CONSTRUCTION MANAGEMENT

IAN M EILENBERG

DISPUTE RESOLUTION IN CONSTRUCTION MANAGEMENT

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PREFACE

It is often said that one of the inevitable outcomes of a building contract is that it will end up as a dispute. This is of course an over simplification and in reality, less than five per cent of building contracts end up in a dispute, and even less in a formal dispute. Of those five per cent an even smaller percentage end up in a formal court order or arbitration award. Most are resolved at the 'door of the court'. Yet the processes are there to resolve these disputes, when unfortunately they do arise. This book aims to provide those involved in building contracts, whether the owner or the builder, or any other person involved, with an overview of the various systems available for the settling of disputes and also some of the methods being adopted, especially in the larger commercial contracts, for minimising the chance of disputes arising in the first place.

Chapter 1 considers the various steps that can be implemented to minimise the chances of major disputes occurring. If a formal dispute should arise, the steps suggested in this chapter will make the preparation of your case that much easier.

Chapter 2 introduces the reader to the psychology of the participants, with the aim of providing some insight into the people with whom you have to deal in day-to-day life, as well as in the dispute environment. In the temple of Delphi there is a sign that says, 'know they self'. In this case it is also a matter of knowing, or at least understanding, the other person as well. This chapter provides some of the guidelines and information for doing just this.

Chapter 3 considers the various court systems. The courts are still an important means of resolving disputes, especially for the larger and more complex legal matters. It is not vital for the readers of this book to know the intimate operations of the court systems. However, a general understanding of what they are, how they operate and their role in dispute resolution will assist the reader when a decision has to be made as to which form of resolution should be selected by the parties.

Chapter 4 has been written from an international perspective, in keeping with the ever-increasing internationalisation of both construction and the law. For this reason the chapter uses the *Model Law on International Commercial Arbitration 1985* as published

by the United Nations Commission on International Trade Law (UNCITRAL) as its base and then compares the legislation in other countries. The focus here is mainly on Australia and New Zealand, with a number of other countries being used as comparisons. In both the court and arbitration legislation chapters, the information provided forms a basis for a more intensive study of any specific country's legislation covering these areas, should the reader wish. However, this information has universal application, as arbitration is now run (with some minor differences as a result of the local culture) similarly around the world.

Chapter 5 goes through the process of running an arbitration hearing, including the preliminary and main hearings. It also reviews some alternative systems based on the main arbitration process.

Chapter 6 provides the reader with the key elements for successful negotiations. When, as will inevitably occur, the parties to a contract have a difference of opinion, good negotiation skills may be sufficient to resolve the difficulty, without the matter progressing to a major dispute — thus saving time, money and frustration of the parties.

Considerations in the use of third party neutral or assisted negotiation through mediation and conciliation forms the basis of Chapter 7. This chapter builds on the knowledge developed in Chapter 6 and applies it to these processes, thus providing the reader with the skills necessary to arrive at the best possible solution of the problem under dispute.

Chapter 8 considers some of the processes that have been developed in an attempt to avoid disputes in the first place, namely partnering and alliancing. These aim to save time and money and to best retain the working relationship between all the parties.

Finally Chapter 9 examines some of the problems that have been identified in the relationships between the contractors (both domestic and commercial) and some of the ways that these may be improved. It also provides a brief look to the future and the direction in which dispute avoidance and resolution may be heading.

The book provides a resource list that includes a large number of web sites to which the reader may refer, as well as useful texts. Most of the legislation from around the world, including many articles on the subject, are now available electronically and are generally more current than many of the texts. I have listed the resources by chapter so that they may be readily accessed as supplements to the book itself.

I hope that this book may in some small way lead to a better understanding of the parties involved in the construction contract and, if unfortunately they should find themselves in a dispute, help to shorten the dispute and lead to a speedy and inexpensive resolution.

This book would not have been possible without the assistance of and support from my wife and my family, who I am sure thought that the doctorate was an end, not realising what lay ahead. Without their patience this book would never have been completed. I would also like to thank Roz Varghese who has supported and assisted me with much of this work.

Finally I would like to express my thanks to John Elliot and Stephanie Harding for their patience, perseverance and encouragement, and to Cassie Futcher — if it were not for her editing abilities this book would be even harder to read than the subject already makes it.

Ian Eilenberg

CHAPTER 1

AVOIDING DISPUTES

INTRODUCTION

This book discusses the various systems that have been developed to help resolve disputes as well as the systems that have been developed to minimise the possibilities of a dispute arising. It seems a logical starting point to suggest some of the steps that may be taken by builders to avoid getting into a dispute situation in the first place. For this reason this chapter provides an overview of some of the basic procedures that all builders and others involved in construction should take to minimise the possibility of becoming involved in a dispute. It also aims to give those parties the best chance of a successful outcome, should a dispute eventuate.

ANTICIPATED LEARNING OUTCOMES

Some simple rules for minimising your risk of having a dispute
How to manage variations and work orders to minimise the chance of later disputes
Pricing of work to minimise documentation errors
Methods of good record keeping

TOPICS COVERED IN THIS CHAPTER

Major areas that can lead to disputes in a building contract
Standard contract clauses that require special consideration
Specially drafted contracts
Related contract documents
Defective work
Variations or 'extra works'
Delays and extensions of time
Latent conditions
Poor documentation and site diaries

MAIN AREAS CAUSING DISPUTES

There are many books available about the various areas of disputation in the construction industry. Without looking at the legal basis of some of these claims, the actual body of the claims can be readily categorised. The most common of these, as identified or confirmed in research by the author, are:

- Contracts
- Defective work
- Variations or 'extra works'
- Delays and extensions of time
- Latent conditions
- Failure to adequately document the works
- Failure to adequately document daily events.

This chapter does not aim to cover the legal processes available, but rather a series of suggestions as to what steps can be taken to minimise the chance of ending up in a costly dispute.

CONTRACTS

Standard forms of contract

The majority of construction contracts are in a standard form published by various organisations — Master Builder's Association, Housing Industry Association, Royal Australian Institute of Architects, Property Council of Australia, Standards Australia, various State and Federal Governments and even banks and finance organisations — sometime separately and sometimes as joint publications. These can be bought from the various organisations, with some now available from their websites.

The language used in these contracts ranges from high legalese through to straightforward English using layman's terms. The contracts all cover the same basic information, if in different ways. Common areas in most contracts include:

- a commencement date
- a completion date or construction duration in either calendar or working days
- a method of dealing with changes to the time frame, for whatever reason
- methods of the builder making a claim for payment
- a time frame for the submission and payment of claims by the client
- methods for dealing with a failure of the client to pay
- methods for dealing with changes to the contract and variations to the work
- methods of pricing and paying for the addition or reduction in workload.

In addition to these, other items may include the process of dealing with a builder who fails to adequately advance the progress of the works and bankruptcy on the part of the builder or client.

Format of the contracts

Most contracts now have two distinct sections. The first part is the printed section containing the standard clauses setting out the parameters of the obligations of both parties. The second part is blank with various clauses relating to the matter in the main part of the contract. It is the second part that is most important — this is where the actual way that matters as listed above may be specified.

It is failure to take care with this second section of the contract that often leads that which should be a readily resolved problem, into a full legal dispute. This frequently comes about through an inadequacy to correctly fill in the various details. Adhering to the following requirements will help avoid potential problems:

- Make at least two copies of the contract – one for the client and one for the contractor. Where financial institutions are involved that body may require a third copy. They should be done at the same time. Situations where the builder has filled in one copy for the client and had it signed, and then given the client a copy that is different is not uncommon in the domestic arena.
- Ensure that both parties sign the contract and have it witnessed. Again this should be done with all the parties present. Unsigned copies create unnecessary difficulties.
- Ensure the date is written into the contract. Leaving this out, or having different dates in different copies, makes determination of the completion date that much more difficult.
- Fill in all the relevant dates, especially if there are to be staged handovers.
- Where provided, ensure that ALL the relevant documents included in the contract are listed, for example drawings, specifications and where they exist and the status of the Bill of Quantities.
- Where there is provision for additional items to be inserted, either include them or write 'not applicable' (rather than 'n/a').

Finally, it is wise to have your lawyer check the various requirements of the contract conditions, and explain to you the various implications and obligations that this contract will place on you, before filling in and signing the contract. It is too late if you find out later that the contract contains conditions you either did not understand or expect. The law will generally accept that if you sign the contract, subject to specific conditions, you agreed to and understood the contract that you signed.

Specially drafted contracts

Where a contract is specifically drafted for a project it is essential that the parties seek advice from their own lawyers. The recommended practice is to use lawyers who have a specialty in construction contracts.

Other related contract documents

As well as the main contract document, the full range of contractual documents consists of:

- **The contract itself**
- **The plans or drawings**
- **The specification**
- **The Bill of Quantities or Schedule of Rates and so on.**

Each document carries a potential dispute. However, if we ignore the actual content for a moment, there are a couple of simple things that can be done to minimise the possibility of disputation.

Defective works

It may seem obvious, but if a builder contracts for a project, the standard of work required as set out in the contract documents or in other documents accepted by the construction industry must be provided. The client has established these standards and has a contractual right to expect that the contractor will meet these. Most tolerances and acceptable levels of work are specified in building codes or standards. Indeed, it may be useful to consult the *Handbook of Building Construction Tolerances: Extracts from Building Products and Structures Standards* (Standards Australia 1992), which summarises many of these and includes what is and what is not an acceptable deviation from the nominated requirement.

Variations — or extra works

In this context I am referring to deliberate variations (or extras) to the original contract as often requested by the client, but which

are also sometimes necessary to enable the works to be completed on time. Builders need to be aware that by and large, work performed but not included in documentation may not form a legitimate variation. The law has long established that the builder is contracted to carry out the works and is responsible for its completion (*Sharpe v. San Paulo Brazilian Railway Co* (1873) Ch App 597 at 608). On the assumption of a legitimate variation a prudent builder will have the request or instruction in written form, and if not so given, will write out confirmation of that instruction. They will then price the work and have it accepted in writing prior to undertaking the work. Indeed, this is a condition precedent to payment in most residential building contracts in Australia.

Delays and extensions of time

Very few contracts for construction will be both commenced and completed on the exact day anticipated in the contract. This is largely a result of natural elements, including wet weather preventing work in the open and the subsequent problems such as access to the site, flooded footings and so on. It also includes the problems of 'latent conditions' discussed in the following section: the result of additional work, and of both industrial and contractual disputes. Once a builder becomes aware that there will be — or even may be — a delay in the works, it is their responsibility to notify the client (or their representative) in writing and to subsequently ensure that the actual time is documented and submitted to the client as soon as the delay and its consequences are known.

Latent conditions — or the hidden snags

Like hidden snags in water, latent conditions are those items that cannot be seen on a normal inspection of the site or works and would not normally be expected. These range from differing soil conditions — water, rock and so on — through to hidden water or gas pipes in walls or even acid in old holding tanks. Once again the essential action by the builder, when this situation is encountered, is to notify the client in writing. In this case the builder may need to receive instructions as to what should be done, but in circumstances where the builder cannot wait, clear documentation as to why and what has been done is essential.

Failure to adequately document the works

Arbitrators nominate inadequate documentation as a major cause of building disputes. A growing tendency is for the client to spend as little as possible in the preparation of the documentation,

leaving more and more to the builder to resolve. It is widely accepted that the more extensive the detailing and documentation, the less chance there is for misunderstanding of the client's intentions and thus mistakes by the builder. The skill and knowledge of the technology of construction by the builder will always be required, as every detail cannot be economically (or even reasonably) included in the drawings or specification. It is also true to say that if a given detail is open to interpretation, in most cases there will be more than one interpretation possible.

The simplest solution is to adequately document the works at the start of the building process. This benefits all parties concerned: it lessens the chances of misinterpretation on the part of the builder and thus the need to impose a cost burden; and it increases the chances of the client being given a more realistic time frame. There is not much that the builder can do with poor documentation supplied on behalf of the client, except to price the work to cover the inevitable problems ahead. (This raises the issue of pricing to win or pricing to cover every eventuality and probably not winning the work — a real problem in the construction industry and one that needs to be resolved if disputes are to be minimised in the longer term. That issue is, however, beyond the scope of this book.) Clients also need to carefully consider the consequences of 'penny pinching'.

Documenting daily events — or how you will learn to love your diary

Many disputes are related to the failure to establish 'facts'. A good site diary where all relevant information is recorded is a prime source of facts when a matter is in dispute. Data should include a record of all people working on the site, from direct labour to subcontractors, as well as visitors to the site, work being undertaken and the recording of all instructions received and actions taken on those instructions.

It is recommended practice to store a copy at the head office for future use if necessary. In this day and age, the use of computers and emails can replace the written page, but proof of authenticity is that much harder.

SUMMARY

The following is a brief summary of the steps that can be taken to help reduce the chance of construction disputation.

- Always fill in the blanks in a contract, especially those regarding dates and finances
- Ensure that all variation instructions are confirmed in writing and the cost is determined and approved, where possible, prior to undertaking the work
- Price the work to ensure that documentation errors do not cost you in both real money and time wasted in arguments and disputes
- Keep good records of everything that occurs both on and off the site that has any influence on that project.

CHAPTER 2

CONFLICT, DISPUTES AND PEOPLE

INTRODUCTION

This chapter considers the question of differences of opinions between people and at what point these differences become disputes. It looks at both the people involved and briefly considers the psychology behind the participants' thoughts and actions in the build up to a dispute. Some knowledge of people and what motivates them may assist in understanding what is really driving the other party, thus increasing the chances of reaching a mutually satisfactory solution to the problem.

One word of caution should be made here. Most building contracts do not result in major disputation. My own research and that of others in the building dispute field has shown that less than five per cent will end up in this situation. Many will have low levels of differences, but these will be resolved without recourse to any outside assistance. However, when disputes do occur in building contracts, they tend to be relatively large by comparison to the contract value. This chapter attempts to explain some of the reasons why people end up with these differences, (at whatever level) and which may lead to a formal dispute situation arising.

ANTICIPATED LEARNING OUTCOMES

An understanding of the progressive nature of differences between contracting parties

A basic understanding of the psychology of the people who end up in building disputes

TOPICS COVERED IN THIS CHAPTER

The psychology of the participants in a dispute

Basic human needs

Frustration

Conflict between people

Builders and conflicts

Perception

Communication

Non-verbal communication

Eye contact

Spatial relations and personal space

Masking and gestures

Listening

Alternative verbal communications

Semantics

SO WHY DO PEOPLE DISAGREE?

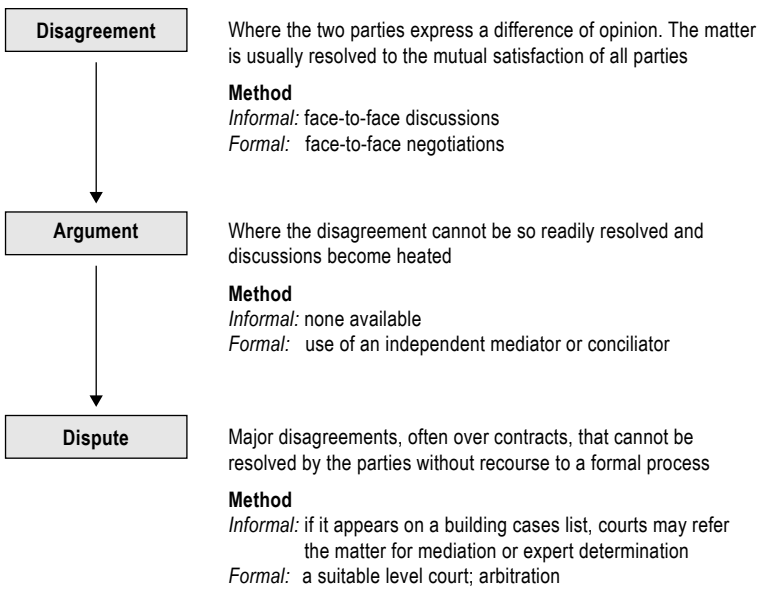
Most people entering into a contract for the purchase of a car, insurance, or a building (whether a house or a commercial/industrial property), do not do so thinking that they will end up with a formal dispute. As I discuss later, virtually all building contracts (and most other contracts) include a formal series of steps to be taken to resolve a dispute should it arise. An architect with whom I did a lot of work used to take the signed contract, place it in a file in his bottom drawer and say that he did not want to see it again. Luckily for me, at least on my projects, he seldom did. But even the best working relationships can have differences of opinion, and in reality it would be most unusual if they did not.

