PUBLIC
upon tabling of Committee's Report

Submission 9

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Hon Adele Farina, MLC
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
WESTERN AUSTRALIA

By email to Renae Jewell – rjewell@parliament.wa.gov.au

12 October 2011

RE: Standing Committee on Uniform Legislation and Statutes Review – Legilative Council INQUIRY INTO COMMERCIAL ARBITRATION BILL 2011 (WA)

Dear Chair

I refer to the terms of referefence by the Legislative Council to the Standing Committee on Uniform Legislation and Statutes Review of the *Commercial Arbitration Bill* 2011 WA for consideration and report by 8 November 2011.

I attach submissions on behalf of the Society of Construction Law Australia.

I have annexed to the submissions a copy of a paper by Mr Alan Limbury dealing with the dispute resolution procedure referred to as Med-Arb, which is the process addressed by Clause 27D of the Bill.

I will be in Perth from 25th October 2011 to 5th November 2011 sitting as an arbitrator in commercial arbitration proceedings. If it was considered that it might assist its deliberations I would be pleased to address the Standing Committee. The most convenient dates for me would be **2, 3 or 4 November 2011.**

Yours sincerely

Yours faithfully

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By email to Renae Jewell rjewell@parliament.wa.gov.au

12 October 2011

Re – Inquiry into Commercial Arbitration Bill 2011 (WA)

I make these submissions on behalf of the Society of Construction Law Australia[i], of which I am Chair. I am also a former member of the NSW Bar Association ADR Committee, which made submissions to the Legislative Council in New South Wales supporting the terms of Clause 27D in the New South Wales 2010 legislation, as adopted by the Standing Committee of Attorneys General ("SCAG") on 7 May 2010. My further interest in commercial arbitration in Australia arises from my role as the Co-Director of Studies for the University of Melbourne Law Masters program in Construction Law[ii].

The terms of reference by the Legislative Council to the Standing Committee of the Commercial Arbitration Bill 2011 (WA) are for "consideration and report" upon the Bill.

I understand however that the Standing Committee is primarily concerned about Clause 27D generally and subclause 27D (7) in particular.

Clause 27D of the Bill, in particular 27D (7)

The interest in, and controversy about, Clause 27D in the New South Wales Legislative Council in 2010, and elsewhere since, derive in part from ill-considered and unnecessarily alarmist submissions made to the NSW Parliament. That is not to say that the provisions do not contain some unusual concepts. As background, and for the assistance of the Standing Committee, I annex a paper by one of Australia's most eminent dispute resolution practitioners, Mr Alan Limbury, on the resolution of disputes by the blended process of "med-arb". Clause 27D constitutes legislative recognition of the procedure which combines the facilitative process of mediation with the determinative process of arbitration, often referred to under the abbreviated title "med-arb".

The following submissions deal with the procedure contemplated by Clause 27D in the sequence in which it in would generally occur, including the steps which are likely to have preceded the referral to arbitration. My objective is to place the Clause 27D process in context.

1. Parties to a contract may include within their contract an arbitration agreement under which they agree to refer disputes which arise between them to arbitration. It is however, relatively rare for the first step in the resolution procedure to involve a reference to arbitration.

2. Most 'modern' commercial contracts provide for a Notice of Dispute to be served which defines the issue about which there is disagreement. The usual contractual resolution provision includes a tiered process requiring an initial obligation to negotiate, sometimes in what is described as "good faith". The next requirement may be the reference of the dispute to mediation, under defined procedural rules.

3. Where the parties have been unsuccessful in their attempts to resolve their dispute, it will be referred to arbitration, the initiation of which commences with the nomination by an independent body of an arbitrator. Often the parties will agree upon a suitably qualified person to act as the arbitrator. The basis of their selection is frequently the reputation of the particular ADR practitioner for efficiency and reliability in the conduct of such proceedings.

4. Once nominated the arbitrator will usually conduct a procedural conference with the parties. During such a conference questions might be raised as to whether:
   (i) the parties have attempted mediation;
   (ii) if the mediation was unsuccessful whether the parties consider it possible that a further attempt at facilitated resolution was desirable;
   (iii) if so, when and by whom might the mediation be conducted, and
   (iv) could the arbitrator act as the mediator?
   (v) Assuming agreement to (iv), how would the mediation be conducted?

5. The procedure under Clause 27D would then apply. It is logical however to recognise that the parties are only likely to adopt this approach if they have confidence that the arbitrator is an individual with the intellect and professional capacity to successfully conduct such a process.

