreme Court Act.³³ In Victoria, litigants accept judicial management as part of their 'entry fee' to the Commercial List:³⁴

It is part of the policy and practice in the Commercial list that . . . 'consent to reasonable judge intervention by the party wishing to stay in the list is implied so as to cooperate with directions which will ensure expeditious exchange of information.

A number of the above matters, and other steps preparatory to hearing, are provided for in standard orders in some detail, which automatically apply when the 'usual' order is made. All of this however can, and will, be varied to suit the particular case.³⁵

No doubt judicial experimentation, in Australia and elsewhere, in order to avoid lengthy court battles, will continue to flourish. As one writer has noted:

The expedition which courts can achieve when they really want to is most commendable.³⁶

Building and Engineering List

The Building and Engineering List was set up in the NSW Supreme Court in mid-1985.³⁷ This initiative represented an attempt to apply to construction cases the streamlined case management techniques of the Commercial Division, including frequent accountability of the parties to the court for their progress in clarifying issues, preparation for hearing and exchanging evidence.³⁸

Like the Commercial Division, within which the List has been administered since 1988, the Building and Engineering List has the

32. As to New South Wales, see generally Rogers J, 'The Conduct of Lengthy and Complex Matters in the Commercial List' (1982) 56 ALJ 570. As to Victoria see Marks J, 'Commercial List in the Supreme Court of Victoria' (1988) 4 Aust Bar Rev 112. As to Queensland see de Jersey, 'Commercial Causes Practice Direction' (1988) 18 QLSJ 87.

33. Section 76A, Supreme Court Act 1970 (NSW).

34. Marks J, 'Commercial List in the Supreme Court of Victoria' (1988) 4 Aust Bar Rev 112, 113-114.

35. On the other hand, for criticism of discovery obligations and of the abandonment of trial by ambush, see Forbes, above n 27 at 16.

36. Forbes, above n 27 at 15.

37. See Part 14A of the Supreme Court Rules (NSW). In Victoria the Building Cases list was originally set up in 1972: see now Order 3 of the Rules of Procedure in Miscellaneous Civil Proceedings 1988; see generally *CW Norris & Co Pty Ltd v World Services and Construction Pty Ltd* [1973] VR 753, 755.

38. Cf Smart J, 'Aspects of Construction Industry Contracts and Disputes' Adelaide, September 1988, p 10.

capacity to utilise Part 72 of the Rules to refer cases out to arbitrators or referees. The List also has the major task, as will be seen later, of case management or supervision in relation to all those construction arbitrations which are commenced, not by virtue of court referral, but by agreement of the parties, and are therefore conducted under the Commercial Arbitration Act 1984 (NSW).

In addition, the List focuses on hearing multi-party cases, cases raising substantive questions of law, and urgent matters. All of these, as will be suggested later, are highly appropriate matters for litigation rather than other forms of dispute resolution.

Court delegation to arbitrators and referees

The court has power to appoint court experts to assist it in complex technical matters,³⁹ but that power cannot be utilised where all parties object. Partly as a result, increasing use has been made in New South Wales of court appointed arbitrators and referees. In principle, the court uses the powers under Part 72 in two situations:

- (a) to overcome delays generally and consequent hardship;
- (b) where the issues are more appropriate to be determined by a 'technical man or a costs man'.⁴⁰

Referrals are also utilised in Victoria, but rather more modestly.⁴¹

However, judicial interest in court-appointed experts, and assessors to assist the court with technical issues, has not been abandoned. If this initiative is revived, as Pincus J has recently done in the Federal Court,⁴² questions will also be revived as to the extent to which the parties should be kept abreast of the assessor's advice to the judge, and be able to challenge or review it.⁴³

Part 72 of the NSW Supreme Court Rules, which was the subject of some controversy at the time it was introduced, allows the court to refer the whole or part of a case to an arbitrator or referee. This may be done in 'suitable cases', even without the consent of the parties, and certainly

39. Supreme Court Rules (NSW) Part 39, Rule 7 and Part 14A rule 14(2).

40. Smart J, above n 22 at 7-8.

41. In Victoria, a Special Referee may be appointed under Order 50 of the Supreme Court rules, which allows the Court to refer any question of fact to such a Referee to decide it, or to give his opinion in relation to it, although such decision can only be enforced as a judgment or order if it is adopted wholly or partially by the Court. See also Supreme Court Act 1958 (Vic) s 104 (investigation by Master). In Victoria, see County Court Act (Vic) 46 (referral of part or all of the matters in dispute between the parties to an arbitrator, if the parties agree, for binding award unless set aside by the court); and Division 3 of the Supreme Court Act 1986 (Vic) (the court in any proceedings may call upon the assistance of one or more specially qualified assessors, or obtain the benefit of the opinion of Counsel).

42. *Newark Pty Ltd v Civil and Civic Pty Ltd* (Pincus J) (1987) 75 ALR 350, 351: Pincus J was of the view that, even if such an expert's report does not resolve the matter, it is admissible in evidence and may assist the court in resolving the issues; it may also assist towards settlement in the case.

43. Rogers J, 'Commercial Dispute Resolution: Litigation and Arbitration in Australia', paper delivered to the Australian Bar Association, 14 July 1988, pp 16-18; see also Rogers J, above n 5 at 614-617. Cf Smart J, above n 22 at p 9).

even though there is no arbitration agreement between the parties.⁴⁴ The validity of this provision has recently been upheld.⁴⁵

In fact, in some cases, astute litigants will institute proceedings in the Supreme Court with the very purpose of having the court 'delegate', or refer the matter out. Thus, the court may be used in this way as a 'doorway' to other means of dispute resolution, such as arbitration. Some examples of when this may be desirable follow. In multiple party construction disputes, many of the proper and necessary parties will not be subject to the arbitration agreement, and litigation followed by court referral may be necessary to involve all necessary parties in dispute resolution. Similarly many cases may have a mixture of complex expert factual issues and legal issues, which are appropriate for division of labour between a judge and an expert arbitrator or referee. In other cases, urgent judicial relief may be required to preserve the status quo while the rest of the issues may satisfactorily then be referred out for determination by an arbitrator.

As American studies suggest, cases referred to arbitration ought not be too factually or legally complex for a truncated procedure; nor should they involve legal issues which are so uncertain that their resolution by a non-judge would be considered unpersuasive by most lawyers. There is also a considerable body of US judicial support for the position that the power to 'un-track' an arbitration, and return it to the hands of the court, is an important and suitable safeguard.⁴⁶ In the Australian context, 'un-tracking' a referral or delegation means providing sufficient court supervision of the referral, and judicial review of the result. However, as will be seen, the trend in Australia appears to be for the court to minimise both supervision and review of delegated decisions and opinions.

Court-ordered ADR

Mediation

All of these mechanisms were designed to achieve prompt definition and determination of issues, and to encourage earlier exploration of settlement.⁴⁷ Nevertheless, there is no system at present in New South Wales of voluntary or compulsory referral by the court to ADR, for the purpose of mediation or conciliation to explore settlement possibilities. Nor was Part 72 initially seen as a means for doing that. However, Mr Justice

44. See *Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd* and *Wilson v R J Pearce Associates Pty Ltd* (1986-1987) 8 NSWLR 123 (Smart J). At least in principle, the court will only compel referral of a matter in the face of opposition by one or more of the parties, if the court considers that the matter is suitable for referral on the following criteria. The issues must be suitable for determination by a referee; a suitable referee must be available; and questions of delay and consequent prejudice, and probable cost saving, ought to indicate that the matter is suitable for referral. The terms of referral will also be relevant to this enquiry—for example whether the referral is for determination, for enquiry or for report back.

45. See *Qantas Airways Ltd v Dillingham Corporation (No 2)*, NSW Court of Appeal, unreported, 25 August 1988.

46. See Enslin, above n 13 at 21.

47. See, for example, Supreme Court Practice Note No 35 as regards the Building and Engineering List in New South Wales.

Rogers initiated an interesting discussion of court referrals to mediation in two papers delivered in 1988.⁴⁸

Mr Justice Rogers has suggested that the court may in future compulsorily refer matters before it to ADR, in the sense of non-binding, without prejudice, negotiations for settlement. The parties would perhaps have the option as to whether to use structured negotiations with a third party, as in voluntary ADR, or the court might itself appoint a mediator. He also suggested a novel, although costly, device of appointing two complementary referees: one to mediate (at various stages), and one to determine the question referred by the court. Presumably the aim of this would be to preserve both the confidentiality of ADR, and the neutrality of the decision maker.⁴⁹

Mediation during litigation is not entirely novel in Australia. Pre-trial conferences or readiness hearings customarily involve some discussion, and encouragement, of settlement.⁵⁰ A system of voluntary mediation has also been enshrined for some time in the County Court Rules in Victoria for cases in that court's Building Cases list.

