

Drafting and Effecting the Best Alternative Dispute Resolution Clause

- The Dispute Resolver's Perspective

'ADR is a PR mans dream. In conjures up visions of a factor 'X' which will do for dispute resolution what it is said to have done for washing powders and petrol. The truth is that there is no factor 'X'. Indeed I rather doubt whether there is any such thing as ADR. It is simply an umbrella term or 'buzz word' covering any new procedure or modification of old procedures which anyone is able to think up.' (Master of the Rolls, the Right Honourable Lord Donaldson of Lynton, Master of the Rolls - 1991)¹

'... in Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts...Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.' (Justice Michael Kirby AC CMG, of the High Court of Australia - 1999)²

Dispute resolution processes range between the extremes of informal direct negotiation between the parties, on the one hand, and a formal decision-making process (such as adjudication by a Court, tribunal or arbitrator) on the other.

Historically, direct negotiation between parties usually involved an unstructured process in which control of both the process and the substance lay entirely within the power of the parties themselves, without the involvement of a 'dispute resolution practitioner' or 'third party neutral'.³

In contrast, adjudication involves a structured process in which a decision is imposed by a Court, tribunal or arbitrator; in which the proceedings are adversarial and usually formal; and where the control of the process lies with the Court, tribunal or arbitrator, as the case may be.

1 Address to the London Common Law & Commercial Bar Association, on 27 June 1991.

2 See Volume 18 number 2 of *The Arbitrator* (September 1999), at p. 107

3 In its Glossary of Dispute Resolution Terms, published in September 2003, the National Alternative Dispute Resolution Advisory Council (NADRAC) say: *'NADRAC prefers to use the term 'dispute resolution practitioner' (rather than "third party", "third party neutral" or "intervener") to describe an impartial person who assists those in disputes to resolve their differences. This term would be sufficient for most purposes unless a clear distinction is required between the roles of different participants in a dispute resolution process. Further descriptions may then be appropriate. NADRAC notes that most dispute resolution practitioners could be described as "impartial", and that this term would be preferred to "neutral".'* I will therefore use the term 'dispute resolution practitioner' in the remainder of this paper.

In the past, the acronym ADR has been applied to any dispute resolution technique which fits between these two extremes, providing a structured system of assisted negotiation or some other process aimed at achieving resolution of the dispute between the parties.

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

From the early 1990s, there has been an increasing trend in Australia and overseas away from traditional litigation as a means of determining disputes. Regrettably, by that time, the practice of arbitration in the common law world had become bogged down with processes derived from litigation which, unfortunately, made the practice of arbitration much less efficient than it should otherwise have been. It is only since that time that, in recognition of the growing unpopularity of arbitration because of the resultant increase in cost, there have been concerted efforts throughout the common law world to conduct arbitration in a manner which is not a mere imitation of Court processes, and thereby take advantage of arbitration's natural advantages.⁴

The increasing cost of litigation and arbitration up to the late 1980s led to a significant increase in the use of ADR, resulting from both dispute resolution clauses which prescribe some form or forms of ADR and ad hoc references after a particular dispute has arisen. It has also led to the introduction of structured dispute avoidance processes such as Dispute Resolution Boards, which have been used in many major infrastructure projects since 1975 to operate during the performance of works, to avoid differences escalating into complex and costly disputes. For example, the World Bank now requires projects with an estimated construction value in excess of US\$50 million to include contractual provisions for three-person Dispute Resolution Boards.⁵

In its '*Glossary of Dispute Resolution Terms*' (September 2003), NADRAC describes ADR in the following terms:

4 Recent examples including the *Arbitration Act, 1996 (UK)*, the *Arbitration Act, 1996 (NZ)*, and the *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)*, adopted by resolution of the Council of the Institute of Arbitrators & Mediators Australia on 13 August 1999.

5 For more information on these dispute avoidance processes, see "*Dispute Resolution Boards*" (NADRAC Conference September 2003), published in '*The Arbitrator & Mediator*' (Vol. 23 No. 2 August 2004) and available at www.roberthuntbarrister.com.

'ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance...'

For the purposes of this paper:

- I will adopt that description of ADR so that it includes arbitration.
- I propose to treat dispute resolution clauses as comprising both the *'catch all'* or *'one size fits all'* type of clause which is drafted as part of the original contract (before any disputes have arisen), and ad hoc provisions which are drafted to meet the circumstances of a particular dispute after it has arisen.

The problems associated with drafting a *'catch all'* clause may be compared with the old adage about a square peg and a round hole. A square peg will simply not fit in a round hole of the same diameter. While a small square peg may fit into a larger round hole, it obviously does not make the best use of the space available in the hole. Similarly, until something is known (or may be accurately predicted) of the nature and complexity of disputes arising under a particular contract, it is not known whether a particular dispute resolution procedure specified in the contract will be likely to provide the most efficient and cost-effective means of resolving any such dispute.

On the other hand, while a clause which is drafted after a particular dispute or disputes has arisen may provide a more efficient and cost-effective means of resolving those disputes, the inherent difficulty is that the perceived self-interests of the parties will colour their attitude to agreeing to any such dispute resolution process. A skilled dispute resolution practitioner appointed under the contractual dispute resolution clause has a valuable part to play in assisting the parties to recognise that greater efficiency and economy may be achieved by utilising a dispute resolution process which may differ from the process agreed at the time of the contract.

These are factors which need to be borne in mind in drafting the dispute resolution clause in the original contract. In my opinion, the most effective and efficient process will probably involve a *'tiered'* approach, in which one (or more) of the consensual ADR processes is employed before resorting to a determinative process.

Before one can appreciate what may (or may not) be *'the best alternative dispute resolution clause'*, it is necessary to form an appreciation of the various processes, and what they offer. For that reason, in this paper I propose to deal with the issues as follows:

1 Consensual Dispute Resolution Processes

- 2 Determinative Dispute Resolution Processes
- 3 Enforceability Issues
- 4 Drafting the dispute resolution clause in a form which is sufficiently certain, which gives effect to the parties wishes and provides cost effective dispute resolution
- 5 Conclusions

1 CONSENSUAL DISPUTE RESOLUTION PROCESSES

There are a number of different consensual dispute resolution processes referred to in the NADRAC '*Glossary of Dispute Resolution Terms*' (September 2003), which are used or referred to in dispute resolution. In this paper, I intend to deal with the consensual processes most commonly used in Australia, namely negotiation, mediation and conciliation.

A Negotiation

Negotiation can take various forms, including direct negotiations between the representatives of the parties, indirect negotiations, or facilitated negotiation or facilitation.

In its '*Glossary of Dispute Resolution Terms*' (September 2003), NADRAC describe indirect negotiation, facilitated negotiation and facilitation in the following terms:

***Indirect negotiation** is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.*

***Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.*

***Facilitation** is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The*

facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.'

Negotiations may take place at various times after a dispute has arisen. Commonly, they involve either discussions between representatives of the parties (with authority to settle the dispute) or discussions between technical experts engaged by the parties as part of some structured dispute resolution process.

In either case, negotiations should involve informed discussions between persons who were not directly concerned in the genesis of the factual dispute or disputes. These discussions are directed towards narrowing the issues in dispute between the parties, and thereby minimising the time and cost which will later be required for ultimate resolution of the overall dispute. To be effective, the negotiators must be provided with sufficient information on the relevant facts (or each party's version, if those facts cannot be agreed), to enable them to agree on the issue or issues as far as possible on the facts as agreed (or assumed, if those facts cannot be agreed).

(i) *Direct Negotiations between Representatives of the Parties*

Direct negotiations between representatives of the parties may be prescribed as part of the process in the dispute resolution clause. By way of illustration, clause 74 of the New South Wales Government GC21 General Conditions of Contract⁶ provides:

'74 Resolution by senior executives

- .1 If a party gives notice of an Issue under clause 73, the senior executives named in Contract Information items 7A and 10 must promptly confer to try to resolve the Issue.*
- .2 A party is not entitled to refer an Issue to Expert Determination until 21 days after giving notice of an Issue under clause 73.*
- .3 A party may only refer an Issue to Expert Determination by giving notice to the other party (specifying the Issue to be decided and copied to that party's senior executive) within the number of days specified in Contract Information item 53 or if no such period is specified, then within 28 days of becoming entitled to under clause 74.2.*
- .4 An Issue for which notice has not been given within the time limited by and in the form prescribed by clause 74.3 is barred from Expert Determination or any other action or proceedings (including court proceedings).'*

(ii) *Negotiations between Experts Engaged by the Parties*

⁶ Used in public sector contracts in New South Wales.

Meetings and discussions between experts engaged by the parties may also form part of another dispute resolution process, such as mediation or conciliation, expert determination or arbitration.

In my opinion, there are particular advantages in any such discussions being held without the dispute resolution practitioner, the lawyers or the parties being present, namely:

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

In addition to the requirement for ‘fresh’ negotiators, and for those negotiators to be provided with sufficient information on the relevant facts (or each party’s version, if those facts cannot be agreed), this type of process involves the need to record any agreement reached, and the reasons for any disagreement. Where there are competing versions of the relevant facts, the agreement should take the form of: ‘*On Issue No. 1, if the facts are A, B, and C (as contended by the Claimant), then we agree X. On the other hand, if the facts are A, D, and E (as contended by the Respondent), we agree Y.*’ By using this sort of approach, the issue to be ultimately resolved is then limited to the factual contest between C and D.

The procedure set out in paragraphs 3 to 6 in Schedule 1 of the Institute of Arbitrators & Mediators Australia (IAMA) *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)* demonstrates how this type of process may be used.⁷

The IAMA *Arbitration Rules* also contain reference to a process called ‘*experts’ conclaves*’. Notwithstanding that the Concise Oxford Dictionary defines ‘*conclave*’ as ‘*meeting place or assembly of cardinals for election of pope; private meeting*’, the term is commonly used in Australian dispute resolution circles as a term of art for a meeting between technical experts, chaired by the arbitrator or mediator, to narrow the technical issues which will ultimately require resolution (where the parties and their lawyers may be present, but do not usually actively participate). My own practice, in relation to experts’ conclaves, is usually to hold a conclave only if earlier

⁷ The IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)* are available at www.iama.org.au.

meetings between experts have not been productive in narrowing the issues (for whatever reason). In those circumstances, if appointed as an arbitrator, I would usually require that a transcript be taken of the conclave and tendered in the arbitration, so that it could not later be said that the arbitral Award was based on matters not properly in evidence.

Where the discussions are held between the experts respectively engaged by the parties, and a document prepared as a joint report which records the extent of their agreement and the reasons for any disagreement, the saving in cost will be substantially greater than merely the reduction in the time required of the arbitrator (or mediator) and the lawyers. In construction and other technical disputes, the time and costs associated with experts' reports are a very significant part of the overall time and costs of preparing a matter for hearing, with costs often approaching (or even exceeding) the legal costs. By way of illustration, in the 1996 John Keays Lecture, Justice Drummond of the Federal Court of Australia referred to a study by the Australian Institute of Judicial Administration in 1992 which found that, in a major class of litigation in Victoria involving relatively simple technical issues, expert witness expenses accounted for between 16% and 27% of the cost of cases.⁸

B Mediation and Conciliation

In its '*Glossary of Dispute Resolution Terms*' (September 2003), NADRAC describe mediation and conciliation in the following terms:

***Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.*

An alternative is "a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute".

***Conciliation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.*

Note: there are wide variations in meanings for "conciliation", which may be used to refer to a range of processes used to resolve complaints and disputes including:

⁸ Published in Volume 15 number 2 of *The Arbitrator* (August 1996), at p. 80.

- *Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute*
- *Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.’⁹*

In relation to the difference between mediation and conciliation, NADRAC also say in the Glossary:

‘Conciliation-mediation distinction

In NADRAC’s view, “mediation” is a purely facilitative process, whereas “conciliation” may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term “mediation” should be used where the practitioner has no advisory role on the content of the dispute and the term “conciliation” where the practitioner does have such a role. NADRAC notes, however, that both “mediation” and “conciliation” are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.’

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

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

⁹ The IAMA *Mediation and Conciliation Rules* define ‘mediation’ and ‘conciliation’ in similar terms to the NADRAC Glossary.

For these reasons, conciliation is often a better option because the process allows for provision of an opinion by the conciliator on the merits of the dispute, and the likely outcome if it is not settled by agreement between the parties. For example, Rule 5 paragraph 5 of the IAMA *Mediation and Conciliation Rules*¹⁰ provides:

- ‘5. *Unless otherwise agreed by the parties, a Conciliator may also exercise the additional functions set out in sub-paragraphs a, b and/or c below if the Conciliator considers that the exercise of those functions will assist the parties in resolving the Dispute.*
- a. make suggestions for settlement of the Dispute;*
 - b. express opinions as to what would constitute a reasonable resolution of the Dispute, or any part thereof;*
 - c. if the conciliation is terminated pursuant to Rule 8, the Conciliator may within seven (7) days of notice of termination provide a written report to the parties expressing the Conciliator’s opinion of what would constitute a reasonable resolution of the Dispute, or any part thereof.’*

(i) Mediation and Conciliation Procedures

Unlike arbitration, there are no Australian statutory provisions which govern the conduct of mediation or conciliation.

