Support for ADR in the Commercial Court

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Supreme Court of Victoria

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1. Introduction

Since the creation of the Commercial Court of the Supreme Court of Victoria ("the Commercial Court" or "the Court") in 2009, judicial support for alternative dispute resolution ("ADR") in commercial matters has continued to grow. In line with the overarching purpose of the *Civil Procedure Act* 2010 ("the *Civil Procedure Act*"), the Court is committed to facilitating the just, efficient, timely, and cost-effective resolution of disputes. In order to help achieve this objective, a number of innovative ADR mechanisms have been integrated into practice within the Court — both on a case-by-case basis and more systematically throughout the Court. In addition to supporting the application of ADR mechanisms in matters before it, the Commercial Court is also ideally equipped to support external forms of ADR, particularly arbitration. The ongoing success of the specialist Arbitration List has been strengthened by the commencement of the still new Arbitration Rules and Practice Note, which together provide a firm administrative and procedural basis from which the Court can support arbitration in an appropriate and commercially meaningful way.

Before detailing some specific examples of how ADR is helping provide for the just and efficient determination of matters entered into the Commercial Court, it may be useful to say something about what I understand "ADR" to mean in the judicial context. Much has been written about the "A" in "ADR" — does it stand for "alternative", "appropriate", "additional", "assisted", or some other suitable adjective conveniently beginning with the letter "A"? I do not intend to consider the various merits of each of these approaches today, other than to say that — in the context of the courts — the "Alternative" prefix appears to describe what we are referring to accurately enough. That is not to suggest that ADR processes are somehow not mainstream — they most certainly now are. Rather, in my view, the term "*alternative* dispute resolution" neatly identifies processes which are different to those involved in conventional litigation.

More important than the label used however, is what the acronym "ADR" is understood to mean. Sir Laurence Street has described ADR as an "additional range of mechanisms within the overall aggregated mechanisms for the resolution of disputes."[1] By contrast, Betancourt and Crook — editors of a significant international collection of essays on ADR, arbitration, and mediation — adopt the broadest possible definition of ADR as referring to "the idea of utilising a wide spectrum of mechanisms aimed at *preventing*, *managing*, *settling*, and *resolving* disputes."[2] Such broad conceptions of ADR are appealing from a judicial perspective because they emphasise the utility of ADR mechanisms as tools in both the management and resolution of matters before the Court. In this light, ADR is as much about resolving, or substantially resolving, the main issues in dispute, as it is about assisting in the timely, efficient and cost-effective preparation and conduct of proceedings through the Court.

In this context, it is clear that the case management principles underlying practice in the Commercial Court are critical to facilitating the use of ADR within the Court, as well as fostering support for forms of ADR conducted externally to the Court. A key aspect of practice in the Commercial Court is that a judge is allocated to manage and hear each matter from the first directions hearing to the final determination at trial — if the matter makes it that far, which many of course do not. Unsurprisingly, this operational structure allows judges to become familiar with the particular needs and peculiarities of each matter and facilitates flexibility in the way in which each matter is managed. In turn, Commercial Court judges are well placed — assisted by counsel and practitioners — to identify matters, or appropriate issues within matters, which may benefit from the application of some kind of ADR. As I have already suggested, this relationship between case management and the use of ADR mechanisms is of course also informed by — and is complimentary to — the *Civil*

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1 Sir Laurence Street, "The Language of ADR" in Julio Cesar Betancourt and Jason A Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Chartered Institute of Arbitrators, 2014) 105, 106.

2 Julio Cesar Betancourt and Jason A Crook, "ADR, Arbitration, and Mediation: An Overview" in Julio Cesar Betancourt and Jason A Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Chartered Institute of Arbitrators, 2014) xxi, xxi (emphasis in original).

Procedure Act, which gives ADR processes as a prominent example of how the overarching purpose may be achieved in the courts.[3]

With this background in mind, my intention today is to give you some concrete examples of how ADR mechanisms are being used in the Commercial Court. I will begin by taking you through some forms of court-managed ADR such as case management conferences and the successful Oppression Proceedings Pilot program. I will then discuss at some length the use of the special referee procedure in the Great Southern group proceedings — a process without which it would have been simply impossible to manage those proceedings. I will conclude with a discussion of some recent cases that I have heard in the Arbitration List as an example of the Court's support for forms of ADR that are necessarily external to the Court.