More to the point, in Queensland's Supreme Court, a 1987 Practice Direction provides for court-ordered mediation in commercial cases. A compulsory conference may be called of representatives of the parties having authority to compromise, and their lawyers:

The court may, on such terms as it thinks fit, direct at any time that the parties confer on a 'without prejudice' basis for the purpose of resolving or narrowing the points of difference between them.⁵¹

However, if the commercial judge chooses to 'conduct' such a conference himself, he will not preside at any subsequent trial of the action.

The Queensland Practice Direction also provides that customarily, two weeks after the conference concludes, the parties will lodge with the judge:

a report confirming that the conference has occurred in accordance with [these] requirements, and recording the substance of any resolution or narrowing of the points of difference between the parties resulting therefrom.

The compulsion of settlement mediation is clearly not part of the common perception of ADR, as it exists outside the court system, notwithstanding the introduction in 1985 of a power to compel conciliation during arbitrations which are conducted under the Commercial Arbitration

48. Rogers J, 'Latest Trends in Formal Dispute Resolution', *Avoiding Disputes In Building and Construction Contract Seminar*, 15 March 1988; see also Rogers J, above n 43 at 19-21.

49. Rogers J, above n 48; Rogers J, above n 43 at 27-28.

50. Cf Pincus J, 'Mixture of Methods Better to Solve Complex Issues' *Australian Law News*, December 1988 at 21.

51. Practice Direction No 4/87, [1988] 1 Qd R 74, para 6. See also de Jersey J, 'Alternative Dispute Resolution (ADR): Mere Gimmickry?' (1989) 63 ALJ 69, 71-72.

Act.⁵² A significant attraction of private ADR was and is the feature of confidentiality, that resort to ADR would not prejudice or influence any subsequent binding adjudication by a judge or arbitrator. Certainly it was not contemplated that the mediator or conciliator would then determine the dispute, or that the judge or arbitrator determining the dispute would be informed of the substance or results of those settlement negotiations, if they proved unsuccessful.

Great pains were taken by the proponents of private ADR to stress the importance of the confidentiality and inadmissibility of ADR negotiations, and the need to draft satisfactory agreements (with the aid of legislation, if need be) to ensure this. This was in turn a response to widely expressed business concerns about the need for considerable safeguards to ensure that views, evidence, admissions, proposals and mediator's opinions, passing between the parties to the ADR process, should not be able to be relied on or introduced into subsequent litigation.

In Queensland there is at least partial acceptance of the need for court-ordered ADR not to influence the subsequent hearing, in providing that a different judge will preside. However it is also clear, in Queensland, that the results of the ADR process are to be used to resolve or narrow the issues for hearing.

In New South Wales Mr Justice Rogers has expressed some enthusiasm for this experiment, and similar ones in the United States.⁵³ However, while Rogers J acknowledged the good sense of the Queensland rule that a judge involved in ADR ought not preside at the trial, he noted nevertheless that it may be argued 'that the best person to facilitate mediation is the judge who has a knowledge of the facts and is in a position to point out to the parties the strength and weakness of their respective cases'.⁵⁴ This saves costs, although it is true that:

if a conciliator is to do his job properly he is almost bound to come into possession of information which would not have been given to him as an arbitrator and which could embarrass him in the further conduct of the arbitration. Nonetheless, I do believe that the concept of an attempted settlement by conciliation or mediation is to be strongly supported and attempts at settlement are vital if these disputes are to be disposed of speedily.⁵⁵

52. It is true that similar concerns that ADR should be voluntary and confidential had been expressed in the mid-1980s, in relation to the enactment of s 27 of the Commercial Arbitration Act 1984 (NSW). Section 27 enables an arbitrator to refer matters which are before him for arbitration to a compulsory settlement conference. Moreover, he is not precluded from continuing to hear the arbitration, if settlement does not result, even if he conducted the settlement conference himself. At the time, this innovation met with strong and confident protests that it was clearly contrary to the spirit of ADR, which was then being popularised in Australia. In fact, solutions to a possible impasse were readily found by such expedients as, for example, an arbitrator appointing another person to act as mediator or conciliator at the settlement conference, rather than becoming involved himself.

53. Rogers J, above n 48 at 7-8; cf Pincus J, above n 2 at 476.

54. Rogers J, above n 43 at 19.

55. Rogers J, above n 48 at 6. This comment is made in the context of discussing s 27 (see n 52 above) and His Honour's proposals for two referees: one to mediate, one to decide.

Delegated decisions

Delegation, by court order, of part or all of a case for determination or report by a referee or arbitrator raises other issues about court-ordered ADR, particularly as regards subsequent court involvement (by supervision and review), or the lack of it.

Certainly in New South Wales the court is prepared to 'manage' referrals by encouraging a spirit of continuous interchange and co-operation between arbitrators or referees and the court.

Under Part 72 of the Supreme Court Rules, the court has a wide discretion as to the conduct of the referred proceedings, and may even rescind the reference or remove the referee. Otherwise, however, the referee is not bound by the rules of evidence, may take evidence or 'inform' himself or herself in such manner as he or she thinks fit, unless the court gives directions to the contrary,⁵⁶ and is even free to amend or add to the questions or issues referred. The parties are required by the Rules, with the ever present judicial sanctions in the background, to co-operate and not delay the referee. A party or the referee may approach the court for further directions.

The referee is required to report his determination or opinion on a question to the court, with reasons. This will be served on the parties.⁵⁷ The court has a wide discretion to adopt, vary or reject it, require further explanation or recommendation, decide the questions for itself on the evidence taken before the referee, or on further evidence, or to enter judgment as it thinks fit.⁵⁸

All of this suggests, as indeed judicial pronouncements have urged, that there is no cause for concern about abdication of the court's role in resolving commercial disputes when it delegates. It is said that these rules provide an 'elaborate [judicial] screening' process of the report and that this is in turn followed by the usual avenues of appeal, from whatever judgment of the court is then entered.⁵⁹

Yet, it is not at all clear that this elaborate screening mechanism will be readily utilised by the court. In fact, the likelihood in both Victoria and New South Wales appears to be that referees' reports in commercial litigation will effectively be considered final⁶⁰ if they reflect proper consideration of the matters referred, are apparently responsible, and are without obvious error.⁶¹

56. SCR (NSW) Part 72, rule 8. Cf J Hunter, 'New Developments in English Procedure: Commercial Judges Leapfrog Over Commercial Arbitrators' (1987) 3 *Arbitration International* 337. A referee or arbitrator is free to request court assistance as he or she proceeds: see *Maschinenfabrik Ausburg-Nuremberg A G v Altikar Pty Ltd* (1984) 2 BCL 62; [1984] 3 NSWLR 152 (Rogers J).

57. SCR (NSW) Part 72 Rules 11, 12.

58. *Ibid* Rule 13.

59. See *Qantas v Dillingham*, above n 25 at 122; Rogers J, above n 5 at 617.

60. See Rogers J, above n 48 at 16-17. In this connection, Mr Justice Rogers also focussed on the interesting question of what status the determination of an arbitrator appointed by the court (under Part 72 of the Rules) has, prior to it being entered as a judgment of the court. He also suggested that a judge may remit issues for determination by an arbitrator, not pursuant to the much debated Rules, but pursuant to the Commercial Arbitration Act. The Act of course, provides for a binding determination by the arbitrator thereby appointed.

61. *Integer Computing Pty Ltd v Facom Australia Ltd, Fujitsu Ltd and Anor* (unreported, Supreme Court of Victoria, Marks J, 10 April 1987), and Rogers J, above n 48. Marks J cites in support *Nicholls v Stamer* [1980] VR 479 and *Attorney General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788, 811.