In November 2001, IAMA published its *Mediation and Conciliation Rules*, which provides a framework for the conduct of mediations and conciliations in an efficient and expeditious manner. Although other organizations¹¹ are involved in training, accreditation and/or nomination of mediators and conciliators, those organizations do not publish any similar rules.

2 DETERMINATIVE DISPUTE RESOLUTION PROCESSES

Based on the description of ADR in the NADRAC ‘*Glossary of Dispute Resolution Terms*’ (September 2003), the determinative ADR processes are arbitration and expert determination. As there are differing statutory provisions which apply to the arbitration of domestic and international disputes respectively, I propose to deal with them separately in this paper.

Whether or not an arbitration is international is to be determined from Article 1 of the *UNCITRAL Model Law*, in Schedule 2 of the *International Arbitration Act, 1974 (C’th)*, which provides as follows:

- ‘(1) *This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.*

10 These Rules are also available at www.iama.org.au.

11 Such as LEADR and the Australian Commercial Disputes Centre.

- (2) *The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*
- (3) *An arbitration is international if:*
- (a) *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
 - (b) *one of the following places is situated outside the State in which the parties have their places of business:*
 - (i) *the place of arbitration if determined in, or pursuant to, the arbitration agreement;*
 - (ii) *any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
 - (c) *the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*
- (4) *For the purposes of paragraph (3) of this article:*
- (a) *if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;*
 - (b) *if a party does not have a place of business, reference is to be made to his habitual residence.'*

A Domestic Arbitration

Domestic arbitration in Australia is subject to the operation of the *Uniform Commercial Arbitration Acts*, comprising the *Commercial Arbitration Act 1984 (NSW)*, the *Commercial Arbitration Act 1984 (Vic)*, the *Commercial Arbitration Act 1990 (Qld)*, the *Commercial Arbitration Act 1986 (SA)*, the *Commercial Arbitration Act 1985 (WA)*, the *Commercial Arbitration Act 1986 (Tas)*, the *Commercial Arbitration Act 1986 (ACT)* and the *Commercial Arbitration Act 1985 (NT)*. So far as relevant, s. 3(2)(a) of the *Uniform Acts* provides that '*this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and an arbitration under such an agreement*'. The term '*arbitration agreement*' is defined in s. 4 of the *Uniform Acts* to mean '*an agreement in writing to refer present or future disputes to arbitration*'.

(i) Arbitration Procedures

(a) Statutory Provisions

Under the *Uniform Acts*, the arbitrator has a wide discretion in relation to the manner in which an arbitration is conducted. Section 14 of the *Uniform Acts* provides:

‘Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.’

Other provisions in the *Uniform Acts*, which provide the arbitrator with further powers to control the arbitration procedure, are as follows:

- the same powers as the Supreme Court to continue with arbitration proceedings in default of appearance or other act by a party to the arbitration agreement in the event of failure to comply with a subpoena or with a requirement of the arbitrator (s. 18(3));
- the duty on the parties to at all times do all things which the arbitrator requires to enable a just award to be made, and not to do or cause to be done any act to delay or prevent an award being made (s. 37).

Various provisions in the *Uniform Acts*, which affect the arbitration procedure, are expressed in terms of *‘unless a contrary intention is expressed in the arbitration agreement’*. Those provisions are as follows:

- evidence may be given orally or in writing (s. 19(1)(a));
- power to make an interim award (s. 23);
- extension of ambit of arbitration proceedings on application by a party (s. 25(1));
- consolidation of arbitration proceedings on application by a party in each of the proceedings (s. 26(1));
- the arbitrator shall include in the award a statement of reasons for making the award (s. 29(1)(c));
- it is an implied term of the arbitration agreement that it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in the arbitration proceedings (s. 46(1)) NB. also see the duty under s.37, which is referred to above.

Some provisions in the *Uniform Acts*, which affect the arbitration procedure, are expressed in terms of *‘unless otherwise agreed in writing by the parties to the arbitration agreement’*. Such agreement in writing may be contained in the arbitration agreement itself, or elsewhere. Those provisions are as follows:

- the arbitrator is not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as arbitrator thinks fit (s. 19(3));
- any question arising for determination in the course of proceedings shall be determined according to law (s. 22(1)).

Finally, in relation to arbitral procedure, the *Uniform Acts* also provide as follows:

- parties to an arbitration agreement may be represented in proceedings before the arbitrator by a legal practitioner where another party is (or is represented by) a legally qualified person, where all parties agree, where the amount in issue exceeds \$20,000 or such other amount prescribed instead by regulation, or where the arbitrator gives leave for such representation (s. 20(1));
- if ‘*the parties to the arbitration agreement so agree in writing*’, the arbitrator may determine any question arising for determination in the course of proceedings ‘*by reference to considerations of general justice and fairness*’ (s. 22(2)).

In relation to the matters referred to above, the parties may agree to particular express written conditions, or may agree that the arbitration is to be conducted according to procedural rules of a particular organization named in the dispute resolution clause in the original contract or otherwise agreed in writing by the parties.

(b) *Non-statutory provisions*

In August 1999, the *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)* were published by IAMA, to provide a framework for arbitration to be conducted in an efficient and expeditious manner.¹² Although other organizations¹³ are involved in training, accreditation and/or nomination of arbitrators in Australia, those organizations do not publish any similar rules.

The IAMA *Arbitral Rules* were introduced to provide the structural framework for prompt and cost-effective arbitration of commercial disputes. As indicated earlier in this paper, these Rules were intended to address the growing unpopularity of arbitration by the 1990s, by providing an arbitral process which was not a mere imitation of Court processes, and thereby take advantage of arbitration’s natural advantages.

12 As earlier noted, the IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)* are available at www.iama.org.au.

13 Such as LEADR and the Australian Commercial Disputes Centre.

Procedural provisions in the IAMA *Arbitral Rules* were modelled on similar procedural provisions introduced in the *Arbitration Act 1996 (UK)* and the *Arbitration Act 1996 (NZ)*, to provide an arbitral framework for the just resolution of disputes in a manner which:

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

The IAMA *Arbitration Rules* are arranged in three Parts. Part I (Preliminary) contains various machinery provisions dealing with such matters as nomination and appointment of arbitrators and/or umpires, filling vacancies, and provision of security. Part III of the Rules contain various facilitative provisions, which include definitions of various terms used in the Rules (Rule 16); application of the Rules being subject to the Statute Law which governs arbitration in the place where the arbitration is held and any other agreement of the parties (Rule 17 paragraph 1); application of the Rules to domestic arbitrations and, subject to Rule 21, to international arbitrations, terms which are defined in Rule 16 (Rule 17 paragraph 2); the counting of days (Rule 18); procedure when there are multiple Arbitrators (Rules 19 & 20); and application of the Rules to international arbitrations, subject to the UNCITRAL Rules, a term which is defined in Rule 16 (Rule 21).

Part II of the IAMA *Arbitration Rules* deals with the arbitral procedure. A distinction needs to be drawn between two types of provision in Part II, namely:

- Rules which impose duties on the Arbitrator and the parties, and which are expressed in mandatory terms (Rules 10 & 11).
- The remaining Rules which set out various procedural provisions, and which are expressed to be subject to the contrary agreement of the parties or any applicable statute law.

Rules 10 and 11 are expressed in mandatory terms so that parties who choose to adopt the IAMA *Arbitral Rules* for the resolution of their disputes can be confident that there is an express written commitment by the Arbitrator and the other party or parties to achieve a just resolution of the dispute as expeditiously and cost-effectively as possible.¹⁴ They provide as follows:

14 Rules 10 and 11 are based on sections 33 and 40 of the *Arbitration Act 1996 (UK)*.

'RULE 10 General Duty of Arbitrator

- 1. The Arbitrator shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the matters in dispute.*
- 2. The Arbitrator shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.*

RULE 11 General Duty of Parties

- 1. The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the arbitral proceedings.*
- 2. Without limiting the generality of the foregoing, the parties shall comply without delay with any direction or ruling by the Arbitrator as to procedural or evidentiary matters and shall, where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law.'*

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

- Extension of the arbitration beyond the particular dispute notified, to other disputes under the Agreement (a term defined in Rule 16) by right or on terms (Rule 9);
- Waiver of a right to object to jurisdiction or the manner in which the Arbitrator conducts the arbitration, unless that objection is taken expeditiously (Rule 12);
- The power of the Arbitrator to make such directions as to procedural and evidentiary matters as he or she sees fit (Rule 13 paragraph 1);
- Incorporation of the default procedural provisions contained in Schedules 1 & 2 (Rule 13 paragraph 2);
- The use which the Arbitrator may make of views, and obtaining of technical and legal assistance by the Arbitrator, subject to complying with the requirements of natural justice (Rule 14);
- The time at which, and the circumstances in which, the Arbitrator shall deliver the arbitral Award (Rule 15).

The default provisions contained in these Rules are also directed to ensuring that disputes are determined expeditiously and cost-effectively.¹⁵

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

Schedule 1 provides that the Arbitrator may make such directions and rulings as the Arbitrator considers reasonably appropriate, including in relation to such matters as defining the issues in dispute (paragraphs 1 & 2); narrowing the issues by various means, including meetings, Experts' Conclaves and the preparation of joint experts' reports (paragraphs 3 & 4); providing factual information to enable the issues to be narrowed (paragraphs 5, 6 & 7); hearing of the remaining issues, and preparation for it (paragraphs 8 & 9); and service of offers of settlement without prejudice except as to costs (paragraph 10).¹⁶

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

In contrast to Schedule 1, Schedule 2 is intended for disputes which can, by and large, be determined based on documents, such as disputes where issues of credit either do not arise or are minimal. Schedule 2 sets out a timetable for the various steps to be taken in providing the Arbitrator with the documentary information necessary for determination of the dispute expeditiously and cost-effectively. It expressly provides that the times fixed under Schedule 2 may be varied by agreement of the parties or, in the absence of agreement, on proper cause being shown to the Arbitrator.

Schedule 2 contains some flexibility, in providing firstly that the Arbitrator may, if he or she considers it appropriate, modify the timetable to enable issues which would otherwise be the subject of experts' reports to be narrowed by meetings, Experts' Conclaves and joint reports in terms which are similar to those contained in Schedule 1 (see paragraphs 5 & 6 of Schedule 2); and secondly that the Arbitrator may make such other directions or rulings as he or she considers appropriate, including rulings for defining issues, narrowing issues, providing factual information to enable the issues to be narrowed, and service of offers of settlement without

15 These Rules are based on similar provisions in the *Arbitration Act 1996 (UK)*.

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

prejudice except as to costs (see paragraph 7 of Schedule 2). The Arbitrator is then to determine the matter based on the written material unless the Arbitrator determines that an oral hearing is necessary to explain or resolve conflicts in the written material in relation to one or more of the issues in dispute, with any such oral hearing being limited to that extent and conducted as soon as practicable and at a time and in a manner determined by the Arbitrator (see paragraphs 8 & 9 of Schedule 2).

B International Arbitration

As noted above, international commercial arbitration in Australia is subject to the *International Arbitration Act, 1974 (C'th)*.

(i) Arbitration Procedures

(a) Statutory Provisions

Section 16(1) of the *International Arbitration Act, 1974 (C'th)* provides that '*Subject to this Part, the Model Law has the force of law in Australia*'. The '*Model Law*' is defined in s. 15(1) of the Act as the UNCITRAL Model Law (which is set out in Schedule 2 of the Act).

Section 21 of the Act provides:

'If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.'

Article 10 of the Model Law provides for appointment of three arbitrators unless the parties otherwise determine. The mechanism for appointment of the arbitrator(s) is set out in Article 11.

Chapter V of the Model Law deals with '*Conduct of Arbitral Proceedings*'. The provisions in Chapter V include:

'Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

- (2) *Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

Article 24. Hearings and written proceedings

- (1) *Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.*
- (2) *The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.*
- (3) *All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.*

Article 26. Expert appointed by arbitral tribunal

- (1) *Unless otherwise agreed by the parties, the arbitral tribunal*
- (a) *may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;*
 - (b) *may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.*
- (2) *Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.'*

(b) Non-statutory Provisions

There are a number of international bodies which have developed sets of Rules which can be applied to international arbitrations in Australia. Those bodies include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA) and the International Bar Association (IBA). Some such bodies provide an administered system, which naturally increases the cost of the process.

Relevantly, the Australian bodies which have Rules which can be applied to international arbitrations in Australia are IAMA and the Australian Centre for International Commercial Arbitration (ACICA).