Figure 2.1 illustrates the levels that a difference of opinion can take. Disagreements are the lowest level and in most cases these differences can be resolved by both parties talking through the matter and by having the mutual aim to resolve the matter as quickly and as painlessly as possible.

If not resolved, the matter may escalate to that of an argument, where the level of difference is such that the parties are not readily able to resolve the matter. The exchanges may become quite heated and the recommended recourse is to seek further advice, either in the form of formal negotiation or mediation. With good preparation and consideration of the problem, the differences may be resolved.

The third level is termed a dispute and this is primarily where our present interest lies. At this level, the difference is such that it cannot be resolved without recourse to a formal system and outside assistance. And whilst mediation may be a first step, it has only a small chance of success and an imposed solution will be required, whether by a court of suitable jurisdiction, or by a jointly appointed arbitrator.

FIGURE 2.1
DISAGREEMENT ESCALATION DIAGRAM



Construction is one field of endeavour that seems to have more than its fair share of disputes. The document, 'No dispute: Strategies for improvement in the Australian building and construction industry' opens with the comment: 'When inevitable shortfalls occur … under claims administration, disputes will occur … ' (NPWC/NBCC 1990). Likewise, in the summary of the Report of the Australian Federation of Construction Contractors (AFCC) it states:

> Construction industry claims and disputes have now become an endemic part of the construction industry … It was found that the problem of claims and disputes in the construction industry is a worldwide phenomenon (AFCC 1988).

It is a sad reflection on the construction industry that not only do these two reports state the inevitability of disputes arising, but

senior judges (Lord Pennock amongst them) and various solicitors have also stated it.

The question that has to be asked then is, why does the construction industry have so many disputes? Perhaps Lord Browne-Wilkinson gives the answer, at least in part, when he observes:

> The disputes frequently arise in the context of the contractor suing for the price and being met by a claim for abatement of the price or cross-claims founded on an allegation that the performance of the contract can be defective (Cremean 1995).

But as set out in the previous chapter, these are the actual causes of the dispute. I wish to address the underlying aspects of differences and why people resort to disputation. I want to consider the psychology of the participants.

THE PSYCHOLOGY OF THE PARTICIPANTS

> In trying to understand why disputes occur in building contracts, the key clearly lies with the fact that people are interacting in some way. Although many disputes are based on arguments about technical or legal points, disagreement continues because the people involved in the argument can become intransigent (Murdock & Hughes 1992).

Conflict, at whatever level, is a complex psychological issue. It could be assumed that people would normally avoid initiating conflict (or disputation) unless first having a belief that they would win a given dispute. Nor surely would they start a dispute if they knew that to resolve it would cost them time and probably money. Yet this is often the case. Michael Ryan, a leading solicitor in the building dispute area, wrote in 1994 that people will often engage in a formal dispute even when experts, usually their legal advisers, tell them in the clearest terms that they will have little, if any, chance of success.

People seem to display the unerring psychological belief that in all instances of conflict they are right, and that their advisers not only might be but probably are wrong — particularly when their advisers do not agree with their own judgment of the situation and its expected outcome. This 'belief in self' is often necessary, or almost elemental for a given personality, to preserve a person's own sense of well being. It is a sad fact that I have heard people say, 'I don't care what you say, I believe that I am right and I am sure the Judge (Arbitrator) will agree with me. Any reasonable person would', even when an independent assessment has clearly shown that this is not the case.

In many respects, construction conflict can be likened to that of the conflict of war. Bueno de Mesquita in his treatise *The War Trap* (1981) writes that the broadest and seemingly obvious generalisation that emerges from the concept of war is the expectation that conflicts will be initiated only when the initiator believes the conflict will yield a beneficial outcome. This simple generalisation is based on the notion that people do what they believe is in their best interest, provided the means to deduce several counter intuitive propositions about the conflict is present.

Basic human needs

To better understand the participants in a dispute situation, it is helpful to have some idea of what elements make up a person; their needs, the things they consider important and that give them a sense of purpose in life, what makes them feel threatened, and their self-perception.

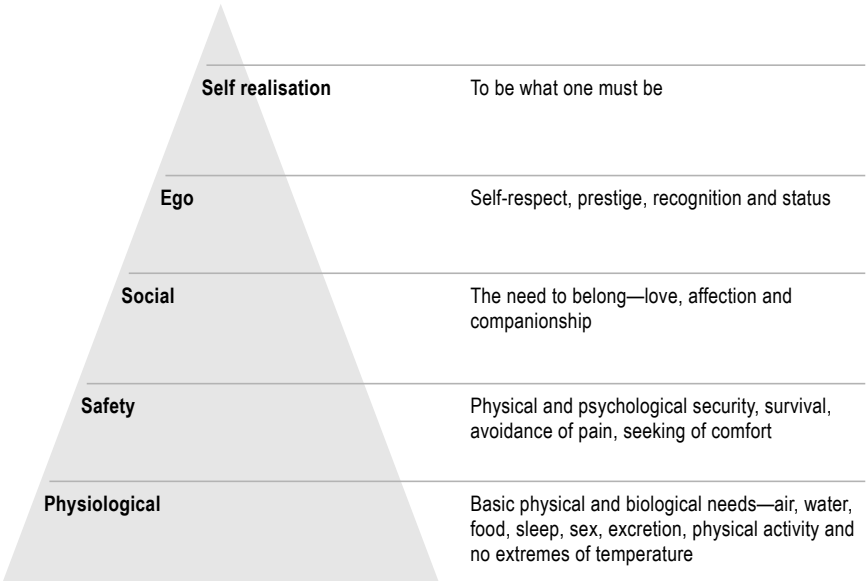
Perhaps Maslow (1954) provides the classic and best-known discussion of human needs when he states that 'all humans, whether rationally or irrationally, consciously or subconsciously, behave as they do to satisfy various motivating forces'. He nominates the essentials for survival as sustenance (food and drink), shelter (residence), procreation (sex) and general security (money). Figure 2.2 shows Maslow's psychological pyramid. He believes that the motivation of human beings depends fundamentally on the extent of their ascent up this pyramid. Later writers use similar terms. It is fair to say that for most writers on the subject, all basic needs are generally aimed at the continuance of the human species, although in the satisfaction of these needs we are usually unaware consciously of what we are doing. This phenomenon is referred to as the primary drive.

With respect to the individual person, various writers on the subject have added such needs as response, security, recognition, stimulation, distributive justice, and a need for meaning, control and to be seen as rational.

Frustration

If for some reason there is interference in the achievement of these human needs, a person suffers 'frustration' (Maslow 1954). Burton (1990) suggests that in modern industrial societies 'the application of "positive law" [a person shall do …] is beginning to require such an extent of coercion, rather than reflecting any habit of obedience, that it and the authorities which impose it, are being challenged, especially in developed societies, such as those

FIGURE 2.2
MASLOW'S PSYCHOLOGICAL PYRAMID



in the so called civilised "western" society'. In other words, people will no longer blindly follow authority but will question this 'imposed' order.

Furthermore, the term frustration has been said to also refer to the circumstances that result from the failure of a need or motive to be satisfied. The internal state of emotional disturbance that accompanies such events is termed 'psychological stress', 'tension' or 'anxiety'.

To realise their particular aims, people attempt to exercise control over the events that affect their lives (Bandura 1997). The hawk cannot influence when the prey will arrive, but will simply keep seeking. People will motivate themselves by forming beliefs about what they can do, anticipate likely outcomes, set goals and plan a course of action (Gleitman 1981). When a person considers that they have lost control over these aims, they feel frustration.

Human needs are being frustrated on a large scale in all modern societies. The more law and order is enforced to control frustration, the more it occurs. In the building arena this administrative frustration has been widely evident. In Queensland (and later in Victoria) for example, a building tribunal was established to hear disputes specifically related to residential construction in an

attempt to reduce the perceived problems of arbitration (excess cost and too legalistic). It seems that this tribunal in turn created its own frustrations, by way of the time factors and the need for documentation it imposed for its own administration. The time delays, bloated costs and ever-increasing complaints from the consumers who were supposed to be being helped by the system were such that, in 1997, the Queensland Government disbanded the tribunal, declaring it a failure. It was subsequently reformed to avoid the earlier problems and is still operating.

Frustration is one of the problems that occur once a construction dispute has arisen. The length of time it usually takes from when a problem arises until it can be resolved will often lead to frustration by the parties. Dispute resolution in California in the early 1990s is a case in point: it was taking five years for the case to be presented at the preliminary court hearing — which was held literally hours before the expiration of the five years to permit continuance. People involved in these matters often feel the resolution is 'out of their control', and it usually is, the matter being in the hands of their legal representatives and the arbitrators. Paradoxically, this frustration is aggravated by the contracts drafted for building works that include systems for dealing with a problem once it has got to the stage where the parties cannot resolve it themselves. But there is, in most instances, no automatic circuit breaker, no way someone can come in and immediately (within hours) settle the problem, prior to the formal notification of a problem.

Conflict between people

Maher (1964) defines conflict as 'any pattern of stimulation presented to an organism which has the power to elicit two or more incompatible responses, the strengths of which are functionally equal'. There is a body of literature that discusses the experiments that have been undertaken in this area starting from as early as 1935, where three forms of conflict situations were described (Lewin 1935). The first of these conflict situations is described as one where people are torn between two desirable alternatives. This might be, for example, in the building context where a person has a choice to build a new house now and move out of the rented unit, or to save up for another year and build an even better house.

In other conflict situations people are forced to make a choice between two undesirable alternatives (in the building sense, an example would be the client paying overtime or having the work

delayed). In the third situation people are both drawn to, and repelled by, a particular goal at the same time (where the client pays the builder for a variation when they actually believe that the work covered in that variation should be paid for by the builder, but the client just wants to make sure the work will get done). This type of conflict also leads to frustration. The person — in the above case the client — may develop the perception that they have lost control, or that the builder has in fact wrested control away from them. Conversely, this situation can also equally apply to the builder. For example, when negotiating a price for a new house, a builder may have to take a lower price than he can really afford, so as to ensure the cash flow and to stay in business. The builder is frustrated because the owner will not pay the 'real' price, yet the builder has little choice — they can either take the lower price or lose the business. In this instance the builder may not only feel that the owner has taken control of the situation, but may also feel frustration knowing that the bank is also controlling the action, not the builder himself.

The perception of a conflict situation will differ depending on where the parties believe they stand in relation to that conflict (initiator or receiver). From their own point of view, when a person is involved in a conflict, they invariably think that they are behaving quite rationally. Yet also it invariably follows that where one party is in conflict with another, they will think that the other party is in the wrong. They cannot imagine how anybody could hold the opposing position. Further, the perception of where a person and/or group stands in the conflict, for instance as an initiator or receiver, will also affect how they react to that conflict.

Builders and conflict

Writers on a wide range of issues on construction note that conflict is a common occurrence for a wide variety of reasons. A number of academics in the area of construction remark that:

> The increased tension and associated stress that accompanies the occurrence of a problem increases the potential for conflict within the project. The research has observed that unexpected problems often act as triggers to conflict episodes … (Langford et al. 1995).

> It seems, however, that not only the builders suffer stress; there is also considerable dissatisfaction by clients of construction, and disputes and conflicts are widespread as a result of severe problems with product quality and the highest rate of insolvency of any industry (Fenn & Speck 1992).

It has been noted that questions of clarification in matters such as work quality and time are bound to arise. These issues will require dialogue and the emergence of familiar constituents of the commercial communications and the skills of management teams on each side to facilitate it. Other writers remark that conflict is to be expected as part of construction and that conflict between contracting companies may be seen as an inevitable by-product of organisational activity (Cook 1979).

It is necessary here to further examine circumstances that occur at the inception of a conflict. As mentioned by the many commentators discussed previously, it is not always the actual situation that leads to conflict, but a perception by the parties that there is a situation that will lead to conflict. So what actually is perception?

Perception

Whenever two or more people meet, they invariably make a number of almost immediate decisions about the other person or group. These decisions are based on preconceived opinions about the 'type' of person or people encountered within that group. Most of these judgments concern relatively superficial characteristics such as nationality, race, social class, occupation, age and physical appearance.

The building industry is no different. For example a builder, appearing for the first time at the home of a prospective client, arriving dressed in dirty torn off overalls, and with beer breath and dirty hair, is likely to be considered 'rough' and even 'unpleasant' and probably thought to be 'poorly educated' at this first meeting. This will not do much to project the image of the builder as a 'professional' as compared to an architect who arrives at the same time in a clean, well-pressed suit, smelling of an expensive aftershave.

The above characters may be a cliché, yet so is the saying, 'you can't judge a book by its cover'. It follows that superficial characteristics may not be important in themselves and the initial perfunctory perceptions may be totally wrong. The dishevelled builder may have come from a hard day's work on a construction site where he had been toiling to ensure a project would be finished on time (while studying externally for his Master of Business Administration). The architect on the other hand may in reality be an alcoholic who consequently takes extra effort to conceal his weakness. Yet superficial characteristics often do elicit stereotypes in the perceiver. And perceptions are difficult to change once they have been made.

Although initial impressions may affect builder/client working relationships, building projects necessarily take place over an extended period of time, and it could follow that the respective relationships also change over that time. Relationships between contract parties tend to be different at the beginning of a project as compared to those that exist by the time a formal dispute has arisen.

Most contracts begin with a sense of partnership and an atmosphere of co-operation. Too many relationships end up in an atmosphere of mutual distrust, if not hatred, and so reinforce the group perceptions discussed above (Cook 1979). There are a number of other areas that can be discussed under the heading of conflict and I recommend further study if the reader has an interest in this area. One that we do need to address is communication.

COMMUNICATION

March Hare: You should say what you mean.
Alice: I do – at least I mean what I say – that's the same thing you know.
Hatter: It's not the same thing a bit! Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see' (Carroll 1880).

I have talked about conflict or differences of opinion at specific levels in the relationships between people and many writers cite a lack of communication as a major cause of this conflict. Communication is essential to the development and maintenance of our daily life. Indeed, it is through communication with others that people learn about the world around them and learn how to behave in the many situations that comprise modern living. Further, human speech is only one of many different ways that the abstract concept of communication can be realised in a practical form (Deutsch 1973).

In construction, communication can be considered as the process of transmitting information from one point to another. This may be between one individual and another, or between one organisation and another:

> Communications can be formal and informal. Formal communications tend to be written, but in construction, the use of drawings is foremost. Drawings are considered the most appropriate method of communication for technical information: what the construction project consists of (Miller 1973).

Lack of effective communication in the building industry is often cited as the chief cause of disputes and costly litigation cases (McLagan 1991). Various writers have noted the poor level of

communication on construction sites, where it seems the main form of communication is verbal (either by telephone or face-to-face). It follows that communications are deficient as, in many instances, these conversations are not confirmed in writing to the other party.

It would seem logical that to ensure full understanding of a contention, a confirmation document sent from one party to the other should include the name of the parties privy to the conversation, the time and date of the conversation and the matters discussed. This basic process is common in commercial construction, but sadly lacking in most domestic construction situations. At the very least the important conversations should be entered into a diary (see Chapter 1).

It is not just the informal conversations on the building sites that need to be confirmed. Formal communications, including those required under a building contract for the legal communication of vital information must also be considered. The consequences of failing to undertake these formal requirements under the contract are a major problem in the construction industry, in both domestic and commercial sectors.