6. It is also important to recognise the different approaches which might be adopted for the conduct of a commercial mediation. The "conventional" model involves both conferencing sessions with all participants and separate private sessions when the mediator confers with each party. In the course of this latter process the mediator may be advised of confidential aspects of the dispute which clearly are not intended to be disclosed to the other party.

7. An alternative procedure is to abandon private sessions with the parties, and to develop conferencing processes so that different aspects are jointly addressed with different representatives of the parties. This might involve expert witnesses or legal advisers, for both parties, being involved in separate conferencing sessions.

8. The difficulties of dealing with confidential information obtained in private sessions, if these are employed in the course of the mediation, when it is also contemplated that the mediator may assume the role as arbitrator, is precisely what Clause 27D addresses.

9. Clause 27D has been drafted in a manner which permits the parties to adopt any method for the conduct of the mediation, which they and the mediator agree to. This permits procedural flexibility, but recognises the necessity for caution in dealing with confidential information.

10. The stepped requirement, in Clause 27D, for separate agreements in writing by the parties, before proceeding to the next stage in the blended "med-arb" procedure, permits a party to opt-out if they are uncomfortable, or uncertain, about the issue of confidential information.

11. It should be apparent that the parties to a dispute which has progressed to the stage of arbitration proceedings will inevitably have become familiar with the processes involved in non-curial resolution of the dispute.

12. I suggest that this background should be recognised when the application, and operation, of Clause 27D is considered by the Standing Committee.

13. Dealing with the provisions of Clause 27D in sequence:

27D (1) recognises that the arbitration agreement itself may permit "med-arb", however it also **permits** the parties, notwithstanding the nomination of the arbitrator, to agree **in writing** that the arbitrator may act as a mediator.

[There is nothing which compels agreement, which is only likely to occur when the parties have confidence in the mediator as referred to in paragraphs 3 and 5 above.]

27D (2) preserves the obligation of confidentiality associated with information provided in private sessions during a mediation, unless the party concerned agrees that confidentiality does not apply.

[Thus confidentiality is protected unless the party entitled to the protection permits the communication of the protected information.]

[The protection of confidentiality can only be changed if the parties agree **in writing after the conclusion of the unsuccessful mediation to proceed to arbitration. The provisions of 27D(7) then apply**]

27D (3) permits a party who has given consent "*to the arbitrator acting as mediator*" to withdraw that consent.

[This is an important protection for a party who, at some stage in the mediation, considers that it is inappropriate to continue with the mediation. This decision might arise as a result of many factors, including the issue of disclosure of confidential information.]

[The party who withdraws their consent under (3)(b) may, but only **if they wish to do so,** consent, **in writing,** to the arbitrator proceeding further.]

[This capacity to terminate the mediation is important. For example a party might have provided confidential information to the mediator for the purpose of achieving settlement in the mediation, and it becomes clear that settlement is unlikely. The party concerned may conclude that the information might adversely influence the arbitrator, and is entitled to terminate the mediation, and further to not proceed to arbitration.]

27D (4) permits the arbitrator, after acting as mediator, to proceed further **but only if the parties give their consent in writing.**

[The written consent to proceed further must be given **on or after the termination of the mediation,** and thus the parties are not bound by their initial agreement under subclause (1) to permit the arbitrator to act as a mediator.]

[This is an important provision because it allows the common sense of a mediation to be conducted, but permits the flexibility and efficiency of the blended "med-arb" process.]

27D (5) merely excludes the basis for subsequent objection **during the arbitration** that the arbitrator had acted as a mediator.

[This is a logical, but confined, limitation upon a party. Other available legal bases for a challenge to the arbitrator's independence would remain.]

27D (6) clarifies that there must be written consent given **on or after the termination of the mediation** for the arbitrator to continue, and without such consent the **arbitrator may not proceed** and a substitute arbitrator is to be appointed.]

[The requirement that both parties provide **consent in writing** for the arbitrator to proceed further after an unsuccessful mediation, provides a second opportunity for a party to withdraw from the Clause 27D procedure. That is in addition to the right under 27D (3) to withdraw the consent for the arbitrator to act as mediator.]

27D (7) obliges the arbitrator to disclose to all parties confidential information that the **arbitrator considers** would be **material to the arbitration proceedings** before commencing the arbitration proceedings.]

[The obligation upon the arbitrator to disclose "**so much of the information as the arbitrator considers material to the arbitration proceedings",** might be read as suggesting that the assessment involves some discretion in the assessment of materiality, however would in fact, in most circumstances, extend to all confidential information provided to the mediator.]