As noted above, Rule 21 of the *IAMA Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)* deals with international arbitration. It provides:

'RULE 21 International Arbitrations

1. *The UNCITRAL Rules shall apply to any international arbitration under these Rules.*
2. *The provisions of Rules 1 to 20 inclusive shall also apply to any international arbitration under these Rules to the extent that any such Rule or Rules are not inconsistent with the UNCITRAL Rules which shall prevail to the extent of any inconsistency.*
3. *The appointing body referred to in Article 6 of the UNCITRAL Rules shall be the Institute which may, by resolution of Council and in accordance with the Memorandum and Articles of Association of the Institute of Arbitrators & Mediators Australia, delegate the power of appointment to the President for the time being or the person so acting.'*

In contrast, the *ACICA Arbitration Rules*, introduced in 2005, provides a detailed set of provisions which are tailored specifically to international arbitrations.¹⁷ They are based on the UNCITRAL Model Law on International Commercial Arbitration, and are intended to provide an advanced, efficient and flexible framework for arbitration of international commercial disputes, with the process being administered by ACICA.

The major differences between the *ACICA Arbitration Rules* and the provisions in the UNCITRAL Model Law are:

- (a) Level of Institutional Involvement: Under the UNCITRAL Model Law, the appointing authority has little involvement in the arbitration. At the other extreme, the ICC Rules provide for heavy involvement of the ICC Court and Secretariat. ACICA has sought to strike a balance between the two. The aim is to ensure that arbitrations are of a high quality while minimizing the money and time that is involved with heavy scrutiny of proceedings.
- (b) Level of Sophistication: The UNCITRAL Model Law was released in 1976. Since that time, there has been significant growth and development in arbitration theory and practice. In the light of these changes, many aspects of the UNCITRAL Rules have proven to be inadequate for major commercial disputes. The *ACICA Arbitration Rules* were released in 2005, and have been able to take account of these developments and provide a more reliable framework for resolving disputes.

The major differences between the *ACICA Arbitration Rules* and the ICC provisions are:

¹⁷ The ACICA Arbitration Rules are available at www.acica.org.au.

- (a) Fees of Arbitrators: Sometimes senior arbitrators are reluctant to accept ICC appointments because they consider the remuneration offered by the ICC's fee scale inadequate. This is particularly the case in complex arbitrations. Ironically where the issues are few and straight forward, but the amount in dispute is considerable, ICC arbitrators may receive a 'windfall' in fees. To avoid these problems ACICA encourages the parties and the arbitrators to agree between themselves on an hourly rate for arbitrators' remuneration. If they cannot agree, then ACICA will determine the hourly rate having regard to the nature of the dispute, the amount in dispute and the standing and experience of the arbitrator.
- (b) Level and Cost of Institutional Support: As indicated above, ICC arbitration is the most heavily supported form of institutional arbitration. This has significant costs consequences. ACICA has sought to minimize these costs by reducing its level of involvement to the areas it considers essential to ensure high quality arbitrations.

Notable features of the *ACICA Arbitration Rules* include the following:

- Where there are multiple parties (either multiple claimants or multiple respondents) they must act jointly when appointing arbitrators. Most arbitral rules are silent on this point which can create confusion.
- ACICA will decide the identity of, as well as challenges to, arbitrators where the parties cannot agree.
- In the absence of agreement between the parties, ACICA will determine the number of arbitrators: either one or three depending on the circumstances of the dispute. This flexibility helps to minimise costs.
- There are detailed provisions governing interim measures, which draw on recent UNCITRAL Working Group deliberations. They provide for, inter alia:
 - (a) an expanded definition of 'interim measures';
 - (b) criteria which must be established before an interim measure can be ordered; and
 - (c) provisions for the modification, suspension and termination of an interim measure;
- Proceedings are expressed to be both private and confidential, unless the parties have a contrary agreement in writing. Many arbitral rules are silent on this issue of confidentiality which can be problematic in light of the High Court of Australia's decision in *Esso v Plowman*.¹⁸

18 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

Exceptions to the obligation of confidentiality include the following:

- (a) applications made to competent courts, including for enforcement;
 - (b) disclosure of information/documents pursuant to the order of a court of competent jurisdiction;
 - (c) obligations under any mandatory laws considered applicable by the arbitral tribunal; and
 - (d) compliance with regulatory bodies (such as the ASX);
- Unless the parties otherwise agree, arbitrators must take guidance from the International Bar Association's specialised and highly advanced *Rules on the Taking of Evidence in International Commercial Arbitration*.
 - ACICA will participate in determining the remuneration of arbitrators where the parties and the arbitrators cannot agree.
 - ACICA's administration fees are stipulated in Appendix A of the Rules, and compare favourably with other bodies such as the LCIA and the ICC.

C Expert Determination

The increasing cost of litigation and arbitration in construction and commercial disputes to the 1990s led to a significant increase in the use of expert determination to resolve those disputes, particularly in the public sector.

Putting aside for a moment the question of whether expert determination offers any real advantages over a form of 'documents only' arbitration,¹⁹ the fact is that the users of dispute resolution services have created a demand for an additional adjudicative process called expert determination as an alternative to litigation or arbitration.

Expert determination is an adjudicative process which involves the appointment of an independent expert in the subject area of the dispute, to investigate and deliver a finding on a nominated issue or issues.

Sometimes parties agree that the expert determination will not be binding, in which case they will commonly use the expert's finding as the basis of settlement or, at the very least, as a basis for clarifying or narrowing the

¹⁹ This issue is dealt with in Part 2 C (ii) below.

issues between them.²⁰ On other occasions, parties submit to a binding expert determination, whereby the parties agree that the independent expert's finding will be determinative of the issues between them.

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

Expert determination is appropriate for use where issues cannot be resolved by consensus (ie. by negotiation or mediation), and the issues for determination do not involve questions of credit. If an inquiry of a judicial or quasi-judicial nature is conducted, then that process is in fact an arbitration, notwithstanding that parties may choose to label it '*expert determination*'.

In *Age Old Builders Pty Ltd v Swintons Limited*²¹, Mr Justice Osborn allowed an appeal from a decision of the Victorian Civil and Administrative Tribunal, which had held that an agreement of the parties to refer an existing dispute to expert determination under the 1997 IAMA *Expert Determination Rules* was void pursuant to s. 14 of the *Domestic Building Contracts Act 1995 (Vic)*. In relation to whether a dispute process was an expert determination rather than an arbitration, his Honour said:

'68 *The Tribunal also set out the relevant "rules" for the expert determination of commercial disputes which the parties adopted in the present case as the basis on which the building consultant was retained. In my view a consideration of these rules demonstrates the following:*

(a) ***The parties expressly agreed that the expert was not an arbitrator. They agreed:***

"The expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these Rules is not an arbitration within the meaning of any legislation or rules dealing with commercial,

²⁰ A non-binding expert determination is often referred to as an expert appraisal.

²¹ [2003] VSC 307 (21 August 2003). An appeal from His Honour's decision was dismissed by the Victorian Court of Appeal [2005] VSCA 217, on the basis that the prohibition in s. 14 of the Act applied only to agreements to refer future disputes to arbitration, and did not apply to an agreement to refer an existing dispute to arbitration. The members of the Court did not deal with the other basis of the decision of Osborn J, that the agreement was for expert determination and not arbitration.

industrial, court annexed or any other form of arbitration. Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration."

Such an agreement cannot be conclusive of the characterisation of the referral (see See Ajzner v Cartonlux Pty Ltd [1972] VR 919). But it must be regarded as significantly indicative of the intention of the parties as to the nature of the task the building consultant was to undertake. In Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 188, Gillard J stated:

"56 It is noted here that the parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration."

- (b) Although the parties might be required by the building consultant to attend a preliminary conference the agreed Rules simply did not provide for any right to a hearing as to the substance of the dispute. The Rules provided a discretion to the building consultant to convene a preliminary conference "to make such procedural and administrative arrangements as are necessary."*
- (c) The core procedure provided for was simply the making of initial submissions in writing by one party, a submission in response by the respondent and a submission in reply. If, but only if, the building consultant decided "further information or documentation is required to determine the dispute" the building consultant might require further submissions or documentation and/or call a conference between the parties and the expert. If a conference were called it might take the form of a view and at the conference the expert might permit the making of further submissions and the provision of further information.*

69. ***In my opinion the Rules simply do not provide for an inquiry in the nature of a judicial inquiry. After the conclusion of the initial submission process no adversarial process is envisaged. Further the process thereafter is at the discretion of the expert. Most significantly the parties do not have the fundamental right to a hearing. It is not to the point that this process requires a "determination", no referral to an expert for determination could be expected to do otherwise than envisage a rational determination. Nor is it to the point that the expert is required to make his determination according to law and in accordance with procedural fairness. The parties and the expert are entitled to agree as to these matters and they are subsidiary to his essential role. The notion of procedural fairness is a flexible one applicable to a process which falls short of an inquiry in the nature of a judicial inquiry (cf Kioa v West (1985) 159 CLR 550 at 585 per Mason J: "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."). Therefore, the fact an expert may be bound to accord procedural fairness (as that notion is applicable to the particular case) to the parties does not necessarily give the process the character of a judicial inquiry or an arbitration (see Sutcliffe v Thackrah [1974] AC 727; Arenson v Casson Beckman Rutley & Co [1977] AC 405). The fact that the process results in a determination which is agreed to be final and binding is also hardly surprising. An expert determination would be no more than an advisory opinion if it did not have this effect. In summary although the Rules provide for***

some matters which would be appropriate in an arbitration the essential character of the procedure was not that of an arbitration.' (emphasis added)

The New South Wales Government GC21 General Conditions of Contract contain a contractual regime for determination of disputes by negotiation between the parties, followed by expert determination. Clause 75 provides as follows:

'75 Expert Determination.

- 1 *If an Issue is to be referred to Expert Determination under clause 74, the parties must endeavour to agree on the Expert to be engaged. If they cannot agree within 28 days of the receipt of a notice under clause 74.3, the Expert will be nominated (on the application of either party) by the person named in Contract Information item 55. That person must not nominate:
 - .1 *an employee of the Principal or the Contractor;*
 - .2 *a person who has been connected with the Works or the Contract; or*
 - .3 *a person who the Principal and the Contractor have not been able to agree on.**
- 2 *When the person to be the Expert has been agreed or nominated, the Principal, on behalf of both parties, must engage the Expert by letter of engagement (copied to the Contractor) setting out:
 - .1 *the Issues referred to the Expert for determination;*
 - .2 *the Expert's fees;*
 - .3 *the procedure for Expert Determination in Schedule 6 (Expert Determination Procedure); and*
 - .4 *any other matters which are relevant to the engagement.**
- 3 *The Principal and the Contractor must share equally the fees and out-of-pocket expenses of the Expert for the determination, and bear their own costs.*
- 4 *The procedure for Expert Determination is set out in Schedule 6 (Expert Determination Procedure).*
- 5 *In answer to any Issue referred to the Expert by a party, the other party may raise any defence, set-off or cross-claim.*
- 6 *If the Expert determines that one party must pay the other an aggregated amount exceeding the amount in Contract Information item 56²² (calculating the amount without including interest on it, and after allowing for set-offs), or if the Expert's determination involves a finding which does not involve paying a sum of money, then either party may commence litigation in respect of the amount referred to above (which amount exceeds the amount in Contract Information item 56) or the finding which does not involve paying a sum of money, as applicable, but only within 56 days after receiving the determination.*

22 The amount in item 56 of the Contract Information is \$500,000, such that the determination is final and binding unless the Expert determines that one party pay the other party not less than \$500,000 (in which case either party may elect to submit the dispute to litigation).

- 7 *Unless a party has a right to commence litigation under clause 75.6:*
- .1 *the parties must treat each determination of the Expert as final and binding and give effect to it; and*
 - .2 *if the Expert determines that one party owes the other money, that party must pay the money within 28 days.*
- 8 *The representative of the Principal for all of the purposes of this clause 75 is the person specified in Contract Information item 54. This person (and his/her address) may differ from the person (and his/her address) for the giving of notices to the Principal, as specified in clause 30.1.'*

(i) ***Expert Determination Procedures***

Unlike arbitration, there are no Australian statutory provisions which govern the conduct of expert determinations.

In November 2001, IAMA published its *Expert Determination Rules*, which provides a framework for the conduct of expert determinations in an efficient and expeditious manner.²³ Although other organizations²⁴ are involved in accreditation and/or nomination of persons to conduct expert determinations, those organizations do not publish any similar rules.

In terms of procedure, the IAMA *Expert Determination Rules* provide in Rule 9(1) that:

'Subject to any rule of law or equity or written agreement of the parties to the contrary, and the requirements of Rule 5, the Expert shall make such directions or rulings in relation to the Process as he or she sees fit.'