One of the problems with verbal communication is simply, words. Ambiguity is one such example. The sentence: 'Mary and John saw the mountains while they were flying to California' can be interpreted two ways. The 'logical' interpretation would be that Mary and John were flying to California, but it could be just as readily interpreted that Mary and John saw the actual mountains flying to California. The reader knows from his/her conceptual knowledge that mountains do not fly, therefore the latter must be wrong. In this sense, the conceptual knowledge is not part of people's linguistic knowledge, but plays an important role in the way we understand language in actual usage (Miller 1973).

It follows that most of our misunderstandings of other people are not necessarily due to any inability to hear them, to understand their sentence, or to understand their words, although such problems do occur. It appears that the major source of difficulty in communication is that people often fail to understand the speaker's intention.

NON-VERBAL COMMUNICATION

Body language (kinesics)

During the course of communication we gain seven per cent of our information from the actual words being used, thirteen per

cent from the tone of voice of the speaker and eighty per cent from their body language (Markhem 1996). It seems there exists both positive and negative body language. For example, a classic 'closed' body language is the arms folded across the chest, body erect and rigid and a general avoidance of eye contact. Therefore, in discussions where one party may say verbally that they agree with what another person is saying, yet adopt the 'closed' posture, the chances are that there is no real agreement at all. In this context it is interesting to note that a letter or a telephone conversation or e-mail can only deliver the words, and perhaps, not the full intent of a given communication. Lowen (1958) sums this up when he notes that '[n]o words are so clear as the language of body expression once one has learned to read it'.

Culturally it is useful to know the type of person with whom you are dealing in a given situation. Australians do not generally greet friends or business acquaintances with a hug and kiss on each cheek. Yet this type of greeting is normal for many Europeans. Most Asians, however, would be greatly offended by overt public affection. And most Australians would be embarrassed.

For many years there had been held a belief based on the work of Charles Darwin (1872) that facial expressions of emotion were similar amongst all humans, regardless of culture. And although in the 1950s this belief was countered by further research, from the 1970s onwards the Darwinian theory has again been accepted and reinstated.

The research carried out by Darwin (and indeed subsequent research) identifies many commonalties in the facial expressions of people. These include that all people are programmed to turn up the corners of the mouth when they're happy; turn down the corner of the mouth when they're discontented; wrinkle the forehead; lift the eyebrows; raise one side of their mouth and so on, according to what feeling is fed into the brain. There is a wide recognition of the importance of body language in projecting a message between communicators (Lowen 1958). This recognition has led people in politically high places to adapt various body language generalities in an attempt to achieve that indefinable something usually referred to as 'charisma'. John F. Kennedy, former President of America, was said to have been a master of non-verbal communication.

Eye contact

Another example of a non-verbal form of communication is the way in which people project their eyes. The classic western novel

will contain the type of stock sentence: 'the cowpuncher sat on his horse loosely and his fingers hovered above his gun while his eyes, ice cold, sent chills down the rustler's back'. Conversely in love stories, the heroine's eyes melt while the hero's eyes burn into hers. Physiologically the eye itself cannot express emotion. Rather it is the face around the eye that conveys the emotion — the facial squint, the non-blinking stare, the raised eyebrow and so on.

In Western culture direct eye contact during discussions is important: it is the equivalent of declaring that a person is prepared to communicate openly with the other party. It follows that a lack of eye contact is often taken as the opposite. Eye contact is also taken as sign that the other party is paying attention to what the first person is saying, thus providing positive feedback. Interestingly, in other cultures direct eye contact is taken as an insult, or a challenge to the interlocutor's authority.

The response of the eyes is even used by people in market research to assess the success of advertising. One method adopted in market research for a new advertisement is to carefully study the eyes while the commercial is being shown to the select audience, to detect just when there is any widening of the eye to indicate the unconscious, pleasant response to the commercial.

Spatial relations and personal space

Paradoxically, it seems that when business people are using face-to-face verbal communication they are generally doing so on an impersonal level. Further to this finding, Edward Hall (1959), who studied this odd phenomenon, found that Americans converse impersonally at a distance of 1.2 metres. In Latin America the equivalent distance is 600–900 millimetres. It follows that for a South American and a North American to converse effectively, finding a suitable distance would need careful consideration. Hall discusses the further problem of using tables or desks in business situations, where South Americans have been known literally to jump over them to express their feelings. It appears that people's use of space has a bearing on their ability to successfully relate to other people.

In the context of the above example, there can be made a comparison with nature, where a herring gull pecks its neighbour if it gets too close. Human beings, thankfully, adopt different actions, but they apparently mean the same thing, or as Gleitman (1981) phrases it, 'you have entered "my" space'.

It is interesting that whilst commenting on the various vagaries of the animal kingdom, it has been said that the territorial nature

of man is genetic and impossible to get rid of (Fast 1970). Psychologists acknowledge that man has a sense of territory. The 'great Australian dream' has long been to own the quarter acre block in the suburbs (Boyd 1952).

Perhaps it follows that the businessman considers (often subconsciously) that his desk is his 'territory'. This seems to be supported by anecdotal evidence that leaning over the desk to make a point to someone will, in most cases, make the owner of the desk move back. In terms of Hall's discussions of space, a 'far' distance is considered to be between 2 and 3.6 metres. It follows that the 'big boss' will have a desk large enough to put him this distance from his employees. The boss can remain safely seated at this distance and look up at an employee without a loss of status.

This matter of spatial relationships is likely to have significance within the construction industry. Other than the obvious office situation (boss to employee) there is a more important area — the physical site where the building is being constructed. At the domestic level, it could be construed that a builder undertaking construction of an extension to a house is in the greatest danger of encroaching on the client's space, where the workplace is the client's home and their place of retreat. For instance, an extension might involve a kitchen where there is a very close encroachment on the area 'owned' by the cooking partner. It follows that whilst at the site, it is difficult for the people communicating (the builder and the client) to be at a 'far' or 'safe' distance. The very nature of the interaction, by sheer proximity, will have a tendency to encroach into the other's 'space', perhaps initiating a threat to the other party (usually the owner). Yet it is true to say that the same threat can potentially exist on any construction project, albeit on a different level.

Discussing a new road may seem an impersonal scenario, but to the engineer and the person responsible for building the road, it may well have the same intimacy as a house extension for a house owner. Similarly, a new office block for a given client is a very personal undertaking for the company owner — it may after all be the culmination of a lifetime of work, or even a symbol of success, implying that the owner has made it in a competitive arena. Further, if the company is large and a representative is responsible for the project, they will have a very personal reason for wanting the project to succeed — their future employment, amongst other things. Either way any given building will have significance for the client, often significance not readily apprehended by the builder (Boyd 1952).

Boyd also contends that the client should, in some cases, be regarded not as a unitary concept (like a person) but as a complex system of interest groups; some congruent, some competing. It follows that a large project will not only have significance for a singular person or client, but rather that many splinter groups of clients will have a corresponding interest in the success of the project.

There are a number of classic experiments regarding human reaction to the invasion of a given 'private' space. One such experiment was undertaken by Nancy Russo (cited in Sommer 1969; Fast 1970), who used a library as her laboratory. On occasions when the library was mainly empty, Russo sat right next to isolated people working by themselves. She observed a number of defensive gestures from subjects ranging from placing their books or pencils as 'fences', to shifting their own seat further away, to eventually moving away altogether. Only one in eight persons actually asked Russo to move away.

Masking

For most people, the face we present to the world is rarely our 'real' face (Russo cited in Sommer 1969; Fast 1970). It seems that one of the faces we show to the public is in fact the very presentation of the way we manage our personal appearance. These 'signals' include the clothes we select and the hairdos we affect. Generally the principle is still one of 'conformity'.

Most people still expect senior business executives to wear a conservative suit and tie. Similarly, it seems our body language is also expected to conform to certain norms. We smile through the day although we may actually feel angry and annoyed beneath the smile. We smile at the customers, at our bosses, our employees, children, neighbours and partners. Very few smiles have any real significance. They are simply the masks we wear.

On some occasions, people may drop the 'expected' mask. In the privacy of their car people often swear at other motorists who annoy them, in a manner that they would never dare to show in public. Perhaps a public emergence of this private face explains the growing incidence of 'road rage'. People also often drop the mask when talking to people they regard to be 'inferiors', usually in the context of the social ladder, for instance servants and secretaries. Children are also often put in this category.

It is interesting to note that in order to successfully negotiate, it is essential that people drop this 'mask' and be as open and honest with each other as possible. But what often happens in any relationship is that language itself becomes a mask and is used as a means of clouding and confusing the relationship.

It is also true that if the spoken language is stripped away so that only the body language is left, the truth will find a way of emerging (Lowen 1971). Yet in most relationships, it must also be noted that body language and spoken language are often dependent upon each other. Neither aspect of language by itself will completely give the full meaning of the person communicating. Nor, it follows, will the reception of only one aspect transmit the full meaning of a communication to the receiver.

Gestures

A gesture is an expressive motion or action, usually made with the hands and arms, but also with the head or even the whole body (Miller 1973). In the Western world a handshake is an accepted sign of welcome (a tradition said to originate in a person holding out the open hand, showing they come with no weapon). In Japan people prefer to bow, offering no direct contact. Other gestures show negative intent. Most Westerners, if seen poking out their tongue, would be considered to be expressing an insult and yet, in the Maori culture, such a gesture is considered a sign of challenge (known as the Haka).

To listen or not to listen

Communication is a two-way activity. No successful communication can occur if one party speaks, but the other party does not 'hear'. The need for listening to the conversation of the other party is obvious, yet it is demonstrably difficult to listen well. In conjunction with the visual clues of body language, words assist in the understanding of the message being communicated. It is good practice for the person communicating to speak clearly and simply, keeping in mind the above ideas. For total clarity it is then useful to ask the receiver to provide 'feedback' to the original speaker, ensuring that the message has been correctly received. Effective feedback demands that the receiving party repeats what has been said, thus confirming complete understanding.

ALTERNATIVE VERBAL COMMUNICATION

Whilst most verbal communication is conducted by means of what is generally termed language, being composed of rational words, other forms of audible communication exist (Whittaker 1965). These forms include audible bodily noises such as grunts and groans of pleasure to indicate agreement. Apart from various noises that may impart agreement or displeasure, we can also

communicate subtextual intentions simply by way of the manner in which we speak. How we say something is often more important than what we say. For example, when asked if a person agrees with a statement, the reply could be, 'of course' with a flat inflection indicating agreement, or 'of course' with an upward inflection actually indicating sarcasm and non-agreement. The written words look the same, yet the verbal 'audible' message may be quite different.

Non-speech, or interrupted speech, can also give non-verbal hints as to what is really going on in the mind of the speaker. Sentences with a number of non-grammatical pauses may indicate an unsure comment, or a person collecting their thoughts, which may well be covering up a lack of knowledge about the issue at hand. For example, suppose a builder asks a client for an extension of time for wet weather, simply because they know delays have occurred as a result of rain, yet they are not sure of the exact dates. When asked directly for the dates by the client, the builder's reply may be: 'Well … I am not totally sure … it was last month … early in the month … probably the first week … err … the 3rd … probably. Look I'll need to go back to the office and check'. The message here is that the builder is not really sure, and in the mind of the client, may be 'trying it on'. In reality the builder may simply not have prepared the claim properly. As a consequence of the interrupted speech, however, the builder is going to have to work much harder to persuade the client of the validity of what is probably a legitimate claim.

SEMANTICS

The most common form of verbal communication used by humans is words. Semantics is the literal meaning of sentences and their constituents. Yet the meaning of words is not clear-cut, as we have already discovered. The English language, and the accepted meaning of words, is constantly changing. For example, the *Oxford Dictionary* says that the word 'footstep' in 1535 was 'the distance traversed by the foot in stepping'. In 1683 it's added meaning was: 'a bearing to sustain the foot of a vertical shaft or spindle' (Oxford 1987). Ambiguity, as has also been discussed previously, is also a problem with the English language. 'I took the photo' can mean 'I stole the photo', or 'I engaged myself in the process of photographing a subject'. Semantics cover a wide range of these verbalised intricacies, including meaningfulness, synonymy, redundancy and so forth.

SUMMARY

Disputes are not restricted to the construction industry, but may occur whenever two people have to work together. One's actions may be controlled by the actions of another person just as another may evaluate one's performance. These and other interdependencies make conflict inevitable. On this basis there is always the potential for conflict and what is needed is the establishment of a system or systems, which will minimise the possibility of disagreements escalating into full disputes.

This is the case also in the United States. Writing in the DART Newsletter, Jack Barden says that: 'during the past fifty years much of the United States construction environment has degraded from one of a positive relationship … to a contest consumed in fault finding and defensiveness which results in litigation (Barden 1996).

In order to resolve disputes in a manner that does not resort to violence (as was once the norm — from wars to duals) it has been necessary to develop systems that will help those parties once they find themselves in a dispute, to resolve these differences. Hence, resolution systems can be classified into two major categories:

- formal hearings that result in an imposed and legally enforceable ruling, including the courts, government tribunals and arbitration. The distinguishing feature of these systems is that an Act of Government established them.
- informal systems that in themselves create no legally enforceable result. These include a vast variety of methods but include negotiation, mediation, mini-trials, partnering and dispute boards.

Throughout this book various systems will be reviewed, with comments on the system as to its role in the resolution of building disputes. The latter two in the last point above may be better considered as prevention, rather than resolution systems, but are now included as part of the total package of dispute resolution within the construction industry.

CHAPTER 3

THE COURT SYSTEM

This chapter considers the various court systems. The courts are still an important means of resolving disputes, especially for the larger and more complex legal matters. It is not vital for the readers of this book to know the intimate operations of the court systems. However, a general understanding of what they are, how they operate and their role in dispute resolution, will assist the reader when a decision has to be made as to which form of resolution should be selected by the parties. In many cases one party will initiate the court hearing leaving the other party no choice but to at least respond to the notice. As far as building disputes are concerned, the principles remain similar. It is not the aim of this chapter to teach the student about the law, which should be done elsewhere.

ANTICIPATED LEARNING OUTCOMES

A general understanding of the various levels of the courts

A general understanding of the way the court systems operate

TOPICS COVERED IN THIS CHAPTER

An overview of the Australian and New Zealand court system

A brief look at the international courts

Building cases lists

Specialist court annexed systems

INTRODUCTION

The court systems of Australia and New Zealand are based directly on the English court systems as a result of the founding of the colonies from Britain. For similar reasons, the court systems of countries that were colonies including Canada, India, Pakistan,

Singapore, South Africa and the United States of America are fairly similar, if not the same as the British system.

We are not interested in criminal law here and will not consider that side of the law, as few builder's end up in that jurisdiction — although some people would like to see more there! Building disputes are generally contract related and come under what is known as Civil Courts (Civil Wrongs). This includes breaches of contract, which in our case is specifically building related contracts. The punishment is not imprisonment, but usually monetary damages and in some cases physical reparation.