[Information which would be protected in a mediation is unlikely to be of no consequence or materiality to the arbitration proceedings.]

[The principal consequences of this obligation are that an arbitrator when acting as mediator;

- is **unlikely to conduct private sessions** during the mediation; or
- if they do, to avoid, if possible, any reference to confidential matters during private sessions, and
- if reference was made to any confidential information in the private sessions, would indicate that they would probably be required to disclose **all confidential information** provided to them, if they were to proceed as arbitrator, on the basis that it **would have to be regarded as potentially material** to the arbitration proceedings.]

[Further common sense would require that such disclosure of possibly material confidential information must be made **prior to the parties providing written consent** under subclause (4). This would be a natural precondition for the giving of such consent.]

[For certainty a party who did not want the confidential information disclosed by the arbitrator, **could either**, withdraw the consent given under 27D (1) by exercising their right under 27D (3) to withdraw consent, or by advising the mediator that they would not be providing written consent pursuant to 27D (4).]

[The practical reality is that competent dispute resolution practitioners, or the parties legal advisers, would bring to the parties attention the issues which are necessarily involved in adopting the procedure contemplated by Clause 27D.]

[Further, in practice parties would only disclose to the mediator any information which could not prejudice their conduct of the arbitration proceedings.]

[The requirement upon arbitrators to disclose confidential information imposes important procedural restrictions upon the manner in which the mediation stage could be conducted. For example:

- Parties would almost inevitably not disclose substantial difficulties involved in their conduct of the proceedings, or commercial considerations impacting on the dispute and
- Parties would not disclose to the mediator, if they were likely to continue as arbitrator, any known weakness in their case which might otherwise be raised confidentially with a mediator in an endeavour to ascertain if the other party was aware of the weakness.]

Conclusions as to Clause 27D

14. Clause 27D provides a practical and reasonably structured alternative procedure for the resolution of commercial disputes, which should be supported.

15. Conventional practice by competent dispute resolution practitioners and the parties' legal advisers will ensure that if the blended "med-arb" procedure contemplated by Clause 27D is adopted the interests of the parties will not be affected.

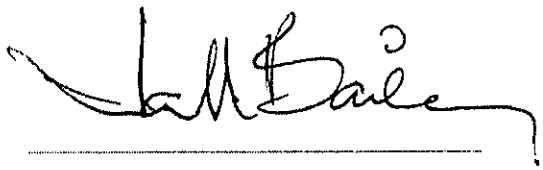
16 Clause 27D, along with conventional practice by dispute resolution practitioners, provides protection for the interests of parties to an arbitration agreement who adopt the procedure permitted by Clause 27D.

17. A secondary, but important, consideration is the maintenance of uniformity in legislation which impacts upon the construction industry across Australia. Inconsistency in legislative provisions costs money. The review by SCAG of Clause 27D has not recommended any amendment to the provision.

18. The terms of Clause 27D have been included in all Commercial Arbitration Acts and Bills thus far introduced in the States of Australia since the agreement by SCAG on 7 May 2010.

19. There is no logical, or legal, basis for the Legislative Council of the Western Australian Parliament to recommend the amendment of Clause 27D of the Bill as passed by the Legislative Assembly.

Professor Ian Bailey SC



12 November 2011

[1] www.socla.org.au
[1] http://www.law.unimelb.edu.au/masters/specialist-legal-areas/construction-law

Med-Arb: getting the best of both worlds

Alan L. Limbury[1]

As in other parts of the world, in Australia the litigation climate is changing. "Just, cheap and quick" is the objective.[2] Courts are streamlining their processes. Unless arbitrators willingly facilitate settlement, arbitration will become less attractive than litigation. One option is to entertain the use of a hybrid process in appropriate cases. The Victorian Law Reform Commission reported in 2008:

> *"The Commission believes "hybrid" dispute resolution processes should be included in the list of ADR options available to the parties. The US experience suggests that hybrid processes can be very effective in the right circumstances and offer parties another alternative to conventional dispute-resolution approaches".*[3]

The practice of combining mediation and arbitration by the same neutral has been traced back to ancient Greece and Ptolemaic Egypt.[4]

Unlike mediation alone and arbitration alone, Med-Arb has the advantage of offering both the possibility of resolution by the parties' own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator. Where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since the neutral is already to some extent "up to speed" when changing from one role to another and may gain insights during the mediation that could contribute to a more appropriate arbitral award.