By way of contrast, the procedure in Schedule 6 (Expert Determination Procedure) of the GC21 General Conditions of Contract is expressed in prescriptive terms, as follows:

'Schedule 6

Expert Determination Procedure

Refer to clause 75 of the GC21 General Conditions of Contract

1 Questions to be determined by the Expert

- .1 *The Expert must determine for each Issue the following questions (to the extent that they are applicable to the Issue):*

23 The IAMA *Expert Determination Rules* are also available at www.iama.org.au.

24 Such as LEADR and the Australian Commercial Disputes Centre.

- .1 *Is there an event, act or omission which gives the claimant a right to compensation, or otherwise assists in resolving the Issue if no compensation is claimed:*
 - (1) *under the Contract*
 - (2) *for damages for breach of the Contract, or*
 - (3) *otherwise in law?*
- .2 *If so:*
 - (1) *what is the event, act or omission?*
 - (2) *on what date did the event, act or omission occur?*
 - (3) *what is the legal right which gives rise to the liability to compensation or resolution otherwise of the Issue?*
 - (4) *is that right extinguished, barred or reduced by any provision of the Contract, estoppel, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?*
- .3 *In the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:*
 - (1) *what compensation, if any, is payable from one party to the other and when did it become payable?*
 - (2) *applying the rate of interest specified in the Contract, what interest, if any, is payable when the Expert determines that compensation?*
 - (3) *if compensation is not claimed, what otherwise is the resolution of the Issue?*
- .2 *The Expert must determine for each Issue any other questions identified or required by the parties, having regard to the nature of the Issue.*

2 Submissions

- .1 *The procedure for submissions to the Expert is as follows:*
 - .1 *The party to the Contract which has referred the Issue to Expert Determination must make a submission in respect of the Issue, within 15 Business Days after the date of the letter of engagement of the Expert referred to in clause 75.2 of the General Conditions of Contract.*
 - .2 *The other party must respond within 15 Business Days after receiving a copy of that submission or such longer period as the other party may reasonably require, having regard to the nature and complexity of the Issue and the volume of the submission. If the parties do not agree on that longer period, the Expert will promptly determine any extra time permitted, following a submission on the point by a party desiring to make a submission, within the time specified by the Expert. The response to the submission in clause 2.1.1 may include cross-claims.*

- .3 *The party referred to in clause 2.1.1 may reply to the response of the other party, but must do so within 10 Business Days or such longer period as that party may reasonably require (in the same terms as in clause 2.1.2) after receiving the response, and must not raise new matters*
- .4 *The other party may comment on the reply, but must do so within 10 Business Days or such longer period as that party may reasonably require (in the same terms as in clause 2.1.2) after receiving the reply, and must not raise new matters.*
- .2 *The Expert must ignore any submission, response, reply, or comment not made within the time given in clause 2.1 of this Expert Determination Procedure, unless the Principal and the Contractor agree otherwise.*
- .3 *The Expert may request further information from either party. The request must be in writing, with a time limit for the response. The Expert must send a copy of the request and the response to the other party, and give the other party a reasonable opportunity to comment on the response.*
- .4 *All submissions, responses, replies, requests and comments must be in writing. If a party to the Contract gives information to the Expert, it must at the same time give a copy to the other party. All documents to be copied to the Principal under this Expert Determination Procedure must be sent to the relevant person at the relevant postal or other address specified in Contract Information item 54. This address may be different to the address for the giving of notices to the Principal under clause 30.1.*

3 Conference

- .1 *The Expert may request a conference with both parties to the Contract. The request must be in writing, setting out the matters to be discussed.*
- .2 *The parties agree that such a conference is not to be a hearing which would give anything under this Expert Determination Procedure the character of an arbitration.*

4 Role of Expert

- .1 *The Expert:*
 - .1 *acts as an Expert and not as an arbitrator;*
 - .2 *must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the Expert's own expertise; and*
 - .3 *must issue a certificate in a form the Expert considers appropriate, stating the Expert's determination and giving reasons, within 16 weeks, or as otherwise agreed by the parties, after the date of the letter of engagement of the Expert referred to in clause 75.2 of the General Conditions of Contract.*
- .2 *If a certificate issued by the Expert contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the Expert must correct the certificate.'*

(ii) *Advantages and Disadvantages of Expert Determination compared with Arbitration*

- (1) Proponents of expert determination suggest that it is quicker and cheaper than arbitration. In the writer's view, expedited arbitration by a skilled experienced dispute resolution practitioner under Schedule 2 of the *IAMA Arbitration Rules* should be no more time-consuming or expensive than an expert determination of the same issues.
- (2) By its very nature, expert determination is unsuitable for resolving issues which depend on findings of credit, as there is no facility to test the evidentiary material by cross-examination or other similar process. As noted by Osborn J in *Age Old Builders Pty Ltd v Swintons Limited*²⁵, if an inquiry of a judicial or quasi-judicial nature is conducted, then that process is in fact an arbitration, notwithstanding that parties may choose to label it 'expert determination'. In contrast, an arbitrator proceeding under Schedule 2 of the *IAMA Arbitration Rules* would be able to conduct a limited hearing on that issue.
- (3) The fact that arbitration clauses, and arbitration awards, are enforceable pursuant to the provisions of the *Uniform Commercial Arbitration Acts* and the *International Arbitration Act, 1974 (C'th)* is a real advantage which arbitration has over expert determination. As noted below in Section 3 of this paper, some Courts in Australia have held that expert determination agreements are void as an attempted ouster of jurisdiction of the Courts, or have declined to exercise their discretion to enforce such agreements, or the expert's determination, for reasons such as the qualifications of the expert to whom the parties have agreed to refer their dispute. This would not occur under the statutory provisions of the *Uniform Commercial Arbitration Acts* and the *International Arbitration Act, 1974 (C'th)*.
- (4) Another reason sometimes given for preferring expert determination to arbitration is the availability of a right to seek leave to appeal from an arbitral award under the *Uniform Commercial Arbitration Acts*. Again, this supposed advantage is more illusory than real, given:
 - (a) The approach which Courts have taken in exercising their discretion not to enforce an expert determination agreement, or the expert's determination, is wider than the very limited grounds on which leave to appeal is available under s. 38 of the *Uniform Commercial Arbitration Acts*.

²⁵ [2003] VSC 307 (21 August 2003). An appeal from His Honour's decision was dismissed by the Victorian Court of Appeal [2005] VSCA 217, on the basis that the prohibition in s. 14 of the Act applied only to agreements to refer future disputes to arbitration, and did not apply to an agreement to refer an existing dispute to arbitration. The members of the Court did not deal with the other basis of the decision of Osborn J, that the agreement was for expert determination and not arbitration.

- (b) In *Promenade Investments Pty Ltd v State of New South Wales*,²⁶ Sheller JA (with whom Meagher and Mahoney JJA agreed) considered at length the history of the legislation and its policy objectives. In his judgment,²⁷ Sheller JA quoted with approval the second reading speech of the NSW Attorney General in introducing the amendment to the NSW Act, namely:

'If arbitration is to be encouraged as a settlement procedure and not a dry run before litigation, a more restrictive criterion for the granting of leave is desirable and the parties should be left to accept the decision of the arbitrator whom they have chosen to decide the matter in the first place.'

Sheller JA then said:²⁸

'In applying s.38, as amended, a construction that would promote the purpose or object underlying the Act must be preferred to a construction that would not promote that purpose or object.'

- (c) There is no doubt that *Promenade Investments* represents the law in all Australian jurisdictions in relation to appeals under s. 38 of the *Uniform Commercial Arbitration Acts*. In the period from the decision in February 1992 to November 2005, it has been referred to in 88 subsequent decisions, including decisions of appellate courts in New South Wales, Victoria, South Australia and Western Australia, and by judges at first instance in the Supreme Courts of all States and Territories. The decision has been followed, applied or approved on 49 occasions (including by the Courts of Appeal in New South Wales and Victoria, the Full Court of the Supreme Court of South Australia, the Full Court of the Supreme Court of Western Australia), and has been cited, considered or referred to on 39 occasions. In no case has the decision in *Promenade Investments* been distinguished or not followed.
- (d) The effectiveness of s. 38 of the *Uniform Commercial Arbitration Acts* in achieving the policy objectives stated by the NSW Attorney General in introducing the amendments can be seen from research performed by the writer which shows that, in the period from February 1992 to November 2005, of the 194 occasions on which s. 38 has been considered by Australian Courts, leave to appeal was granted (in whole or in part) on only 38 occasions, and was refused on 105 occasions, as follows:

26 [1991] 26 NSWLR 203.

27 At page 221.

28 At page 225.

	NSW	Qld	SA	WA	Vic	ACT	NT	Tas
Granted	5	3	11	9	9	1	0	0
Refused	32	11	13	23	32	1	2	1

- (e) The significant body of case law which has emerged since *Promenade Investments* establishes that courts will apply those policy objectives. A strong statement to that effect was made by the members of the New South Wales Court of Appeal, in *Stadium Australia Management Ltd v Sodexo Venues (Australia) Pty Ltd*,²⁹ a case in which *Promenade Investments* was ‘cited’. In that case, notwithstanding that Hodgson JA (with whom McColl JA agreed) concluded that the both the arbitrator and the primary judge had erred in saying there was no need to consider the surrounding matrix of fact in construing an agreement, all three judges held:

‘Granting leave to appeal would be contrary to the policy underlying s. 38 of the Commercial Arbitration Act, that is to promote finality of arbitral awards even at the price of denying ordinary rights of appeal.’

3 ENFORCEABILITY ISSUES

These issues usually arise when one party seeks to restrain another party from commencing court proceedings in breach of an agreement to refer disputes to an ADR process (other than arbitration), or seeks to persuade a dispute resolution practitioner that he or she has no jurisdiction to undertake the process.³⁰

One basis of challenge is that the terms of the agreement are too uncertain, by failing to specify with sufficient particularity the procedure to be followed by the dispute resolution practitioner. Various other grounds have been argued for challenging an agreement to refer a dispute to expert determination, namely that:

- any such agreement would be void as an attempted ouster of the jurisdiction of the courts;
- an issue in dispute is not susceptible to expert determination;

²⁹ [2003] NSWCA 234.

³⁰ In relation to jurisdictional issues, it is worth noting that Rule 5(5) of the IAMA *Expert Determination Rules* expressly provides as follows:

‘Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert’s jurisdiction) shall be submitted to and determined by the Expert.’

- an issue in dispute is not suitable for expert determination by the Expert appointed (or to be appointed);

I will deal with each of those grounds in turn.

A Uncertainty in the procedure to be followed

The issue of uncertainty was considered by Mr Justice Cole, in Triano Pty Limited v Triden Contractors Limited,³¹ a case which concerned an expert determination clause. His Honour said, at p. 307:

'Whilst recognising that there may be utility in the Court determining procedures to be followed in an expert determination, in my opinion the Court has no jurisdiction to do so. The Court has power in an arbitration subject to the Commercial Arbitration Act 1974 to make interlocutory orders in relation to arbitration proceedings (Section 47). However the contemplated proceedings are for a determination by an expert, and are not intended to be an arbitration. That seems clear from the provisions of Clause 25 and the draft agreement advanced either by the experts or Triarno. The difference in function between an independent expert and an arbitrator is well recognised. See for instance Hudsons Building Contracts 3rd Ed., Volume 1, p. 707-717 and cases there collected; In Re: Carus-Wilson and Greene 1887 18 QBD 7 at 9; Legal and General Life of Australia Limited v A Hudson Pty Limited 1985 1 NSWLR 314 at 336 per McHugh JA (as he then was).

If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the Court can fill. There is no reason to imply a term that the Court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.'

That approach was followed by Mr Justice Rolfe in Fletcher Construction Australia Limited v MPN Group Pty. Ltd., in which he referred with approval to the decision of Mr Justice Cole in Triano Pty Limited v Triden Contractors Limited, and said, at pp. 23 – 24:

'In my opinion, this decision is authority for the proposition, which I consider is correct, that in the absence of agreement as to procedures, they are to be decided by the expert. There is, accordingly, no uncertainty of the type for which MPN contended.

In various clauses of the present agreements there is provision for disputes to be determined pursuant to clause 6.1 but, upon a consideration of the whole document, I reach the conclusion Cole J reached, namely that there is nothing in the terms of the agreements, which suggests or necessarily implies that a determination by the independent expert, which is favourable to one party or the other, should result in the unsuccessful party paying the costs of the independent experts. Nor, in my opinion, is there any express or implied power in the independent expert conferred by the Deed to make an order for costs.' (emphasis added)

31 (1992) 10 BCL 305.

In the result, Mr Justice Rolfe held that an expert determination clause was not void for uncertainty because it made no provision about procedural matters such as whether the parties could be legally represented, whether the parties could be compelled to provide documents, who should bear the costs etc.

Accordingly, unless the parties have agreed between themselves on matters of procedure, an expert determination will proceed largely as the expert sees fit. In those circumstances, the expert will not have to apply the rules of procedural fairness usual in an arbitration (such as calling of witnesses, cross-examination, not receiving submissions from one party in the absence of the other etc), and will not have to provide reasons for the determination.

The issue of uncertainty in ADR clauses was also considered by Mr Justice Einstein in Aiton Australia Pty. Limited v Transfield Pty Ltd,³² in which his Honour reviewed what was earlier said by Mr Justice Giles, in Hooper Bailie Associated Ltd v Natcon Group Pty Ltd and Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd,³³ and said:

‘44 The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced: Elizabeth Bay Developments.

45 In Hooper Bailie, Giles J framed the test for enforcement in the following terms at p. 209:

“An agreement to conciliate or mediate is not to be likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.”

