The American Review of International Arbitration

1996

7 Am. Rev. Int'l Arb. 267

ARTICLE: ASSESSING DISPUTE RESOLUTION PROCEDURES

I. INTRODUCTION

A revolution has occurred in dispute resolution in Australia over the past twenty years. It has extended to:

- procedures;

- personnel;

- laws;

- writings.

A much broader range of techniques or procedures are now in common use for dispute resolution. The most evident are the alternative dispute resolution procedures, particularly mediation. There are other ADR techniques including the mini-trial and various hybrid procedures. It should not be forgotten, too, that in the traditional adjudicative dispute resolution procedures (both litigation and arbitration), there have been significant developments. Court rules have been revised and arbitration has seen some innovation in the form of fast-track arbitration and arbitration on docu-

ments alone. Nevertheless, it is true to say that ADR, and in particular mediation, is at the epicenter of the dispute resolution revolution.

Along with new techniques have come more diverse personnel. Lawyers no longer have a stranglehold on dispute resolution and lay people have entered the field, especially in relation to mediation. They have swelled the ranks of nonlawyers who previously were confined to specialized industry and trade arbitrators.

Judges and legislators have also been active in advancing dispute resolution. The most significant legislative developments have concerned arbitration. The uniform Commercial Arbitration Act n1 did away with many of the shortcomings of the previous law and gave arbitration the independence and flexibility which is essential for its effective utilization. I would venture to suggest that reform is not complete and that it is perhaps time to revisit the Commercial Arbitration Act and effect further modernization.

In the field of international arbitration, the International Arbitration Act 1974 n2 [*268] has given Australia an international arbitration law as modern as any in the world and one which has an international currency. The Act also implements in Australia the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards n3 and the Washington or ICSID Convention. n4 In addition, the courts have, in general, tended to support arbitration and mediation and recognize the growing place and importance of non-curial dispute resolution. Enlightened courts have taken the view that the parties should abide by their agreements on dispute resolution and have even held that mediation agreements are enforceable. There are, however, a few notable exceptions.

With these developments has come an explosion of writings including books, articles and journals specifically devoted to mediation, arbitration or dispute resolution in general. These

loose-leaf services, textbooks, journals and articles of which, unfortunately, this article constitutes an addition, have given a credibility to the new procedures but have also advanced the science of dispute resolution and the professionalism of the participants. Not long ago it was remarked that a lawyer may be negligent if he or she fails to advise a client of the possibilities of dispute resolution other than litigation. In my view, a lawyer drafting an agreement, particularly an international contract, may also be derelict if he or she does not advise of the inclusion in the agreement of an appropriate dispute resolution provision.

Where does this new learning or awareness of dispute resolution techniques lead us? In the first place, we should be aware of the new techniques and of the range of possibilities that are available to disputants. But beyond this, I think it is important to ask some fundamental questions:

- Why are some techniques used rather than others?

- What is the most appropriate procedure to resolve a particular dispute?

- How can the various procedures be improved?

Dispute resolution practitioners tend to specialize. Barristers, of course, are most familiar with litigation. Others practice as mediators and yet others undertake arbitrations. We may have our own preferences based on our experiences, skills and prejudices. But nonetheless, we should recognize that no one dispute resolution procedure is superior to all others in all situations. In other words it is foolish, I believe, to say that litigation is always to be preferred to other methods of dispute resolution or to say that every dispute should go to mediation. There are clearly instances when one dispute resolution procedure is more appropriate than another.

How, then, does one determine which dispute resolution procedure should be used in a particular case? The matter may well be complicated by the fact that the choice often has to be made be-

fore a dispute has arisen. In particular, if a dispute resolution procedure is to be included in a contract, then the choice will have to be made at that stage. [*269]

One way of evaluating dispute resolution procedures is by reference to certain criteria which will highlight the benefits and detriments, the strengths and weaknesses of the procedures. I will therefore commence by outlining the criteria which I believe to be relevant and will then attempt to apply these criteria to the main dispute resolution processes. I do not claim that the criteria which I set out are the only relevant ones but they do encompass many of the considerations which I believe are important.

II. CRITERIA

A. Nature of Tribunal and Process

These criteria specifically focus on the tribunal or personnel involved and on the process followed. The considerations which come to mind in relation to the tribunal or personnel are:

- impartiality and integrity;

- appropriateness;

- expertise.

The considerations relevant to the process include:

- fairness;

- appropriateness;

- flexibility.

With some of these considerations, it is perception as much as substance which is important. Thus, for example, a judge or arbitrator must not only be impartial but must be seen to be impartial. There are circumstances where a perception will render a tribunal or personnel inappropriate even though in substance the tribunal may be perfectly capable of carrying out its task fairly. Not all the

criteria are of equal importance in every case. For example, the criteria of flexibility will be of less importance in assessing the suitability of a tribunal to pass upon the constitutional validity of legislation as opposed to a tribunal charged with the resolution of international commercial disputes which may vary considerably and require adaptation of processes.

B. Basis of Decision/Resolution

The sorts of considerations which are relevant here are whether the decision or resolution of the dispute is:

- fair/objective;

- correct/according to law.

Let us take, by way of example, a simple dispute between a vendor and the purchaser of a dog. The dog is sold as a pure-bred Pekinese. Later, the purchaser expresses doubts and claims that the dog is in fact a cross breed. The purchaser has become fond of the dog and wishes to keep it but wants some monetary allowance because it is not a pure breed. If the dispute is resolved by engaging an expert or by appointing an arbitrator who hears expert evidence, then the decision will be on the facts and will hopefully be correct. However, the parties may regard this as too expensive. They may prefer to settle their [*270] difference by the toss of a coin. This decision is unlikely to be correct in the sense of being based on the facts but it may be regarded as fair in the sense that it is impartial and each party has an equal chance of winning. The parties may well conclude that the cost of achieving a "correct" decision is too high and that they will resolve the dispute by the toss of a coin which although not correct, is at least fair. If, however, the parties agree to resolve the dispute by seeing who can run to the vendor's front gate the fastest, and if the vendor does not disclose that he is a trained athlete, the decision is likely to be neither correct nor fair.