If agreement is reached in mediation, the parties sign a binding settlement agreement or the neutral may, by consent, as arbitrator, convert their intended settlement into an arbitral award. It is important, especially in international commercial disputes, that the process should formally begin as an arbitration. Otherwise, if the dispute is settled at mediation, there will be no "dispute" on foot entitling the parties to an enforceable consent award.[5] If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the remainder. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

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1 Specialist Accredited Mediator (Law Society of NSW); Solicitor; Chartered Arbitrator; Managing Director, Strategic Resolution: www.strategic-resolution.com .

2 Civil Procedure Act 2005 (NSW) – s. 56

3 *VLRC Civil Justice Review Report (2008)* at p.235.

4 Roebuck, D *The Myth of Modern Mediation* (2007) 73 Arbitration 1, 105 at 106.

5 See Newmark, C and Richard, H *Can A Mediated Settlement Become An Enforceable Arbitration Award?* (2000) 16 Arbitration International 8.

Variants include Non-Binding Med-Arb (rarely used because there is no certainty of resolving the dispute); Med-Arb Show Cause, in which a tentative award is made to give the parties an opportunity to show cause as to why the dispute should not be so resolved; and MEDALOA (Mediation and Last-Offer [aka Baseball] Arbitration) in which the arbitrator does not reach an independent decision on the merits but instead must choose between the parties' final offers.

Apart from relative speed and economy, Med-Arb ensures certainty that, either by agreement or by award, the dispute will be resolved. The parties are at liberty to put a time limit on that in their Med-Arb agreement. If they use only mediation, they run the risk of not settling all the issues in dispute. If they use only arbitration, they know that all the issues will be resolved but they deprive themselves of the creative options their own negotiated solution might provide.

The potential to save time and money for disputants needs to be weighed against several concerns about Med-Arb, mainly in common law countries, to the effect that linking mediation and arbitration in the same third party neutral threatens to distort both aspects of the process, inhibiting disputants' bargaining creativity and forthrightness, tainting the Med-Arb practitioner's interventions, and threatening the validity and enforceability of the arbitral award.

Arbitral awards may be set aside by the courts and an arbitrator may be removed for misconduct (which includes *inter alia* partiality, bias and a breach of the rules of natural justice *aka* procedural fairness).[6] In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, the arbitral procedure was not in accord with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;[7] or if the recognition or enforcement of the award would be contrary to the public policy of that country.[8]

One concern about Med-Arb is that disputants may be inhibited in their discussions with the mediator if they know the mediator might act as arbitrator in the same dispute. They may be unwilling to reveal their underlying needs and interests and this could hamper the mediator's ability to find common ground. They may be unwilling to reveal their "bottom line" if they think that might appear in any subsequent award.[9]

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6 For discussion of the term 'misconduct' see e.g. *London Export Corp. Limited v. Jubilee Coffee Roasting Co. Limited* [1958] 1 WLR 27 and *Sea Containers Ltd. v. ICI Pty. Ltd. [2002] NSWCA 84.*

7 UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention,Article V(1)(d).

8 New York Convention, Article V(2)(b).

9 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 4th Ed.1-82.

However, even in straightforward mediation, disputants are only as forthcoming with the mediator as they think appropriate. Where the nature of the dispute is susceptible to a "win-win" solution, there may be no need to discuss, in the mediation phase, who is right and who is wrong nor what the "bottom line" is.

Another concern is that it is easier to let a third party sort things out rather than engage in the hard work of dialogue, disclosure and compromise. Accordingly, presenting disputants with arbitration as an end-point might lead them to treat the mediation phase as a mere prelude to arbitration, thereby rendering more likely the failure of the mediation and an arbitrated result all the more inevitable. Research into Med-Arb may be needed to see whether fewer settlements occur in the mediation phase.

Also of concern is that, in the context of Med-Arb, suggestions by the mediator may be taken as an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation. The mediator should therefore be careful to avoid making suggestions and appearing to exert pressure on a party to proffer or accept a particular settlement. Adopting a facilitative – as opposed to evaluative - stance in mediation should alleviate this concern.

Other concerns focus on the requirements of procedural fairness in proceedings which culminate in binding decisions imposed by judges and arbitrators. Unlike mediation, where disputants retain decisional autonomy, disputants accord to judges and arbitrators the power to determine the outcome of their disputes, while retaining certain procedural rights, including the right to be heard, to know the case they have to meet and to be judged by an unbiased, impartial decision-maker.