While the fundamental objective of the court is said to be to satisfy itself that the ends of justice are satisfied, Mr Justice Rogers in New South Wales and Mr Justice Marks in Victoria, at least, would regard it as mischievous and wrong, and productive of great expense, to put at nil the exploration conducted by a referee. Even if the court were persuaded that it might itself reach a different conclusion in some respects, in their view the court will be loath to re-explore territory or to qualify adoption of referees' reports. They will not treat reports as mere 'starting points', open to argument that the referee might have reached different findings if, for example, additional evidence had been placed before him by one of the parties. It is interesting to note in this context that, in order to fully utilise the expert skills of referees, the court encourages parties to limit the amount of evidence they call before a referee.

In the midst of these bold ideas, a somewhat cautionary note is sounded by a recent decision of Mr Justice Brownie of the New South Wales' Supreme Court.⁶² In that case, at the request of one of the parties, his Honour rescinded the appointment of one of the two referees (a retired appellate judge), because he had 'descended into the arena'. Brownie J made some interesting comments about what he saw as the 'judicial' role of a referee,⁶³ suggesting that the requirements of natural justice may provide one safeguard against arbitrariness in this new era of dispute resolution, as they do in arbitration.⁶⁴

62. *Pimas Constructions Pty Ltd v Metropolitan Waste Disposal Authority* (unreported 4 August 1988). The parties had been appearing before two referees, the non-lawyer being an expert construction arbitrator. The aim had been for the lawyer to assist the non-lawyer on significant legal issues likely to arise. See also *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (unreported Supreme Court of New South Wales, Powell J; 17 October, 1988), at 29. But see, *Pflieger v Sparks* (unreported, Supreme Court of New South Wales, Giles J, 9 March 1989).

63. A similar approach obtains in the United States: see Rodman, *Commercial Arbitration* (1984 West's Handbook Series) para 2.51.

64. In 1984 Rogers J had warned of unjust actions by referees: 'the only point I am seeking to make is that in excluding lawyers, in an effort to ensure an absence of legalism and secure inexpensive and speedy resolution, steps need to be taken to ensure that action by the impartial third party, the conciliator, will not result in any injustice': above n 5 at 6ll.

In the *Pimas* case, above n 62, Brownie J said: 'On the one hand, he [a referee] may properly do such things as consult reference books, he may measure and weigh objects, and he may, in a proper case, conduct scientific tests himself, but when it comes to deciding questions of fact which are in dispute or to deciding which witness to believe or not believe, a referee is in no real way in any different position to a judge in an ordinary court case. He is, in my view, bound by the same rules as a judge.' As to the way in which the context colours the variable requirements of natural justice, see, for example: *Tracom SA v Gibbs Nathaniel (Canada) Ltd and Bridge* [1985] 1 Lloyd's Rep 586, 588-589.

Arbitration and litigation

Litigation processes also work in a complementary fashion with consensual or private arbitrations,⁶⁵ where arbitrators are appointed by agreement of the parties under the Commercial Arbitration Act 1984 (NSW), despite some ‘relaxation’ of judicial control over arbitrators evident in some features of the Act.⁶⁶

A streamlined arbitration procedure has been provided by the Act for all arbitrations commenced since 1985. It provides an array or ‘menu’ of statutory options enabling parties to structure their own arbitration format.⁶⁷ Given the further availability of court referral to arbitration (albeit with probably greater scope for appeal from the result), can the proponents of arbitration claim that today it provides a practical and sensible alternative to litigation, with the valuable adjunct of ADR processes? That is, will arbitration now serve to relieve the pressure on the courts, and achieve just results? Admittedly in some cases, arbitration provides rather rough justice, or a compromise result, but it may provide the parties with some sense that a cost effective resolution has been achieved, even though it does not produce some ultimately ‘correct’ result.⁶⁸ These issues will be considered below.

Court supervision and support of arbitration

The Supreme Court, through its Commercial Division⁶⁹ and Building List, has important powers of supervision and review in relation to arbitrations under the Act. These are important because there are still serious limitations on the ability of one party in an arbitration to combat the deliberate delay of another party, despite some added ‘teeth’ given to arbitrators by the Act.⁷⁰

The Act also empowers the court to step in and to make interlocutory orders in aid of arbitrations, and provides various other specific powers of court intervention, to compel evidence, to decide questions of law,

65. See generally C Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (8th edn, Stevens 1986) 588. Schmitthoff usefully summarises the courts' role in arbitrations as follows:

- (i) the Courts assist in the constitution of the arbitral tribunal and make available to it the judicial measures which are not at the disposal of the arbitrator;
- (ii) they intervene if the arbitrator commits any irregularity or misconducts himself;
- (iii) they allow access to the courts if it is appropriate to stay the arbitration proceedings;
- (iv) subject to certain conditions, they admit a judicial review on issues of law;
- (v) they control the enforcement of domestic and foreign awards.

66. Cf Rogers J, above n 43 at 22.

67. See generally P O'Keefe, 'Arbitration Law in Australia' in *Commercial Arbitration Law in Asia and the Pacific*.

68. Cf O'Hara, above n 16 at 1739-1743.

69. See SCR (NSW) Part 72A.

70. This is notwithstanding the obligation of the parties (s 37 of the Commercial Arbitration Act 1984 (NSW)), the power of the arbitrator to continue in default of compliance (s 18(3)(b)), and his power to penalise by costs (s 34). Ultimately the court has power under the Act (s 46) to intervene or terminate arbitration proceedings in the case of undue and intentional or severely prejudicial delay.

remove arbitrators, or set aside an award.⁷¹ Appeals to the court from awards of arbitrators, admittedly on a severely limited basis, are also possible.⁷²

Attractions and disadvantages of arbitration

Some would say that arbitration is at last beginning to fulfill the role of providing the advantages traditionally claimed for it, but which were claimed with increasingly muted voices by the 1980s.

However, balanced against these high hopes, much can still be said for the proposition that commercial and construction arbitrations are subject to much the same delays, costs and (if not technicality) scope for adversarial manoeuvring as litigation. The possible exception to this pessimistic view is that an arbitration can provide a hearing at a much earlier date, which will in itself enhance the prospects of earlier settlement.

A major construction industry research report recently criticised the failure to perceive the breakdown of arbitration as a cheap and efficient means of resolving construction disputes, especially those disputes which involve substantial legal issues:

the rhetoric is that [arbitration] is *the* system for the resolution of disputes in the industry and that it provides cheap, efficient and speedy resolution of construction industry disputes. This rhetoric continues, despite the reality, which is otherwise.⁷³

It identified one of the causes of the breakdown of arbitration as the increasing use of arbitration to determine legal rights and obligations, rather than matters of quality and technical expertise for which arbitrations are best suited.

There has been some tendency to search for panic solutions to these criticisms. Some of these run the risk of streamlining the arbitration process by amputating any part of it which takes time, regardless of the benefits of that part. This may be a danger with some of the 'fast track' rules devised to expedite arbitrations.⁷⁴ For example, in major commercial or construction disputes it is indeed questionable (as Sir Harry Gibbs has pointed out) whether dispensing with reasons for the arbitral award really assists the arbitrator himself in reaching an appropriate result, or fulfills the needs of the parties.⁷⁵

71. See ss 47; 17 and 18; 39; 44; and 42 respectively: Commercial Arbitration Act 1984 (NSW).

72. Under ss 38 to 40 of the Commercial Arbitration Act 1984 (NSW).

73. 'Strategies For The Reduction Of Claims And Disputes In the Construction Industry—A Research Report' November 1988, p 65.

74. In August 1988 the Institute of Arbitrators Australia published its *Expedited Commercial Arbitration Rules* with the encouragement of the Australian Federation of Construction Contractors and the National Building and Construction Council: see F Shelton, 'Fast Track Arbitration—The New Alternative: Latest Developments in Australia', in I I R Seminar, *Avoiding Disputes in Construction*, March 1989. Cf D Farrington, 'Arbitration—Or 100 Years War?' *Arbitration*, November 1988, p 273.

75. See H Gibbs, 'Reasons for Arbitral Awards' (1988) 7 *The Arbitrator* 95, 103; Bingham L J, 'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' (1988) 4 *Arbitration International* 141; D Hunter J, 'Conciliation, Publicity and Consolidation' (1988) 7 *The Arbitrator* 121, 126.