2. Court-managed ADR

The most prominent example of ADR in commercial matters is mediation. Most proceedings entered into the Commercial Court are referred to an external mediator for mediation as soon as possible after the first directions hearing. Mediation at an early stage is encouraged as a way of minimising unnecessary costs and delay and in many cases this can happen before discovery, or at least before witness statements and expert reports are prepared. It is encouraging to see that mediation has become very much the norm in Victoria and practitioners appear to appreciate the value of mediating disputes, both in terms of the outcomes for their clients, and in terms of their obligations under the *Civil Procedure Act*. However, the use of ADR processes in the Commercial Court is broader than merely referring matters to external mediation. The capacity within the Court to conduct judicial mediations and case management conferences, as well as the Oppression Proceedings Pilot program, are some such examples to which I will now turn.

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3 See *Civil Procedure Act* 2010, ss 7–8, 47–48, Ch 5.

a) Judicial Mediation and Case Management Conferences

In recent times, Commercial Court judges have increasingly utilised the Associate Judges and Judicial Registrars for ADR referrals. In early November 2014, Hetyey JR was appointed as Judicial Registrar of the Commercial Court. Hetyey JR is responsible for the management and oversight of the Commercial Court Registry, and exercises extensive judicial and ADR functions, including the conduct of judicial mediations and case management conferences. Mediation led by a judicial officer has long been a feature of the Supreme Court; however, there has been a noticeable increase in judicial mediation referrals in recent years.[4] This increase in judicial mediation is a direct result of a targeted and proactive approach to ADR brought about by active case management. To give you an idea of the numbers, I am told that around 70% of judicial mediations resulted in settlement in the 2013–14 financial year, saving the equivalent of over 600 hearing days — impressive numbers by any measure.

Case management conferences, on the other hand, serve a different function and, amongst other things, are designed to help —

- identify, define and refine issues requiring judicial resolution;
- determine any interlocutory steps necessary in the preparation of the proceeding for trial; and
- determine how the trial might be most efficiently conducted.

Depending on the size and complexity of the proceeding, these conferences typically run for half a day and as such allow for a level of detailed discussion in relation to particular interlocutory issues or disputes which is not possible at an ordinary directions hearing. The parties are also expected to undertake appropriate preparation prior to the conference and a key representative of each client is encouraged to attend.

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[4] Chief Justice Marilyn Warren, "The Litigation Contract: The Future Role of Judges, Counsel and Lawyers in Litigation" (Speech delivered at the Victorian Bar and Law Institute of Victoria Joint Conference, Melbourne, 17 October 2014).

In a recent matter entered into List C — being the general commercial list that I manage — I referred the parties to Hetyey JR for a case management conference. The proceeding had been active for over two years and involved disputes over a complex web of loans between numerous parties. In preparation for the conference, I directed the parties to produce a costs budget — a procedure set out in the White Book, being the Civil Procedure Rules of the Supreme Court of Judicature of England and Wales, now the Court of Appeal, the High Court of Justice, and the Crown Court.[5] In subsequent correspondence with the Court, the parties were advised that the budget was to provide a breakdown of costs and disbursements for each stage of the litigation, identifying costs already incurred and those estimated to be incurred going forward.

As I made clear to the parties, this process is designed to bring the commercial realities of the dispute to the fore. I expressly told the parties that this was a chance to see what the case was actually all about, and, more importantly, to see how much it was all going to cost. More generally, this process is designed to ensure that costs are incurred in a manner that is reasonable and proportionate to the complexity and importance of the issues and amount in dispute. The process of preparing and discussing a costs budget also enables parties to better anticipate the potential consequences of an adverse costs order at the conclusion of the proceeding. Although not binding, a costs budget may also be referred to at the taxation stage with respect to the reasonableness of the costs incurred.