It is useful to understand some common terms used in civil matters:

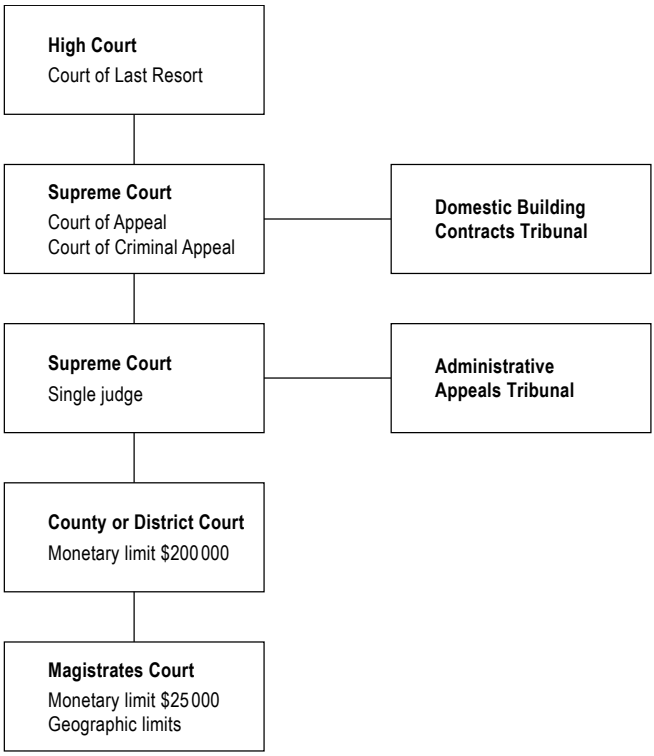
Plaintiff	the person who brings the action – or sues the other party
Claimant	basically the same but a term commonly used in arbitration and so forth.
Defendant	the person who is being sued by the Plaintiff or Claimant.
Judgement	this is the judge's decision. If it is successful, it will be 'for the plaintiff'. If the action fails, then it is usually said that the plaintiff failed rather than the defendant won, although of course that is the net result.
Directions Hearing	a preliminary meeting with the judge (or nominee) to set the schedule for the hearing – what documents will be used, dates for exchange of document and so forth. The purpose of a directions hearing 'is to make any orders or directions which are necessary for the expeditious and fair hearing and determination of a proceeding including the reclassification of the proceeding' (Victorian Civil and Administrative Tribunal 1998).
Discovery	disclosure of all the documents relating to a case, made before the hearing commences and on which the parties wish to rely.

The losing party to the action is usually said to be liable or guilty. In a building case, the losing party may become liable to pay the outstanding progress payment plus interest, or carry out repairs to faulty work and so forth.

The courts that deal with civil matters are generally referred to as Courts of Civil Jurisdiction. The English court system has three basic levels with the highest court being the House of Lords. In Australia and New Zealand it is the High Court of each country and in the United States, the Supreme Court.

The main active court in England is the High Court. This is divided into three sections: the Queen's Bench, The Chancery and the Family Division. Civil cases are before a single judge, generally without a jury. The next level in England is the

FIGURE 3.1
THE COURT HIERARCHY IN AUSTRALIA



SOURCE Varghese 1997

Magistrates' Court, which hears the smaller value cases. Appeals can be taken to the High Court or right through to the House of Lords; indeed a failed appeal in the High Court can also be taken to the House of Lords — as a result of historic precedence, not necessarily common sense. However you need a lot of money to undertake this procedure.

In Australia and New Zealand, the systems are similar, in that there is a basic level Magistrates' Court, a second level referred to as the County or District Court and the High Court. Thus, at a national level the court system is three tiered. Included in the hierarchy however is the Supreme Court, a state based system. Figure 3.1 reproduces the Australian hierarchy.

The following looks at the New Zealand and Australian courts in general only. The sections here are listed in descending order. For specific details reference should be made to the various web pages listed at the end of the book. There are a large number of

other jurisdictions, which may be separate, or come under one of the three main levels. These are not covered here, as they do not handle building matters. To provide a comparison, information is also supplied regarding the relative American courts.
Before we look at each court within this hierarchy, it is useful to understand two areas to which I will refer in these sections.

BUILDING CASES LISTS

Under many Supreme Courts and County or District Courts there may be a number of tribunals and what are commonly referred to as 'lists' related to a specific area of law or commercial activity. One such is the building list, which is:

> Any proceedings in which the claim of one party against any other party arises out of or is in any way concerned with any agreement expressed or implied involving (whether exclusively or not) the performance of work of any description in connection with or incidental to any building or structure actual or proposed with any construction project of any kind whatsoever (Civil Procedure Victoria 1996 p. 17).

The list of building cases is compiled by the Registrar, and controlled by a judge nominated by the Chief Judge of the relevant jurisdiction. The method of placing a case on the list is to apply to the judge (by completing the appropriate form and filing through the Registrar) to have the proceedings listed as a building case, subject to showing that the matter does meet the criteria.

At the directions hearing, the judge in charge of the list is given the option (in most jurisdictions using this system) of placing any case thought desirable (on the grounds of expedition, economy, convenience or otherwise) onto the list either with or without a request from any party. The court may use mediation within the court system, with or without consent of all parties. The function of the mediator will be to consult with the parties in an endeavour to reach a speedy resolution of their difference. Irrespective of whether or not any such resolution is reached, the mediator is not required to make any report to the judge and, unless all parties otherwise agree in writing, all communications between all parties in the course of the mediation will be taken to be communications made without prejudice. The parties must pay the fees for the mediator in equal parts. The advantage of this process is that many of the cases are settled without the expense of a full court hearing and those which still have to go to the court have a reduced waiting time. See Chapter 7 for a more detailed discussion of the mediation process.

REFERENCE OUT

Another useful tool for the court is to send the matter out to a specialist. The court may give directions for the conduct of the reference and can give the referee a wide range of powers necessary for him/her to obtain the information and/or arrange witness to attend and give evidence as required. Once the court has received the report from the referee, the court can ask for additional information or an explanation of some part of the report, may send the whole matter back for further consideration or to another special referee for an opinion, or vary the report themselves. The court is free to adopt or reject the report as justice may require. Where the reference out is to a mediator, no report is made to the court, except to state that it took place and it is now finished — successfully or otherwise. The court may also have the right to send the matter to arbitration, possibly on a specific part of the matter being heard.

AUSTRALIA

The High Court

The High Court is the highest in the Australian judicial system. It was established in 1901 under Section 71 of the Constitution. The functions of the High Court are 'to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals by special leave from Federal, State and Territory courts' (Federal Government, Canberra, <www.hcourt.gov.au/ about_01.html>, viewed June 2002). The High Court is situated in Canberra, but also has registries in Sydney and Melbourne and branches in each of the other main cities around Australia. It is the court of final appeal and is generally related to constitutional matters. However there are a number of other divisions, the main two being:

- Federal Magistrates Service. Its jurisdiction includes family law and child support, as well as administrative, bankruptcy, and consumer protection law.
- Family Court of Australia. It contains information on divorce, family law, forms, legislation and judgments.

The High Court deals with the interpretation of the Constitution. It may be asked to reconsider previous decisions and matters involving the very principles of the law. In these cases the court will sit as a full bench comprising all seven Justices. It can

also give a final determination in an appeal against the rulings of a state Supreme Court — usually heard by at least two Justices, sitting as a full bench. The subject matter can cover the whole of the Australian law from arbitration, company law and criminal law, to tax law, property, trade practices and so forth.

There is no automatic right to appeal to the High Court and parties who wish an appeal to be heard must first have a preliminary hearing and show that there are special reasons why an appeal should be heard. There is no further appeal to a decision of the High Court and all its decisions are binding on all other courts throughout Australia.

NEW ZEALAND

Unlike Australia, New Zealand can still make appeals to the Privy Council from the High Court or Court of Appeal of New Zealand. For civil actions, there is an open right of appeal in cases involving more that $5000. For cases involving lesser sums, and in criminal cases, the leave of the court is required.

Court of Appeal

The highest court in New Zealand is the Court Of Appeal, based in Wellington. It deals with appeals of both a criminal and civil nature emanating from matters heard in the High Court, and criminal matters from indictment in the District Court (see following sections for more details on these courts). It also has the ability to hear appeals sent from the District Court to the High Court, if thought to be of sufficient significance. If leave is granted by the High Court, it may also hear appeals against pre-trial rulings in criminal matters. It can also hear appeals from the Employment Court.

UNITED STATES

Supreme Court

The American equivalent to Australia's High Court is the Supreme Court. It was founded under the American Constitution and started its existence in February 1790. Under Article III, s. 2, the jurisdiction of the court:

> shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority …

AUSTRALIA

The Supreme Court

The Supreme Courts are the highest courts within the states themselves. Each state has their own legislation controlling the court operation, although in most respects this legislation is very similar. Major civil cases are heard by this court; most of these (including building cases) are heard by a judge only. An appeal may be made from lower courts to what is technically called an 'appellant' court — which is the Supreme Court sitting under a different name. In most cases the appeal will be on the legal issues of a case, rather than matters of 'fact'.

The Supreme Court may hear any case, but usually presides over cases above a certain monetary limit, determined by the legislation in each state. Table 3.1 details these limits further. Major construction and engineering disputes that are likely to result in a settlement above these limits are usually heard before the Supreme Court. The District or County Courts hear cases with likely settlements below these limits. In Victoria and Queensland legislation has been enacted which has required residential housing disputes to be heard by a Domestic Building Tribunal no matter what the settlement value.

As I have previously mentioned, many of the Supreme Courts have a special building list under the jurisdiction of an appointed judge. At the directions hearing the Judge heading up the list has the power to remit building cases out for hearing by a person most likely to achieve a resolution of the matter (see 'Referencing Out' section above). The person is usually a qualified mediator or arbitrator familiar with the construction industry. The advantage is that the initial hearing should be heard fairly quickly as against the probable time delays likely to be encountered in achieving a hearing in the court before the judge. Delays of two years and more have been known and in the early 1990s for example, delays of five years in obtaining a hearing were common in California. Courts favour this system because it reduces the court lists and has proved to be very successful in those jurisdictions that have adopted the system.

The advantage of referencing out is that many of the technical matters can be decided or resolved without the expense of a full court hearing. The court-appointed referee is invariably an expert in the technical matter in dispute. By being more familiar with the industry, the referee is better able to make a finding of 'fact' in relation to the technical matters in dispute. The referee reports back to the court, which then determines the legal issues arising in the case from the findings of fact.

NEW ZEALAND

High Court

Until 1980 New Zealand's High Court was referred to as the Supreme Court. Despite the name change it remains similar to Australia's Supreme Courts. It is based in Auckland, but has branches in Hamilton, Wellington and Christchurch, and its jurisdiction extends to thirteen other centres throughout New Zealand. It deals with major crimes and civil claims where settlements are expected to exceed NZ$200 000.

The High Court may hear appeals from various tribunals and lower courts, including the District Court. It too has a building cases list for faster resolution on commercial issues and undertakes a regular review of its rules and procedures. Recent changes have provided an Office of Master of the High Court to allow many matters to be dealt with expeditiously.

UNITED STATES

As in Australia, each American state is responsible for the implementation and interpretation of the local law. In New York State the highest court is the Appellate Court. The main court is again known as the Supreme Court and has general original jurisdiction in law and equity and the appellate jurisdiction. It is also the court of last resort, being the Court of Appeal. Within the City of New York the Supreme Court 'has exclusive jurisdiction over crimes prosecuted by indictment, although the legislature in New York State may give the city wide court of criminal jurisdiction including over crimes and offences by or against minors or between spouses or between parent and child or between members of the same family' (NYS United Court System, <http://www.courts.state.ny.us/ctstructure.htm>, viewed May 2002). In addition, there is the Court of Claims, which deals with claims against the State or by the State against another party; and the Family Court and Surrogate's Court with jurisdiction over wills, probate, administration of estates, guardianship over minors and related matters.

AUSTRALIA

County or District Courts

The next level of the court structure in most states (with the exception of Tasmania which has only two levels) is the County Court (also known in some states as the District Court). These

TABLE 3.1
JURISDICTIONS OF THE COURTS IN AUSTRALIA

ACT	Supreme Court	Court of Appeal; criminal and civil trials	
	Magistrates' Court	Criminal, civil, traffic offences, worker's compensation, Victims of Crime and Children's Court	Claims up to $50 000
NSW	Supreme Court	Court of Appeal; criminal, land and environment court; industrial relations commission; compensation court	
	District Court	Criminal; personal injury; damage to property; contract disputes; and debt recovery	Claims from $40 000 to $750 000
	Local Court	Criminal; juvenile; motor traffic; civil actions; some family law issues and coronial inquiries	Civil recovery up to $40 000
NT	Supreme Court	Court of Criminal Appeal; civil and criminal trials; appeals form the Magistrates' Court	
	Local Court	Local Court; Court of Summary Jurisdiction; Juvenile Court; work health; Coroners' Court and Family Court	Claims up to $100 000
Qld	Supreme Court	Court of Appeal; serious criminal matters	
	District Court	Civil disputes and criminal cases including rape and armed robbery	Civil recovery between $50 000 and $250 000
	Magistrates' Court	Less serious offences; civil matters	Civil recovery up to $50 000
SA	Supreme Court	Court of Appeal; criminal, civil, land and valuation; admiralty and appellate causes	
	District Court	Civil, administrative, and disciplinary; criminal injuries; compensation and criminal divisions	Motor vehicle related where amount exceeds $60 000; other actions where the sum exceeds $30 000
	Magistrates' Court	Criminal; juvenile; motor traffic; civil actions; some family law issues and coronial inquiries	Motor vehicle related matters up to $60 000.; other actions where matters are below $30 000

Tas.	Supreme Court	Court of Appeal; serious criminal matters; civil law matters	Jurisdiction in all matters over $20 000
	Magistrates' Court	Civil actions; criminal; Children's and Family Court; small claims; coronial; appeals	Jurisdiction in matters under $20 000
Vic.	Supreme Court	Court of Appeal; criminal and civil	
	County Court	Civil matters including all claims for personal injuries. All criminal indictable offences except treason, murder and some related areas; appeals from the Magistrates' Court	Except for personal injury up to $200 000
	Magistrates' Court	Criminal; motor traffic matters; civil actions including motor vehicle accident claims; contractual and tortuous matters; and personal injury claims	Disputes up to $40 000
WA	Supreme Court	Civil, criminal and appellant jurisdiction	
	District Court	Civil, criminal and appellant jurisdiction	Up to $250 000
	Magistrates' Court	Civil Small claims Residential tenancy disputes Criminal	Up to $25 000 Up to $3000 Up to $6000

will hear both commercial and criminal cases. A judge and jury will hear criminal cases. Most civil cases, including the majority of building matters, will be heard by a judge sitting alone. The limits of this court are such that it will not generally hear the smaller cases but will hear those above the maximum level as set by the Magistrate's Court (see below). A common level is from $25 000 to $200 000 but this varies from jurisdiction to jurisdiction (refer to Table 3.1). In many states, this court has also adopted the use of a specialist list for building cases. This provides the chance for the court to provide the parties initially with a judge who is (or quickly becomes) familiar with building matters as well as the law, to undertake the first directions hearing. The main constraint at this level is the formality of the court system itself.

AUSTRALIA

Magistrates' or Local Courts

It is the Magistrates' Court that hears the majority of small value construction disputes (with the proviso that they do not have to go to a specialist tribunal). As such it is important that the working of this court is fully appreciated. It hears many cases, and any one magistrate may hear a range of cases over a given period. Unlike the higher courts, most Magistrates' Courts do not have a building cases list, although this is being considered in various jurisdictions.

This is the lowest level court, a fact reflected well by its physical presence throughout each state: higher courts are located only in the major cities. The Court can sit as a number of special courts, including the Children's Court, Workers Compensation Court, industrial division, employee's relations and others depending on the jurisdiction. These courts hear the majority of summary offence cases: traffic offences, breaches of local council bylaws, minor criminal cases such as drunkenness, family disturbances and committal proceedings for more serious cases. They usually sit with a magistrate only. The financial limit for these courts is relatively low and varies according to the jurisdiction, but ranges from $25 000 to $50 000 in most cases. By agreement, and in accordance with regulations, a higher financial level can be heard. The Rules of Court in each jurisdiction cover the full working of the court and include the Notice of Dispute, through claims and counterclaims and discovery. The Rules are such that evidence may be given orally before the court, or in the form of sworn affidavits. The court may also view any place, process or thing. The Rules allow for the use of witnesses and expert witnesses.

In Victoria and other jurisdictions around the country, these courts require that any matter under $5000 must go first to court annexed arbitration, although there is flexibility with this depending on the nature of the complaint. The arbitration must be conducted by either a magistrate or a registrar and is not bound by rules of evidence, although the court representative may inquire into any matter in such manner as they see fit. The award must be in writing, and although the summation does not have to include reasons for the decision, these must be supplied if requested by one of the parties within twenty-eight days of the making of the award. Court costs are not given if the award is less than $500. No discovery of documents is permitted in the arbitration.