The advantages traditionally claimed for arbitration are its flexibility, finality (ie limited avenues of review) speed and privacy.⁷⁶

It is also claimed to have a cost-saving, less adversarial, approach, at least in smaller matters where legal representation is not utilised. Above all, arbitration provides the expertise of an arbitrator well versed in a particular field, who will bring to the dispute an increased understanding of the issues, and a capacity to shorten the expert evidence with which a court might otherwise labour.

Other factors attracting parties to arbitration under the Act, or repelling them from it, depending upon their needs and interests, are the following choices available to them under the Act's 'menu':

- The ability of the parties to require their dispute to be determined on principles of general justice and fairness, rather than according to law, presumably with the 'bonus' that appeal on a question of law is impossible.⁷⁷

While this may produce a less certain or predictable result, it may enable a result better moulded to the commercial needs of the parties to be achieved;

- The ability to exclude legal representation, or at least not provide for it in the original contract, in which latter case the issue is left for later agreement or for approval of the arbitrator;⁷⁸
- The ability to dispense with reasons for the award;⁷⁹
- The fact that the rules of evidence will not apply, and that the arbitrator may inform himself as he thinks fit, unless the parties otherwise agree.⁸⁰ This may be especially useful in reducing costs in technical, or 'sniff and smell' aspects of arbitrations, using an expert arbitrator.⁸¹ However it should be noted that this is qualified by the requirements of natural justice, including the requirement that the arbitrator put to the parties, in order to allow them an opportunity to answer, any expert views of his own which he prefers to the evidence;
- That the award is to be final unless otherwise agreed;^{81a}
- That arbitrators have now been empowered by the Act to grant additional remedies which were previously either unavailable, or at least doubtful, under the common law, such as specific performance, interest up to award and after award, and likewise to make interim awards—for example on urgent matters;⁸²

76. See, for example, O'Hara, above n 16 at 1731-1732.

77. Section 22, Commercial Arbitration Act 1984 (NSW). See also Steyn J, above n 14 at 223, and *Eagle Star Insurance Company Ltd v Yuval Insurance Company Ltd* [1978] 1 Lloyd's Rep 357 and *Deutsche Schachsbau Und Tiefbohrergesellschaft GmbH v Ras Al Kharmah National Oil Company* [1987] 2 All ER 769.

78. *Ibid* s 20. As to the arbitrator's discretion in considering legal representation, see the *Commissioner for Main Roads v Leighton Contractors Pty Ltd* (unreported, 4 July 1986, New South Wales Supreme Court, Smart J).

79. *Ibid* s 29; see Gibbs, above n 75.

80. *Ibid* s 19.

81. Rogers J, above n 43 at 23.

81a. Commercial Arbitration Act 1984 (NSW) s 28.

82. *Ibid* ss 24, 31, 32, and 23.

- That all rights to appeal may be excluded by agreement of the parties, although this can only be done in domestic arbitrations after commencement of the arbitration. In any event, appeals from awards are restricted to questions of law arising out of the award, and then only with the consent of all parties or by leave of the court. That leave will only be granted if the appeal could in all the circumstances substantially affect the rights of the parties.⁸³ Although New South Wales' courts have to date been more liberal in allowing appeals, support is gathering for the stricter English and Victorian tests,⁸⁴ particularly in light of the stricter approach to judicial review adopted in the UNCITRAL Model Law.⁸⁵

One possible answer to criticisms of arbitration is that if it is too cumbersome, then it is up to the parties to better frame their contracts, in order to utilise properly the options provided by the legislation, and to agree on streamlined procedures.

However this does not solve the problem that many arbitrators are, at least when compared with activist judges, inadequate case managers, particularly when one party wishes to delay. It is open to doubt whether arbitrators as a whole can take up the challenge, or have sufficient powers and authority, absent fast-track rules agreed by the parties, to enforce proper discovery, and give effective directions at regular preliminary conferences. Those arbitrators who are not arbitrary in their approach often tend to be cautious, rather than firm, in their procedural handling of the case and the parties. They tread a careful path, with the constant

83. Ibid ss 38, 39, 40.

84. As to appeals, in New South Wales, see *Abignano Ltd v Electricity Commission of NSW* [1987] 3 BCL 290 and *Jennings Construction Ltd v QH and M Birt Pty Ltd* [1986] 8 NSWLR 18. The principles governing the grant of leave to appeal are discussed in *Qantas Airways Ltd v Joseland & Gilling* [1986] 6 NSWLR 327. For the *Nema* guidelines see *Pioneer Shipping Ltd v BTP Oxide Ltd (the Nema)* [1982] AC 724 especially per Lord Diplock at pp 724-743. In Victoria the *Nema* guidelines have been preferred in *Costain Australia Ltd v Fredrick W Nielsen Pty Ltd (receivers and managers appointed)* (unreported, 21 May 1987, Supreme Court of Victoria, O'Bryan J) following the decision of Crockett J in *Karen Lee Nominees Pty Ltd v Roberts Salzer Constructions Pty Ltd* (unreported 19 May 1987 Supreme Court of Victoria), which case in turn accepted the conclusion reached by Nathan J in *Zafir and Papaefstathiou* (unreported, 30 October 1986).

85. Street C J, 'Court Review of Awards: An Australian Perspective' The Institute of Arbitrators Australia: International Arbitration Conference 7 and 8 September, 1988, urging the need to bring the reviewability of domestic arbitration awards into line with the UNCITRAL Model law, which dispenses international arbitration awards from review on the merits by the domestic courts. In turn, the New South Wales view has been supported by a leading Victorian Counsel: see S Charles, 'Appeals from Arbitration Awards' (1988) 7 Arbitrator 105.

There was also a recommendation in a report to the Attorney-General in 1988 that the stricter English *Nema* guidelines should be enacted into the uniform commercial arbitration legislation of the Australian states. At the time of writing, the Model Law is before Federal Parliament. It provides a set of internationally known arbitration rules which the parties may choose to adopt for international arbitration.

As to international commercial arbitration and the UNCITRAL Model Law recommended by the General Assembly of the United Nations on 11 December 1985, see generally Schmitthoff, above n 65 at 598; M Pryles, 'International Dispute Resolution and Litigation in Australia' (1988) International Business Lawyer 454; K Klaric, 'Judicial Intervention and International Commercial Arbitration: The Australian Perspective' (1988) Australian Business Law Review 440.

risk that at least one party may want to claim misconduct if there is a failure to extend natural justice.

Advantages of litigation

The larger truth about the debate is that commercial litigation now shares, or has 'appropriated' to itself, many of the advantages formerly claimed for arbitration. For example, proceedings in the Commercial Division and the Building and Engineering List are now much more flexible and streamlined, with the added advantage of greater authority and sanctions available to a judge. The costs in major cases will be similar to arbitration, particularly in substantial commercial cases where legal representation is agreed or allowed. In addition, commercial litigation is now a more attractive option because the complexity of giving evidence on, and resolving, technical expert issues is alleviated by the ability of the court to refer such matters to a referee for report back; and the court can, at least potentially, better review and control the progress and results of a reference, as opposed to an arbitration under the Act, even if it chooses not to do so.

Moreover, some cases are, of course, better suited for litigation, whether by reason of subject matter or framework.⁸⁶ Examples of such cases are:

- disputes between multiple parties, or multiple disputes between the same parties when some of them are unwilling to bring all disputes into the arbitration process;⁸⁷
- cases susceptible to early resolution of legal issues by an expert commercial judge.⁸⁸ Such resolution may well be critical to, or conclusive of, the dispute at an early stage, thereby rendering enormous savings in costs and time;⁸⁹
- cases where important causes of action, such as counts under the Trade Practices Act, may fall outside the jurisdiction of an arbitrator under the Act. In that case, the proceedings should be brought in the Federal Court, or the Supreme Court under the cross-vesting legislation; and of course
- cases where urgent relief is required from the court, for example, by way of injunction.

These kinds of cases are all more fit for litigation than for arbitration, assuming of course that the parties are not bound by agreement to go to arbitration.

Alternative Dispute Resolution

The attractions of ADR flow from the savings in time, legal costs and commercial resources which it can produce, from its confidentiality, from its preservation of continuing commercial relations, and from the assistance

86. See O'Keefe, above n 67 at 7.

87. Notwithstanding the provisions of ss 25 and 26 of the Commercial Arbitration Act 1984 (NSW), which unfortunately require consent.