Allowing an arbitrator to receive private representations during the mediation phase creates an appearance of bias and may actually bias the arbitrator when determining the dispute.[10] However, in Australia an objection on that ground may be waived. In the South Australian *Duke Group* case,[11] in which a judge disqualified himself from hearing a case, where he had mediated between officers of the parties some years before being appointed to the bench, the following relevant principles were enunciated:

> *"It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide".*[12]

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10 *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, [2003] SASC 272.

11 Ibid.

12 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J.

> *"...save in the most exceptional cases, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge* ***or consent*** *of the other party"*[13] [Emphasis added].

Procedural fairness also requires that arguments be made in the presence of the opposing party and be subject to rebuttal. In Med-Arb, this creates a conflict between the confidentiality of private disclosures in the mediation and the openness of the arbitration.

Many courts and legislatures recognize that parties may validly consent to these encroachments on the right to procedural fairness and thereby waive their procedural rights. Given the importance of ensuring, for the purposes of Article V(2)(b) of the New York Convention, that an international arbitral award made at the end of the Med-Arb process will be valid and enforceable in the country or countries concerned, an important contribution to the learning in this field would be research identifying those New York Convention countries in which waiver of the right to procedural fairness is or is likely to be regarded as contrary to public policy. In Australia, waiver is acceptable.

Australian domestic uniform commercial arbitration legislation has long enabled arbitrators, with the parties' consent, to mediate and, likewise with consent, to hold private sessions, on the basis that no objection may be made if this course is followed.[14] There was little or no use of this provision since it was enacted in New South Wales 1984 and adopted elsewhere shortly afterwards, most likely because the section did not make it clear whether the parties could opt out after the mediation phase, should the dispute be unresolved. However, in May, 2010 the Attorneys-General of the States and Territories agreed to modernize this legislation by adopting the approach to arbitration of the UNCITRAL Model Law, thus aligning Australia's administration of domestic and international arbitration. Instead of abandoning the provision empowering the arbitrator to mediate (since there is no such provision in the UNCITRAL Model Law) the legislators have taken advantage of the opportunity to improve it so as to make Med-Arb more attractive and so as to address the procedural fairness issues.

The first jurisdiction to introduce amending legislation was New South Wales. Section 27D of the *Commercial Arbitration Act 2010 (NSW)*[15] , a

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13 Per McInerney J in *R. v. Magistrates' Court at Lilydale; Ex parte Ciccone*[1973] VR 122 at 127, cited with approval by Gibbs CJ and Mason J in *Re JRL;Ex parte CJL* (1986) 161 CLR 342 at 346 and 350.

14 See section 27 of the *Commercial Arbitration Act (NSW) 1984* and its state and territory counterparts.

15 Act No. 61 of 20101, assented to on June 28, 2010.

copy of which is attached to this paper, modifies the previous Med-Arb provision by requiring not merely that the parties consent at the outset (in the arbitration agreement or otherwise) to the arbitrator mediating, but that the parties expressly consent in writing, after the mediation has terminated, to the arbitrator proceeding to arbitrate. This accords with the approach adopted in Article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002), as explained in the accompanying Guide.[16]

The 2010 NSW Act further requires the arbitrator, before taking any further steps in the proceedings, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration.[17] This echoes comparable legislation in Hong Kong[18] and Singapore.[19]

It may be expected that these amendments will encourage greater resort to the Med-Arb process in Australia, because the disputants will have the opportunity to opt out after the mediation phase if they feel uncomfortable about continuing with the same person as arbitrator, in which case the 2010 Act requires another person to be appointed to arbitrate.[20]

Further, knowing that the arbitrator is required to disclose to the other party or parties to the arbitration any confidential information obtained during the mediation that is material to the arbitration, parties can be expected both to be circumspect in their disclosures during the mediation phase and to enquire, before deciding whether to consent to the mediator arbitrating, what disclosures to the other parties are contemplated. Again, the opportunity to opt out, having obtained the answer, will provide assurance that they may confidently embark on the first stage of the process and that, if they do consent to the second stage, they will know what disclosure of their own information the arbitrator will make.

It follows that, in practice

- the issues to be addressed in any arbitration will need to be clarified before the commencement of the mediation phase; and

- the prudent mediator will respond in writing when asked what potential disclosures to the other parties are contemplated.

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16 See http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf at paragraphs 78 – 81.

17 *Commercial Arbitration Act 2010* (NSW) s.27D(7).

18 See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong).

19 See section 17 of the *International Arbitration Act* (Cap134A) (Singapore), which followed the Hong Kong Arbitration Ordinance in this regard.