46 *In that case, the court dealt with a summons seeking to prevent the defendant from continuing with an arbitration between the parties. The suit was brought on the basis that the defendant had agreed by exchange of letters that the arbitration would not continue until a process of conciliation had concluded and the process had not concluded.*

47 *Giles J held that the parties had agreed to conciliation in respect of the issues identified in the exchange of letters and had agreed that the arbitration would not resume until such conciliation was concluded. After reviewing Australian authorities and having reference to United States’ and English authorities, Giles J concluded that the procedure was sufficiently certain to render the agreement enforceable as a solicitor’s letter set out the procedure to be followed. Accordingly, his Honour ordered that the arbitration be stayed pending conclusion of the conciliation process.*

32 (1999) 153 FLR 236; (2000) 16 BCL 70.

33 (1992) 28 NSWLR 194, and (1995) 36 NSWLR 709 respectively.

48 In contradistinction, in Elizabeth Bay, a case where Giles J again considered the enforceability of a dispute resolution agreement, being an agreement to mediate, his Honour held that there were **two compelling reasons why the agreement was not sufficiently certain to be enforced in the circumstances. The first, related to the inconsistency between the mediation agreement and the guidelines setting out procedure. The second, relevantly to the issue now before me, related to the requirement (cl. 11) that parties attempt to negotiate their disputes in good faith.**

49 His Honour stated at p. 716:

“..by cl. 11 the parties also confirmed that they “enter[ed] into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute”. What did this mean?

On one view it was merely declaratory, a statement of the parties’ states of mind. It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had (at the future time) a commitment to good faith negotiations: first, other than being a laudable emotion the declaration itself would not advance the process of mediation, and secondly by the future time one or other of the parties may well not have had that commitment. It is more likely that, as one of a number of paragraphs expressing rights and obligations in a formal legal agreement, cl. 11 was intended to impose an obligation to attempt to negotiate in good faith. The obscurity in cl. 11 is to be regretted, since it brought to the mediation agreement either a legally peripheral declaration likely to be disproved at the very time cl. 11 was invoked **or a purported obligation the recognition of which involved formidable legal difficulty: the cumulative uncertainty of “commitment”, “attempt”, “negotiate” and “in good faith” is forbidding.**

I do not think it matters which view is taken of cl. 11. It is not easy to take a course requiring a party to assert a state of mind which it may well not have, and even less easy to take a course which compels a party to commit itself to the vagueness of attempting in good faith to negotiate with the other party to the dispute. The latter difficulty lies not so much in the ascertainment of the presence or absence of good faith, or even in the uncertainty of attempting, but rather in the necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith: see Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (at 209); Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1 at 26-27; Walford v Miles [1992] 2 AC 128 at 138.’ [Emphasis added]

50 The plaintiff submits that the decisions of Giles J in Hooper Bailie and Elizabeth Bay, mandate a holding that cl. 28.1 is unenforceable not only because it is merely an agreement to negotiate, as opposed to an agreement to conciliate and/or to mediate, but also because it contains a good faith requirement. Likewise, that cl. 28.2 also containing the good faith requirement, is unenforceable.

51 Giles J did not have before him, in either case, an agreement to negotiate. In Hooper Bailie, his Honour drew a distinction between an agreement to conciliate or mediate and an agreement to negotiate in good faith, upholding the former in principle and expressing doubt as to the necessary certainty of the latter. However, his Honour’s reasoning centred upon an

agreement to conciliate - the question of enforceability of an agreement to negotiate as part of the dispute resolution mechanism, not being an immediate concern'.³⁴ (emphasis added)

Later, in *The Heart Research Institute Limited v Psiron Limited*³⁵, Mr Justice Einstein said:

'35 *The plaintiff contends that the procedure to be adopted pursuant to the clause is sufficiently certain for there to be little doubt as to the circumstances in which the clause operates and as to the process to be adopted by the Expert - Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194 at 206; Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236; State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited, [2002] NSWSC 178 para 38.*

36 *The central issue raised by the defendant concerns **the well-established proposition that agreements to participate in alternative dispute resolution procedures are enforceable in principle provided the conduct required of the parties for participation in the process is sufficiently certain.** See Hooper Bailie Associated Ltd. v Natcon Group Pty. Ltd. (1992) 28 NSWLR 194; Elizabeth Bay Developments Pty. Limited v Boral Building Services Pty. Limited (1995) 35 NSWLR 709; Aiton Australia Pty. Limited v Transfield Pty. Limited (1999) 153 FLR 236; Morrow v Chinadotcom [2001] NSWSC 209; Banabelle Electrical Pty. Limited, [2002] NSWSC 178.'*³⁶ (emphasis added)

In *The Heart Research Institute Limited v Psiron Limited*, Mr Justice Einstein then repeated what he previously said in *Aiton*, in the following terms:

'37 *In Aiton:*

- *emphasis was given to the statement by Giles J in Hooper Bailie:*

"What is enforced is not cooperation and consent but participation in a process from which consent might come". [Emphasis given in Aiton]

- *The matter was put as follows:*

"It is for this reason that the process from which consent might come must be sufficiently certain. This is not to suggest that the process need be overly structured. Certainly, if specificity beyond the essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself." [Emphasis added in judgment]'

34 Given what is said in paragraph 51 in *Aiton*, it should be noted that his Honour took the opportunity in that case to express *obiter dicta* views, to the effect that a dispute resolution clause will not be void for uncertainty merely because it requires the parties to participate in the dispute resolution process 'in good faith' (contrary to the views expressed by Mr Justice Giles in *Hooper Bailie*), as well as what comprised 'the core content' of an obligation to negotiate or mediate in good faith.

35 [2002] NSWSC 646 (25 July 2002)

36 *Hooper Bailie, Elizabeth Bay Developments* and *Aiton* concerned enforcement of a mediation clause, and *Morrow* and *Banabelle* concerned enforcement of an expert determination clause.

On the facts of the case, his Honour found that the agreement was too uncertain to be enforceable, for the following reasons, set out at paragraph 40 of his judgment:

‘40 *The real question of substance for determination concerns the defendant's submission that in an important, indeed critical sense, the approach which should be taken by the court presently should follow the approach taken in Elizabeth Bay Developments. The defendant's submissions in the sense are follows:- The similarity between the contractual provisions and the Guidelines considered in Elizabeth Bay and clause 18 and the Guidelines in the present matter is noteworthy.*

- *In particular in both instances the Guidelines provide that the parties are to sign an expert determination appointment agreement the terms of which are required to be “consistent with these guidelines”.*
- *In neither case can the expert determination commence until the executed agreement is held by the ACDC. See paragraphs 4 and 5 of the Guidelines at JC1 Tab 39.*
- *In the present case, again as in Elizabeth Bay Developments the guidelines do not call up any particular form of mediation agreement.*
- *Nevertheless, a copy of the agreement which the expert selected by HRI, is in evidence at JC1 Tab 48. Its terms illustrate the point made by Giles J in the earlier decision. Terms which are included in it but which are not dictated by the Guidelines include the following:*
 - (a) *the proposed expert was not prepared to embark on the mediation unless that agreement (no other) was signed by the parties (Tab 48 Page 1);*
 - (b) *the recitals (a) and (b) would give rise to an estoppel by deed which would not be accepted by Psiron (Tab 48 page 4);*
 - (c) *clause 8(a) requires “total confidentiality” in relation to the expert determination and clause 8(d) requires every aspect of every communication within the expert determination to be without prejudice (Tab 48 pages 6 and 7).*
 - (d) *by clause 10 the parties release the ACDC and the expert from any tortious claim they might have in respect of the expert determination. This right is an important right which the parties would otherwise have see Goldspar Australia Pty. Limited v City of Sydney [2001] NSWCA 246.*
- *It follows that the agreement to submit to expert determination, if otherwise valid, is unenforceable.’*

B Ouster of Jurisdiction

It is settled law that Courts will not enforce agreements which are in effect an ouster of jurisdiction, on the grounds of public policy.

The manner in which Courts may give effect to ADR clauses was considered by Mr Justice Einstein in *Aiton Australia Pty. Limited v Transfield Pty Ltd*,³⁷ in which his Honour said:

'ADR clauses as a precondition to litigation generally

- 42 *There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration: Commercial Arbitration Act 1984 (NSW). However, it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a precondition to commencement of proceedings in relation to the dispute: Hooper Bailie.*
- 43 *To achieve enforcement of such an agreement it is essential that the agreement is in the Scott v Avery form - that is, expressed as a condition precedent. Such a clause was seen not to offend the general tenet of law that it is not possible to oust the jurisdiction of the court as it acted, in effect, as a postponement of a party's right to commence legal proceedings until the arbitration was concluded, not as a prohibition against a party having such recourse: Scott v Avery (1856) 10 ER 1121. Further, as mentioned previously, the agreement is enforced, not by ordering the parties to comply with the dispute resolution procedures, but by forbidding them from using other procedures from which they have agreed to abstain until the end of the dispute resolution process.*

Regrettably, to date there has not been a consistent approach to this issue by judges at first instance in Courts in Australia. In New South Wales, Victoria, and Queensland, judges of the Supreme Courts have sought to uphold the bargain made by the parties to refer their disputes to expert determination. In contrast, in a decision in the Supreme Court of Western Australia, it has been held that while an agreement to refer issues within an expert's particular expertise may be upheld by the Court, an agreement to refer issues of fact and law to a technically qualified expert (with no legal qualifications) was void as an attempted ouster of jurisdiction.

In *Fletcher Construction Australia Limited v MPN Group Pty. Ltd.*³⁸, Mr Justice Rolfe held that there are still grounds on which the Court's jurisdiction may be invoked to attack a 'final and binding' determination, such that a clause to that effect was not void as an attempted ouster of jurisdiction of the Courts. At p. 18 of the judgment, his Honour said:

'... in my opinion, Clause 6.1 does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the clause providing that the expert's decision shall be 'final and binding' or 'conclusive', and provisions such as that do not oust the jurisdiction of the Court. The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The

37 (1999) 153 FLR 236; (2000) 16 BCL 70.

38 NSW Sup Ct, 14 July 1997, unreported

expert's decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.' (emphasis added)

In the Supreme Court of Western Australia, in Baulderstone Hornibrook Engineering Pty. Ltd. v Kayah Holdings Pty. Ltd.³⁹, Mr Justice Heenan held that the clause there being considered was an impermissible attempt to oust the jurisdiction of the court in the particular circumstances of the case, saying at p. 280:

*'As a general rule, the court will recognize as proper any procedure which the parties have agreed upon to settle a dispute. As the provisions of the Commercial Arbitration Act 1985 show, if they have agreed in writing to refer present or future disputes to arbitration their agreement will be recognized and enforced. Even if the procedure agreed upon is not arbitration, the agreement might well be enforceable as a matter of contract. Thus **the court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise** (for example, see the judgment of the Court of Appeal in Jones v Sherwood Computer Services [1992] 2 All ER 170). However, on behalf of the plaintiff it is contended that the procedure agreed upon in this case is so contrary to fundamental principles that it must be treated as against public policy and void.*

*The main limitation imposed upon the power of the parties to prescribe their own rules of procedure is that they cannot by contractual provision oust the jurisdiction of the court (Scott v Avery (1856) 5 HL 810 and Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643). For a recent discussion of the topic see the judgment of Drummond J in Novamaze Pty Ltd v Cut Price Deli Pty Ltd (1995) 128 ALR 540 at 548-549. **In this case, cl 20 provides for the resolution by the referee of any dispute arising out of the contract, whether or not the determination of the dispute is within the referee's particular field of expertise. Further, the clause purports to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the court. To that extent it operates to oust the jurisdiction of the court and will not be recognised.'** (emphasis added)*

Although it is not apparent from the reported decision, I understand that that there were some surrounding factors which may have had a bearing on Heenan J's decision namely that, arising out of the same project and based on the same alleged facts, court proceedings had been commenced by a third party against the plaintiff, who joined the defendant to those proceedings as a cross defendant. In those circumstances, there would seem to be a practical reason for staying the expert determination because otherwise the parties would incur the trouble and expense of two sets of proceedings relating to the same dispute, and there would be a prospect of inconsistent findings. This is consistent with the approach adopted by Mr Justice Chesterman of the Supreme Court of Queensland, in Zeke Services Pty Ltd v Traffic Technologies Limited⁴⁰, in which his Honour said:

*'37 Accordingly, I conclude that some only of the complaints may be appropriately determined by an expert. There should be no stay with respect to those matters. To order a stay of the proceedings to allow the expert to determine some only of the complaints would be unsatisfactory. **The same***

39 (1998) 14 BCL 277

40 [2005] QSC 135

decision-maker should determine all questions in dispute. As the court must determine some, it should determine all.' (emphasis added)

In the Supreme Court of Victoria in *Badgin Nominees Pty. Ltd. v Oneida Ltd. anor*⁴¹, Mr Justice Gillard reviewed the earlier authorities (although not expressly mentioning *Baulderstone Hornibrook* in his judgment) and the relevant principles, and said in his judgment:

23. *Surprisingly, there is no decision at Court of Appeal level in Australia concerning the approach by the court in respect of an application such as the present. Of course there are many cases concerning an application for stay where the dispute resolution procedure is by way of arbitration.*
24. *Nevertheless, the issue has been considered at the highest level in England.*
25. *Before considering the English case it is important to state a number of propositions.*
26. ***First, the parties, both experienced in the conduct of the types of business, the subject of the sale, at arm's length and well able to look after their own interests, with the assistance of their respective solicitors negotiated the purchase agreement.***
27. ***Secondly, in their wisdom they decided and agreed that certain disputes were to be resolved by an expert and not by an arbitrator.***
28. ***Thirdly, their agreement expressly stated in bald terms that the dispute in question was to be decided by an expert and his "determination in writing ... will be conclusive and binding on the parties", without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice.***
29. *It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as mistake, misrepresentation or in capacity.*
30. *The parties here established a scheme concerning the resolution of a dispute in relation to the "quantity, quality or value of the Trading Stock" sold pursuant to the agreement.*
31. ***It was their common intention that the dispute resolution procedure be applied in the event of a dispute.***
32. ***It is their contract: and it should be enforced.***
33. *In Huddart Parker Ltd v. The Ship Mill Hill (1950) 81 CLR 502, Dixon, J stated the principles which should guide a court in an application to stay a court proceeding because of an arbitration agreement.*
34. *In my respectful opinion what his Honour said in that case applies to an application for a stay where the parties have agreed to a dispute resolution procedure involving an expert.*

41 [1998] VSC 188 – 18 Dec 1998 - unreported

35. He said at p.508-509 -

"But the courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in Bristol Corporation v. John Aird & Co, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton, LJ said in Metropolitan Tunnel and Public Works Ltd v. London Electric Railway Co, 'A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it.'"