88. This advantage of court adjudication persists notwithstanding the power of an arbitrator to give interim awards, and the limited power to refer preliminary points of law to the court.

89. For example, particularly lengthy and costly litigation was aborted in *BTR Trading (QLD) Pty Ltd and Anor v Wright Engineers Pty Ltd and Ors* (unreported, Supreme Court of the Northern Territory, Kearney J, 23 February 1987) and in *Jennings Construction Ltd v Seltsam Ltd, Oliver-Davey Glass Co Pty Ltd and PPG Industries Inc* [1988] 7 BCLRS 14.

which a neutral third party, with particular expertise, can provide in helping to resolve the dispute.⁹⁰ ADR is not particularly appropriate in some situations, for example, when legal principles need to be determined in order to avoid similar disputes in future.

ADR may be used alone, but there is also considerable scope for complementary and parallel use of ADR techniques, in conjunction with litigation or with arbitration. These traditional adjudicative mechanisms are, in turn, useful adjuncts to ADR, even if they are seen merely as a means for providing discovery,⁹¹ or for preserving the status quo (for example by providing interim relief), or for providing sanctions which force the parties to re-open or maintain constructive dialogue, or as a last resort measure available for compulsory dispute resolution when, for example, a contract between the parties has collapsed entirely or been abandoned.

In view of the anomalous features of court-ordered ADR identified earlier, the following treatment of ADR deals with consensual or private ADR, except when court ADR is specifically referred to.

Constant and variable features of ADR

As mentioned earlier, ADR techniques (such as mediation or conciliation) have a wide range of variable features depending upon the agreement of the parties.⁹²

Consensual ADR techniques, excluding arbitration for purposes of this discussion, are all essentially voluntary, non-coercive, and designed to arrive at a negotiated settlement of a dispute with the assistance of a neutral third party, who is trained in ADR techniques, and has an expert background in the relevant industry.

This 'facilitator's' role is to ensure that discussions continue, that progress is made, that doubts are created about unrealistic positions, and that common ground and possible solutions are explored. But his role is not to make a decision which is binding on the parties.

It is imperative, if this process is to succeed in any given case, that the mediator is impartial, and that he or she has sufficient personal status or authority, and skills, to assist in reconciling the competing interests of the parties. Whether his approach is more or less interventionist will depend on personality, the form of ADR selected, and the ground rules which are agreed.

This is not the place to consider in detail the various forms of conciliation, mediation, independent expert appraisal, mini-trial etc which have been used here and overseas in order to relieve the workload of the courts, and the arbitration process. However, some mention will be made below of the ADR technique of 'early neutral evaluation', a form of court-ordered ADR discussed recently by Mr Justice Rogers.

90. R Banks, above n 11 at 572.

91. Cf J David, above n 4 at 21.

92. One of the better treatments of the distinctions between the various ADR options is found in a paper by R G Collins, 'Alternative Dispute Resolution: Choosing the Best Settlement Option' June 1988. See also Enslin, above n 13 at 10ff; Domke, *Commercial Arbitration* 1984, para 3.01 ff; Rodman, *Commercial Arbitration* (West's Handbook Series 1984) 18-46.

Use and abuse of ADR

Despite criticisms to the contrary, time spent on ADR will not be time wasted, even if litigation or arbitration ensues, at least where time limits are imposed on the ADR process. The ADR process must, of course, be well utilised, and the expert issues must call for the assistance of an expert mediator. Senior executives must also be willing to be involved, with authority to settle the dispute.

Utilising ADR well also means that the parties must have a genuine mutual predisposition to settlement, and be opposed to delay. The parties must not be merely engaged in an exercise for tactical or evidentiary advantage, or in order to obscure legal issues better suited for court resolution. These were concerns which gave rise in the United States to the case of *Strandell v Jackson*, where the plaintiff's lawyer refused to comply with a court order for ADR by means of a summary jury trial.

ADR may provide scope for compromises and results which are beyond the power of the courts to mould by way of orders. In many cases parties increasingly see that it is simply not realistic, particularly in light of the costs and time involved, and the damage to commercial relationships, to insist on a 'zero sum' or 'win/lose' mentality.

Unfortunately, examples are already occurring where the laudable 'disarmament' or peacemaking philosophies of ADR have been abused by parties astute enough to manipulate the situation to their advantage,⁹³ given that there may be few 'verification' procedures (such as discovery) to keep one's opponent honest.

Of course, abuse was only to be expected. In any event, many will not regard such manipulation as too harmful. They may, in fact, regard competitive manoeuvring as appropriate and necessary, provided the parties always have certain safeguards. In court-ordered ADR, the watchful eye of the court may prove a sufficient safeguard, or at least provide an incentive for both parties to lay most of their best cards on the table.

In voluntary or private ADR, the main safeguard required is that the results are non-binding, that is, the negotiating parties need not enter into a settlement agreement if they dislike the results of the ADR process. It will usually also be important to the parties that they can be assured that the contents and result of the ADR process (if settlement is not agreed) cannot be utilised in any way in subsequent litigation or arbitration, although it is probably impossible to prevent some strategic and evidentiary litigation advantages being gained by an opponent during ADR.

In any event, negotiating manoeuvres must also be viewed in light of the fact that the aim of ADR is not to produce the 'right' result. Rather the aim is to produce a solution which is commercially acceptable, in all the circumstances, to both parties: it may be a compromise result unsatisfactory in some respects to both of them, or what has been called a 'win-win' resolution, addressing the 'real' needs of both parties.

Having said all that, it is still worth stressing that some elements are fundamental to the philosophy of consensual ADR. An impartial third party should mediate, rather than one who is commercially or personally inclined towards one of the parties. There must also be a genuine predisposition on the part of the parties to compromise. Nevertheless it

93. Smart J, above n 22 at 12.

would be naive not to bear in mind that parties who engage in deliberate concealment or mis-statement of facts or positions during ADR may well be able to escape detection in doing so, because, for example, legal issues may escape a mediator with expertise in the relevant technical field, or vice versa.

The scope for such manipulation may be more prevalent, and less easily detected, in consensual ADR than in court-ordered ADR, especially where the latter involves an expert delegate producing a report back to the court, rather than a settlement mediation.

The integrity, experience, strength and expertise of the mediator, plus suitably negotiated ground rules for the ADR process, are essential to minimise abuses of the ADR process.

The role of lawyers

Judicial leadership and support has been vital to the development of ADR.⁹⁴

A major and positive role can now be played by lawyers in working towards ensuring the proper use of ADR. For example, lawyers may act as mediators. They may also provide advice, negotiating skills, and perhaps advocacy skills for the benefit of their clients who use ADR processes. The lawyer's tasks could include careful drafting of effective ADR contractual clauses (for example, to allow for staged, or parallel use of ADR and litigation);⁹⁵ identifying relevant parties and issues for ADR; negotiating the terms and safeguards for the ADR process; presentation of submissions during ADR, or inclusion in their clients' negotiating teams; and the subsequent framing of a binding settlement agreement.

American and Australian lawyers, far from seeing ADR as threatening,⁹⁶ have not been slow to see the potential for development of their practices in the field of ADR.⁹⁷ Some have set up in-firm or multi-firm⁹⁸ ADR teams, designed to focus on the possibilities of non-litigious resolution of disputes, including disputes already in litigation.

Increasingly, practising lawyers are also likely to be retained as arbitrators and mediators, in addition to retired judges. Lawyers' professional

94. Mr Justice Rogers, now Chief Judge of the New South Wales Supreme Court's Commercial Division, and the former Chief Justice, Sir Laurence Street, have been the leading judicial advocates of ADR in Australia, and the latter now acts as a mediator in appropriate cases. See, for example, Street CJ, 'An Alternative for Dispute Resolution—Setting Up the Australian Commercial Disputes Centre' (1986) *Law Society Journal* 23.

In the United States, judicial leadership has been provided by Chief Judge Robert Peckham of the Northern District of California (the Early Neutral Evaluation project); Judge Richard Enslin of the Western District of Michigan (court—annexed mediation); and Judge Thomas Lambros of the Northern District of Ohio (summary jury trials), and many others.

95. Cf Smart J, above n 22 at 12.

96. R Banks, above n 11 at 575.

97. A Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review* 668. Judge Edwards notes that '... the [ADR] movement is ill-defined and the motives of some ADR adherents are questionable. It appears that some people have joined the ADR band wagon without regard for its purposes or consequences, because they see it as a fast (and sometimes interesting) way to make a buck'.