20 *Commercial Arbitration Act 2010* (NSW) s.27D(6).

Picking the right dispute for this process will be important, as it is with all ADR processes. It is a question of "Fitting the Forum to the Fuss", to quote the architect of the modern ADR movement, Harvard Professor Frank E.A. Sander.[21]

The kind of dispute most suitable for Med-Arb is one in which there appear to be "win-win" possibilities that may be explored in mediation without having much debate about who is right and who is wrong. One example in my experience (which settled at mediation) was a trademark infringement proceeding in which the defence was that the proceeding itself amounted to an abuse of market power, in breach of Australia's *Trade Practices Act, 1974*. The mediation was spent discussing ways in which the parties might be able to do business with each other to their mutual benefit, with no discussion about the legal issues, except to agree at the outset that they were very interesting.

It remains to be seen what use is made of Med-Arb in Australia in the coming years and the extent to which mediators learn to arbitrate, arbitrators learn to mediate, lawyers learn to recommend the most suitable ADR process for their clients' disputes, and clients learn to choose lawyers with the requisite skills:

> "The challenge for the legal profession... is not simply a matter of adopting less adversarial practices and attitudes, but also being skilled in being able to move elegantly between adversarial and consensual or collaborative approaches." [22]

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21 Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss; A User-Friendly Guide to Selecting an ADR Procedure*, Harvard Negotiation Journal, January, 1994.

22 NADRAC submission 03/9165 to the Attorney-General commenting on the Federal Civil Justice System Strategy Paper.

The following submissions deal with the procedure contemplated by Clause 27D in the sequence in which it in would generally occur, including the steps which are likely to have preceded the referral to arbitration. My objective is to place the Clause 27D process in context.

1. Parties to a contract may include within their contract an arbitration agreement under which they agree to refer disputes which arise between them to arbitration. It is however, relatively rare for the first step in the resolution procedure to involve a reference to arbitration.

2. Most 'modern' commercial contracts provide for a Notice of Dispute to be served which defines the issue about which there is disagreement. The usual contractual resolution provision includes a tiered process requiring an initial obligation to negotiate, sometimes in what is described as "good faith". The next requirement may be the reference of the dispute to mediation, under defined procedural rules.

3. Where the parties have been unsuccessful in their attempts to resolve their dispute, it will be referred to arbitration, the initiation of which commences with the nomination by an independent body of an arbitrator. Often the parties will agree upon a suitably qualified person to act as the arbitrator. The basis of their selection is frequently the reputation of the particular ADR practitioner for efficiency and reliability in the conduct of such proceedings.

4. Once nominated the arbitrator will usually conduct a procedural conference with the parties. During such a conference questions might be raised as to whether:
   (i) the parties have attempted mediation;
   (ii) if the mediation was unsuccessful whether the parties consider it possible that a further attempt at facilitated resolution was desirable;
   (iii) if so, when and by whom might the mediation be conducted, and
   (iv) could the arbitrator act as the mediator?
   (v) Assuming agreement to (iv) how would the mediation be conducted?

5. The procedure under Clause 27D would then apply. It is logical however to recognise that the parties are only likely to adopt this approach if they have confidence that the arbitrator is an individual with the intellect and professional capacity to successfully conduct such a process.

6. It is also important to recognise the different approaches which might be adopted for the conduct of a commercial mediation. The "conventional" model involves both conferencing sessions with all participants and separate private sessions when the mediator confers with each party. In the course of this latter process the mediator may be advised of confidential aspects of the dispute which clearly are not intended to be disclosed to the other party.

7. An alternative procedure is to abandon private sessions with the parties, and to develop conferencing processes so that different aspects are jointly addressed with different representatives of the parties. This might involve expert witnesses or legal advisers, for both parties, being involved in separate conferencing sessions.

COMMERCIAL ARBITRATION ACT 2010 - SECT 27D

27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary

(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement ("mediation proceedings") if:
- (a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
- (b) each party has consented in writing to the arbitrator so acting.

(2) An arbitrator acting as a mediator:
- (a) may communicate with the parties collectively or separately, and
- (b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.

(3) Mediation proceedings in relation to a dispute terminate if:
- (a) the parties to the dispute agree to terminate the proceedings, or
- (b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or
- (c) the arbitrator terminates the proceedings.

(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2) (b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a "mediator" includes a reference to a conciliator or other non-arbitral intermediary between parties.

Note: There is no equivalent of this section in the Model Law.