In many cases as previously mentioned, residential building disputes no longer go to the courts in some jurisdictions. However where building cases have gone to court, solicitors have expressed mixed attitudes towards the Magistrates' Court. In discussions with some solicitors I have been told that the court itself is intimidating to their clients. Others believed that the court is a better place to resolve disputes that involve a number of parties such as where both the builder and the architect are joined by the owner. Yet other solicitors believe that the best way for an owner to win a dispute with a builder over money is to pay out the builder and then sue them in the courts. Some solicitors would represent the client in the Magistrates' Court, rather than employing a barrister, thus saving the client money.

The other objection to the Magistrates' Court is that the outcome tends to be less predictable than in arbitration: the reason being that the arbitrator is more experienced in the subject matter (that is, in our case, building or construction related matters).

Many jurisdictions permit a pre-hearing conference upon the application of a party to a dispute and indeed in some jurisdictions this is compulsory. The proceedings of a pre-hearing conference are confidential and cannot be used in a subsequent court hearing or arbitration, without the consent of all parties. All parties must attend the hearing, but may be represented by a solicitor or counsel. If a claimant does not appear, the registrar may strike out the case or if the defendant does not attend, dismiss the case. In affect this is consistent with the formal mediation process under the County and Supreme Court legislation, although that is not necessarily conducted by an expert mediator in a specific industry.

There are a few points worth noting with respect to the Magistrates' Court. The Rules covering costs require that unless it is impracticable to do so, the court must fix the costs of any complaint or application on the day on which the complaint or application is heard and determined. The Court Rules require that the costs be in accordance with scale. In most jurisdictions, they also specifically disallow costs of discovery or interrogatories, unless the court has reasons to allow otherwise. The court has the power to order security of cost. Parties to a civil proceeding can appeal to the Supreme Court on a question of law but not on fact. This must be made within thirty days after the order was made. This appeal must be brought in accordance with the Rules of the Supreme Court.

NEW ZEALAND

District Courts

In New Zealand the courts were originally titled as Magistrates' Courts but were changed to District Courts in 1980 and subsequently had their jurisdictions increased. They have jurisdiction over both civil and criminal matters. In the civil jurisdiction they can hear claims of sums up to NZ$200 000. Disputes involving sums of less than $7500 are generally heard by dispute tribunals. The criminal jurisdiction covers minor offences, but under the current rules can also conduct criminal trials.

UNITED STATES

County Court

The County Court is equivalent to our Magistrates' Court and has jurisdiction over civil matters — mainly recovery of money in property related matters where the value does not exceed US$25 000. They have jurisdiction over criminal matters as per the Australian courts and also hear appeals from local or city courts.

COMMENTS ON THE COURT SYSTEM

There are arguments for and against using the court system, some of which are summarised below.

The hearing is before a fully trained legal person

This has the benefit of ensuring that the hearing is in accordance with current law. It also ensures that the magistrate or judge will have a full understanding of any legal arguments raised by the parties appearing before the bench. They are less likely to permit long legal arguments that do not relate directly to the case than many arbitrators, and are better able to keep the various parties in line, being generally more knowledgeable and experienced in the law than those appearing before them.

In construction disputes personal observation is that magistrates (and especially judges in the County Courts) tend to conduct hearings in an inquisitorial manner. That is, the magistrate will ask questions to ensure that they fully understand the arguments and technical issues being put before them.

There has been some argument that building cases take longer before the courts, as the technical matters have to be explained in

more detail than before an industry expert arbitrator, often by the use of numerous expert witnesses. The benefit is clearly in the area of procedural control.

Special list

The use of the special list in the county courts has been shown to be a very successful way of resolving building disputes. It has been estimated by the practitioners that of those cases sent out to mediation, some eighty per cent of them are resolved at that level. It is also thought that of those that are not resolved in mediation, both parties at the very least come away with a clearer picture of the real issues of the dispute, thereby reducing the time spent in court. The courts (and the Building Tribunal) run a number of specialist lists. These cover a specific industry. There are currently five main lists — admiralty, building cases, commercial, intellectual property and taxation. The one of most interest to us is the building cases list.

Building cases list

The use of a specific building cases list, (which actually includes all construction and engineering related disputes) with one judge appointed to head the list, has the added advantage of a legally trained person becoming familiar with the industry, thus overcoming some of the problems said to be associated with the use of courts for specific industries (that is, lack of technical expertise). Generally the building cases list allows for control of what is to happen and when. Expedited directions are given as to the time for pre-hearing procedural matters such as the exchange of pleadings, discovery, exchange of expert witness reports and so forth. In most cases the judge will be reluctant to hear the matter before an attempt has been made to resolve the dispute before a mediator (or some other form of resolution). The judge can also determine those parts of the case that should be heard by a special referee funded by both parties. Under the rules of the list, parties are not entitled to interrogate as of right (that is, question the witness) thus also saving time and costs.

Time

One disadvantage of the court system, especially in the Magistrates' Court, but also present in the other levels, is that of the delay in securing a hearing date. Even with a special fixture, the commencing time or day cannot be guaranteed. As an example of what can happen, in one case I attended the hearing was scheduled to commence at 10 am on a Thursday morning and to

proceed over two days. As a result of a number of matters before the magistrate, the hearing did not commence until the Friday morning. The parties and their witnesses were present for most of Thursday and Friday. The case was then adjourned until the following Tuesday and finalised on the subsequent Friday, a week later than originally planned.

There have also been situations where cases listed to be heard in one court have been relocated to another court as a result of previous hearings not being completed or for various other reasons. Personal experience includes moving from a court in the west of the city, to the main city court, and another case, which moved from a south-eastern court to an eastern court. This usually permits a case to commence on the designated day, but involves lost time and thus additional costs.

OFFICIAL REFEREES

Another option instead of court-annexed arbitration is the 'official referees' system in the United Kingdom. In this system a number of persons are appointed as official referees who are also 'circuit' judges. They can work in much the same way as the reference out system now being adopted in Australia and New Zealand, and discussed above.

CHAPTER 4

ARBITRATION LEGISLATION

INTRODUCTION

This chapter considers the main dispute settlement system outside of the court system. There is an ongoing debate by those involved in dispute resolution as to whether arbitration is an alternative form of dispute resolution. It is an alternative to the courts, but it is also subject to strict rules established by legislation, so some people say that it is just an extension of the formal court system. Other practitioners consider that because it is not a court, it does indeed qualify as an alternative dispute resolution system (ADR). In the end though, whether it is an ADR or simply another resolution system really does not matter. Arbitration is, outside of the courts, the mostly widely (and some say the oldest) accepted method of dispute resolution. Sir Lawrence Street uses the term 'appropriate' instead of 'alternative' and this may be a better way of considering an ADR in any discussion.

Street sums up arbitration by stating that it has well defined and well understood specific mechanisms that enable it to be recognised as occupying its own clearly defined place in the spectrum of dispute mechanism. It is one of the few formal systems of dispute resolution that is, especially in the procedures, almost uniform around the world (see the discussion below). This makes arbitration ideal for international disputes as well as local and interstate matters, as all parties, once they know one system, have a good understanding of the system elsewhere.

This chapter is divided into three sections. First there is a discussion of the legislation as it relates to arbitration, both international (referred to as the Model Law) and domestic (by this I

mean country-based). Reference is made to the *United States of America Uniform Act* as an overriding Act rather than state by state. The state-based *Ontario Act (1991)* was adopted instead of the national Canadian Act which is virtually a repeat of the Model Law. Reference is also made to the French Code to show the universality of arbitration. The second part of the chapter considers some of the basic Australian components, including the awarding of costs, the role of the Taxing Master and payments into court. Finally at the end of the chapter there is a brief discussion about the Acts in a sampling of other countries around the world.

ANTICIPATED LEARNING OUTCOMES

An understanding of the laws relating to arbitration

An understanding of the arbitration process

An appreciation of when arbitration can be best applied to a dispute

Knowledge on international arbitration Acts and conditions

Understanding of the concept of 'costs' in the legal context

TOPICS COVERED IN THIS CHAPTER

A brief background to arbitration

International agreements

The Model Law on International Commercial Arbitration 1985

The relevant legislation in a number of countries

Scott v. Avery clauses

Basis for appeals – the NEMA Principle

Costs relating to arbitration

BACKGROUND

There is a lot of commonality in arbitration legislation and methods of conducting the procedure around the world. This is partially a result of the adoption of the early English legislation by many of the colonies, and partially as a common bond for the resolution of maritime disputes which by their nature are spread around the world by trading nations. Even more significant currently, is the gradual adoption of the *Model Law on International Commercial Arbitration 1985* as discussed in detail below.

Prior to this however, and as an aid to the use of arbitration

in trade, the Geneva Protocol was sponsored by the League of Nations in 1923, where countries agreed to recognise the validity of an arbitration award in each of the signatory countries. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in New York superseded this on 10 June 1958. It has become widely known as the 'New York Convention'. As a note of interest the earliest signatories included Argentina, Belarus, Belgium, Bulgaria, Costa Rica, Ecuador, El Salvador, Finland, France, Germany, India, Israel, Jordan, Luxembourg, Monaco, Netherlands, Pakistan, Philippines, Poland, the Russian Federation, Sri Lanka, Sweden, Switzerland, the United Kingdom and Ukraine. The United States ratified the protocol in 1970 (so even though the convention was in New York the United States did not sign the agreement); Australia in 1975; New Zealand in 1983; and Singapore and Hong Kong in 1986. As at January 2002 there were 129 signatories to this Convention.

The next international development was the United Nations Commission on International Trade Law (UNCITRAL*) Model Law on International Commercial Arbitration 1985*, which is slowly being adopted by countries as part of their own legislation. To date it has been incorporated into the legislation in thirty-five countries including Australia (in part), Hong Kong, New Zealand, Singapore, the United Kingdom, and the United States.

The recorded history of arbitration dates over two thousand years. In 350 BC Plato wrote, 'In the first place there shall be elected judges in the courts who shall be "arbiters" rather than judges'. There is a copy of an award dating back to the 14th century (cited in Fitch 1989) as being in the possession of a former Director of the United Kingdom Chartered Institute of Arbitrators. The *Arbitration Act 1697* in England provided a procedure whereby parties could refer their matter to arbitration and have the ensuing award enforced as a judgement of the court (Fitch 1989). The preferred method for resolving commodity disputes was one where the disputants agreed to submit quality/quantity issues, the subject of the dispute and by whose determination they agreed to be bound to a person of high standing and expertise (Varghese 1997). Even older references to arbitration go back to ancient Athens and the settling of a dispute over a chariot race (Mahady 1991). Indeed, the very term 'arbitrator', is a derivation of the Latin *arbiter*, literally translated as 'judge'.

F. Russell wrote one of the first modern books on arbitration in 1849; the fact that it is now in its 22nd edition shows the significance of his work (Sutton, Gill & Kendall 1997). There was

'modern' legislation in Britain enacted at least as early as 1889; Australia's first Act was in 1902; and New Zealand's in 1908. For a full discussion on the procedure's origins a good reference is *On Commercial Arbitration* (Domke 1989).

Arbitration has been defined as 'the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction' (Street 1992).

In the mid-18th century Sir Robert Raymond CJ said:

> An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent, to determine controversies between them. And arbitrators are so called because they have an arbitrary power; for, if they observe the submission [arbitration agreement] and keep within due bounds, their sentences are definite from which there lies no appeal (Golding 1970).

This passage is significant, as it establishes an arbitrator's jurisdiction: that of the evidence directly provided to him/her. Once the matter has been submitted and addressed, the decision is binding and final.

Arbitration has many advantages. Foremost of these is that the arbitrator is appointed jointly by all parties to the dispute, and so that at least in principle, both parties believe the appointee to be the best person available to hear a particular dispute. Most arbitrators are not formally trained in the law, but will have received training in the relevant areas by the local arbitration association (for instance the Chartered Institute of Arbitrators in the United Kingdom (CIArb), the American Arbitration Association , The Institute of Arbitrators & Mediators Australia (IAMA) and so on.

The second advantage is that the arbitrator is normally an expert in the field of the matter under dispute. Most of their training will have been in the area of the expertise in which they have earned their livelihood. In the past this has covered many fields of endeavour, but has been used extensively in international trade disputes, construction, and tenancy disputes. The growing field is in computer and IT related areas.

A further advantage of arbitration, at least in theory, is that the parties are given a wide range of power to adopt the procedures for the conduct of the arbitration process that they consider best fits the specific requirements of the dispute. This freedom of the parties to tailor the procedure to the nature of the dispute is embodied in all arbitration legislation, with the *Australian Uniform Commercial Acts* having in excess of twenty provisions which

begin with the words: 'Unless the parties otherwise agree in writing'. In the current United Kingdom legislation even more options are given to the parties.

Possibly the biggest advantage of the arbitration procedure is the fact that hearings are conducted in private, whereas court hearings are, in the majority of cases, open to the public. In commercial disputes it is important to ensure that commercial rivals (not involved in the arbitration) are not aware of the nature of the dispute or of the evidence being given during the hearings because it may be of a commercially sensitive nature. Most arbitration hearings and the subsequent awards are not reported in the way that court hearings are reported. There are reports in arbitration journals of some cases — usually those that have some significance for the relevant industry — but even then it is usually only specific aspects rather than the whole case. However, even this is changing: a recent Australian High Court decision has eroded the confidentiality benefit of some specific aspects of arbitration over court proceedings.

Two other aspects of arbitration are that it is virtually universally consensual, and it is binding. The arbitrator's jurisdiction and powers are based in a private contract. Thus it is the contract that confers the jurisdiction and at the same time defines the limits of the arbitrator's jurisdiction to hear and determine matters in dispute between the parties. The determination made by the arbitrator is, by consent of the parties, final and binding, and subject to extremely limited attacks which may be made in the courts against that determination.

There are a few (indeed some people assert that there are many) complaints about arbitration. Theoretically it should be a system that is designed to provide a speedy hearing of a dispute, with expedited pre-hearing procedures. This is not always achieved and it is dependent upon the willingness of the arbitrator to control the parties. The biggest number of complaints about arbitration arises from the mimicking of the arcane court procedures. There is scope for the arbitrator and the parties to take advantage of the autonomy permitted by the legislation, yet it is seldom done. These complaints usually revolve around the inflexibility of the legal representatives for the parties in using every available technicality to further the interests of their client rather than assisting and cooperating in expedited procedures. Where lawyers do take advantage of the parties' freedoms and are committed to the processes as an alternative to the court system they can assist the parties and the arbitrators to great savings in costs.

THE LEGISLATION

The latest details on arbitration legislation around the world can be found on <www.internationaladr.com/country.htm>.

This part of the chapter will consider the various sections that are to be found in most arbitration legislation and discuss the differences. The UNCITRAL Model Law on International Commercial Arbitration (referred to as the Model Law from hereon) is used as the starting point from which to consider current and proposed legislation in relation to a given clause.

While the following covers most parts of relevant legislation, it is intended as a guide only. Reference should be made to the Further Readings section as the end of this book for a detailed discussion of local legislation. I have not tried to compare every section of every Act, except in the case of Australia and New Zealand, but have done so where there are definite points of interest.

MODEL LAW

One of the advances in using arbitration as a tool for dispute resolution around the world was the publication of the Model Law as adopted by the United Nations Commission on International Trade Law on 21 June 1985. (Visit <www.jus.uio.no/lm/un.arbitration.model.law.1985/doc.html> for further details.)

The Model Law applies specifically to international arbitration. The definition provided by the Model Law to the interpretation of the words 'commercial' states that it should be applied to all relationships of a commercial nature, whether contractual or not (Model Law Endnote 2).

DOMESTIC LEGISLATION

In this case the word domestic refers to legislation within a specific country.