98. For example, see (1988) 2 *ADRR* 349 and 424-425.

associations have moved to regulate the ethics of their members engaged as mediators.⁹⁹ Issues about the training, ethics and liability of ADR lawyers (and judges)¹⁰⁰ acting as mediators will increasingly be raised, as will issues about the credentialling of lawyers and non-lawyers as conflict resolvers.¹⁰¹

Finally, lawyers should be able to assume a practical advisory role for their clients which, in the United States, has been suggested for court officials. In some parts of the United States, and in one sense in the Commercial Division, the idea of a 'multi-door court house' allows a court official (or judge) to assign cases to the appropriate dispute resolution system. Increasingly, this role can and should be undertaken by commercial lawyers for their clients, by assisting clients at an early stage to choose one or more appropriate means of dispute resolution for their particular case, from the various alternatives available. Doubtless, the Commercial Division will assist and encourage clients and practitioners who are astute to see opportunities either for early conciliation, or for referral out of part or all of their cases from the court to arbitrators or referees.

Criticism of ADR—the 'Second Wave'

These days the debate about ADR is not so much about its worthy objectives or usefulness, but about its impact on the judicial and legal systems, coupled with a call for a more critical analysis of its results: in short, what is lost by diverting cases away from litigation to ADR? Some mention will be made here of these concerns, although this article has been concerned primarily with other issues, namely pragmatic concerns such as the voluntariness, confidentiality, and conclusiveness of ADR processes, and its complementary use with its more traditional alternatives.

Despite the constant claims for success of ADR¹⁰² what has been called the 'second wave' of criticism of ADR deserves to be recognised.¹⁰³ The American criticisms focus on such issues as whether runaway development of ADR will stunt development of judicial law making;¹⁰⁴ whether it will attract the best lawyers away from less lucrative judicial positions,¹⁰⁵ whether it allows the courts to abdicate their responsibility to society in a quest for efficiency rather than 'justice'; and whether two systems of justice will be created, one for wealthy (commercial) litigants, and the other for 'have-nots'.

99. For example, NSW Guidelines, above n 7 at para 5.

100. As to legal education and the role of lawyers in mediation see J David, above n 4 at 26 and NSW Guidelines, above n 7 at para 4.8.

101. For example, one issue raised is the extent to which professional 'conflict resolvers' or mediators, who are neither lawyers nor experts in the particular field of dispute, should be encouraged to develop in competition with lawyers and experts.

102. See D Newton, 'Australian Commercial Disputes Centre Geared for Further Growth' (1988) Commercial Law Quarterly 27.

103. See O'Hara, above n 16 at 1734 (at n 72), for references to literature on the 'Second Wave', and generally (eg at 1735, 1738). See also G Maatman, below n 129 at 455-459. O'Hara also queries whether court-annexed arbitration introduces competition rather than cooperation between private and public judicial services, which is inappropriate given that public institutions are reluctant suppliers (at p 1737 and n 92).

104. For one US legislative response, the New Jersey Alternative Procedures for Dispute Resolution Act, see O'Hara, above n 16 at 1743ff.

105. Cf 'ABA President sounds warning on "private judging"', Australian Law News, January/February 1989 at 20.

Concern has also been expressed that ADR will increasingly become more institutionalised and rigid, a lucrative and well-marketed end in itself, rather than a means of distributing justice more fairly.¹⁰⁶ The critics claim that little critical attention is being paid to such policy issues, and to the absence of empirical evidence about the success or effect of ADR.¹⁰⁷ They parody the philosophy that a 'case disposed of is a case disposed of', and note that 'arm-twisting' judges who settle cases are 'appeal free', and may be 'motivated to look statistically superior by their disposition of an increasing number of civil cases'. These critics also mention one of the concerns dealt with in this article, namely the tendency of the courts to delegate decisions to non-judges, and adopt their decisions without any effective re-hearing.¹⁰⁸

In the United States these criticisms are coloured by, and closely linked to, concerns that civil rights, constitutional and environmental issues ought not to be relegated to a bargaining process or a non-judicial decision maker, when they deserve to have the attention of the courts. Indeed an unlikely combination of traditionalist and liberal critics of ADR has assembled. Legal traditionalists fear that future disputes may find root in the very informality of the process, because while ADR 'may reduce or eliminate the antagonisms of litigation, it could be inefficient in the long run by failing to alter the type of behaviour that led to the breakdown'.¹⁰⁹ They join with liberals¹¹⁰ in sharing a concern that ADR may stunt legal development by avoiding resolution of major public and social issues. One acerbic criticism is that the courts, by their own delay, have diminished their ability to serve society by developing case law.

It is then argued that wealthy commercial litigants are well-suited to pay the legal costs of funding judicial law-making, especially when public resources have been made available by providing them with the courts to resolve their disputes. In Australia, paradoxically, it is these very litigants who are being encouraged in some quarters to resolve their disputes, at their own expense, on a 'user pays' basis, outside the courts. In Australia some attempt has been made to preserve to the courts the determination of significant legal issues, at least as regards consensual arbitrations and court delegations, but this is on a severely limited basis. Some proposals have also been made that legal assistance should be provided in the ADR process, by such means as appointing lawyers as additional arbitrators, referees or advisers to assist technical arbitrators or mediators.

Strong criticisms have also been made around the issue of whether the pre-eminent social policy should be the production of fair and just results, to the extent the courts themselves are capable of doing so, or the more efficient and rapid disposition of disputes. The criticism is that ADR runs the risk of means becoming ends.¹¹¹ Of course, efficiency is not

106. L Nader in (1985) 2DR Forum, above n 6 at 5.

107. See generally R Enslin, 'ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences' (1988) 18 New Mexico Law Review 1, 26ff; cf R Posner, above n 3.

108. R Enslin, above n 107 at 3.

109. J O'Hara, above n 16 at 1733, n 44.

110. B Dunne, 'Community Justice Centres: A Critical Appraisal' (1985) Legal Service Bulletin 188, 191.

111. See generally Horvitz in (1985) 2DR Forum; above n 6; J O'Hara, above n 16 at 1732; A Edwards, above n 97 at 679, 683.

synonymous with a fair or just result; but the dichotomy being criticised is illusory, since delay in itself may be a cause of injustice. In addition, of course, one major social objective must be to put disputes to rest expeditiously and relatively cheaply. As one Queensland judge has noted, ADR will hopefully 'leave the courts of law free to dispense justice in the cases which really must or should go to trial'¹¹² although, of course, this benefit is restricted to commercial litigants.¹¹³

ADR has also been criticised for its lack of protections to ensure fairness, because 'often there are no evidentiary rules for ensuring relevance, nor are 'due process' rights guaranteed. There may be no legally enforceable guarantee of a fair and equal hearing for all disputants'. But, as the same (Australian) writer goes on to point out:

One assumption underlying this type of criticism is that all litigants do receive full protection under adjudication. This is obviously not true, given inequalities of financial power and capacity to last out long litigation; some disputes find better attention in ADR.¹¹⁴

Clearly, a number of these criticisms do some injustice to the ADR movement. More importantly, in Australia, the debate on many of these issues has already been pre-empted and decided. Nevertheless, as one Australian judicial supporter of ADR, Mr Justice de Jersey, has noted:¹¹⁵

a continuing exuberant scepticism may not be a bad thing. The phenomenon [of ADR] should be promoting the profession to early active attention to negotiation, and the courts to more streamlined case management . . .

In Australia, as was seen from the earlier discussion of the Commercial Arbitration Act, the state legislatures have conclusively decided to provide parties with the option of fully resolving their disputes outside the court system, with only limited rights of appeal to the courts, and then usually only on those issues of law of considerable importance. For their part, Anglo-Australian courts have also been increasingly astute to uphold arbitration agreements notwithstanding the presence of legal issues.¹¹⁶ Australian legislators have also determined to allow the parties to choose to have their dispute resolved other than in accordance with legal principles. Mr Justice Rogers¹¹⁷ regards use of this option as likely to produce results 'which more accurately reflect the sense of the commercial community', as well as obviating appeals. And, of course, there has long been a legislative mandate for delegation of factual issues to referees or

112. de Jersey J, 'Alternative Dispute Resolution (ADR): Mere Gimmickry?' (1989) 63 ALJ 69, 70.