The courts, and probably the community, regard the correctness of a decision as important. That is why our legal system makes provision for appeals from the decision of a tribunal or judge. Allowing a decision to be taken by a tribunal or judge, is a fair and objective way of resolving a dispute. But by allowing appeals, and sometimes a number of appeals, from such a decision, the legal system has adopted the stance that fairness and objectivity are not enough. The principle of correctness has been superimposed and has been given great importance even at the expense of other considerations such as speed and cost.

Not so long ago the consideration of correctness was applied to arbitrations with great rigor. Judicial intervention during and after the arbitral process were commonplace. Thus, it was not sufficient that the arbitrator sat as an impartial decision-maker. His or her decision had to be correct and in consequence the courts freely intervened and reviewed the acts and decisions of arbitrators. Judicial intervention in domestic arbitrations has been curtailed under the Commercial Arbitration Acts and it has been severely restricted in international arbitrations under the UNCITRAL Model Law which is given effect by the International Arbitration Act 1974. Thus, the desirability of correctness has given way to other considerations primarily relating to speed, cost and the enforcement of the dispute resolution process agreed to by the parties. In other words, having an arbitrator decide is regarded as fair and objective and it is also appropriate that the dispute is resolved by the tribunal or process designated by the parties.

I approve of these developments. I do not believe that "correctness" is a consideration that outweighs all others. Also, I am somewhat skeptical as to whether "correctness" is an objectively attainable goal. Sometimes disputes involve fairly complicated or fine points of law. A judge, at first instance, may decide one way, an appeal court may allow an appeal and a further appeal may be allowed or dismissed by a court which is deeply divided on the issue, perhaps three judges in the

majority and two in the minority. In these circumstances, is it true to say that there is only one "correct" decision and that the other view is "incorrect"? Indeed, if we add up the number of judges involved in the original action and the two appeals, there may be an equal number in favor of each view. "Correctness" may therefore only be a subjective matter and its importance can be overstated. [*271]

C. Commercial Considerations

There are at least two matters whichare relevant and which, to some extent, overlap. These are:

- speed;

- cost.

These considerations are generally very important in assessing a dispute resolution procedure. In large part, mediation developed in the United States in response to the slow speed of dispute resolution by litigation, and in particular, its high cost. We return to our illustration of a dispute concerning the breed of the dog. To resolve this dispute by litigation or arbitration may involve costs out of proportion to the amount claimed. Thus, the desirability of a "correct" decision may have to give way to the need for a speedy and cost-effective decision. Deciding a dispute on the basis of a toss of a coin may be appropriate! On the other hand, if the parties regard a "correct" decision as very important despite the cost, they may choose arbitration or litigation. The criteria of correctness and speed and cost could, perhaps, be balanced by choosing to resolve the dispute by obtaining the opinion of an expert without formal arbitral or litigation processes. This would be slower and more expensive than tossing a coin but faster and less expensive than arbitration or litigation. Further, the decision is more likely to be "correct" than the result arrived at by tossing a coin.

While litigation and arbitration are regarded as fairly expensive methods of dispute resolution, efforts are being made to improve the speed and cost of these procedures. In particular, arbitration offers some opportunity for flexibility and the parties may agree to any one or more of the following:

- reduce or dispense with discovery of documents;

- reduce or eliminate pleadings;

- impose strict time limits;

- dispense with a hearing and have arbitration on the documents alone.

There are, of course, many other ways of speeding up and containing the costs of arbitration. One innovation developed in the United States is "finaloffer" arbitration. This involves each party submitting its final offer to the arbitrator who can only choose between the two alternatives presented. A variation is for the parties to set out their final offer but not disclose it to the arbitrator. After the arbitrator has made his decision, the party's offer which comes closest to the arbitrator's decision is accepted.

D. Effectiveness

The effectiveness of a dispute resolution procedure is, of course, of central importance. There are two considerations here:

- Will the procedure provide a result in the sense of a determination or resolution?

- If so, will it be enforceable?

Let us look at the first consideration. Arbitration will result in an award and litigation in a judgment. However, a criticism sometimes levelled at mediation is [*272] that it may not provide a result. It is not adjudicative but is consensual in nature. A mediation is successful if the parties agree on a resolution of their dispute and terms of settlement. If they do not, there is no result which

concludes the dispute. Arbitration and litigation will virtually always provide a result in the form of an award or judgment.

Even if there is a result, the question of its enforceability may arise. Court judgments might be thought to pose few problems. A court exercises the judicial power of the State and its judgment is enforceable by utilizing the various execution processes available. However, a problem about the enforceability of a court judgment may arise in international transactions where the defendant does not have assets within the territory of the local court. Whilst it is axiomatic that a court judgment is enforceable in domestic cases, it may not be enforceable in international transactions.

The enforceability of arbitral awards is similar to that of court judgments although the international enforcement of an award is easier and less problematic than the international enforcement of a court judgment. Domestically, legislation allows arbitral awards to be enforced in much the same way as court judgments. Thus, the dispute resolution procedures available for the enforcement of court judgments are, generally, available for the enforcement of arbitral awards. The situation of settlements arrived at in a mediation is less certain. It may be that the instance of voluntary compliance with a mediated settlement is very high but enforcement must be considered in cases where a party has a change of mind and decides not to carry out the terms of the settlement arrived at in a mediation. In general, such a settlement is not as easily enforceable as a court judgment or an arbitral award. Unless there is specific legislation in point, it would seem that the settlement would have to be enforced as a contract. This would involve the enforcing party taking action in a court on the agreement and obtaining judgment. The judgment would then be enforceable in the ordinary way. If mediation takes place after arbitration proceedings or judicial proceedings have been instituted, it may be possible to record the terms of the settlement in the form of a consent award or a consent judgment. Where this is done, then the settlement will be enforceable the same way as any other

award or judgment. But certainly the enforceability of a mediated settlement would be much improved if legislation were to provide for its direct enforcement in the same way as an arbitral award.