Australia

There have been separate state Arbitration Acts in existence around Australia since the 19th century. These had been amended over the years. In 1974 the Standing Committee of the Attorney-General passed a resolution to consider the existing legislation and report on commercial arbitration with a view to preparing a Model Bill to form the basis of Uniform Legislation.

In 1984 each State began to introduce what are commonly known as the Uniform Arbitration Acts, but are officially termed

the *Commercial Arbitration Act Collective.* In Victoria and New South Wales the legislation was enacted in 1984, while the other states and territories gradually enacted virtually the same legislation in subsequent years. The last state to introduce the Uniform Act was Queensland and they had some minor differences, which were subsequently adopted by the other states. There are still some minor differences but in the main they are uniform throughout the country.

New Zealand

In 1996 the New Zealand Government adopted the Model Law as the basis for the *New Zealand Arbitration Act 1996*. This legislation replaced the older 1908 Act and its major amendments of 1938 and subsequent amendments. The Act applies the special clauses necessary for using the Act in New Zealand. It then has the First Schedule and this, within reason, replicates the Model Law. The Second Schedule is optional and should be specifically included in any arbitration agreement: it contains seven clauses including default appointment of arbitrators; consolidated proceedings; powers relating to the conduct of proceedings; preliminary points of laws by the courts; appeals on points of law; costs and expenses of arbitration; and extension of time for proceedings. The Third Schedule includes the protocol on arbitration clauses.

Singapore

A new Act (*Ordinance 14 of 2001*) has been prepared for use in Singapore, based on the Model Law, but adapted to suit the country and its relationship to the local laws. This will replace the *Ordinance 14 of 1953* and its subsequent revisions of 1970 and 1985.

Ontario

The current legislation is the *Arbitration Act 1991*. The format is different but the general content follows the Model Law with variations to make it suitable for local laws and conditions.

United Kingdom

The current legislation is the *Arbitration Act 1996*, which like so many other Acts around the world now incorporates much of the Model Law but also reflects the local law and long history of arbitration within the United Kingdom. This Act replaces a number of others, including parts of the *Arbitration Act 1950*, all of the 1975 and 1979 Acts, as well as other Acts relating to arbitration and as set out in Schedule 4 of the current Act. Its introduction was

somewhat controversial and there were many papers written about the new legislation discussing its pros and cons. The general consensus was, and I believe still is, that it is a very good piece of legislation for the use of arbitration.

United States

I have used the *United States of America Uniform Arbitration Act* (1990) for comparison. This is a relatively short Act compared to many around the world but covers most of the points incorporated in longer documents.

France

As an international comparison, I have included reference to the *French Code of Civil Procedure — Book IV — Arbitration 1981*. Its organisation is somewhat different to those who are use to the British model, but it covers the same items, incorporates a lot of the Model Law and applies the French Law as well. It is interesting more in terms of the commonalities rather than the differences, demonstrating the universality of the arbitration process.

ARBITRATION SECTIONS AND CLAUSES

Arbitration agreements

Model Law (Chapter II)

The Model Law defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes' (Art. 1, s. 1). This agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. It specifically requires the agreement to be in writing. The definition of a written agreement is one by letter, telex, telegram, or other means of telecommunications that provide a record of agreement. This is now generally agreed to include facsimile documents, but I am unaware of any legal proof of acceptance of emails, although this seems the next logical step. The Model Law also states that an agreement is in place if, in exchange of relevant documents in relation to statements of claims and defense, one party claims the existence of the agreement and the other party does not deny it.

Domestic legislation

The **Australian** Acts define an arbitration agreement as 'an agreement in writing to refer, present or future disputes, to arbitration' (s. 3.2). The **New Zealand** Act requires a defined legal

relationship 'whether contractual or not', but does not require it to be in writing (see Chapter II, cl. 7 for more detail). In the **Singapore** Act 2001, cl. 4 provides a definition that if a claim is made in writing that an agreement exists (in the form of a pleading, statement of case or other document) and is not denied by the other party, then it is deemed that an agreement to arbitrate does exist. This is almost word for word from the Model Law.

Article 1443 of the **French** Code states that an arbitration clause is an agreement by which parties to a contract undertake to submit to arbitration any disputes that may arise in relationship thereto. The **Ontario** Act specifically states in cl. 4. (3) that an arbitration does not have to be in writing. The **United States** Act requires a written agreement to submit either an existing dispute or provision for a future dispute, to be heard by arbitration under the Act. The **United Kingdom** Act requires the agreement to be in writing but does not mention any specific requirement for a contract.

Scott v. Avery

Article 8 of the Model Law covers arbitration agreements and substantive claims before a court. This is an interesting area of law relating to arbitration. The Model Law states that where an action which is subject to an arbitration agreement is bought before a court, the court will send the matter to arbitration if they agree this situation does legally exist and/or if a party so requests (within certain conditions).

The background to this action is founded in 19th century English Law and is commonly referred to as a *Scott v. Avery* clause (Roskill 1977). Briefly this arose from a case that was finally decided by the House of Lords in 1856. Mr Scott was a ship owner and Mr Avery was effectively an insurance underwriter. The rules that applied said that if a loss was incurred, this loss had to be determined by a committee, and if this was not done, the losing party could not sue for losses. Mr Scott lost his ship and the underwriters offered a very meager payment as settlement which was rejected by Mr Scott who then initiated legal proceedings to recover his losses. Mr Avery, through the organisation, said that Mr Scott could not do this as the matter had not gone to the committee and he was thus barred from going to court. Mr Avery went to court and appealed to have the legal hearing rejected as the committee hearing had not been held. The court rejected this and gave Mr Scott the right to sue. An appeal was instigated and in this case the judgment was reversed, stipulating that Mr Scott was required to go to the committee first. Mr Scott appealed this judgment through the House of Lords but was defeated.

Domestic legislation

The **Australian** Acts in s. 55 rules out the automatic operation of *Scott v. Avery* clauses, thus permitting recourse to the courts if the parties so agree. In reality in the majority of cases, if an arbitration clause does exist, the courts will attempt to send the matter off to arbitration or at least send the parties away to see if they can agree to arbitration rather than a court hearing.

The **New Zealand** Act in Chapter II, s. 8, follows the Model Law and at the request of the parties sends a court hearing out to arbitration, thus effectively incorporating *Scott v. Avery*. **Singapore** follows the Model Law. Clause 1458 of the **French Code** employs *Scott v. Avery* in that it says a state court must declare itself 'incompetent' if an arbitration clause exists. Indeed, cl. 1459 does not allow the parties to alter this situation, even if the parties so agree. The **Ontario** Act of 1991 reinforces the use of the *Scott v. Avery* principle. The **United Kingdom** Act goes further in that not only may it request the courts to send the matter to arbitration, but in cl. 2, may ask the courts to send the dispute to arbitration only after all other forms of dispute resolution have been exhausted.

The **United States** Uniform Act requires that if one party to an arbitration agreement which is upheld by the court as existing as previously defined wishes it, the courts will effective enact *Scott v. Avery* and send the matter to arbitration.

Written communications

Model Law

Article 3 addresses the receipt of written communications and covers delivery by hand, to the place of business, usual residence, or mailing address.

Domestic legislation

The **Australian** Acts (s. 60) basically includes similar wording and likewise the **New Zealand** Act. The **Singapore** Act 2001 (s. 60) again uses very similar wording. Most other Acts are silent on this matter.

Legal proceedings

Model Law

Article 5 of the Model Law provides an overriding statement that no court will intervene unless specifically stated in the Act. Exceptions are the need to appoint an arbitrator (Art. 11.3);

breach of agreement (Art. 11.4); challenges to a given procedure (Art. 13.3); failure or inability on the part of the arbitrator to act (Art. 14.1); and decisions on jurisdiction (Art. 16.3).

The question often asked, especially by a 'losing party' is, can I appeal against an arbitrator's award? This is dealt with under specified conditions in Art. 34, which states in part that an appeal may be allowed if:

> [a] party to the agreement was under some incapacity, or that the agreement was not valid under the laws to which the parties have agreed to act. Further, that a proper notice was not given of the appointment or to some part of the proceedings. The other grounds is that the Tribunal exceeded its authority under the agreement or that the award either did not address, or exceeded the matters set out in the agreement to be arbitrated. An appeal must be made within three months of the award.

Domestic legislation

In the **Australian** Uniform Acts, Part 5 deals with the power of the courts. The arbitrator makes the award on the basis of the law and of the facts. There are three distinct areas to consider, as well as a number of general areas:

- Appeals Against the Award (s. 38)
- Preliminary Points of Law (s. 39)
- Misconduct (s. 42)

Appeals against the award

Section 38 states that the courts do not have the jurisdiction to set aside an arbitrator's award just because of an error of fact or law on the face of the award. If an appeal is to be made, the Act requires it to be made to the relevant state or territory Supreme Court. In some states and territories prior to 1993 the discretion to permit an appeal was left to the presiding judge. Post 1993 there were amendments made in the various legislation to ensure uniformity, based on the NEMA judgment which limited the former discretion by placing judicial fetters upon it.

The NEMA Principle was so named after the case decided in England in the House of Lords (*Pioneer Shipping Ltd v. BTP Tioxide Ltd* [1982] AC 724). Diplock LJ set out the proposition that:

> If on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance.

The NEMA Principles that are now embodied in the Uniform Acts require that at least one of the following exists:

1 That strong evidence of error was required (a manifest error of law on the face of the award)
2 That the award substantially added to the uncertainty of the commercial law
3 No appeal of a one off contract rather than a standard form.

Preliminary Points of Law

An application can be made to the court for determination of any question of law arising in the course of the arbitration, with consent of the arbitrator or consent of all the other parties. The courts will only hear an application if the determination will produce a substantial saving in the costs of the arbitration and or is affected by matters above in s. 38.

Misconduct

The Australian Acts give the courts the power to set aside an award where there has been misconduct on the part of the arbitrator or the award has been improperly procured. This is also a useful back door attack on an award when there is a doubt about obtaining leave to appeal. Section 44 sets out the manner of removal of the arbitrator where misconduct has been proved.

The reluctance of arbitrators to depart from curial procedures and adopt simplified, speedier and less cumbersome procedures is a reflection of the readiness of the courts to intervene where there is a claim of procedural misconduct. It would have been logical to think that this section empowered the courts to lend their support for arbitration proceedings where there was a weakness in the arbitral process by reason of lack of the coercive powers of the state, whereas the opposite appears to be true. This empowerment should include such areas as preservation of assets; the subject matter of the proceedings; or the granting of an injunction to detain assets in the jurisdiction that may be otherwise transferred abroad to defeat enforcement of an award. Power to grant such ancillary relief in aid of arbitration has long been a feature of legislative enactments governing arbitration. However, the courts have interpreted the legislation in s. 42 as providing a power to intervene in procedural aspects of the arbitration itself. An example of this can be found in *Leighton Contractors Pty Ltd v. South Australian Superannuation Fund Investment Trust* [1994] SASC 4846.

Under s. 44 of the Act, the court may remove an arbitrator if it can be shown that he/she has been guilty of misconduct, the

arbitrator has been shown to have exercised undue influence, or where an arbitrator has been shown to be incompetent or unsuitable to deal with a specific dispute. An example of this is where one side claims the medical health of the arbitrator makes it impossible for him/her to act. One such case was that of *Korin v. McInnes* (unreported 1984) where the arbitrator informed the parties that he was recovering from a major operation and might have to interrupt the hearing from time to time to visit the toilet. One party objected and asked the arbitrator to stand down. On medical advice, the arbitrator refused the request. The matter was taken to the Supreme Court, where Justice Brooking held that the arbitrator's inability to act was not proved in terms of the Act.

Further sections of relevance are s. 47, which permits the courts to make interlocutory orders in relation to the arbitration. Section 48 permits the court to extend the time of the appointment of the arbitrator and under certain circumstances permit extension of the start of the hearing. Whilst not common, there have been applications made to the court to require the arbitrator to deliver the award where the time given by the arbitrator for handing down the award has been exceeded — usually by a substantial period of time.

New Zealand

Schedule 1, s. 5 states that no court shall intervene unless specially provided for within the Act. Section 3 includes that if a party applies to a court for an interim injunction when an arbitral ruling has already been made, the courts cannot overrule the arbitral ruling.

An appeal to have an award set aside has to be made to the High Court. It can only set aside an award where one party was in some way incapacitated; the agreement to arbitrate was invalid; proper notice of the appointment of the arbitrator was not given to one party; the award deals with matters outside of the original agreement; or where the arbitral tribunal or the procedures were outside of the agreement. In a similar situation to the Australian Act, s. 6 sets out that the award is in conflict with public policy if it was induced or affected by fraud or corruption, and if the rules of natural justice were breached at any time. An appeal has to be made within three months of the publication of the award.

Other domestic legislation

Part IX of the **Singapore** Act covers the powers of the court in relation to the award. Whilst the wording is not verbatim, it effectively incorporates the NEMA Principles into the Act. Other countries manage this situation in different ways.

Article 1484 of the **French** Code establishes the grounds for an appeal, which include an invalid arbitration agreement; an irregularly constituted appointment of the arbitrator; failure by the arbitrator to render the award in accordance with the agreement; failure to follow due process; or violation of a public policy rule. The Code then sets out the processes to be followed.

The **United Kingdom** Act covers the powers of the courts in ss. 66 to 71. The questions that can be taken to the court are generally in line with those in the Australian Uniform Act and cover misconduct and matters of law. In addition, s. 70 gives the parties only twenty-eight days in which to make their appeal from the handing down of the award. Section 68 sets out that a challenge may be made only on the grounds of 'serious irregularity'. The Act provides nine very specific definitions as to serious irregularity.

In s. 2 the **United States** Act gives the courts the right to order the parties to proceed with a hearing, should one party refuse to participate, if the court is of the opinion that an agreement to arbitrate does exist. Like the other Acts, s. 12 considers the vacating of the award and includes corruption, fraud, misconduct of the arbitrator and also the power to decide if an agreement ever existed (which is the same as legislation in other countries but which often comes under common law rather than the Act itself).

Arbitral tribunal

Model Law

Chapter III covers the appointment of the arbitrator/s. Article 10 permits the parties to appoint the number of arbitrators they may wish, but if it is not agreed, then the normal recourse is three arbitrators. Article 11 states that no person will be precluded from an appointment as arbitrator because of his/her nationality unless otherwise agreed by the parties. The parties are free to agree between themselves the matter of the appointment. But if the parties cannot agree, then where there are to be three arbitrators, the Model Law calls on each party to appoint one arbitrator and those two appointed arbitrators to appoint the third arbitrator. If after thirty days this has not happened the courts will make an appointment. Where only one arbitrator is to be appointed, and the parties cannot agree on an appointment, then one party alone may apply to the court to have an appointment made for them. There is no appeal to a court appointment.

Under Article 12 an arbitrator must inform the parties of any reason that could be said to affect his/her impartiality or independence, both prior to their appointment and at any time

that they may become aware of any change in this situation that would influence the hearing. If a party wishes to challenge an arbitrator for some reason, they must do so within fifteen days of becoming aware of the circumstances that are leading to the challenge. If the arbitrator does not withdraw or the other party does not agree to the challenge, the arbitral tribunal shall decide the matter. Should the challenging party not like the outcome, they have thirty days to appeal to the courts. During the court challenge the hearing may continue and the arbitrator may issue an award. A comparison with the very wide range of restrictions imposed by the Japanese legislation is worth reading (refer to the resource list at the end of this book).

Domestic legislation

Part II of the **Australian** Uniform Act covers the appointment of the arbitrators and umpires. Section 6 provides the presumption of a single arbitrator unless it is provided differently in the agreement. All parties must agree to the appointment of the arbitrator/s. Section 8 deals with the failure of an appointing party to carry out the required appointment of the arbitrator and the fall back position of having the court make the appointment.

Chapter III of the **New Zealand** Act follows the Model Law with one arbitrator being the norm, except for international arbitration when three arbitrators will be appointed. Where difficulties arise in the appointment of the arbitrator/s the matter is taken to the High Court for resolution. There is no appeal to a court-appointed arbitrator. The Act follows the Model Law in ss. 12 and 13 with respect to the need for total impartiality and independence. The challenge also follows the Model Law process.