113. See R Posner, 'The Summary Jury Trial and Other Methods of Dispute Resolution: Some Cautionary Observations' (1986) 53 University of Chicago Law Review 366, 382. Judge Posner notes that ADR, while relieving the court system, may also increase commercial litigation: 'we should keep in mind that settling more cases may make litigation more attractive to other disputants by reducing the waiting period for a trial'.

114. J David, above n 4 at 26.

115. de Jersey J, above n 51 at 71.

116. See K Klaric, 'Judicial Intervention and International Commercial Arbitration: The Australian Perspective' (1988) Australian Business Law Review 440, 464; and Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (London 1982) 36.

117. Rogers J, above n 43 at 24-25.

Masters by the Courts although, in principle and practice, use of this mechanism has been fairly limited in the past.^{117a}

Nevertheless, contrary to the approach in New South Wales, there are some Australian echoes of the concerns voiced in the United States, about abdication of judicial responsibility. Some Australian judges clearly feel that they can and should determine not only legal issues, but also complex factual issues, and have superior skills for doing so.¹¹⁸

In addition, the Australian legislatures have now enshrined in the Commercial Arbitration Acts provisions for compulsory settlement negotiations or conciliation, during arbitration, if the arbitrator so orders. Similarly, there is clear governmental and judicial support for ADR, at least in New South Wales.

Thus, in light of all this, the balance of the Australian debate is generally tipped in favour of ADR. Moreover, although it passed largely unnoticed at the time, judicial supporters of ADR in New South Wales foreshadowed compulsory, court-ordered ADR from the outset.

Thus, Mr Justice Rogers said in 1984:¹¹⁹

I believe that it will need to be an integral part of the system of dispute resolution that any contest, in any matter, be preceded by an attempt at conciliation or mediation. *Only disputes which cannot be resolved by these means* will then proceed to argument and so consume the scarce resources required by contentious dispute resolution. Furthermore, even after a tribunal embarks on the task of determining a dispute it should *continue to search* for settlement by mediation (emphases added).

117a. See the discussion by Powell J of the history of Anglo-Australian provisions regarding referees in *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd*, above n 62 at 24-30, quoting from *Buckley v Bennell Design v Constructions Pty Ltd* (1977-1978) 140 CLR 1, 14-22 per Stephen J.

118. Mr Justice Campbell of the Queensland Supreme Court said in *Honeywell v Austral Motors Holdings Ltd* (1980) Qd R 355:

the Defendant wishes to have the decision of a judicial tribunal and not the decision merely of a person skilled in the appropriate scientific field. It is very likely in this case that the fact-finding process will be a difficult one and it is likely that there will be conflicting views and opinions of expert witnesses. In my opinion, the fact-finding process will be more satisfactorily handled by a judicial officer than by a person who lacks the training, experience and skills of a trial court judge. In a complex case of this sort there will be problems arising as to the admissibility of evidence and a person lacking legal training will find such matters very difficult to decide.

Mr Justice Beach of the Victorian Supreme Court agreed with the views of his Queensland counterpart in *A T & N R Taylor & Sons Pty Ltd v Brival Pty Ltd* (1982) VR 762, 765 (Beach J was hearing an application by the plaintiff for the appointment of a Special Referee pursuant to s 14 of the Victorian Arbitration Act 1958, which was opposed by the defendant):

Where a party to litigation wishes the sort of dispute which normally calls for judicial determination to be tried by a judicial tribunal it will only be in cases of an exceptional nature that his wishes will be disregarded and the matter referred to an Arbitrator or Special Referee. In my opinion, the so-called complexities of the matters pointed to by the Plaintiff in support of its application do not constitute special circumstances in the present case. It is by no means unusual for a Judge of this court to be called upon to investigate and resolve such matters assisted as he invariably is by expert witnesses called by the parties. The fact that such a process may be time consuming is of itself no reason to deprive a party of its right to have the matter or matters determined by a judicial tribunal.

119. Rogers J, above n 5 at 610, 613, 620.

Likewise, the Chief Justice, Sir Laurence Street, said in 1987:¹²⁰

Looking further down the path, there might be, within the staff of the court, mediation registrars associated with the imposition upon parties of an obligation to exhaust the prospects of resolution through mediation. I do not foreshadow so arbitrary a step at this stage, but what I seek to do is urge upon the profession a recognition of the need to take an initiative at the very outset to achieve a resolution of the dispute.

This reflects a worldwide trend, as Rogers J sees it:

Today, the virtue of active judicial participation in settling civil cases is part of the received wisdom. That is, it is but another facet of judicial case management.¹²¹

Anglo-Australian law has in the past been reasonably permissive with arbitral tribunals, but has not, until lately, extended this latitude to other extra-judicial conflict resolvers.¹²² The changes wrought to arbitration by the uniform legislation, and the introduction of other forms of ADR, are changes of such substance that they may well entitle Australian critics to embark on their own 'second wave' of criticism rather than regarding the debate as already pre-empted.

It may, however, be a little late for a body such as the Victorian Law Institute to protest proposals for court-annexed arbitration¹²³ including elements of inquisitorial approach, simplified and informative procedures, minimal legal representation and procedures designed to encourage settlement. On the other hand, the Institute rightly criticises the fact that there are no simple and effective rules of procedure for arbitration.

In the end, the solution to at least some of the criticisms of ADR is that parties should be more discerning as to when and how they use ADR and, in theory, the courts should better control the flow of delegations to arbitration or other forms of ADR so as to meet the ends of fairness, justice, and legal development.

Finally, it should be borne in mind that the vast majority of cases have always settled anyway, and all these are resolved in some sense, in the shadow of legal rules¹²⁴ and the burden of legal costs. As Smart J has said:¹²⁵

Litigation, Arbitration, Conciliation and Mediation each have a useful place. We should be careful about reinventing the wheel. The primary catalyst for settlement is always the party's financial interests and the parties usually manage to find the appropriate method for the particular case and circumstances.

There are also promising signs of a 'new detente',¹²⁶ rather than destructive competition¹²⁷ between litigation, arbitration and ADR. While some see this co-operation as another part of the solution, a few observers would regard healthy competition in the dispute resolution 'market place'

120. Street CJ, above n 14 at 38.

121. See Rogers J, above n 5 at 610-611 and above n 48.

122. Mustill and Boyd, above n 116 at 35-36.

123. For all types of claims in the Victorian Magistrates Court up to a limit of \$5,000.00: see J Mott, 'Exclusion of Lawyers from Arbitration in Magistrates Courts', Law Institute News Issue No 2 of 1989, mid-March, pg 1.

124. J David, above n 4 at 25.

125. Smart J, above n 22 at 12.

126. G Longo, 'Towards a 'Common Core' of Legal Rules on Commercial Arbitration' (1985) 59 ALJ 407.

127. See J O'Hara, above n 16 at 1,737 and generally.

as worthwhile. On balance, most commercial disputants would probably prefer to leave competition for the real market place.

Confidentiality of compulsory ADR

One continuing practical concern about ADR is as to its confidentiality. Despite occasionally bland assurances from proponents of ADR, this concern has not been fully laid to rest even as regards private or consensual ADR.^{127a}

Given the advent of compulsory ADR, concerns about confidentiality will be revived, particularly as regards the court's awareness of what occurred in the ADR process. This concern will be increased by suggestions that reports back to the court on progress are desirable. Although this concern may be alleviated by ensuring that the ultimate trial judge does not preside over the ADR process, parties may still be troubled if there are proposals to impose costs or award reduced interest, as a means of penalising those parties who continue to litigate after ADR, but fail to achieve a better result than the settlement offered to them in ADR.