So far I have been talking about the effectiveness and enforcement of the results of dispute resolution, be it an award, judgment or agreed settlement. But effectiveness and enforcement may also arise at an earlier stage if one party decides to seek redress in court and bypass an alternative procedure for dispute resolution previously agreed to in a contract. Here the question of the enforceability of the agreed dispute resolution procedure will arise. We know that legislation now provides for the enforcement of arbitration agreements by the staying of court proceedings commenced in breach of such an agreement. In domestic cases, the court has a discretion that is now usually exercised in favor of enforcing the arbitration agreement. In international disputes, there is no discretion and a court will be required to stay proceedings commenced in breach [*273] of an arbitration clause in defined circumstances. The enforcement of a mediation agreement is more problematical. As mediation is a consensual process, some observers have questioned whether a party can be forced to mediate if it does not want to do so. However, there is now some authority to the effect that a mediation agreement in a contract is enforceable: AWA Ltd v Daniels. n5 Despite this courageous, and if I may say so, enlightened opinion, the enforceability of a mediation agreement remains questionable.

E. Other Considerations

There are of course a number of other considerations relevant to assessing dispute resolution procedures. The two which I wish to mention are:

- maintenance of relationships/harmony; and

- confidentiality.

The maintenance of relationships is one of the perceived advantages of mediation over adversarial procedures such as litigation and arbitration. The point has been made that adversarial procedures are often bitterly fought and result in one party winning and the other losing. In contrast, mediation with its emphasis on the accommodation of interests can result in a "win/win" result and therefore preserve harmony between the parties. The maintenance of relationships or harmony between the parties is particularly important where the disputants have, or desire to have, continuing business relationships. In these circumstances a procedure and resolution which does not unduly impair the relationship is particularly valuable. It should not be thought, however, that all adversarial proceedings necessarily destroy business relationships. I recall arbitrating a dispute between a banker and its customer. The dispute involved entitlement to an amount of some $ 15,000. Both the bank and the customer felt strongly that, as a matter of principle, they were entitled to the money. Neither wanted to give in to the other. The parties agreed to refer the matter to the decision of an independent arbitrator. They were content to let a neutral decide. It was agreed that each party would prepare a submission, that neither party would comment on the other's submission and that there would not be a hearing. On the basis of these two submissions I wrote a brief award and decided who was entitled to the moneys. I do not think that this procedure severed the business relationships between the parties and I imagine that they were able to continue their commercial association.

The other consideration I wish to mention is that of confidentiality. A party may wish to keep confidential some or all aspects of a dispute. This may range from particular documents disclosed during the procedure through to other information or indeed the existence of the dispute itself. Court proceedings are, of course, not confidential but other avenues of dispute resolution may offer various degrees of confidentiality. In this regard the recent decisions of the High [*274] Court of

Australia in Esso Australia Resources Limited v Plowman, n6 and the New South Wales Court of Appeal in Commonwealth of Australia v Cockatoo Dockyard Pty Ltd, n7 are of great interest.

III. LITIGATION

I now turn to apply the criteria to the different forms of dispute resolution. Hopefully this will enable an assessment to be made of the comparative strengths and weaknesses, or advantages or disadvantages, of the various procedures. I commence by looking at litigation.

The first criterion focuses on the nature of the tribunal and the process. I start by asking whether the courts are impartial, appropriate and have the necessary expertise. In relation to the process, the sorts of questions which are relevant are whether it is fair, appropriate and flexible.

Speaking in general terms, I think there would be near universal agreement that the Australian courts are impartial and have integrity. In general, too, our courts would be regarded as appropriate and possessing the necessary expertise to adjudicate a wide range of commercial and civil disputes. Of course, disputes vary greatly in terms of their subject matter and value. Specialist courts exist for certain types of disputes, particularly family law and industrial disputes. The general civil courts have expertise in law and in fact-finding as the bench consists exclusively of lawyers, at least in the higher tiers of courts. Where, however, the dispute is of a highly technical, scientific or engineering nature, it might be thought that the courts are not entirely appropriate. In such cases, adjudication of a dispute before an arbitrator who possesses the relevant technical qualifications may be preferred. Of course, the courts do have some flexibility and the technique of appointing a special referee does permit a court to refer technical issues to experts.

Disputes vary not only in relation to their nature or subject matter, but also in relation to their value or the amount claimed. While courts are appropriate for a broad range of civil and commercial disputes, they may not be regarded as appropriate if the amount in dispute is small. The formal ad-

judicative process of our courts, which usually warrants legal representation, comes at a cost. If the amount claimed is modest, it may be that the costs of our litigation process are out of proportion to the value of the dispute. In such cases the courts may not be appropriate. Not surprisingly, specialist tribunals have been established to deal with small consumer claims and disputes between landlords and tenants in residential tenancy matters.

The process of litigation, which is governed by the rules of the court concerned, is fair and generally appropriate for civil and commercial disputes where the amount claimed is significant. The rules admit of some flexibility but are clearly not as flexible as the procedure in an arbitration. The parties to an arbitration have great freedom to mold the procedure to suit their dispute and [*275] needs. I have mentioned arbitration on documents alone but the range of procedures in arbitration is very extensive and is only constrained by basic considerations of natural justice and due process. Thus, an arbitrator could be asked to adopt an inquisitorial process, there could be arbitration without any pleadings, and of course there can be arbitration on documents alone and without a hearing.