The **Singapore** Act follows the Model Law clauses and processes. The legislation in other countries either follows the Model Law very closely, or generally incorporates the same requirements with different wording.

Replacement of the arbitrator

One problem faced by people who use arbitration is the reasonably unusual event of the need to replace an arbitrator during the hearing. In the main this will be from the death or the inability of an arbitrator to continue (such as ill health) or the emergence of a previously unknown or unforeseen conflict of interest. It may also be as a result of the removal of arbitrators by the courts, but this does not happen very often and this specific circumstance is discussed elsewhere in this chapter.

Model Law

Article 15 of the Law covers the replacement of an arbitrator and says that a substitute arbitrator shall be appointed as per the rules originally agreed upon by the parties to the arbitration.

Domestic legislation

Under ss. 9 and 10 of the **Australian** Uniform Act the appointment of a replacement arbitrator reverts to the original appointing body/persons. If the arbitrator has been removed by the court on application of one or more of the parties then the court, upon further application, may appoint. If all the parties normally reside in Australia the court may terminate the arbitration.

The appointment of a substitute arbitrator in **New Zealand** (s. 15) follows the Model Law. It adds that where a sole arbitrator is replaced, the hearing will be repeated. This is an option if more than one is replaced. Section 18 in **Singapore** covers the replacement of the arbitrator and leaves the manner to the parties, and this extends to the parties being able to decide if all or part of the previous proceedings will stand. There is then a subsection dealing with the instance that, should agreement not be reached by the parties, the power to decide reverts to the Singapore Institute of Arbitrators who are the default appointing body under this Act.

Section 16 of the **Ontario** Act requires the replacement arbitrator to be appointed as per the original appointment, which may be as per any agreement by the parties, or if no such agreement, by the court (see also s. 10). The **United Kingdom** wording under s. 27 is very similar to Singapore's but states that failing agreement, the appointment will be as per the original appointment determined by the CIArb or relevant organisation. The **United States** Act does not deal specifically with this situation, but in all these matters the court is the fallback position (see s. 3).

Jurisdiction of the arbitral tribunal

Model Law

The Model Law in Article 16 permits the arbitral tribunal to rule on its own jurisdiction. In this case an arbitration clause will stand on its own, as an agreement independent of the other terms of the contract. Indeed it includes the sentence: '[a] decision by the arbitral tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause'. If one party wishes to propose that the tribunal does not have jurisdiction, it must raise the issue prior to the submission of the statement of defence. If a party

wishes to claim that the tribunal has exceeded its authority it must do so as soon as the said matter is raised. The tribunal may rule this as a 'preliminary question' (that is before the final award is brought down) or in the final award as appropriate. If the party objects to the ruling it may appeal to the court for an alternative ruling, from which there is no further appeal. The Model Law in Art. 17 provides the tribunal with the power to order interim measures to provide security to any party.

Domestic legislation

There is no equivalent in **Australia** to Art. 16. However, if the contract is shown not to be enforceable, then the authority of the arbitrator will also be null and void. Only a court can rule on this issue. Section 51 provides that the arbitrator is not liable for negligence in anything done or not done, except for fraud, whilst acting in the capacity of the arbitrator.

Section 13 of the **New Zealand** Act protects the arbitrator from negligence charges. Section 16 in Chapter IV provides the same ability to rule as the Model Law and likewise s. 17 duplicates the Model Law. The **Singapore** Act in Part VI, s. 21 duplicates the Model Law. The **United Kingdom** adopts the Model Law and allows the tribunal to rule on its own substantive jurisdiction. The **United States** Act precludes the tribunal from hearing the claim for the revocation of any contract on the same basis as the Australian law.

Conduct of Arbitral Proceedings

Model Law

Article 18 covers the treatment of the parties and requires that all parties be treated equally and given a full opportunity to present their case.

Domestic legislation

Australia's Uniform Act does not contain a section with the same wording, but s. 22 states that the arbitrator may either determine according to law, or with the agreement of the parties, or by reference to considerations of general justice and fairness. If there is agreement to use general justice and fairness, it does not mean that the arbitrator can ignore the law. Indeed Young J in *Woodbud Pty Ltd v. Warea Pty Ltd* (unreported Supreme Court of NSW, 15 June 1995) stated that this clause did not allow arbitrators to disregard all law and be arbitrary in their dealing with the parties.

Natural justice or procedural fairness

Model Law

Arbitrators are bound to afford the parties the right to present their case and test the case of each. This is generally referred to as the Rules of Natural Justice or Procedural Fairness. In 1978 Marks J referred to the two main principles upon which natural justice rests:

> The first is that an adjudicator must be disinterested and unbiased. The second principle is that the parties must be given adequate notice and opportunity to be heard. One amplification of the first rule is that justice must not only be done but appear to be done. The sub-branch of the second principle is that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing [has been] given to all parties (cited in Jacob 1990).

Varghese (1997) elaborates on these two principles by stating the following:

1. each party must be afforded the fullest opportunity to present its case
2. each party must be made fully aware of the other's case and be given a full opportunity to test and rebut that case
3. each party must have the same opportunity to put forward its own case and test that of the other party.

Domestic legislation

New Zealand and **Singapore** in ss. 18 and 22 respectively adopt the words of the Model Law. The **Ontario** Act adopts very similar wording to the Model Law, but employs the wording 'treated equally and fairly'. Section 33 of the **United Kingdom** Act adopts the Model Law in principle, but uses the wording: 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his/her case and dealing with his/her opponent'. The **United States** Uniform Act includes in s. 7(b) that the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

Determination of rules of procedure

Model Law

This is covered in Art. 19, which permits the parties to agree on the procedures to be followed by the arbitrator in the conduct of the hearing. Failing such agreement, the tribunal may, subject to the provisions of this law, conduct the arbitration as it considers appropriate.

Domestic legislation

According to s. 14 of the **Australian** Act the arbitrator may conduct the proceedings as he/she 'thinks fit', subject to the arbitration agreement. **New Zealand** (s. 19) and **Singapor**e (s. 23) follow the Model Law in permitting the parties to agree on the procedures as does the **United States** in s. 5(a). Section 20 of the **Ontario Act** gives the authority to the arbitrator/s to set the procedures, likewise the **United Kingdom** in s. 34.

Statement of claims and defence

Model Law

Section 23 sets out the initial provision of the claim and defence and the need to submit with their statement a copy of all documents that each party considers to be relevant or to be used as references in addition to any other evidence they will submit.

Domestic legislation

There is no equivalent section in the **Australian** legislation. **New Zealand** (s. 23), **Singapore** (s. 24) and **Ontario** (s. 24 and 25) follow the Model Law requirements. The **United Kingdom** and **United States** are silent on these matters.

Hearings and written proceedings

Model Law

Article 24 covers the options of oral or written evidence, the requirement to notify the parties of hearing dates and any inspections that will be undertaken and the need that any statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.

Domestic legislation

Section 19 in the **Australian** Act covers the provision of evidence and the option of evidence under oath or affirmation. Unless otherwise agreed in writing by the parties, the arbitrators are not bound by the rules of evidence, but are free to inform themselves in relation to any matter in any way that they think fit or appropriate.

Again, **New Zealand** (s. 24), **Singapore** (s. 25) and **Ontario** (s. 26) incorporate the Model Law wording. The **United Kingdom**

(s. 34) and the **United States** (s. 5) do not incorporate exact Model Law phraseology but cover the same provisions in various other ways.

Evidence

It is worth discussing here the concept of what is meant by the word 'evidence' as it is not a simple concept. Evidence can be considered to fall into two main categories: direct and opinion. There is also a third type termed hearsay evidence.

Direct Evidence

Put simply, this refers to what was seen or done by the party giving the evidence: that is, by the five senses of sight, sound, smell, touch or taste.

Opinion evidence

The opinions in reference are those given by 'expert witnesses' (see Chapter 5 for further discussion). It is usual for the arbitrator/judge to permit the use of notes while the expert is giving evidence to refresh their memory of the event in question, for instance notes taken by a building expert during his/her inspection of a building. The general rules regarding this are:

1. that they are contemporary – that is they were made close to the event being debated
2. that the notes were written by the person given the evidence. In building disputes, the authorship is usually insisted upon, however in some cases it may be that the person giving evidence supervised the material, for example in test results of a specific analysis of a material.
3. that the actual document to which the witness is referring is tendered in evidence to the hearing. In many cases this will occur prior to the hearing and is referred to as the witness statement.

Hearsay

This is not normally admissible as evidence as Dorter and Sharkey (1990) sum up:

> It is not permissible to prove a fact by oral evidence from a witness where someone (other than the witness him/herself) asserted that fact prior to the giving of the evidence or by a document asserting that fact.

In general terms this means that unless you are a direct witness to an event you cannot give evidence on that event. The Privy Council in part said that it is hearsay and inadmissible when the object of the evidence is to establish the truth of what is

contained in the statement. In Australia s. 19 (3) gives the arbitrator the discretion to admit hearsay evidence unless the parties agree otherwise.

Legal representation

The **Model Law** does not mention legal representation, although Art. 26 covers the appointment of experts by a tribunal.

Domestic legislation

Section 20 of the **Australian** Act permits the arbitrator to approve legal representation of the parties subject to three specific tests:

1. if one party is, or is represented by, a legal representative
2. where all the parties agree and
3. where the amount or value of the claim exceeds $20 000 or other approved value and where the arbitrator gives leave.

The overriding requirement for approving legal representation is that the granting of such will shorten the case or reduce the cost, and that the applicant would be disadvantaged if not so granted. Part of the clause also allows representation by non-legal persons, however care needs to be taken as their costs may not be covered (refer to the case discussed under the heading 'Costs' later in this chapter).

New Zealand and **Singapore** no longer incorporate this section, although these two countries, as well as **Ontario**, have incorporated Art. 26 of the Model Law. The **United States** covers it in s. 6, which states the right of the parties to be represented by an attorney. The corresponding part in the **United Kingdom** Act is s. 36.

Alternative settlement options

Model Law

There is nothing in the Model Law to cover settlement except by the use of arbitration.

Domestic legislation

The **Australian** Uniform Acts provide an alternative option in s. 27. In some of the original Acts (including the Victorian Act), this section gave the arbitrator the power to order the parties in an arbitration to take such steps as the arbitrator 'thinks fit' to achieve a settlement of the dispute. This included attending a conference, with the proviso that should this method fail, the

parties could not then object to the arbitrator returning and continuing the arbitration hearing.

The 1993 Victorian amendments made some changes to the section in accordance with the NSW Act (1992). These Acts now read as follows:

> (1) Parties to an arbitration agreement:
> (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
> (b) may authorise an arbitrator … to act as a mediator, conciliator or other non-arbitral intermediary between them, whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

Where the arbitrator acts in those roles and settlement is not achieved, the parties cannot object to the arbitrator then proceeding with the arbitration hearing.

Subsection (3) requires the arbitrator (unless otherwise agreed in writing) to be bound by the rules of natural justice. The problem with this provision is that it could be argued that it defeats the purpose of mediation and also leaves the arbitrator open to a future challenge for misconduct. For this reason, in the 1990s the Royal Australian Institute of Architects (RAIA) issued practice rules that prevent an architect who is an arbitrator from holding such a conference, in an attempt to prevent the appearance of bias.

One proposal (Jacob 1990) is that the following clause should be included in every mediation, conciliation or arbitration agreement:

> (i) Party A (here identify the person) will not participate in the arbitral proceedings, in any way whatsoever.
> (ii) Party A will not be obliged to comply with the rules of natural justice as set out in (here identify the legislation, for instance s. 27 of the *Commercial Act 1992 (NSW)*).

New Zealand and the **United Kingdom** do not incorporate the alternative but the **Singapore** Act does in ss. 62 and 63, which follow the Australian Act. The **Ontario** Act in s. 35 specifically excludes the use of mediation or conciliation as part of the arbitration process.

The Award

Model Law

Article 28 of the Model Law requires the matter to be decided in accordance to the rules agreed on by the parties and in accordance with the relevant laws. They may decide as *aimable*

compositeur only if the parties have agreed to this. In all cases the decision must be in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction.

If during the proceedings the parties agree to a settlement, the arbitrators will terminate the proceedings and record the settlement in the form of an arbitral award on agreed terms. This is commonly referred to as a 'consent award'. Once the award is handed down, the arbitration is terminated (Art. 33).

Domestic legislation

Section 28 of the **Australian** Act states that the award made by the arbitrator is final and binding on the parties. **New Zealand** (ss. 28–30) covers the same material as the Model Law. Section 32 terminates the arbitration. The **Singapore** Act in Part VIII adopts the item on the relevant law (s. 32) and on the award by consent (s. 37). Further, s. 44 makes the award final and binding upon the parties. The **United Kingdom** Act also incorporates similar sections (s. 46) and (s. 51) respectively. Section 58 uses the phrase 'agreement is final and binding'. The **United States** is silent on these matters.

Form of the Award

Model Law

Article 31 states that the award must be in writing and signed by the arbitrator/s. It must also include reasons upon which the award is based, and the date and place of the determination. A copy must be given to each party.

Domestic legislation

Section 29 of the **Australian** Act includes basically the same requirements, as do all the other domestic Acts. Further details of the award structure are discussed in Chapter 5.

Power to correct the award

Model Law

Article 33 permits a party to request correction of errors in computation, any clerical errors or any errors of a similar nature. A party may also request an interpretation of a specific point. The arbitrator may also undertake the same within thirty days of the issue of the award at his or her own initiative.

Domestic legislation

The **Australian** Act (s. 30) permits similar corrections but without the time restrictions. The same section also allows an arbitrator to correct an award where there may be a clerical error, an error arising from an accidental slip or omission, a material miscalculation, or a defect in form. The arbitrator cannot change the actual award itself. The relevant sections in **New Zealand** (s. 33) and **Singapore** (s. 33) both incorporate the Model Law requirements. In the **United Kingdom's** legislation, the correction of the award is covered by s. 57, whilst s. 9 of the **United States** Act provides the arbitrator with similar powers to that covered by the Model Law.

Costs of the Arbitration

The **Model Law** is silent on this issue.

Domestic legislation

Section 34 of the **Australian** Act deals with the matter of costs. The distribution of the costs of the arbitration is, unless agreed to the contrary, at the discretion of the arbitrator and usually 'follow the event'. Refer to the later section on costs for a more detailed discussion on this. If required the arbitrator's fees and expenses can be taxed, upon application to the court (s. 35) if the arbitrator fails to deliver an award. If the award makes no provision with respect to costs, a party may apply within fourteen days to the arbitrator to have these dealt with. In s. 34 (5) the Act requires the arbitrator to take into account any money paid into court (or its equivalent).

In the **New Zealand** Act, the matter of costs is covered in the Second Schedule and is known as 'Additional Optional Rules'. These need to be included in the arbitration agreement. Section 6 is quite extensive and not only gives the arbitrator the normal powers, but also sets out how to deal with 'offers' (sometimes known as 'offers into court') and specifically states that these offers must not be communicated to the tribunal. In the **Singapore** Act, s. 39 is quite specific about the dealing of the costs of the award, while s. 40 sets out the manner of payment of the arbitrator. The **United Kingdom** Act is even more extensive in its coverage of the costs (ss. 59–65) by considering the costs of the award and the arbitrator's costs. Again the recommendation is that 'costs should follow the event' (s. 61[2]). In the **French** Code Title III covers the same material with very much the same requirements.

Interim awards

The matter of costs is usually held over until the final award. The arbitrator will make his/her decision of the facts made known and then give the parties time to make submissions regarding the awarding of costs. The parties may require time to submit their costs to be taxed (discussed under 'Costs' below).

The **Model Law** does not make reference to interim awards.