36. *In my opinion the court clearly has a jurisdiction to stay a court proceeding on the simple basis that "a contract is a contract" and the parties should abide by it.*

37. *I refer to the oft quoted dictum of Lord Tomlin that "the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains" - Hillas & Co v. Arcosi Ltd (1932) 38 Com. Cas. 23 at 29. (emphasis added)*

The reasoning in Badgin Nominees and Fletcher Constructions v MPN Group seems unassailable. The decisions and the reasoning were referred to with approval by Mr Justice Einstein in The Heart Research Institute Limited v Psiron Limited⁴². If the processes of the Court must be invoked to enforce any determination made by the expert, then it is difficult to see how the expert determination process can be said to oust the jurisdiction of the Courts.

The most recent case on this issue is the Queensland decision in Zeke Services Pty Ltd v Traffic Technologies Limited⁴³, in which the clause said to oust the jurisdiction of the Court was in the following terms:

'7.6 Warranty Claims

In the event the Purchaser makes a claim ... for damages for breach of any of the Warranties in accordance with this clause 7 ... and the claim arises in the period prior to payment of the Second Instalment, or in the period between payment of the Second Instalment and prior to payment of the Third Instalment ... the following will apply:

...

(d) *for a period of 14 days from the date of the Claim, the parties must negotiate in good faith to resolve the Claim (Initial Period); and*

(e) *if the Claim has not been resolved in the Initial Period, either party may refer the matter to the Australian Institute of Chartered Accountants to appoint an independent expert (Expert) to resolve the Claim. Any decision of the Expert will be final and binding on the parties and Middletons Lawyers will be granted an irrevocable authority to release the ... Amount in*

42 [2002] NSWSC 646 (25 July 2002)

43 [2005] QSC 135

accordance with the decision of the Expert. The costs of the Expert will otherwise be borne equally by the parties.'

In rejecting the contention that the clause operated to oust the jurisdiction of the Court, Mr Justice Chesterman said in Zeke Services:

'10 *The plaintiffs' submissions take as their starting point the well known proposition which finds expression in such cases as Lee v The Showmens' Guild of Great Britain [1952] 2 QB 329 at 342:*

"If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void..."

The principle is not to be too readily invoked, nor should courts be too astute to construe contracts so as to conclude that they are deprived of jurisdiction with respect to the relevant dispute. As Rich, Dixon, Evatt and McTiernan JJ said in Dobbs v National Bank of Australasia Ltd (1934) 53 CLR 643 at 652:

"A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might be required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them ...

Parties may contract ... but yet make the acquisition of rights under the contract dependant upon the ... discretionary judgment of an ascertained ... person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction ...

What no contract can do is to take from a party to whom a right actually accrues ... his power of invoking the jurisdiction of the Courts to enforce it."

11 *Their Honours also said (at 654):*

"What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award ... But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual

conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend.."

12 *In the same case Starke J said (at 656-7):*

"An agreement not to sue on a contract would doubtless be void, and so, I should think, would be a stipulation in a contract that no proceedings at law ... should be brought in respect of matters referred to arbitration ... But it has never been thought that the submission of disputes to arbitrators whose award was final and conclusive ousted the jurisdiction of the Courts. ... Again, the "conclusive evidence" clauses in various mercantile contracts have never been held to oust the jurisdiction of the Courts ... Certificates of engineers and architects under engineering and building contracts are common; they may certify facts, or approval, or sums to be paid ... In none of these cases is the jurisdiction of the Court ousted: all that has been done ... is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal, and to leave the enforcement of the parties' rights, so ascertained ... to the determination of the Courts of law."

13 *In The South Australian Railways Commissioner v Egan (1973-1974) 130 CLR 506 a clause in an engineering contract, when properly analysed, required any dispute between the Commissioner and a contractor 'to be referred to and decided finally and conclusively by the Chief Engineer for Railways.' Menzies J described the clause (at 513) as 'a barefaced attempt to oust the jurisdiction of the courts.' It amounted to a contractual denial of the contractor's right to seek redress from the courts. All the judges who decided the case held that another clause in the contract, which provided that no action could be brought by a contractor against the Commissioner to recover any money under, or arising out of any breach of, the contract without first obtaining a certificate from the Chief Engineer for the amount sued for, did not oust the jurisdiction of the court, and was valid.*

14 *Gibbs J explained (at 519):*

'The parties to a contract may by their agreement validly provide that the giving of a certificate ... by a third party shall be a condition precedent to the right to bring ... an action. Such a provision is construed, not as ousting the jurisdiction of the courts in respect of a cause of action already accrued, but as having the effect that no cause of action arises until the certificate ... is given ...'

The clause was valid because it made the existence of the certificate a condition precedent to the cause of action: there was no cause of action under the contract unless the certificate were obtained. The clause did not prevent recourse to the courts with respect to any cause of action which existed independently of the need to obtain a certificate.

15 *Given this exposition of the law, I cannot accept that clause 7.6(3) purports to oust the jurisdiction of the courts. It is of the type which the High Court asserted has the approval of the common law. It does not prohibit access to the courts. It provides for a means by which an identified area of dispute, which might arise under the share sale agreement, should be resolved. It does not purport to commit all disputes which might arise under the contract to an expert, as did the clause which so angered Menzies J. The contract allows the parties to enforce their rights under the contract. The fact that some of those rights*

may depend upon the expert's determination does not, as the authorities explain the law, deprive the court of jurisdiction so as to invalidate the clause.

- 16 *Counsel for the plaintiffs referred me to the unreported decision of Heenan J of the Supreme Court of Western Australia, Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (CIV1742/1996; judgment given 2 December 1997), which considered a clause in an engineering contract referring all disputes arising out of the agreement to a referee who should investigate the dispute and make a decision on it 'in any manner that he saw fit' subject to an obligation to observe 'the principle of procedural fairness'. The decision of the referee was to be final and binding.*
- 17 *Heenan J (at 6-7) observed that "... the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute ... Thus the Court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise ...". The clause was, however, struck down because it was:*
- "... against public policy in that it (a) purports to oust the jurisdiction of the Court and (b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract."*
- 18 *The reasoning which led to these conclusions is not entirely clear but it seems that Heenan J took the view that the clause in question was of the type described by Menzies J in Egan. It was a clause which referred all disputes which might arise out of a complicated contract to a functionary who was given exclusive jurisdiction to determine them as he thought appropriate. The clause here in question is not of that type.' (emphasis added)*

Until this difference is resolved at appellate level, Baulderstone Hornibrook represents the law in Western Australia. In the writer's view, Courts in other jurisdictions in Australia (and possibly other judges at first instance in Western Australia) are unlikely to follow Baulderstone Hornibrook on the issue of ouster.

Based on the decisions referred to above, it seems unlikely that Australian Courts would consider an agreement to refer disputes to expert determination an impermissible attempt to oust the jurisdiction of the Courts, in circumstances where the result of the expert determination is subject to enforcement or challenge in the Courts.

Unlike arbitration under the *Uniform Commercial Arbitration Acts*, where an arbitrator's award may be enforced as if it were a judgment or order of the Court (s. 33), to obtain the fruits of a successful expert determination, a party must commence proceedings in a Court of competent jurisdiction for a declaration or order for specific performance of the agreement by which the parties agreed to the resolution of the dispute by expert determination. The unsuccessful party may then seek to resist the Court making such a declaration or order on the basis that the Court should, in its discretion, not enforce the expert determination agreement or, alternatively, challenge the result of the expert determination.

The grounds for challenge of an expert determination are very limited. In Savcor Pty. Ltd. v State of New South Wales⁴⁴, Mr Justice Barrett summarized the relevant principles in the following terms at pp. 596 - 597:

'35 *Mr Rudge also made reference to the cases which have examined the enforceability of the determinations of experts and the grounds on and extent to which those determinations may be reviewed or corrected by courts. He referred to the decision of Rolfe J in Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd (unreported, NSWSC, 12 February 1998) and to the cases there cited, particularly the decision of the Court of Appeal in Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314. The relevant authorities on this are conveniently collected and discussed by Palmer J in Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd [2001] NSWSC 405 and by Mr M S Jacobs QC in "Impugning Expert Determinations in Australia" (2000) 74 ALJ 858. It is sufficient to note, for present purposes, that there is no equivalent, in relation to a determination of an expert, of the judicial review and judicial enforcement jurisdiction conferred by ss.38 and 33 of the Commercial Arbitration Act in the case of an arbitrator's award. **In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert.**' (emphasis added)*

C An issue in dispute is not susceptible to Expert Determination

A further argument which has been raised against holding a party to an expert determination agreement is that the relief which is sought in the dispute can only be given by a Court.

In Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture,⁴⁵ the High Court held that, even though an arbitration clause contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power in the arbitrator to award interest in accordance with the *Supreme Court Act*. Similarly, in IBM Australia Ltd v National Distribution Services Ltd,⁴⁶ the NSW Court of Appeal held that, subject to the terms of the particular arbitration clause, an arbitrator may make awards and orders of the kind contemplated by the *Trade Practices Act 1974 (Cth)*, notwithstanding that this Act expresses that it is 'the Court' which may grant such relief.

This issue was considered more recently by Mr Justice Barrett of the NSW Supreme Court in Savcor Pty. Ltd. v State of New South Wales⁴⁷. Savcor commenced court proceedings seeking, amongst other things, an order pursuant to s. 72 of the *Fair Trading Act (NSW) 1987*, declaring the contract void *ab initio* in consequence of

44 (2001) 52 NSWLR 587

45 (1981) 146 CLR 206

46 (1991) 22 NSWLR 466

47 [2001] NSWSC 596; reported at (2001) 52 NSWLR 587, at p. 596.

alleged misleading or deceptive conduct⁴⁸. The section empowers 'the Supreme Court' to make various orders if 'the Court' finds that there has been misleading or deceptive conduct or other breach of the *Fair Trading Act (NSW) 1987*. The State sought a stay of the Court proceedings in reliance on a 'tiered' dispute resolution clause in the contract imposing a contractual regime for determination of disputes which included expert determination. Savcor argued that an expert could not award relief under s. 72 of the *Fair Trading Act (NSW) 1987*. It sought to distinguish the decision of the NSW Court of Appeal in *IBM Australia Ltd. v National Distribution Services Ltd*, in which it was held that, subject to the terms of the particular arbitration clause, an arbitrator may make awards and orders of the kind contemplated by s. 87 of the *Trade Practices Act (C'th) 1974*.

Mr Justice Barrett rejected that argument, saying:

32. 'it has been the law in this State since *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 that, subject always to the terms of the particular arbitration clause, an arbitrator may make awards and orders of the kind contemplated by the *Trade Practices Act 1974 (Cth)*. Such a power of an arbitrator can, of course, derive only from the relevant arbitration clause. That clause must be such that, upon its proper construction, the parties intend an unknown person who might in future become arbitrator to dispense remedies of a kind which a statute puts in the hands of courts. In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 it was held that, even though an arbitration provision contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power to award interest in accordance with the *Supreme Court Act*. The same reasoning caused the Court of Appeal to conclude in the *IBM Australia* case that an arbitrator might give remedies which the *Trade Practices Act* allows a court to give.