Following the case management conference, the parties returned for a directions hearing. If all the costs estimates were accurate, the budget showed that there would be hardly any money left for the successful party. In other words, and to put it bluntly, there was simply not enough money in the dispute to justify its continued prosecution through to trial and judgment — particularly in light of the parties' overarching obligations. Although the proceeding did not settle immediately following this revelation — from my position on the Bench at least — this process appeared to have a fundamental effect on the way in which the practitioners

[5] See *Civil Procedure Rules* 1998 (UK) Pt 43, s 6.

approached the dispute. Indeed, the parties' representatives went as far as to openly acknowledge the stubbornness of their clients in circumstances where the costs of the litigation were projected to be disproportionate to the amounts in dispute.

This is an instructive example of the potential diverse outcomes of these kinds of conferences — outcomes which are inherently difficult to measure. Although the focus is not on the resolution of the dispute per se, case management conferences can help focus the parties on the commercial realities of a dispute — which, in turn, can enhance the chances of the parties achieving settlement at a judicial or external mediation. Where this does not happen, these conferences can save public time and money by narrowing the issues in dispute and encouraging the parties to make suggestions as to how the trial might be run most efficiently. Moreover, case management conferences help parties to comply with their obligations under the *Civil Procedure Act*, and assist the Court in achieving the overarching purpose.

b) Oppression Proceedings Pilot

Another example of the relationship between innovative case management and the adoption of ADR processes is the treatment of applications under s 233 of the *Corporations Act* 2001 (Cth) ("the *Corporations Act*"), where it is alleged that the affairs of a company have been conducted oppressively. The Oppression Proceedings Pilot ("the Pilot") was launched in October 2014 with the issue of *Practice Note No 5 of 2014*. Following a highly successful trial period, the Pilot was recently reviewed and extended to run to 1 August 2016, when the process will be reviewed again.

Practice Note No 13 of 2015 explains the circumstances that gave rise to the Pilot as follows:[6]

> Almost all of the claims seeking relief under s 233 of the Corporations Act relate to small businesses, most commonly family businesses. Frequently, the value of the business is not substantial. Nevertheless, applications are often supported by affidavits which run to many pages and considerable detail. At the first return of the originating process, it is common for orders to be made for inspection and copying of the books of the company, for valuation of the shares in the company and for mediation.

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[6] *Practice Note No 13 of 2015: Applications under s 233 of the Corporations Act 2001 (Cth) — Oppressive Conduct of the Affairs of a Company*, [2].

In response to the disproportionate costs typically incurred in, and court time spent managing oppression proceedings, the Pilot was developed to trial ways of encouraging the resolution of the dispute at very early stage. Conceptualised as a form of ADR, the new process first restricts affidavits in support of applications under s 233 to three pages, with no exhibits other than a current company search. Following initiation, the proceeding is reviewed by the Corporations List Managing Judge to determine whether it is suitable for inclusion in the Pilot. The Practice Note gives some examples of the kinds of proceedings which may not be appropriate for entry into the Pilot, such as applications concerning publically listed companies, or involving complex trust structures.[7]

Following entry into the Pilot, the application is made returnable for an initial conference before an Associate Judge or a Judicial Registrar at which both the parties and their legal representatives are expected to attend. This initial conference is an opportunity to explore whether the matter is ready for referral to mediation or whether some other preliminary steps should first be taken, such as whether the Defendant should have an opportunity to file a short responding affidavit or whether a valuation of the company is appropriate. The matter is then mediated by an Associate Judge or a Judicial Registrar, or referred to external private mediation if appropriate. If the matter does not resolve at mediation, an Associate Judge or Judicial Registrar may make directions by consent for the future conduct of the matter and the application may be referred to a Judge for further directions and/or for hearing.

The Pilot is an excellent example of the systematic application of ADR processes in the Commercial Court that goes beyond individual case management. Indeed, the success of the Pilot is testament to the support for ADR from both judicial officers and the court administration.

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7 *Practice Note No 13 of 2015: Applications under s 233 of the Corporations Act 2001 (Cth) – Oppressive Conduct of the Affairs of a Company*, [6(c)].