Up to this point I have been discussing litigation in the context of a domestic dispute. Where, however, litigation involves an international transaction (say a contract between an Australian party and an Indonesian party), the assessment of a court and its process undertakes a different complexion and may yield very different results. For a start, we may have to assess the suitability not only of an Australian court but of the alternative forum, namely the Indonesian court. Is the Indonesian court impartial and possessed of integrity, is it appropriate and does it have the necessary expertise? These are questions which I pose but do not answer. The Indonesian party would ask the same questions of an Australian court. While we might feel that the Australian court possesses these necessary qualities, would an Indonesian litigant feel that he or she has an equal chance of success be-

fore an Australian court as does the Australian litigant? Will either court have the necessary cross-cultural sensitivity or foreign legal expertise which may be necessary or desirable to fairly adjudicate the dispute?

The next criterion focuses on the basis of the decision. A court of law will decide according to law and its decision should be fair and objective. There is a greatemphasis on the correctness of the decision and one or more appeals are possible. Thus, the policy of the system is not a quick and final resolution of the dispute but a correct adjudication. This, then, is directly relevant to the next criterion which comprises the commercial considerations of speed and cost. Because the emphasis is on correctness with the possibility of appeals, it is possible and indeed likely that litigation will not be either quick or cheap. Consequently, if the amount in dispute is small or if the parties desire a speedy and final resolution, then litigation may not be appropriate. Of course, the speed of litigation depends on many factors including the workload of the court.

In an international dispute, where the qualities of courts in different countries may have to be evaluated, the speed and cost of litigation can vary considerably. As far as cost is concerned, it will be necessary to consider factors such as the fees of lawyers and also whether a successful party is able to recover costs from the other side. In some countries, each party bears its own legal costs while in the English common-law countries, it is usual for the winning party to be awarded costs or at least part of its costs.

The speed of litigation also varies enormously from country to country. In some countries it is not unknown for a dispute to continue for ten or fifteen years before it is finally resolved by the highest court of the country concerned. The number of possible appeals and the time for deciding appeals is therefore of great significance in evaluating the speed and the cost of litigation.

The next criterion is effectiveness. Here, litigation, at least in domestic matters, has a great advantage over mediation and other forms of ADR with the possible exception of arbitration. Litigation will result in a judgment which is [*276] binding and enforceable. It may take some time, if there is provision for appeals and if appeals are taken. But the end result of litigation is an enforceable judgment. A court of law exercises the judicial power of the State and its judgments and orders are enforceable by authority of the State and by using the execution processes prescribed by law. For this reason, a claimant is often able to put much greater pressure on the other party to a dispute by threatening to or actually instituting court proceedings. The other party will recognize the court's authority and will understand that its judgments and orders are enforceable. Thus, if one party owes money to another party and has no justifiable excuse for non-payment, there is no better way to secure enforcement than to institute court proceedings. Mediation is likely to be of little or no avail and the best way to force a person to do something he or she is required to do at law, is by recourse to a court.

On the international plane, the situation may be otherwise. Take our hypothetical dispute between an Australian contractor and an Indonesian contractor. What are the enforcement powers of an Australian and Indonesian court respectively? There are various matters to consider including:

- the jurisdiction (competence) of the court; and

- the enforcement of its judgments.

All courts have limited jurisdiction (or in civil-law terms, competence). The rules on jurisdiction determine whether it is possible to institute an action in the court. Therefore, in an international commercial dispute the first question which arises is whether the court has power under its own rules to hear the case. Assuming that jurisdiction exists, and that a favorable judgment is obtained, the next question is whether the judgment is enforceable. The judgment, of course, will always be

enforceable in the territory of the court. But if the defendant is a foreigner, and has no assets within that territory, the judgment will be of little effect. It will then be necessary to enquire whether the judgment is enforceable in the defendant's home country or in some other place where the defendant has assets. This is dependent on the rules applicable to the enforcement of foreign judgments in the place concerned. In other words, in the case of an international dispute, it is necessary to ask whether the chosen court is able to hear the case and if so, whether its judgment will be effective.

The final criterion I have selected concerns the maintenance of relationships/ harmony and confidentiality. As previously pointed out, litigation is not good for the maintenance of relationships between the parties. It is instituted by the plaintiff, without the consent of the other party, it is costly and the nature of the process encourages a tenacious contest, often bitterly fought by the parties, or, perhaps more accurately, by their legal advisors. It becomes a contest, somewhat like a sporting contest, fought on the basis of clever tactics with skillful utilization of the rules. But unlike a sporting contest it is expensive, time consuming, distractive and, because of its adversarial nature, usually fatal to the maintenance of good relationships between the parties. Neither is litigation in general confidential. Court documents are not private and the court and the press can be admitted to the courtroom. [*277]

IV. MEDIATION

Mediation is the dispute resolution procedure which has grown dramatically in recent years. While its importance has perhaps been overstated by keen disciples, it is undeniable that consciousness or awareness of this procedure has dramatically increased and its use has grown significantly. Assessment of mediation has sometimes tended to be subjective with keen proponents advocating it as the panacea for the resolution of all disputes and maintaining that it renders other forms of dispute resolution redundant. Equally, at least in the earlier days, mediation was attacked

by opponents, often practitioners of other forms of dispute resolution, as naive, simplistic and a waste of time. The truth lies somewhere in-between. Mediation has its place, and indeed an important place, in the armory of dispute resolution techniques. There are times when it is appropriate and instances when it should not be used. I will now attempt to evaluate it in the light of the criteria I have previously enunciated.

I turn first to the nature of the tribunal or process. Strictly speaking, mediation does not involve a tribunal. The latter is more appropriate to refer to the formal dispute resolution body which will generally have adjudicative powers. Mediation does, however, involve personnel (the mediator) and a process. The parties can generally choose any person as a mediator although in particular instances of court-annexed mediation or statutory mediation there may be an approved list of mediators. The parties will be able to select a person whom they regard as possessing impartiality and integrity, who is appropriate and who has the necessary expertise. In the context of mediation, expertise does not usually refer to expertise concerning the subject matter of the dispute (although this is of course possible) but rather expertise in relation to the skills of mediation. Many mediation courses are now offered, in Australia and elsewhere. While mediation might be regarded as simply requiring common sense there are certain skills and techniques which can be learned and acquired. In their book entitled ADR Principles and Practice, n8 Henry Brown and Arthur Marriott summarize the mediator's skills as:

- listening;
- observing non-verbal communications;
- helping parties to hear;
- questioning;
- summarizing;

- acknowledging;

- mutualizing;

- re-framing;

- managing conflict and venting emotions;

- managing the process;

- lateral thinking;

- encouraging a problem-solving mode;

- centering; [*278]

- being silent;

- constructive facilitation.