33 Does the same hold good in the case of expert determination? It was argued by Mr Rudge SC, senior counsel for the plaintiff, that while an arbitrator and the functions and role of an arbitrator have characteristics which justify the conclusions in *GIO v Atkinson-Leighton* and *IBM Australia*, the same cannot be said of an expert acting under an expert determination clause. He pointed to provisions of the *Commercial Arbitration Act* which facilitate the proceedings of arbitrators and assimilate them in certain respects to court proceedings. Arbitrators may compel the attendance of persons and the production of documents. They may administer oaths. They must give reasons for their decisions. All these things are provided for in the Act.

34 Mr Rudge also referred to the distinctions drawn between arbitration and expert determination in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277. Heenan J there observed that, as Lord Esher MR said in *In Re Carus-Wilson and Greene* (1886) 18 QBD 7, arbitration is "a judicial enquiry worked out in a judicial manner". An arbitrator, it was said, "must not only be impartial but, unlike an expert, must decide the dispute in accordance with the substantive law".

35

48 s. 72 of the *Fair Trading Act (NSW) 1987* is in similar terms to s. 87 of the *Trade Practices Act (C'th) 1974*

36 *The various statutory incidents of and adjuncts to the role of an arbitrator were not in any way the source of the conclusions in GIO v Atkinson-Leighton and IBM Australia. Nor was any underlying assumption that an arbitrator would preside over some form of quasi judicial inquiry. Those decisions turned wholly on what Mason J described in the former as "the real question", namely:*

"... whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter."

37 *That is also "the real question" here in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, in the circumstances in which they are placed, a court would make an order, pursuant to ss.72(1) and 72(5)(a) of the Fair Trading Act, declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. If such an agreement may be made expressly, it may also arise by implication if the terms of the referral clause so warrant.'* (emphasis added)

D An issue in dispute is not suitable for Expert Determination by the Expert appointed (or to be appointed)

In his judgment in Badgin Nominees, in relation to determination of issues of law by a non-legally qualified person, Mr Justice Gillard expressed a different view to Mr Justice Heenan in the earlier case of Baulderstone Hornibrook Engineering Pty. Ltd, saying:

‘132. *I refer to what I said in the Commonwealth of Australia case, supra at p.5 as to what the parties should accept on a reference to an expert. I said -*

"The parties to a contract agree that the value is to be determined by an expert acting as such using his own skill, judgment and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination 'warts and all' and subject to such deficiencies as one would expect in the circumstances. The parties put in place a procedure, they must accept the result unless it would be contrary to their common intention."

133. *In my opinion the matters raised by Mr Loewenstein are matters which the parties contemplated. They put in place the procedure and if it involves a question of law as to construction of the agreement, the gathering of evidence without regard to rules or procedures, a determination in which the expert may rely upon his own experience and knowledge and without hearing the parties or any valuation experts on their behalf, the parties are bound by it.*

134. *They put it in place, it binds them'*. (emphasis added)

Similar views were expressed in the Victorian decision of *Age Old Builders Pty Ltd v Swintons Limited*⁴⁹. On this issue, Mr Justice Osborn said, at paragraph 70:

- (a) *First, the Tribunal appears to give substantial weight to the fact that the dispute went beyond matters in respect of which the building consultant had apparent expertise. There are two factual observations to be made with respect to this. The first is that the curriculum vitae of the building consultant which was supplied by the respondent to the appellant as evidence of his appropriateness before his appointment, is in fact so extensive as to suggest he could properly be regarded as having expertise in assessing claims under a contract of the type in issue. An expert may become an expert through experience as well as through qualification. It is very far from clear that the building consultant's expertise should be regarded as necessarily limited in the manner contemplated by the Tribunal. Secondly, the respondent put forward the building consultant as an expert presumably precisely because it believed he did have appropriate expertise to make an appropriate determination. The essence of the agreement between the parties was that the expert would perform an agreed role. It was for the parties to that agreement to agree as to whether he was for their purposes sufficiently qualified to perform that role. In circumstances of this kind considerations of convenience and cost effectiveness may lead to an agreement that a person having some relevant expertise (only) is to be regarded as sufficiently expert by the parties. I can see nothing in such an agreement which is improper or transforms the character of the expert's role into that of an arbitrator. Once it is accepted as the Master of the Rolls said in *Carus Wilson* that there is an intermediate category which is not to be regarded as arbitration, where though a person is appointed to settle disputes that have arisen, it is still not intended he or she should enter into an inquiry in the nature of a judicial inquiry, the extent of the expert's expertise cannot be decisive of the characterisation of his role.*' (emphasis added)

In the Queensland decision in *Zeke Services Pty Ltd v Traffic Technologies Limited*⁵⁰, Mr Justice Chesterman took a slightly different approach to that taken in Victoria in *Badgin Nominees* and *Age Old Builders*, and in New South Wales in *The Heart Research Institute* (and other cases). His Honour said, in relation to this issue:

- '19 *There is an undoubted jurisdiction to stay a legal proceeding where the parties have by contract agreed that their dispute shall be determined by means other than curial adjudication. As Lord Mustill explained in *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors* [1993] AC 334 at 352, there is an "inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way." The basis for the power was said to be a "wider general principle ... that the court makes people abide by their contracts and ... will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."* (Per MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126.)

49 [2003] VSC 307 (21 August 2003). An appeal from His Honour's decision was dismissed on other grounds by the Victorian Court of Appeal [2005] VSCA 217.

50 [2005] QSC 135

- 20 ***The jurisdiction has been recognised in a number of cases, in this country, at first instance: Badgin Nominees Pty Ltd v Oneida Ltd Anor [1998] VSC 118; The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646; Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd [2003] NSWSC 1134.***

I have not included cases concerning a stay of proceedings where the parties had agreed that disputes between them should be referred to arbitration. Those cases are regulated by the various arbitration statutes.

- 21 ***The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in Channel Tunnel, by the High Court in Dobbs and Huddart Parker Ltd v The Ship Mill Hill and Her Cargo (1950) 81 CLR 502 (an arbitration case) and by Gillard J in Badgin. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.***
- 22 ***Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done.***
- 23 ***There is a clear distinction between arbitration and expert determination. The former involves a more or less formal adjudication of the respective cases put before the arbitrator. The court exercises a degree of supervision over the conduct of arbitrations and arbitrators, and minimum standards of procedural fairness are required. There are no such safeguards with respect to expert determination. Lord Esher MR explained the ordinary case of an expert determination In Re An Arbitration Between Dawdy and Hartcup (1885) 15 QBD 426 at 430:***

“... if a man is, on account of his skill ... appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge ... (He has) to determine the matter by using solely (his) own eyes, and knowledge, and skill.”

Einstein J (at [16]) in Heart Research Institute noted that “Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.” The most common examples are where a valuer is appointed to fix the rent of demised premises or a man experienced in a particular line of business is called on to fix the price of stock in trade, or say whether it is saleable.

- 24 *It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character.*
- 25 *In Cott UK Ltd v FE Barber Ltd (1997) 3 All ER 540 the court refused to stay an action on a contract which contained a clause referring disputes to the determination of an expert on the grounds that:*
- (a) *There were no rules identified in the contract or in the expert's professional association governing the mode of his determination.*
 - (b) ***The expert appointed had no experience in the areas of dispute.***
 - (c) *The contract gave no guidance as to the rules or principles pursuant to which the expert was to approach his determination.*
 - (d) ***The nature of the dispute itself – a claim for damages for breach of contract – was inapt for determination by an expert.***
- 26 *Gillard J in Badgin doubted the relevance of some of the matters relied upon by the court in Cott and I respectfully share those doubts. The second and fourth points do, with respect, appear to be of substance. Gillard J thought that:*
- “... the fact that there were issues concerning a number of legal questions, whether there was a breach ... of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person ... [I]n the end it is a question of what the term of the contract provides and the nature of the dispute.’*
- 27 *The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed.*
- 28 *All but three of the defendants' complaints are suitable for expert determination. The expert is an accountant. Most of the complaints concern the state of the company's accounts and whether they properly recorded the company's liabilities. It would seem entirely appropriate that an accountant should determine these questions. If the matter went to trial the judge would be informed by expert evidence from accountants about these matters. All that is involved in the determination of these complaints is that the accountant uses his professional knowledge in a perusal of the company's accounts and other records. The determination is likely to be quick and relatively cheap. There can be no sensible objection to the parties being held to their bargain that those disputes be resolved in that way.*

- 29 *The same is not, I think, true of two categories of complaint: those concerning the fictitious employment of staff and the alleged misrepresentation as to bad debts. They are described in paragraphs 5(d), (e) and (h) of these reasons.*
- 30 *The second of these categories of complaint involves an alleged misrepresentation that all debts owing to the company would be recovered. The misrepresentation is said to have been made by the omission from the company's accounts of any provision for bad or doubtful debts. If that were a proper description of the complaint it may well be the sort of dispute an accountant could readily resolve. There is, however, more to it. For a start, there must be a doubt that the omission gives rise to the representation alleged. There are well known difficulties in basing actions for damages on silence. I would have thought it more likely that the omission would, at most, amount to a representation that the company's officers had insufficient reason to think that all debts would not be paid. The dispute, therefore, raises a question of what the company's officers believed about the recoverability of the debts and the reasonableness of any grounds for that belief. There are, therefore, questions of mixed fact and law to be resolved as to whether a representation was made and the content of any representation. Such questions are more readily answered by a lawyer than an accountant. Whoever makes the determination, the process must involve some argument, legal in nature. This is not the paradigm of applying one's special knowledge to one's own observations.*
- 31 *The same considerations apply to the complaint about fictitious employees. There is clearly a dispute of fact concerning whether these people were employed by the company and performed services for it. It does not seem likely that the question can be resolved merely by an examination of the company's records. No doubt they show payments to the people in question on the basis that they were employees. The question is whether the reality was different to that which is recorded. This, too, will involve an inquiry and an examination of employer and employees. It is not a matter with respect to which an expert accountant is particularly well equipped to answer. It is more the province of a trained fact finder, such as a judge or arbitrator.*
- 32 ***It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement.***
- 33 ***Equally significant is the point that as long as an expert acts within the terms of the contract pursuant to which he was appointed the parties are bound by his determination. Lawton LJ described the position well in Baber v Kenwood Manufacturing Co Ltd (1978) 1 LLR 179 at 181:***
- "They were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening."*
- 34 ***If an expert has conducted his examination in accordance with the contract, that is he has determined or valued that which he was to do, the only basis on which the determination***

can be set aside is dishonesty. (See the judgment of McHugh JA in Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 and, more generally, 'Impugning Expert Determinations in Australia' by Marcus S Jacobs QC (2000) 74 ALJ 858.)

- 35 *These three complaints are not readily amenable to expert determination. That paradigm does not accommodate these aspects of the dispute, which require an adjudication between opposing contentions. The answers cannot be found in expert observation, nor informal, one sided, fact finding. The designated expert, an accountant, has no obviously relevant skill or learning to equip him for an adjudication of disputed fact. This point was important to Heenan J in Baulderstone. The determination may be made without hearing both sides of the dispute and, therefore, without giving them, or any one of them, an opportunity to bring relevant evidence to the expert's attention. One complaint requires an answer to a question of law or mixed fact and law, more suitably given by a lawyer. These points were important to the outcome in Cott.*
- 36 *When one adds to these concerns the point that should the expert fall prey to muddle, or make a mistake, his determination will nevertheless be binding in the absence of fraud, a good ground has been shown for refusing to stay the action.'* (emphasis added)

It can be seen that there is a difference between the approach respectively taken in the Western Australian and Queensland decisions of Baulderstone Hornibrook and Zeke Services Pty Ltd⁵¹, and the approach taken in Victoria in Badgin Nominees and in New South Wales in The Heart Research Institute (and other cases).

It is worth noting, in relation to this issue, that Rule 3(1) of the IAMA *Expert Determination Rules* expressly provides as follows:

'The parties agree that the Expert is an expert in the subject matter of the Dispute.'

While Rule 3(1) of the IAMA *Expert Determination Rules* has not been the subject of judicial consideration, a party which agrees to expert determination under those Rules should be precluded from arguing to the contrary. This position is reinforced by Rule 12 of the IAMA *Expert Determination Rules*, which provides as follows:

'RULE 12 Waiver of Right to Object

1. *Subject to any rule of law or equity or written agreement of the parties to the contrary, if a party to the Process takes part, or continues to take part, in the Process without making within a reasonable time thereafter any objection:*
 - a. *that the Expert lacks substantive jurisdiction;*
 - b. *that the Process has been improperly conducted,*
 - c. *that there has been any other irregularity affecting the Expert or the Process,*

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then that party shall be deemed to have waived its right to make such objection later, before a Court, unless it shows that, at the time it took part or continued to take part in the Process, it did not know and could not with reasonable diligence have discovered the grounds for the objection.