3. The Use of Special Referees

The sheer size and complexity of some matters entered into the Commercial Court necessitates the innovative application of ADR processes in order to complete interlocutory steps and prepare the matter for trial. The imperative to deviate from conventional litigation practice was no more tangible than in the Great Southern group proceedings where the special referee reference procedure in Order 50 of the *Supreme Court (General Civil Procedure) Rules* 2005 ("the Rules") was used to manage the discovery process, and later to manage other issues such as the opt-out process and the amendment of pleadings.

a) The Great Southern Proceedings

The Great Southern Proceedings stemmed from the collapse of the Great Southern Group in 2009. From 1998 to 2009, the Great Southern Group was involved in a number of managed investment schemes relating to timber, cattle, and other agricultural products. There were over 23,000 investors in these managed investment schemes, with some investors being self-funded, and a large number obtaining finance though one of the entities within the Great Southern Group — namely, Great Southern Finance. Broadly speaking, the Great Southern Proceedings involved disputes surrounding allegedly misleading product disclosure statements which the Group had issued in relation to the managed investment schemes. There were also a number of proceedings which were brought by certain banks against investors who had defaulted in their loan repayments.

In addition to the proceedings originally issued in the Supreme Court, over 80 proceedings were transferred from the Supreme Courts of New South Wales, South Australia and Western Australia, the District Court of New South Wales, and the County Court. These transferred cases were all stayed pending the outcome of the main trial; a trial which involved 16 group proceedings and eight individual proceedings, selected as representative of the main issues in the proceedings that had been issued and transferred.

From the outset, it was apparent that discovery was going to be a serious issue in the management of the proceedings. There were a rather staggering number of possibly relevant documents identified, with a total of 3,657 boxes of hard copy records, together with approximately ten million electronic files. To further complicate matters, many of the documents were in the possession of the Group's liquidators. As every lawyer is acutely aware, the discovery process can be painstaking at the best of times, taking up much time, at considerable cost. However, given the monumental number of potentially discoverable documents in the Great Southern Proceedings, any type of general discovery would have been simply impossible to complete without taking up years of both the parties' and the Court's time and money.

With this in mind, and with a proposed trial date already fixed, I invited the parties to make written and oral submissions in relation to discovery and document inspection. Some of the suggested alternatives included a document room, akin to a due diligence room, where parties would have access to documents that had not been reviewed for relevance, as well as for limited discovery, which in itself would have still been problematic to define, given the volume of material. After considerable discussion with the parties, I suggested that Mr Anthony Nolan SC be appointed as a special referee to facilitate the resolution of the discovery issues.

b) The Special Reference

Rule 50.01(1) of the Rules empowers the Court to refer any question to a special referee for the special referee to decide or to provide an opinion on. Rule 50.04 allows the Court to adopt the report of the special referee, or decline to adopt the report in whole or in part, as the "interests of justice require", and the Court of Appeal has provided comprehensive guidance in this regard.[8]

Over a few days in late August 2011 the parties, in conjunction with the special referee, settled the form of orders and questions to be decided by the special referee. I then made orders for the appointment of the special referee and the questions to be

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8 See *Wenco Industrial Pty Ltd v W W Industries Pty Ltd* (2009) 25 VR 119 at 126–7.

decided regarding the scope of proposed orders for discovery. The special referee process involved a number of conferences attended by the various parties at different stages to discuss the appropriate discovery orders to be made.

In early September 2011, the special referee provided a written report to the Court in which he gave his opinion as to how the discovery process should be conducted. The report acknowledged that the proposed discovery protocol was not perfect; however, the parties agreed that it was in their clients' respective interests to make the process work. It was encouraging to see the parties arrive at this position — particularly as, in my experience, discovery is far from an exercise in perfection. Following the special referee's first report, I expressed the view that ongoing management of the discovery issues was desirable and I requested that the special referee's involvement continue. The parties agreed to this course and the special referee continued to be involved after the rendering of his first report. This had the effect of the first report being treated as an interim report and I advised the parties that the special reference therefore remained on foot to assist the parties.

Between September 2011 and October 2012, the special referee remained involved in the proceedings, attending directions hearings to provide oral updates on the ongoing reference, and providing the Court with nine further written reports. The special referee communicated with the parties by telephone and email and held conferences as and when required, usually after the exchange of written submissions. In addition to discovery issues, the ongoing reference helped resolve issues regarding the content of opt-out notices, the identification of newspapers in which the opt-out notices would be published, the nature of the mediation and choice of mediator, the amendment of pleadings, and common issues in each group proceeding.

c) Reflections on the Procedure

The use of the special referee procedure allowed the interlocutory processes to be expedited in the hands of a very experienced senior counsel, thereby saving a great deal of public resources and giving me room to continue managing other aspects of the pre-trial process. The most important point to take out of this aspect of the trial is that each step was taken with an end goal very much in mind. This ensured that the court management processes and systems were co-ordinated to ensure each party — as well as the Court — were working together to achieve the most efficient, timely, and cost-effective process possible.