The Harvard School of Negotiation, based on the work of Roger Fisher and William Wry, which can be adapted to mediation, stresses the following points:

- separate the people from the problem;

- focus on interests, not positions;

- invent options for mutual gains;

- insist on objective criteria.

A great variety of processes or procedures can be followed in a mediation. The process itself is therefore very flexible and can be specifically designed for the dispute or the parties. Often, however, it takes into account the skills and preferences of the mediator.

A mediation is usually conducted on an informal basis. The mediator meets with the parties and may subsequently separate the parties and speak to each of them individually. This is known as caucusing. However, it is possible to have structured forms of mediation of which the best known is the mini-trial. This involves a brief presentation of each party's case to a panel consisting of senior

representatives of each side and a neutral chairperson. After the presentation the senior representatives attempt to negotiate a settlement and may utilize the services of the neutral chairperson. There are, of course, various other forms of mediation and hybrid procedures involving mediation and arbitration. The range of mediation procedures is limited only by the imagination of the parties and the mediator.

On the criteria I have espoused, the mediation process is certainly flexible and should be appropriate. It should also meet the criterion of fairness as the parties and mediator confer and agree on the procedure to be employed. Even if the mediator decides to caucus, and confer with each party alone, the criterion of fairness is generally met. In the first place the parties will have agreed to this procedure and secondly the mediator, unlike an arbitrator, does not have the power to issue a binding determination. Thus the fundamental objection to caucusing in an arbitration, or court proceeding, would not apply in mediation.

The second criterion is the basis of the decision or resolution. A mediation if successful, results in a resolution by an agreement of the parties. Thus it may not be a "correct" decision or a decision according to the law but the resolution will in general be fair because it will be consented to by both parties. Some writers have been troubled about the fairness of mediation where there is a significant power imbalance between the parties. While this may sometimes be a problem, the fundamental position remains that a mediation is only settled if both parties consent. Therefore, in general the procedureis fair.

A perceived advantage of mediation is that it makes possible creative settlements. For example an existing dispute may be resolved on a basis which includes an agreement to enter into a new commercial relationship. This gives mediation a flexibility which is absent in litigation or arbitration. A judge or arbitrator can only resolve a dispute by determining existing rights. It is no part of

the function of a judge or arbitrator to suggest or require that new rights or arrangements be created. [*279]

The next criterion concerns commercial considerations, particularly the speed and cost of dispute resolution. There is no prescribed time for a mediation. A mediation ends when the parties reach a settlement or when a party or the mediator decides to terminate the mediation. Commonly mediations do not last more than a day and it is certainly true to say that a mediation will take less time than arbitration or court proceedings. It is not only the length of the mediation itself which is relatively short but the time for preparing for a mediation is much less than the time for preparing for litigation or arbitration. Thus mediation is much quicker and cheaper than adjudicative forms of dispute resolution. In this respect mediation, if successful, has an enormous speed and cost advantage over litigation and arbitration. This is certainly one of its prime advantages.

I now turn to the effectiveness of mediation. The first consideration is whether the procedure will result in a determination or resolution. The outcome of litigation and arbitration is a judgment or award. The outcome of mediation is either a settlement or the abandonment of the mediation. Mediation may not therefore be effective because it may not result in a resolution of the dispute. A dispute is only resolved by mediation if the parties agree on terms of settlement. If they fail to agree then the dispute is not resolved. In this respect mediation is not as effective as arbitration or litigation. But, of course, the cost of an ineffective mediation is not likely to be high. Moreover, where a mediation does work it is very cost-effective. Thus the criteria of commercial considerations and effectiveness really need to be considered together. The possible lack of effectiveness of mediation is not an overwhelming consideration against attempting mediation having regard to the modest costs of an aborted mediation and the overwhelming advantages of speed and low costs in the event that it is successful.

The criterion of effectiveness also involves the enforceability of the settlement. Here mediation is at a disadvantage to litigation and arbitration. A court judgment is immediately enforceable by levying execution process. An arbitral award is in a similar position although an application may first have to be made to a court for leave to enforce the award as a judgment. However, a settlement arrived at in mediation is in a different position. If a party refuses to carry out the settlement it will probably be necessary to commence an action on the settlement agreement, to obtain judgment and then to levy execution process. This places mediation in an inferior position to arbitration and litigation. However, experience perhaps suggests that parties who have mediated a settlement of their dispute tend to carry out the terms of a settlement voluntarily and that enforcement, in terms of formal enforcement procedures, is rarely necessary.

The other considerations I have referred to are the maintenance of relationships/harmony and confidentiality. Here mediation fares well. Arbitration and litigation tend to separate the parties and place them on opposite sides. On the other hand, mediation brings the parties together physically and requires them to negotiate with each other. If they are then able to agree on the terms of a settlement they will be in a much more harmonious position than disputants [*280] who have gone through the litigation or arbitration process and been subject to a judgment or award. The maintenance of relationships/harmony is one of the perceived advantages, and perhaps the most prized advantage, of mediation over other forms of dispute resolution.

Mediation can also be made confidential by appropriate provisions in the mediation agreement. Generally mediation discussions are held on a without prejudice basis and there may be an agreement not to disclose documents produced in the course of a mediation. It is important for parties in a mediation process to ensure that the mediator cannot be called to give evidence in a subsequent ad-

judicative process, should the mediation not be successful. This is usually dealt with by an appropriate provision in the mediation agreement.