2. *Subject to any Statute Law or principle of common law or equity, or written agreement of the parties to the contrary, where the Expert rules that he or she has substantive jurisdiction and a party to the Process who could have questioned that ruling in a Court does not do so within any time fixed by the Expert (or if no time is fixed, within a reasonable time), then that party shall be deemed to have waived any right it may otherwise have had to later object to the Expert's substantive jurisdiction on any ground which was the subject of that ruling, and shall be deemed to have submitted to the Expert's jurisdiction.'*

4 DRAFTING THE DISPUTE RESOLUTION CLAUSE IN A FORM WHICH IS SUFFICIENTLY CERTAIN, WHICH GIVES EFFECT TO THE PARTIES WISHES, AND PROVIDES COST EFFECTIVE DISPUTE RESOLUTION

A Preliminary Considerations

It is a basic principle of contract law that, for an agreement to be enforceable, it must be more than simply an agreement to agree. As Giles J said, in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,⁵² at p. 209:

*'An agreement to conciliate or mediate is not to be likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by **conduct of sufficient certainty for legal recognition of the agreement.**'* (emphasis added)

Accordingly, the dispute resolution clause in the original contract must go beyond an agreement to agree in the future on a particular dispute resolution process. While parties could satisfy the requirement of certainty by delegating the choice of an appropriate process to an identified third party nominator,⁵³ in practice this alternative is unlikely to find much support in the commercial community for obvious reasons.

The other alternative is the catch all (or '*one size fits all*') approach, in which the dispute resolution clause is drafted in terms which are sufficiently certain for enforcement, yet are sufficiently flexible to accommodate the potential use of a range of processes to achieve resolution of any dispute as expeditiously and cost-effectively as possible.

As noted above in the introduction to this paper, in my opinion the most effective and efficient process will probably involve a 'tiered' approach, in which one (or more) of the consensual ADR processes is employed before resorting to a determinative process.

52 (1992) 28 NSWLR 194, per Giles J, at p. 209, quoted at paragraph 45 in *Aiton* extracted above.

53 such as the President of the Institute of Arbitrators & Mediators Australia.

A ‘tiered’ dispute resolution clause can incorporate by reference Rules formulated by one or more of the dispute resolution organizations,⁵⁴ in whole or in part. Alternatively, a detailed prescriptive clause may be drafted for a particular contract.⁵⁵ In the writer’s view, the former approach is preferable.

In drafting a ‘tiered’ dispute resolution clause, it needs to be recognised that practical problems can arise from the appointment of the same dispute resolution practitioner in both the consensual process and the determinative process, as a perception of bias may arise from the approach taken (or remarks made) by that practitioner in the consensual process. Reality testing in private session with the parties is an important tool in mediation or conciliation. While a robust approach to reality testing by the dispute resolution practitioner will assist parties to reach a realistic assessment of their prospects of success, the expression of robust views by that practitioner will inevitably lead to an application that the practitioner be disqualified from later determining the matter as expert or arbitrator.

Rule 11 of the IAMA Mediation and Conciliation Rules expressly provides:

‘1 If the Dispute is not resolved, the Mediator or Conciliator shall not, without the written consent of all parties, accept an appointment to act as arbitrator, or act as advocate or adviser to any party, in any subsequent arbitral or judicial proceedings arising out of or in connection with the Dispute.’

This issue is dealt with in a similar manner in the *Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property*, which was developed by IAMA for the Australian Seed Federation, to provide fair, quick and cost-effective resolution of claims, in the Australian seed industry in a ‘tiered’ process involving conciliation and arbitration.⁵⁶ Clause 3 of those Rules provides:

‘3.5 If the Parties do not settle the dispute within six (6) weeks of the Conciliator’s appointment (or such other time agreed in writing by the Parties):

(a) the dispute may be referred to arbitration; and

54 Such as the IAMA *Mediation and Conciliation Rules*, *Expert Determination Rules* and *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)*, and the ACICA *Arbitration Rules*.

55 Such as those contained in the New South Wales Government GC21 General Conditions of Contract, which is referred to above in Section 2 C (i) of this paper.

56 The *Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property* are also available at www.iama.org.au.

(b) *unless otherwise agreed by the Parties, the Conciliator shall within seven (7) days provide a confidential written report to the Parties expressing the Conciliator's views of what would constitute a reasonable resolution of the dispute.*

3.6 *The documents previously submitted to the Conciliator shall be passed on to the Arbitrator, together with a report by the Conciliator on the facts, issues, claims and counterclaims. The Conciliator must not communicate to the Arbitrator any suggestions for settlement of the dispute nor any information given in confidence by either party nor any views expressed by the Conciliator.*

3.7 *If at any stage the Parties agree or the Conciliator considers that the dispute is inappropriate for continuation of the conciliation process, then the matter may be referred to arbitration under these Rules.*

3.8 *Unless jointly requested by the Parties, the Conciliator shall not be appointed as Arbitrator.*

3.9 *The Conciliator shall not act as an advocate, adviser or witness for a party in the arbitration, or be required to disclose any information about any matter arising during the conciliation procedure other than as provided under Rule 3.6.'*

B Which ADR processes should be nominated in the dispute resolution clause

(i) *Should the clause provide for negotiation?*

It is quite common for a 'tiered' dispute resolution clause to provide firstly for negotiations between representatives of the parties before reference to some other ADR process or processes. The advantage of including such a provision is that time and cost will be saved if the representatives of the parties manage to settle the dispute before referring it to a dispute resolution practitioner and incurring significant expenditure in engaging lawyers and experts. However, in my opinion, that is outweighed by the disadvantages of including such a provision, namely:

- as noted in the cases referred to in Section 3 A & B of this paper, any such provision may be held to be unenforceable; and
- even if 'fresh' negotiators are used by the parties, as recommended in Section 1 A of this paper, in most cases there would be less likelihood of settlement than if the services of a skilled dispute resolution practitioner were used to facilitate discussions between the representatives of the parties.

(ii) *Should the clause provide for mediation or conciliation?*

As indicated above in Part 1 B of this paper, conciliation is often a better option in commercial disputes because the process allows for provision of an opinion by the conciliator on the merits of the dispute, and the likely outcome if it is not settled by agreement between the parties.

(iii) Should the clause provide for arbitration or expert determination?

For the reasons indicated above in Part 2 C (ii) of this paper, in the writer's view arbitration should be preferred to expert determination as the adjudicative process in the dispute resolution clause, in the event that the dispute is not settled by (or as a result of) conciliation. As views may differ on this issue, an alternative provision is set out in Part 4 C below for expert determination instead of arbitration.

(iv) What form of arbitration should be provided for in the clause?

The form of the arbitration clause will depend on:

- (a) whether disputes arising under the contract will require international arbitration or domestic arbitration;
- (b) if disputes arising under the contract will require international arbitration, whether the circumstances are such as to justify the additional expense of an administered arbitration (and, if so, to what extent);
- (c) whether disputes arising under the contract are likely to be suitable for arbitration by a process which is wholly or substantially 'documents only'.

If disputes arising under the contract will require domestic arbitration, then the IAMA *Expedited Arbitration Rules* should be nominated in the clause if those disputes are likely to be suitable for arbitration by a process which is wholly or substantially 'documents only'. Otherwise, the IAMA *Rules for the Conduct of Commercial Arbitrations* should be nominated.

If disputes arising under the contract will require international arbitration, and the circumstances are such as to justify the significant additional expense of such an arbitration being administered by ACICA, then the ACICA *Arbitration Rules* should be nominated. If the circumstances are not such as to justify the expense of such an arbitration being administered by ACICA, then the IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)* should be nominated in the clause, or the UNCITRAL Model Law should be nominated in the clause.

C The contents of the dispute resolution clause

To avoid the need to re-invent the wheel (as it were), it is desirable that the dispute resolution clause should incorporate institutional Rules by reference, modified to suit the particular circumstances of the contract and the wishes of the parties. Apart from the considerable saving in time and cost, the advantages of doing so are:

- (a) Rules such as the various IAMA *Rules* and the ACICA *Arbitration Rules*:

- provide a framework for the conduct of the various dispute resolution processes in an efficient and cost-effective manner;
- are sufficiently certain for enforcement;
- can be modified as and where required to give effect to the wishes of the parties given that (subject to (b) below) most of the detailed provisions are expressed to be subject to the contrary agreement of the parties.

(b) The IAMA *Rules* contain express provisions setting out the duties of the dispute resolution practitioner and the parties to ensure that the particular process is conducted expeditiously and cost-effectively, which provides an assurance that processes conducted under the IAMA *Rules* will be conducted in that manner.⁵⁷

Set out below are the various alternative formulations of a dispute resolution clause, so as to be sufficiently certain, to give effect to the parties wishes, and provide cost effective dispute resolution, incorporating by reference the institutional Rules for various processes. The alternative in sub-paragraph (vii) is suitable for use where there is an industry based dispute resolution scheme along the lines of the *Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property*, where the dispute resolution scheme itself makes provision for both conciliation and arbitration.

(i) Conciliation / expedited arbitration

‘Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):

57 See Rules 10 & 11 of the IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating The Expedited Commercial Arbitration Rules)*, Rules 5 & 6 of the IAMA *Mediation and Conciliation Rules*, and Rules 5 & 6 of the IAMA *Expert Determination Rules*.

- (a) the dispute shall be referred to arbitration in accordance with the *Expedited Arbitration Rules* of The Institute of Arbitrators & Mediators Australia; and
- (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(ii) Conciliation / arbitration other than expedited arbitration

'Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to arbitration in accordance with the *Rules for the Conduct of Commercial Arbitrations* of The Institute of Arbitrators & Mediators Australia; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(iii) Conciliation / expert determination

'Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.

- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to expert determination in accordance with the *Expert Determination Rules* of The Institute of Arbitrators & Mediators Australia; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(iv) Conciliation / international arbitration (administered by ACICA)

'Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to arbitration in accordance with the *Arbitration Rules* of The Australian Centre for International Commercial Arbitration; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(v) Conciliation / international arbitration (IAMA Rules)

'Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to arbitration in accordance with the *Rules for the Conduct of Commercial Arbitrations* of The Institute of Arbitrators & Mediators Australia; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(vi) *Conciliation / international arbitration (UNCITRAL Model Law)*

'Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Mediation and Conciliation Rules* of The Institute of Arbitrators & Mediators Australia.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to arbitration in accordance with the *UNCITRAL Model Law on Arbitration*; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.'

(vii) *Industry based (or other) dispute resolution scheme providing for conciliation and arbitration (example based on the Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property)*

‘Any dispute arising out of or in connection with this contract, or the performance of obligations by any party to the contract, shall be resolved as follows:

- (1) Unless otherwise agreed in writing by the parties, the dispute shall firstly be referred to conciliation in accordance with the *Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property*.
- (2) If the parties agree in writing that the dispute should not be referred to conciliation, or if the dispute is not settled within six (6) weeks of the conciliator's appointment (or such other time agreed in writing by the parties):
 - (a) the dispute shall be referred to arbitration in accordance with the *Australian Seed Federation Dispute Resolution Scheme for the Domestic Trade in Seed for Sowing Purposes and for the Management of Intellectual Property*; and
 - (b) unless otherwise agreed in writing by the parties, the conciliator appointed shall within seven (7) days provide a confidential written report to the parties expressing the conciliator's views of what would constitute a reasonable resolution of the dispute.’

5 CONCLUSIONS

The various alternative clauses suggested above are in terms which are sufficiently certain for ‘enforcement’, and provide a ‘tiered’ dispute resolution process which offers flexibility and should best accommodate the wishes of the parties while achieving efficient and cost-effective dispute resolution.

However, the facts of a particular dispute could be such that an experienced skilled dispute resolution practitioner may form the view that some variation of the process specified in the dispute resolution clause may offer realistic prospects of savings in time and cost of resolving the dispute.

As indicated above, a skilled dispute resolution practitioner appointed under the contractual dispute resolution clause has a valuable part to play in assisting the parties to recognise that greater efficiency and economy may be achieved by utilising a dispute resolution process which may differ from the process agreed at the time of the contract.

It is to be expected that many lawyers, and possibly those of their clients who have experienced the traditional passive approach to litigation and arbitration, may well view this sort of suggestion with some degree of apprehension. To overcome this, the dispute resolution practitioner must 'sell' the benefits of the process proposed to the parties and their lawyers.

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

An alternative (if it appears that the procedure referred to in the preceding paragraph may not be successful) is the 'try before you buy' approach, whereby the dispute resolution practitioner seeks to persuade the parties to try the approach on a limited number of the contested issues (eg. negotiation between experts, or non-binding expert determination on a number of the smaller claims) before deciding whether or not to extend the suggested procedure to other claims.

Even if a dispute resolution practitioner had the power to do so, it is obviously not desirable to insist on measures which are unanimously opposed by the parties and their lawyers. If only some of the parties consent, then the dispute resolution practitioner's power to direct this sort of approach is somewhat restricted, according to any applicable legislation (such as the *Uniform Commercial Arbitration Acts*), the common law, and the terms of the dispute resolution clause and particular institutional procedural rules incorporated by reference.

From the dispute resolver's perspective, one may ask, rhetorically: 'Why bother?' The answer is to be found in something said in 1996 by Mr Justice Drummond of the Federal Court of Australia, in relation to pro-active arbitration, namely:⁵⁸

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

58 In the 1996 John Keays Lecture - see Volume 15 number 2 of *The Arbitrator* (August 1996), at p. 87.

across the whole community, as a valuable means of resolving disputes that is truly alternative to litigation and ADR.'