Counsel for one of the parties has described the process as —

> a cost effective way to manage interlocutory disputes and differences. The parties were supportive of the process, which ensured the process achieved results. The process enabled the parties to resolve interlocutory disputes in a way which minimised costs and Court time.

The same counsel commented on the initial conference held to discuss the discovery process as follows:

> The immediate benefit of the conference was that the parties were able to consider the submissions of the opposite parties and constructively develop a regime. The process was assisted by the approach taken by the special referee. He insisted on a level of informality, encouraged comment from all parties, readily participated in discussions, suggested alternatives and acted in a manner regularly seen in mediation.

It is pleasing to read such positive reflections on the involvement of the special referee, particularly given the enormity of the task with which we were faced at the commencement of the process. This innovative use of the special reference procedure was a great positive to come out of the Great Southern Proceedings and I trust that the lessons learned in the process can be applied in future mega litigation in particular.

4. Judicial Support for ADR: Arbitration

Another important manifestation of the Commercial Court's support for dispute resolution processes other than conventional litigation is the management of arbitration-related matters through the Court. The establishment of the specialist

Arbitration List in 2010, and particularly the commencement of the accompanying *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014 ("the *Arbitration Rules*") and *Practice Note No 8 of 2014 — Commercial Arbitration Business (*"the *Arbitration Practice Note*") late last year, have greatly assisted in providing practical direction to the profession as to how to proceed in arbitration-related applications. The Rules provide a comprehensive set of rules and forms and are designed — so far as possible — to be a user's guide to the appropriate procedure for the variety of applications which may arise with respect to arbitration proceedings. This means that it is easy for practitioners to find the relevant rule and appropriate form or forms — a basic feature, but one which goes a long way to saving time and money for parties, as well as court time.

With these arbitration-friendly structures now well established, the Court is ideally placed to offer appropriate and commercially meaningful judicial support for arbitration. This support manifests itself in the form of support for the processes of arbitration, as well as support for the product of those processes, namely the arbitral award. Examples of the former include applications to stay proceedings in favour of arbitration, as well as applications for the issue of subpoenas, while the latter involves applications to set-aside or enforce arbitral awards.

a) Supporting Arbitral Processes

In *Robotunits Pty Ltd v Mennel*, the Defendant ("Mennel") sought orders that proceedings commenced by the Plaintiff ("Robotunits") be stayed and that the parties be referred to arbitration.[9] The proceedings in question involved a claim for the return of money which Robotunits claimed that Mennel, its former managing director, had wrongly caused it to pay to his bank account. Mennel sought a stay and referral to arbitration in reliance on an arbitration agreement contained in a shareholders agreement to which he and Robotunits were party. Mennel claimed that he was entitled to make the bulk of the payments under the shareholders agreement, and that therefore the proceeding involved the "determination of a matter that, in pursuance of the [arbitration] agreement, [was] capable of settlement

[9] [2015] VSC 268 ("*Robotunits*").

by arbitration", and so was required to be stayed in accordance with s 7(2)(b) of the *International Arbitration Act* 1974 (Cth) ("the *International Arbitration Act*").

In resisting the application, Robotunits submitted that, in order to constitute a "matter" under s 7(2)(b) of the Act, the assertions giving rise to the dispute between the parties must be "sustainable", in that they must have a reasonable prospect of success. Robotunits argued that Mennel's assertion that the shareholders agreement authorised some or all of the payments did not meet this sustainability requirement and so there was no matter — or dispute — to which the arbitration agreement could apply. Upon reviewing the authorities, including from Hong Kong, Singapore and the United Kingdom, I found that neither s 7(2)(b) of the Act, nor its Model Law equivalent in art 8, imposed a threshold requirement of this kind. I noted that—[10]

> to find otherwise would be to succumb to the temptation of "domesticity" … by allowing the determination of whether to stay proceedings and refer the parties to arbitration to be coloured by the merits of the case.