Litigation is not, of course, confidential. However, arbitration is much closer to mediation in this regard and the parties to an arbitration can expressly agree to treat the arbitration as confidential.

V. ARBITRATION

Arbitration has its advocates and its critics. This is not surprising because in common with other forms of dispute resolution, arbitration has advantages and disadvantages and there are situations where it is appropriate and situations where it is not so appropriate. In evaluating arbitration, like litigation, there is a significant difference between domestic and international disputes. Arbitration has particular advantages in international disputes which are not as relevant in domestic disputes. Therefore the arguments for arbitration in domestic and international disputes are not identical although there is some overlap.

I turn, first, to the nature of the tribunal and process. The questions to ask in relation to the tribunal concern its impartiality and integrity, appropriateness and expertise. In domestic disputes, arbitration rates highly but does it rate higher than litigation? The only circumstance where it may do so is where the dispute is of a highly technical and non-legal nature and where it may be a distinct advantage to have as arbitrator a person who has the necessary technical qualifications. In other cases an arbitrator, say a legally qualified arbitrator, would not be regarded as more impartial, appropriate or having greater expertise than a judge. Indeed litigation would probably be preferred to arbitration in terms of the nature of the tribunal except, as I have said, for technical disputes.

The situation dramatically changes when we consider international disputes. In a dispute between say an Indonesian party and an Australian party there may well be an apprehension of un-

fairness if the dispute is litigated before an Indonesian or Australian court. The fact that the adjudicator possesses the nationality of one of the parties may well be regarded as unfair or at least undesirable. It is here that arbitration has the distinct advantage. Usually an international arbitrator will not hold the nationality of either of the disputant parties. This is the common case if there is one arbitrator. In the case of a tribunal of three arbitrators, the chairman will be neutral though each of the party-appointed arbitrators may well bear the nationality of the appointing party. In relation to neutrality, the survey conducted by Dr. Buhring-Uhle is instructive. Dr. Buhring-Uhle undertook a survey of [*281] international commercial arbitration in connection with a doctoral thesis he presented to the University of Hamburg. The results of his work are published in a book entitled Arbitration and Mediation in International Business. n9 He developed a questionnaire with the help of a number of scholars, practitioners and institutions in the fields of both international commercial arbitration and alternative dispute resolution. Approximately one hundred and fifty questionnaires were distributed to arbitrators, attorneys and in-house counsel in over twenty countries. A total of ninety-one individuals from seventeen countries responded and Dr. Buhring-Uhle personally interviewed sixty-eight. The respondents included people from the United States, Germany, Switzerland, France, England, Columbia, Netherlands, Spain, Australia, Austria, Denmark, Egypt, Italy, Mexico, Poland, Sweden and Syria. The largest number consisted of Americans and West Europeans. As a result of the survey Dr. Buhring-Uhle collated data on the perceived advantages of international commercial arbitration. The advantages of arbitration are listed as:

- forum is neutral;
- treaties ensure enforcement abroad;
- confidential procedure;
- forum has expertise;

- no appeal;

- limited discovery;

- less time-consuming;

- more amicable;

- greater degree of voluntary compliance;

- procedure is less costly;

- results are more predictable.

One of the two most significant perceived advantages of arbitration was the neutrality of the forum and the avoidance of being subjected to the jurisdiction of the court of one of the parties. On a scale of -1 ("advantage does not exist") through 0 ("not relevant"), 1 ("one factor among many"), 2 ("significant") to 3 ("highly relevant") the aggregate of the answers with respect to the neutrality of the forum amount to 2.4. The advantage of the expertise of the forum also rated highly and was deemed "highly relevant" (3) or "significant" (2) by sixty percent of the respondents.

In relation to the process itself it seems to me that there is less difference between domestic and international arbitration. In both instances the procedure of arbitration will generally be regarded as fair, appropriate and flexible. The flexibility of arbitration gives it a certain advantage over litigation and it may be that one of the significant benefits of domestic arbitration over litigation lies in the development of new, innovative and appropriate procedures for particular disputes. When arbitration is conducted according to a process which is similar to that of litigation it does not of course enjoy any corresponding advantage over [*282] litigation as far as the procedure is concerned. Unless there are significant advantages in relation to other criteria, then arbitration will not be attractive.

International arbitration is frequently conducted according to an established and well-tested set of arbitral rules. The two most significant international arbitration rules are those of the International Chamber of Commerce and the United Nations Commission on International Trade Law. Both have been developed by international organizaions, have been used on many occasions and therefore have an international currency and acceptability. In contrast, litigation takes place before a national court which will apply its own rules devised for domestic transactions and which sometimes admit of little flexibility. It is significant that one of the advantages of arbitration which rated highly in the Buhring-Uhle survey was limited discovery. Compulsory and extensive production of documents is not common in some civil-law systems and international arbitrators rarely order discovery as extensive as is usual in, say, United States litigation. An international arbitrator can therefore adopt a position somewhere between the American and civil-law practices.

The second criterion concerns the basis of the decision. Here arbitration is much closer to litigation than mediation. In the first place, there is a decision (the result of the adjudication) which is hopefully fair/objective and correct/ according to law. But there are two differences between arbitration and litigation. In the first place an arbitrator may not have to decide according to law. It is now accepted that the parties can authorize the arbitrator to decide as amiable compositeur or ex aequo et bono. While the precise meaning of these terms may be the subject of some speculation it is generally accepted that they free the arbitrator from having to decide strictly according to law. This does not mean that an arbitrator should disregard rules of law but the arbitrator does not always have to apply strict rules of law, particularly rules of construction, if they would lead to an inequitable result. In particular it has been said that amiables compositeurs take a more flexible approach to the quantification of damages. A variation of this occurs where an arbitrator does not decide as amiable compositeur but concludes that the contract is governed by the lex mercatoria. In such a

case an arbitrator does not apply the legal rules of a particular country but gives effect to the perceived rules of international commercial law. Such rules are said to be predicated on international conventions, international practices, standard form contracts and the like. Despite hostility to amiable composition and application of the lex mercatoria, particularly in England, it should be noted that both techniques are now well-established and indeed the English Arbitration Act 1996 n10 now provides in Section 4(1)(b) for the arbitral tribunal to decide the dispute in accordance with such considerations as are agreed to by the parties or determined by the tribunal.