In the *Strandell*¹²⁸ case in the United States, pre-trial settlement discussions had already reached an impasse, and the defendant had been refused access to the plaintiff's privileged materials. The plaintiff's concern was that its rights at the ultimate trial might be prejudiced if it were now compelled to participate in ADR. It was reluctant to engage in ADR, which would (in order to be more than a sham) require it to reveal privileged materials (such as witness statements), and its trial strategy, to a possibly ill-prepared opponent. A host of other concerns about ADR were raised.¹²⁹

However, in the modern climate of commercial litigation in Australia, the parties are no longer entitled to hold back their 'best' evidence until trial under the cloak of privilege or strategy.¹³⁰ If truly necessary, justified concealment may be catered for under the rules.¹³¹

Moreover, in Australia, the concept of cost penalties for failing to achieve a better result at hearing than was offered during ADR is not

127a. As to the inadmissibility in evidence of settlement discussions, see *Rush and Tompkins Ltd v GLC and PJ Carey Plant Hire (Oval) Ltd* (House of Lords, 2 November 1988) NLJ Law Reports, New Law Journal 11 November 1988 at 315. In that case, it was held that without prejudice correspondence entered into with the object of effecting a compromise of an action remains privileged after the compromise has been reached. Accordingly the correspondence is inadmissible in any subsequent litigation connected with the same subject matter whether by the same or different parties. Furthermore, it is also protected from subsequent discovery by other parties to the same litigation. Cf *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1988] 1 WLR 946 (Webster J ordered disclosure to plaintiffs in litigation of documents in custody of defendant arising out of a private arbitration between defendant and another).

128. *Strandell v Jackson County* 115 FRD 333, 334 (SD Ill 1987), on appeal *Strandell v Jackson* 838 F 2d 888. But see ADRR 28 April 1988 at p 164 referring to *McKay v Hall* DC EKy No 84-149, 4/5/88.

129. See, Gerald L Maatman Jr, 'The Future of Summary Jury Trials in Federal Courts: *Strandell v Jackson County*' (1988) 21 John Marshall Law Review 455 especially at 470, 471, 474, 481 and 485. See also G Maatman, 'Work-Product Privilege is Disturbed by Mandatory SJT, *Strandell* Counsel Says' ADRR June 1988, 213, 214, 216.

130. Cf R Enslin, above n 13 at 29.

131. Rogers J, above n 43 at 14.

entirely novel. There are already existing mechanisms with comparable consequences, such as payments into court, and 'without prejudice' offers in which the right is reserved to tender the offer in evidence on the question of costs at the conclusion of the hearing.

Related to confidentiality is the further concern that ADR should not affect the court's disposition of the case at the ultimate hearing. This controversy remains even after giving due weight to judicial impartiality, and to the fact that judges may in any event develop pre-trial views about cases during directions hearings, even without ADR. On the other hand, various commentators agree with the view expressed by Mr Justice Rogers that some use of ADR results in the subsequent litigation process should be seen not as a problem, but as a bonus. It also saves costs by avoiding duplication, and may narrow the distance between the parties:

the parties [in ADR by mini-trial] generally agree not to use the mini-trial proceedings in the litigation, but even in the case of apparent failure, a case ultimately may be resolved because of each party's increased knowledge of the case resulting from the 'trial'. If the dispute is bona fide, the principals will understand the adversary's fact and legal issues better and often at least some narrowing of the case results.¹³²

Such commentators also take the view that judges or arbitrators, who also act as conciliators or mediators, are thereby enabled to reach a more just result, by what is virtually an inquisitorial process.¹³³

The United States' technique of Early Neutral Evaluation,¹³⁴ may foreshadow possible future developments in Australia. This involves a 'confidential' case evaluation session by a neutral appointed by the court under 'its inherent power to appoint special masters', although sometimes other trained lawyers may be used.¹³⁵ Such a neutral fact finder 'plays an inquisitorial role investigating facts and provides a report which is used in settlement negotiations, and which may be used in adjudication should settlement not be achieved'.¹³⁶

This technique is said to enable the parties to analyse and present their positions at an early stage, to hear the other side, and to isolate the centre of their dispute, and the factual and legal matters which will not be seriously contested. The evaluator then provides the litigants with his assessment of the relevant strengths of their positions and the overall value of the case, which serves as a 'reality check' on their expectations. After the parties receive the neutral assessment, they have an opportunity to try to negotiate a settlement. The evaluator may play an active, probing role in this process.

In Australia, Mr Justice Rogers' interest in the ADR technique of early neutral evaluation stems from his attraction to the fact that it can be

132. R Banks, above n 11 at 574.

133. Hunter J, above n 75 at 123, 124. The proposed amendments to the Hong Kong Arbitration Ordinance, which Hunter J was discussing, include express and continuing consent by the parties to conciliation, leave to the conciliator to see the parties alone and in confidence; and (if the process fails) mutual disclosure of all relevant information received in confidence before resumption of the arbitration.

134. R Enslin, above n 13 at 25; 'Dispute Resolution Forum: Where Is Dispute Resolution Today? Where Will It Be in the Year 2000?' (1985) 2 DR Forum National Institute for Dispute Resolution at 3; Pincus J, above n 2 at 477.

135. R Enslin, above n 13 at 25; Rogers J, above n 48 at 5.

136. J David, above n 4 at 11.

utilised both to attempt to achieve a settlement, and also to expedite fact-finding in the adjudication process:

Even if the procedure fails to achieve a settlement, it should serve to narrow the issues and provide a springboard for the speedy determination of what disputed facts remain.¹³⁷

Thus, presumably it is intended that there may be some form of report back to the judge on what issues have been narrowed down.

Conclusion

In addition to the advent of private ADR, there has been, and will continue to be, a substantial growth of ADR in the court system. This is despite the original 'hands off' approach by which the courts saw the ADR processes as independent of, rather than dependent on the courts. Whether or not this is what most commercial lawyers wish,¹³⁸ it is certainly a sign of things to come in Australia. Commercial disputants and lawyers need to learn to choose the best methods of dispute resolution in each case, and to use these methods in a complementary fashion.

It remains to be seen what will happen to private or consensual ADR conducted through such centres as the ACDC, which are not 'court-annexed'. In fact, the ACDC is likely to continue to provide mediators, facilities and assistance even as regards court-referred ADR.

The technicality, delays, and costs which have bedevilled commercial litigation, must adversely affect the quality of justice provided. Hence the debate about litigation and ADR can never be simply a polarised contest between justice and efficiency.

The Commercial Division of the Supreme Court has led the way in providing the most cost effective and expeditious method of resolving those commercial disputes which require adjudication. On the other hand, even many of those arbitrations which are confined to technical matters, for which expert arbitrators are best suited, suffer from the dearth of firm, efficient and experienced arbitrators¹³⁹ with adequate powers or sanctions. Arbitrations would benefit from greater use of the simplified procedures pioneered in the Commercial Division, with adequate support from the Court and retired judges.

However, the Commercial Division has not only reformed its procedure by abandoning an unduly adversarial approach, but has also embraced compulsory ADR for determination of issues. In the not too distant future it may also embrace compulsory ADR for mediation, as a prerequisite to litigation. This should stimulate fresh debate about the place of ADR, its confidentiality and its conclusiveness (or reviewability), in the court system, notwithstanding the fact that Australian legislators, and some courts, have already indicated their preferences on crucial policy aspects.

137. Rogers, above n 43 at 3.

138. Enslin, above n 13 at 20.

139. One remedial suggestion is that, if a dispute involves difficult questions of law and/or fact, the dispute should be arbitrated by one or more technical experts plus a lawyer. See C Meares, 'The Need for Non-Court Resolution Techniques and Their Advantages' Alternative Dispute Resolution Conference 22 July 1988, 24; Rogers J, above n 43 at 28.

Litigation, arbitration and ADR techniques must be seen as complementary. In particular, the constant threat of court proceedings, their sanctions and their cost penalties,¹⁴⁰ provides an important backdrop to all dispute resolution, as do legal principles. This is especially the case if the court is hovering in the background because the ADR process is court-annexed. Like arbitration, ADR is a game played in the 'shadow of the law', and the shadow of litigation.¹⁴¹ So much so, that ADR cannot work without a strong court system.¹⁴² But litigation too is only a means of dispute resolution, not an end in itself.

Whatever the outcome of the various debates about ADR, its advent means that clients have become more involved in early settlement processes, lawyers and judges will become more knowledgeable about what it takes to achieve settlement, and some of the techniques (more than others) are likely to reduce costs and delay.

140. McCree in (1985) 2 DR Forum, above n 133 at 5, warns that streamlined court procedures will not suffice unless legal costs cease to escalate.

141. R Enslin, above n 13 at 33; D Newton, 'Alternative Dispute Resolution and the Lawyer' (1987) 61 ALJ 562.

142. R Banks, above n 11 at 570-571.