ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND

Arbitration Day – Auckland – 16 November 2009

"How to Minimise Disruption and Delay in Arbitral Proceedings"

Commentary by Justice Clyde Croft

It is a great pleasure to be in New Zealand and participating in such an important Arbitrators' and Mediators' Institute of New Zealand (AMINZ) event as this Arbitration Day – particularly following so soon on the very interesting, useful and enjoyable conference held in Wellington just a few months ago.

I attended that conference as Vice-President of the Institute of Arbitrators and Mediators Australia (IAMA), as a Director and the Treasurer of Australian Centre for International Commercial Arbitration (ACICA), and, of course, as an arbitrator and mediator – and a few other things in the ADR, appropriate dispute resolution, field. I speak to you today – again as a person intimately involved in supporting and delivering services in the ADR field – but now as a judge of the Supreme Court of Victoria. While I regret the passing of my more direct involvement with IAMA and ACICA, I am delighted to be a member of a Court dedicated to a leadership role in dispute resolution; whether it be litigation, arbitration, mediation or other techniques available from the very extensive array of appropriate dispute resolution processes – and all under the very imaginative and dynamic leadership of Chief Justice Marilyn Warren. In this respect, I should add that the Court's role extends not only to domestic dispute resolution, but also to the encouragement, facilitation and support of international commercial arbitration in Australia and this region.

Regionally I think we need to co-operate for the benefit of all. I am very pleased to see close co-operation developing even further between IAMA and AMINZ; and in this respect I note that Paul Crowley, the Chief Executive Officer of IAMA, is present today and will be spending tomorrow discussing the further development of these ties with David Carden, your President, and Deborah Hart, your Executive Director. I have always been very impressed at the way AMINZ covers a broad range of ADR. In particular, it has deftly integrated and emphasised both arbitration and mediation, without compromising either. This is so much so that many years ago as President of the then Institute of Arbitrators Australia I was able to emphasise and develop our mediation stream; and rename the Institute to acknowledge the other important focus, mediation. You are also doing very effective work here in relation to judicial mediation and we are very fortunate to have had Justices Robert Chambers and Graham Lang, and Associate Justice John Faire, speak on the topic at a very recent Victorian Supreme Court Judges' Conference. They provided very helpful presentations and led discussions which both provided support and new ideas for our work in judicial mediation in the Supreme Court in Victoria. Personally and professionally, I am very pleased indeed to be able to maintain close links with your work here as a Judicial Fellow of AMINZ.

I turn now to the very helpful paper that David Williams presented, having, I hope, provided some background to the institutional and Court concern in Australia to achieve cost-effective and efficient appropriate dispute resolution – which is, of course, the theme of David's paper with respect to arbitration.

Given the enormous cost of arbitration or litigation, I do not think that the majority of parties in the community would see rampant "party autonomy" as an essential part of any dispute resolution process. "Fairness" as an abstract is clearly the goal in all these processes but, ultimately, it must be a balance – with the equilibrium varying according to all the circumstances. I ask, rhetorically, how can it be fair to all parties to allow an "arbitration terrorist" or "arbitration guerrilla" (to use Michael Hwang's terminology), or the same species in litigation, free reign to use all or many of the tactics David has outlined to thwart proceedings entirely or prevent the opposing party or parties from presenting their case as a result of the cost, expense and delay generated? Article 18 of the Model Law is clearly directed to all parties – all parties are to be given a full opportunity to present their case. Consequently, this connotes a balance; though this might be thought to be obscured by some of the terse and sometimes unhelpful language of the Model Law – particularly to our eyes nearly twenty-five years after its adoption by the General Assembly. In this respect, I think some allowance needs to be made for the genesis and status of the Model Law as an "international instrument" and the difficulties inherent in its drafting; undertaken not merely by a committee, but by a vast assembly of States and non-governmental organisations at the United Nations. I have not had a chance to look at the Article 18 and more general debates of UNCITRAL and its Working Party which drafted the Model Law, but I would be very surprised if it is not clear from this material that Article 18 is to operate as part of a cost effective "international arbitration regime" and that the expression "full opportunity" was, in this context, intended to be read as meaning "reasonable opportunity".

The more modern *English Arbitration Act* 1996 makes this position clear in sub-section 33(1), particularly with the aid of the "overriding principles or objectives" spelt out in section 1 of that Act. I think it is very helpful to apply the "overriding objective" device in arbitration legislation and rules – and also in a litigation context. The prime example of the latter is the "overriding objective" which is now stated in the *English Civil Procedure Rules,* which was the result of the reforming work of Lord Woolf. The "overriding objective" is, in substance, the same as that contained in section 1 of the *English Arbitration Act.*

In my view, the overriding objective provision does itself also assist arbitrators in applying the relevant arbitration rules with a heightened degree of authority. This allows arbitrators to seek to achieve expedition, cost-effectiveness and real, practical, fairness for all parties. We took this view in preparing the ACICA Expedited Arbitration Rules, and included the following provisions:

> 3. Overriding Objective
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> 3.1 The overriding objectives of these Rules, which is to inform the processes, powers and rights here described, is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved.
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> 3.2 By invoking these Rules the parties agree to accept the overriding objective and its application by the Arbitrator.

The overriding objective is then expressly reflected in Article 13.1, which provides:

> 13. General Provisions
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> 13.1 Subject to these Rules, including the overriding objective in Article 3, the Arbitrator may conduct the arbitration in such manner as he or she considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity of presenting its case. [emphasis added]

Another essential ingredient in dealing with delay and disruption in arbitration proceedings is for the arbitrator to feel comfortable in the knowledge that the whole process will be supported and assisted – and in a very timely and practical way – by the courts of the arbitral seat. This not only provides comfort to the arbitrator, it also enhances very significantly his or her authority to apply the relevant arbitration rules or procedural orders to achieve cost-effectiveness and expedition, and to prevent parties exploiting threats of misconduct claims or other appeals and delaying tactics in the arbitration or court proceedings. This assistance and support may need to be immediate. An example that has always fixed in my mind of the sort of service a supporting court should be ready to provide comes from an international arbitration in the London Court of International Arbitration many years ago. After great difficulty in organising the proceedings, which involved multiple international parties, the hearing began. It was discovered mid-morning that an injunction was required from the English High Court of Justice. The North American party despaired; "and after all the cost and trouble in organising this hearing"! The then doyen and Registrar of the London Court, Mr Bertie Vigrass, said to disbelieving parties that this was no problem – we provide a service here! Sure enough, to the surprise of the doubters, Mr Justice Wilberforce (later Lord Wilberforce) and one of the most eminent common law judges, certainly of the 20th century, sat down at the arbitration table with the arbitrators and the parties at 2.15pm. He heard the injunction application, granted it and returned to the High Court. The hearing then proceeded as scheduled - and you can only imagine how this would have enhanced the authority of the arbitrators to apply the "reasonable" interpretation of Article 18 of the Model Law – or its equivalent – in those proceedings.

I am sure that this is the sort of timely support, assistance and practical service your Courts strive to provide to help deal with the problems David has outlined. It is certainly the timely support, assistance and practical service you can expect from the Supreme Court of Victoria.