The second respect in which arbitration differs from litigation concerns the "correctness" of the decision and in particular the possibility of appealing from the decision of the arbitrator on the ground that it is incorrect in law. As I have previously mentioned, judicial intervention in arbitrations has been restricted. [*283] Under the Commercial Arbitration Act an appeal lies to the Supreme Court on any question of law arising out of an award but this requires the consent of the other party or the leave of the court. Moreover it is possible to enter into an exclusion agreement to preclude such an appeal. Under the UNCITRAL Model Law there is no appeal on a question of law and the arbitrator's decisioncannot be impeached for error of law or fact unless the mistake is so fundamental as to conflict with public policy. Not surprisingly one of the perceived advantages of arbitration which rated highly in the Buhring-Uhle survey was the absence of appeals from awards.

The third consideration encompasses the commercial factors of speed and cost. While arbitration can be speedier and less costly than litigation this is not always the case. Arbitration does offer some opportunities for innovation and for devising an appropriate and cost-effective procedure for the particular dispute. Indeed the future of domestic arbitration may well rest on the development of such procedures so that arbitration can become more streamlined and costeffective than litigation. There are also opportunities for doing this in international arbitration but the cost of international

arbitration is generally substantial. The speed of arbitration is a relative concept which has to be compared with the time for undertaking litigation in the potentially available court or courts. Not surprisingly the Buhring-Uhle survey placed the speed of arbitration over litigation about halfway between 0 and 1 with 0 being "not relevant" and 1 being "one factor among many." The suggested advantage that arbitration is less costly than litigation rated less highly. Interestingly it was considered to be a slight advantage in the United States but a disadvantage in continental Europe outside Germany.

The next criterion is effectiveness. Arbitration will usually result in a determination or resolution because the end result of arbitration is an award. But there are instances where arbitration does not result in an award. This may occur where a party is able to frustrate the procedure of the arbitration by seeking various relief in a court. This will not occur in a country with a modern arbitration law but there are unfortunate examples of arbitrations held in certain countries, with rather antiquated arbitration laws, where it has proved possible for a court to intervene on more than one occasion. Sometimes it takes a substantial period of time to obtain a court order and thus an application to a court may involve an interruption to the arbitration of several years. In one arbitration I heard in an Asian country the proceedings were delayed by some four years before a judge at single instance determined whether or not I had jurisdiction. Eventually a judgment issued which enabled me to proceed and hear part of the claim. Shortly thereafter another application was made by the defendant to the court and the proceedings were further delayed by a period of another year. This, of course, is hardly compatible with the efficient resolution of a dispute by arbitration and it is important to designate as a situs for arbitration a country which has a modern arbitration law which restricts or excludes judicial intervention.

Effectiveness also involves the enforceability of the determination. Here arbitration fares well. Section 33 of the Commercial Arbitration Act provides [*284] that an award made under an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court and, where leave is so given, judgment may be entered in terms of the award. Thus a domestic award is placed in much the same position as a court judgment.

It is in respect of international disputes, however, that arbitration assumes a qualitative leap over litigation. The enforcement of a court judgment in a foreign country can only proceed if the rules of private international law in that foreign country permit the enforcement of the judgment. Thus if one wishes to enquire whether the judgment of an Australian court is enforceable in Singapore, Malaysia, Japan and Indonesia it is necessary to look at the rules of private international law applicable to the enforcement of foreign judgments in each of those countries. Some foreign judgments may be enforceable while others may not. There may be judicial discretion in relation to enforcement or the rules may be clear and unambiguous. In relation to arbitration, however, there is an international convention which has attracted near-universal adherence. Some 110 countries are now parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"). This Convention does two things. It requires the court of a contracting state to refrain from hearing a dispute which is the subject of an arbitration agreement. Secondly, it provides for the international recognition and enforcement of arbitral awards. There are certain grounds for refusing recognition and enforcement which are mainly of a procedural nature but also include public policy. The provisions of the New York Convention combined with the extremely wide adherence to the Convention have resulted in an international enforceability of arbitral awards which greatly exceeds the international enforceability of court judgments. This is not to say that enforcement under the New York Convention is always an easy mat-

ter, is trouble-free and is capable of accomplishment. But the New York Convention undoubtedly gives to arbitral awards a greater international effectiveness than court judgments. Not surprisingly the persons surveyed in the Buhring-Uhle survey rated the international enforcement of arbitral awards pursuant to treaties as one of the two most significant advantages of arbitration. It rated about halfway between "highly relevant" and "significant."

The final two considerations I have highlighted are the maintenance of relationships/harmony and confidentiality. As to the former it may be doubted whether arbitration is in a significantly better position than litigation. Both are adjudicative processes involving a procedure which can be tenaciously utilized by lawyers. The outcome is often the breakdown of relationships. Perhaps, though, the perceived confidentiality of arbitration and its more flexible procedure may make arbitration a little more hospitable than litigation to the maintenance of relationships. This is perhaps why respondents to the Buhring-Uhle survey gave some credence to the fact that arbitration is more amicable than litigation. The average marked it at somewhere between "not relevant" and "one factor among many." Certainly, however, arbitration is much closer to litigation than mediation as regards its ability to maintain relationships between the disputant parties. [*285]

That brings us to confidentiality. The respondents to the Buhring-Uhle survey regarded it as the third most important advantage of arbitration in a list of eleven. It ranked just slightly below the neutrality of the tribunal and the international enforcement by treaty of awards. The average of all the responses placed it much closer to "significant" than the lower category of "one factor among many." It is not surprising, therefore, that a recent decision of the High Court casting doubt on the confidentiality of arbitration has aroused tremendous international interest and attracted criticism. In Esso Australia Resources Ltd v. Plowman, n11 a majority of the High Court held that confidentiality is not an essential attribute of private arbitration imposing an obligation on each party to re-

frain from disclosing the proceedings or documents and information provided in and for the purposes of the arbitration. In so deciding the High Court rejected recent English judicial authority that a general duty of confidence exists, although subject to limited exceptions and qualifications. While the High Court rejected a general duty of confidence it did hold that the arbitral proceedings were private in the sense that they were not open to the public. Subsequently in Commonwealth of Australia v Cockatoo Dockyard Pty Ltd. n12 the New South Wales Court of Appeal held that an arbitrator did not have the power to give directions for the purposes of maintaining the confidentiality of documents prepared for the purposes of the arbitration or produced by either party for inspection on discovery.