Robotunits submitted further that, in any event, the matters for determination in the proceeding were not "capable of settlement by arbitration" and so did not satisfy the requirements of s 7(2)(b) of the Act. Robotunits argued that there was a strong public interest in having conduct which could constitute serious criminal offences — namely potential breaches of directors' duties under s 184 of the *Corporations Act* — ventilated in a public form so that the Australian Securities and Investments Commission ("ASIC") could be aware of it. In rejecting these submissions and finding that the *Corporations Act* issues pleaded were arbitrable, I commented that:[11]

> In my view, and as a general proposition, there is not a sufficient element of legitimate public interest in matters involving the *Corporations Act* to make their resolution by arbitration — that is, outside the national court system — inappropriate.

I noted further that I did not consider there to be any reason why the possible interest or standing of a statutory body such as ASIC in prosecuting conduct at issue in a dispute should make that dispute inappropriate for binding private dispute

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10 *Robotunits Pty Ltd v Mennel* [2015] VSC 268, [42].

11 *Robotunits Pty Ltd v Mennel* [2015] VSC 268, [69].

resolution.[12] These are strong endorsements of the virtues of arbitration and, in my view, accurately reflect Australian legislators' support for arbitration, as embodied in the *International Arbitration Act* and in the Uniform Commercial Arbitration Acts enacted in every State and Territory (other than the ACT).

Another example of judicial support for the processes of arbitration is the determination of applications for the issue of subpoenas to attend before, or produce to an arbitral tribunal under s 27A(1) of the *Commercial Arbitration Act* 2011 or s 23 of the *International Arbitration Act*. Applications of this kind may only be made with the permission of the arbitral tribunal and the *Arbitration Rules* require that applications be accompanied by an affidavit stating the terms of the permission and the nature of the arbitration, as well as a copy of the draft subpoena.[13]

In *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* ("*Esposito*") the Applicant applied for the issue of subpoenas to a number of corporate entities in relation to an arbitration before Michael Shand QC ("the Tribunal").[14] Before setting out the applicable principles, I reiterated my view as expressed in the *ASADA* case that it is—[15]

> clearly inappropriate for the Court, in an application … by a party to obtain subpoenas, to embark upon a process which would, in effect, "second guess" the arbitral tribunal which has already given permission for the application to obtain a subpoena …

In ordering that the proposed subpoenas be issued, I noted that the principles applicable to the question of whether an arbitral tribunal should grant permission to a party to apply to the Court for the issue of a subpoena are not necessarily the same as the principles which the Court applies in deciding whether to issue a subpoena. Nevertheless, I remarked that there is "every reason why an arbitral tribunal should

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12 *Robotunits Pty Ltd v Mennel* [2015] VSC 268, [70].

13 *Commercial Arbitration Act* 2011, s 27A(2); *International Arbitration Act* 1974 (Cth), s 23(2); *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014, rr 9.06(2), 9.14(2).

14 [2015] VSC 183.

15 *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183, [5] citing *ASADA v 34 Players and One Support Person* [2014] VSC 635, [63].

not grant permission in circumstances where it is reasonably clear that the court will … not issue the subpoena."[16]

In relation to the Court's role in these kind of applications, practitioners and counsel ought be reminded that the Court is not a mere rubber stamp on the determination of an arbitral tribunal to permit a party to apply to the Court. The Court retains a discretion whether to issue the subpoena and it is for the Court, not the arbitral tribunal, to determine whether the coercive powers of the state to compel a person to do something should be exercised. This gives rise to a relatively delicate balancing act whereby the Court must exercise its discretion without "second guessing" the tribunal's decision to allow the application to be made, or otherwise interfering with the substantive or procedural issues before the arbitral tribunal. In light of this, it was particularly helpful in the *Esposito* case that the Tribunal had furnished detailed reasons for his decision to permit the application to be made to the Court. As such, I was able to see that the Tribunal appeared to have accorded procedural fairness to the parties and that the principles applicable to the issue of subpoenas by a court had been considered and applied.

b) Enforcing Arbitral Awards

In addition to support for the processes of arbitration, the Commercial Court is also ideally placed to offer appropriate and commercially meaningful judicial support for the product of the arbitral process — the arbitral award. Earlier this year, the *Sauber* case attracted worldwide attention — and not only because it involved a race car driver seeking to be reinstated as one of his team's two drivers for the 2015 Formula 1 Season.[17] The Applicant driver and the company set up to manage his interests ("van der Garde") sought enforcement in Victoria of a Swiss arbitral award. The critical dispositive provision of the award required the Respondent ("Sauber") to—

> refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula

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16 *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183 [7].