Outside Australia the decision of the High Court in Esso Australia has not been well received. An entire issue of an international journal n13 was devoted to confidentiality and focused on the High Court decision. In an article based on the 1995 Bernstein lecture given under the auspices of The Chartered Institute of Arbitrators, in the United Kingdom, Patrick Neill QC observed:

In conclusion may I say this. If some Machiavelli were to ask me to advise on the best method of driving international commercial arbitration away from England I think that I would say that the best way would be to reintroduce the two types of case stated and all the court interference that was swept away by the 1979 Act. The second best method -- but the two boats are only separated by a canvas -- would be for the House of Lords to overthrow Dolling-Baker and to embrace the majority judgment of the High Court of Australia in Esso/BHP. This would be to announce that English law no longer regarded the privacy and confidentiality of arbitration proceedings (using that term in the broadest sense) as a fundamental characteristic of the agreement to arbitrate. Lawyers and businessmen in France, Germany, Switzerland and in the countries of the Commonwealth and elsewhere

would take note and there would be a flight of arbitrations from this country to more hospitable climes. n14

In view of the importance placed on arbitration by the respondents to the BuhringUhle survey it is difficult to take issue with Mr. Patrick Neill's conclusion. [*286]

VI. CONCLUSION

I will conclude by making some brief and general observations.

a. I have sought to identify certain criteria which will highlight the strengths and weaknesses of the various dispute resolution procedures. I do not claim that my list is original or exclusive but it does, I believe, encompass many of the important considerations.

b. Applying these criteria indicates that the procedures I have focused on (litigation, mediation and arbitration) have various strengths and weaknesses. Identifying these enables an informed choice to be made as to the appropriate procedure for a particular dispute or relationship.

c. It is clear that a distinction has to be drawn between domestic and international disputes at least with regard to assessing the suitability of litigation and arbitration. The strengths and weaknesses of these procedures are very much affected by the domestic or international nature of the dispute.

d. Where the prime consideration is effectiveness in the sense of achieving a determination which will be enforceable, then litigation and arbitration are appropriate for domestic disputes. Arbitration is also particularly appropriate for international disputes but litigation may not be effective.

e. Where the prime consideration is to establish a legal precedent and to have a decision according to law, then litigation will be the preferred procedure. On the other hand if the parties want a decision otherwise than according to law or, wish their dispute to be kept confidential, then litigation will not be appropriate and arbitration or mediation will be preferred.

f. Where speed and the containment of costs are important then mediation has much to offer. Of course it is possible to develop speedy and cost-effective procedures for arbitration.

g. If the parties are in a continuing business relationship and desire to maintain harmony then mediation will be much more appropriate than either litigation or arbitration. Arbitration may be slightly preferable to litigation in this regard.

h. Where a particular tribunal is required then special considerations arise. If the particular tribunal takes the form of technical experts then arbitration may have advantages over litigation although the procedure of appointing a special referee in litigation can be used to achieve a similar result. In international disputes the desired characteristic of the tribunal is neutrality. Here arbitration has an enormous advantage over litigation.

i. What then is the future of litigation, mediation and arbitration? Litigation is clearly effective domestically but it is costly and may not be quick. Mediation has a non-adjudicative procedure which preserves relationships, is fast and costeffective (providing it works). It has an entrenched place in the armory of dispute resolution procedures. The future of arbitration is more problematical. On the international plane arbitration is well-established and will increase in popularity because of its effectiveness and neutrality. Domestically however arbitration faces its greatest challenge. Why should it be used in preference to litigation? One answer is that it enables a specialist tribunal, such as a technical [*287] expert, to be appointed. But this consideration alone will not ensure a good future for arbitration. I believe its future depends on further distinguishing itself from litigation by becoming quicker and more cost-effective. Its future depends on the development of innovative procedures and creative personnel who will be able to establish arbitration as a different dispute procedure to litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawFormalitiesArbitration Royalty PanelsInternational LawDispute ResolutionGeneral OverviewInternational Trade LawDispute ResolutionArbitration

FOOTNOTES:

n1 As implemented in State and Territory statutes, reprinted in Marcus S. Jacobs, Commercial Arbitration Law & Practice in Australia (1994).

n2 Reprinted in 2 Wld. Arb. Rep. 701 (Hans Smit & Vratislav Pechota eds. 1994).

n3 Opened for signature June 10, 1958, entered into force June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38.

n4 Convention on the Settlement of Investment Disputes Between States and Nationals of other States, convention approved Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

n5 Supreme Court of New South Wales, Rogers C.J. Commercial Div., February 24, 1992 (unreported).

n6 [1995] 183 CLR 10.

n7 [1995] 36 NSWLR 662.

n8 Henry Brown & Arthur Marriot, ADR Principles and Practice (1993).

n9 Christian Buhring-Uhle, Arbitration and Mediation in International Business (1996).

n10 Reprinted in 36 I.L.M. 155 (1997).

n11 [1995] 183 CLR 10.

n12 [1995] 36 NSWLR 662.

n13 11(3) Arb. Int'l (1995).

n14 Patrick Neill QC, Confidentiality in Arbitration, 12 Arb. Int'l 287, 316-17 (1996).