17 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792 ("*Sauber*").

One Season as one of Sauber's two nominated race drivers.

Two days after the rendering of the award, van der Garde's Australian representatives contacted my Associates in accordance with paragraphs 10 to 12 and 14 of the *Arbitration Practice Note*. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday), at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber. I made orders for substituted service and listed the substantive application for hearing on the following Monday, the Labour Day public holiday.

At the hearing, Sauber sought — amongst other arguments — to resist enforcement on public policy grounds.[18] Sauber submitted that the critical dispositive provision was too uncertain to constitute an order of the Court. In support of this submission, Sauber argued that the subject of an order "must be able to ascertain in precise terms what it is that they must do, or refrain from doing", where default may ground an action for contempt.[19] Incidentally, as things panned out, van der Garde did in fact bring contempt proceedings later that week. In addition to this uncertainty argument, Sauber submitted that enforcement would be futile because the award did not require Sauber to take any positive step to reinstate van der Garde as one of its drivers.

I delivered my judgment and written reasons one day after the hearing. I allowed the application and made orders enforcing the award and its critical dispositive provision. I found that the provision was not too vague or uncertain, nor was enforcement futile. Importantly, I noted that the Court was available to assist the parties at all hours, seven days a week, in the event of any "doubt or difficulty" in this regard.[20] The Court of Appeal affirmed this approach within 36 hours of the delivery of my judgment, upholding my orders and finding that "all concerned are well aware of the nature of the dispute and its resolution", and that there was

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18 *International Arbitration Act* 1974 (Cth), s 8(7)(b).

19 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792 at 795 [7].

20 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792 at 797 [22].

"no demonstrated lack of utility in the award as to render it against public policy to enforce it as an order of the court."[21]

The expeditious and effective manner with which the *Sauber* case was managed through the Court, both at first instance and on appeal, provides an excellent example of the Court's capacity to support arbitration. At the conclusion of the final hearing, senior counsel thanked the Supreme Court and the Court of Appeal on behalf of the parties for the "extraordinary time and effort … put into hearing … and resolving" the matter.[22] In open court, the President of the Victorian Bar, James Peters QC commented that —

> There are very few cases in legal history where a matter [has been] started, appealed and then [had] contempt proceedings resolved within eight days. … [W]e're very grateful to the Supreme Court of Victoria for going to that effort.[23]

Clearly, not all arbitration-related matters will require the same urgent handling and disposition as the circumstances of the *Sauber* case necessitated. However, this case is a prime example of the Court's capacity to support external forms of ADR — in this case, arbitration — in an appropriate and commercially meaningful way.

5. Conclusion

In conclusion, and as I have discussed today, ADR is routinely used in the Commercial Court as an important tool in both the identification and narrowing of the issues in dispute, and often in the resolution or settlement of the substantive controversy between the parties. The integration of ADR processes into the Commercial Court has been heavily influenced by the case management principles underlying practice within the Court. As I have noted, these practices are integral to facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute and as such are complimentary to the overarching purpose of the *Civil*

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21 *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 at 789–90 [12]–[13].

22 Transcript of Proceedings, *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (Supreme Court of Victoria, S CI 2015 00978, Croft J, 14 March 2015) page 64, line 2–9.

23 Transcript of Proceedings, *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (Supreme Court of Victoria, S CI 2015 00978, Croft J, 14 March 2015) page 64, line 2–9.

Procedure Act. Finally, from a judicial perspective where I am faced with managing increasingly busy and complex commercial lists, I see the ongoing adoption of ADR processes as critical to the efficient management of matters through the Court and I expect the support for ADR that I have shared with you today to continue.