Domestic legislation

Unless the parties make an agreement to the contrary an arbitrator may bring down an interim award. Section 23 of the **Australian** Act covers this. The usual reason for the interim award is so that the decision with respect to the specific items under dispute can be made. This is important where the hearing is about work that may still be underway and a quick decision is required to permit work to continue with minimal loss of time. It can also apply to where there are a number of specific points, each of which can be answered separately.

New Zealand, Ontario and the **United States** do not appear to specifically cover an interim award under the Act. In the **Singapore** Act, s. 33 specifically permits more than one award to be published, at different points in time during the proceedings, on different aspects of the matters to be determined. Similar wording is to be found in the **United Kingdom** Act (s. 47).

Interest

The **Model Law** does not address the question of interest.

Domestic legislation

Section 31 of the **Australian** Act permits an arbitrator, subject to anything to the contrary in the agreement, to include interest in the award, where the award is for money (liquidated or unliquidated amounts). Subsection (4) of s. 31 specifically forbids compound interest (that is, interest upon interest). The **New Zealand** Act in s. 12 (b) permits interest up to the date of the award. **Singapore** (s. 35) permits interest, including interest on a compound basis, on the whole or any part of the award. The **Ontario** Act (ss. 127–130) refers this question to the Courts of Justice Act. Section 49 (3) of the **United Kingdom** Act states that the tribunal may award simple or compound interest.

Other clauses

There are a number of other clauses with the various Acts which should be noted but do not require full consideration.

Crown to be bound

In the **Australian**, **New Zealand**, **Singapore** and **Ontario** Acts, the Crown is bound by the Act, meaning that the government is bound to the sections of the Act.

Privacy

The **New Zealand** Act in s. 14 specifically forbids disclosure of information relating to the proceedings. This is almost unique in relation to other domestic legislation.

Recognition and enforcement

Again, **New Zealand** is unique in that it confirms the recognition of the award and its enforcement via the High Court (s. 35).

COSTS

There is a lot of confusion as to what is meant by this term in the dispute arena. Many people believe that if they win a case, whether in the courts or in an arbitration hearing, they will receive all their 'out-of-pocket' costs from the other party. Regretfully this is far from the truth. Indeed, it is possible to win your case and receive only minimal (if any) monetary payment. There have been cases where the costs given by the court have been purely token. In one case the court directed a token payment of only one cent. These cases are referred to as nominal damages. The issue of costs is a common grievance for all those involved in the dispute resolution process, especially when discussing 'costs of litigation versus that of an appropriate alternative system' (Golding 1970). Furthermore, the adoption of a 'cost efficient' system could run into the danger of making overall costs larger than conventional litigation:

> Clearly the public interest requires that there be means of satisfying grievances and entitlements, but the primary means of satisfaction need not necessarily be recourse to judicial remedies in all situations. Cost-effectiveness must be a major factor at every level (McKay cited in Golding 1970).

Litigation costs were an issue as far back as 1278 as the following shows:

> And whereas before time, damages were not taxed, but to the value of the issues of the land; … it is provided, that the Demandant may recover against the Tenant the costs of his Writ purchased, together with Damages aforesaid (Statute of Gloucester 1278).

Simply translated, the person making the claim, having won, may claim the cost of the case as well as any damages that they may be awarded.

To appreciate the extent of the problem of costs it is necessary to understand clearly what is meant by the term in this context. Award of costs may be made on three different bases:

- party/party costs
- solicitor/client costs
- indemnity costs

Costs are a common area of misunderstanding. Many people do not appreciate that when they win costs to be paid to them by the other party, it will not be the actual costs incurred. The costs awarded will normally be those termed party/party costs. But the judge or arbitrator may make whatever order he/she considers just. Rules of Court (refer to the General Rules of Procedure in Civil Proceedings 1986 — Order 63 as an example) typical in various Acts around the country can be summarised as follows:

(i) The normal rule is that 'costs follow the event', but
(ii) The judge has an unlimited discretion to make what order as to cost he/she considers that the justice of the case requires.
(iii) Consequently a successful party has a reasonable expectation of obtaining an order for their costs to be paid by the opposing party but has no right to such an order, for it depends upon the exercise of the court's discretion.
(iv) This discretion is not one to be exercised arbitrarily; it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case.
(v) The discretion cannot be well exercised without grounds for its exercise
(iv) The grounds must be connected with the case.

This was demonstrated in the case of *M.Kor v. NTC & A Dimitriou* (unreported Supreme Court of Victoria, 10 November 1987), which was an appeal against the award of an arbitrator. Nathan J summarised the principle in the following words:

> That being so and examining the award in its entirety, it is apparent that the arbitrator directed his mind to the usual rule as to costs, but more particularly directed his mind to the particular and peculiar facts of this case.

Party/party costs

Party/party costs are such that:

> In the formal dispute resolution processes of litigation and arbitration, costs on a party/party basis are the expenses that a successful party is entitled to recover from the other party to the dispute by reason of the proceeding (Ambrose 1988).

These costs are limited to those necessarily and properly incurred in obtaining the award or the judgment. This is a very conservative assessment usually considerably less than actual legal cost. Most jurisdictions will have a gazetted schedule of party/party costs upon which the payments will be approved.

Who will receive their costs?

The basic principle is that 'costs follow the event'. This can be restated as 'costs follow the money', which means that unless there is some unusual circumstance, the successful party will obtain an award for party/party costs. As an example, the *Victoria Magistrates' Court Act 1989*, cl. 131 states:

> The costs of, and incidental to, all proceedings in the Court are to be in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

Similar wording appears on many other court related legislation around the world.

Solicitor/client costs

These are:

> … the actual costs incurred by a party in obtaining legal advice and representation and the prosecution or defense of a case, be it arbitration or court hearings. This includes all of the solicitor's reasonable remuneration for professional services, together with any other fees or expenses incurred, and generally described as disbursements (Ambrose 1988).

If the successful party is able to claim costs on a solicitor/client basis they will receive considerably more of their actual expenses than on a party/party basis. The limitation is that the costs must not be unreasonably incurred. Care needs to be taken with these costs, for instance in a recent case, a person was awarded $400 000 in a matter and the legal expenses were $360 000. The person appealed the extent of the costs, but the appeal was rejected on the basis that the costs incurred by the person were fair and reasonable.

Indemnity costs

In very unusual circumstances costs may be awarded on an indemnity basis. Where a party is lucky enough to obtain an award on this basis they will recover most of their legal costs. Such a situation may arise, for example where the unsuccessful party has prolonged the hearing by raising a deliberate false defence.

The Taxing Master

In Australia and New Zealand, parties to a hearing who do not agree with the costs submitted to them they may refer the costs incurred to the 'Taxing Master', an independent office within the court system, established to settle the quantum of costs that should be awarded. This applies to the quantum of an item as well as to the appropriate cost of an item not on the scales of costs applicable to court proceedings. The Taxing Master of the Supreme Court (or the officers working therein) acts on behalf of all the court jurisdictions. The office has records going back many decades and has vast resources (documents) to permit comparison and thus an appropriate allowance can be made. A very simple example would be where the dollar value per hour is correct according to the scale, but the extent of the hours may be deemed to be excessive, based on past claims, for that particular item.

Costs of parties appearing without legal representation

The power of the arbitrator has been brought to light in a case in Western Australia. In the case of *James Aris and Associates v. Minister for Works* (unreported Supreme Court of WA, 29 April 1994), one party was an architect, who employed another architect to act as his representative:

- no lawyer was employed
- both parties were given leave to be represented by non-legal representatives under s. 20 (1) of the relevant Arbitration Act
- the successful party was awarded party/party costs to be taxed in court
- the fees of the representing architect were those permitted to be charged by the Royal Australian Institute of Architects (RAIA).

The Taxing Master raised the question with the courts as to whether he could tax these costs. The answer according to Rowland J, was no, not on the basis of the *Supreme Court Act 1935* (WA) where it provides that:

> 167 (1) Rules of Court may be made under this Act, by the Judges of the Supreme Court, for the following purposes:
>
> …
>
> (d) for regulating any matters relating to the costs of proceedings fixed by determination under section 58W of the Legal Practitioners Act 1893.

The Court held that it could only tax in relation to *certified legal practitioners*, not for non-legal practitioners. Thus the costs can be taxed or settled by the arbitrator, but not by the courts.

As this case illustrates, an arbitration (or court case) without legal representation does not entitle the parties to claim costs for time in preparation for and during the hearing. Their costs are limited to out-of-pocket expenses and a witness allowance (this is a nominal amount — approximately A$25). A party representing themselves cannot recover their loss of earnings for the time spent in the arbitration.

Payments into court

Whilst this point will vary between jurisdictions, this section provides the general rules for such payments. An area of costs that needs to be understood by anyone contemplating settlement proceedings, either in the court or in arbitration, is the term 'payment into court'. Originally this meant exactly what it says. A party to litigation or arbitration could make a payment into a trust account held by the courts. This payment is in effect the sum of money that a party is prepared to pay to the other side, should they lose their claim. Today, this is usually a formal offer in writing, in a format specified by the different courts, rather than actual cash. This is generally referred to as 'an offer of compromise'. The other party is notified of the value of this offer but it is not disclosed to the judge or arbitrator, who might take it as an admission of liability.

Once a case is determined, the matter of the offer is made known to the arbitrator (or judge). The question then to be asked is:

> Has the claimant achieved more by rejecting the offer and going on with the arbitration than he/she would have achieved if they had accepted the offer (Dorter & Sharkey 1990)?

It has also been held that:

> A fair and civilized body of law [does not] necessarily require inclusion of a principle that if an offer of payment into Court is too small by any amount or fraction of the sum recovered, it must be wholly disregarded (*Archital Luxfer Ltd v. Henry Boot Constructions Ltd* [1981] 1 Lloyd's Rep. 642).

The general rule still applies. If the winning party receives any more than the offer being made, then the costs will follow the event.

OTHER INTERNATIONAL SYSTEMS

There are many other pieces of legislation for the control of arbitration throughout the world that differ to those discussed above, yet fundamentally the systems are the same. I have included a few of these for comparison and for those interested in the broader aspects of the covering legislation. These various Acts and so on are in many ways of as much interest for the similarities as for their differences.

Poland

The court system in Poland incorporates two systems of arbitration. The first is a permanent court of arbitration and the second is for courts of appointed arbitration. The court regulations of the civil code apply to both of these courts. The basis is the *Courts of Arbitration Act (1968)*. This requires the agreement between the parties to be examined by the court of arbitration. The rules are laid down in the Act and leave no discretion to the parties as to the manner of running the arbitration. Disputes concerning maintenance and the law cannot be heard by these courts.

It is a requirement that there be a defined legal relationship. In effect *Scott v. Avery* exists if there is an arbitration clause, and thus the parties cannot bring an action in front of the common court. There is no appeal from an arbitration decision, unless the decision is clearly a breach of the common law. The appeal must be made within one month of the judgment being handed down and basically as laid out in the Model Law. International commercial arbitration based on the Model Law is being adopted for those cases that fall into the definition of international disputes.

China

The opening wording of the Arbitration Law legislation of the People's Republic of China (adopted at the ninth session of the Standing Committee of the Eighth National People's Congress on 31 August 1994) states:

> **Article 1** The law is formulated with a view to ensure fair and timely arbitration of economic disputes, reliable protection to legitimate rights and interests of parties concerned and a healthy development of the socialist market economy.
>
> **Article 2** Contractual disputes between citizens of equal status, legal persons and other economic organisations and disputes arising from property rights may be put to arbitration.

Article 4 requires an agreement to engage in arbitration be reached by the parties but does not stipulate a written agreement.

Article 5 effectively incorporates *Scott v. Avery* as it states that if an agreement to arbitrate has been reached, then the matter shall be sent to arbitration. Article 8 states that the arbitration shall be based on facts and the relevant laws so as to give a fair and reasonable settlement and also says that the arbitration will be 'conducted independently, according to law, and free from interference of administrative organs, social groups or individuals'. The arbitration award is final as stated in Art. 9.

The Arbitration Law permits an arbitration commission to be set up in the domicile of the People's Government of Municipalities under the direct jurisdiction of the central government 'according to needs'. The commission must have its own name, residence and statute, all necessary property and members, and shall appoint arbitrators. The commission will consist of a chairman, two vice-chairmen and between seven and eleven members. An arbitrator must have one of the following requirements:

- have been either an arbitrator, judge or lawyer for a minimum of eight years, or
- be engaged in law research and teaching and be at least a senior academic.

From thereon, the Law is fairly standard as one would expect to find in other legislation, however Art. 34 is one of the most precise clauses I have ever read in relation to why an arbitrator may be removed or not appointed. It includes reference to a party involved being a blood relative or relative of the parties concerned or their attorneys, or where the arbitrator has vital personal interests in the case.

Article 40 effectively makes an arbitration hearing private unless the parties agree otherwise. Article 48 requires the arbitration tribunal to keep a written record of the proceedings that are sealed and stored upon completion of the hearing. Articles 49–52 cover the ability for the parties to hold a conciliation prior to the award being bought down — effectively inclosing a 'system 27' (that is, the use of mediation or other resolution system within the arbitration process explained above) process into the Law. Once the majority of the arbitral tribunal supports the award, each party must follow its recommendations. Once this is done the award has the power of a contract and can be enforced by the relevant people's court.

Chapter 7 of the Law covers arbitration arising from foreign economic co-operation and trade, transportation and maritime matters. This follows the Civil Procedure Law of China rather than the Model Law.

Japan

The basic requirement for an arbitration in Japan is that a contract exists for an arbitration to be held: 'an agreement to submit a future dispute to arbitration shall not be valid unless it relates to a specific legal relationship and a dispute arising there from'. An agreement is also only valid if the parties have a right to make a compromise with regard to the matter in dispute.

The parties have seven days in which to agree to the arbitrator after which the relevant competent court will, when requested by one of the parties, appoint the arbitrator/s. Once an arbitrator is appointed by one party, and notifies the other party, he/she is bound to that appointment and cannot then change their minds. The appointment of an arbitrator can be challenged as can the appointment of a judge, but only if the arbitrator unduly delays the process or is legally incapable or deprived of his/her civil rights. However, under this Act, an arbitrator who is 'deaf or dumb' can be challenged as to their 'competency'.

In Art. 794 the arbitrator 'shall determine procedure at their own discretion' unless the parties agree otherwise. The Act does not permit the arbitrator to administer an oath to any witnesses or experts.

Unlike most Acts which make provision for replacement, the death or resignation of the arbitrator/s is grounds for the hearing to be declared void unless the parties have specifically made provisions otherwise. A tied decision of an arbitration panel has the same affect. The award must be in writing, signed and dated and sealed by the arbitrator/s and served on the parties. Unlike most countries, an original copy of the award has to be deposited with the competent court. The award carries the same effect as a judgment of the courts. The award can be set aside generally the same as most Acts, but also allows for specific cases where a party was not represented in accordance with the provision of the law (cl. 3) or where a party was not heard in the arbitration procedure (cl. 4). This effectively applies the principles of general justice and fairness as discussed previously. Any appeal to set aside the award must be made within one month after the grounds for the appeal have been noted.

One point of interest in the Japanese Act is the grounds for preventing a judge acting in relation to the above, namely any family connection, or guardian role, being a witness or an expert before the arbitration, if the judge was the representative for one of the parties or where for some reason the judge had participated in the

arbitral award itself. Whilst these grounds would apply in most jurisdictions, it is certainly one of the few Acts to incorporate the section.

Nigeria

It may seem a little strange to include the *Arbitration Act of Nigeria 1990* here, but in my opinion it is well worth reading by anyone interested in this area of law. Much of the Model Law has been incorporated, but with local variations.

The Act stipulates that the agreement must be contained within a written document and sets out specific requirements, not the least that it must be signed by the parties, must be exchanged or that there is an exchange of points of claim and defence which contain an arbitration clause.

Section 4 effectively incorporates a voluntary *Scott v. Avery* requirement that if one party to a court case which is subject to an arbitration agreement requests it, the court hearing will be put on hold whilst the matter is referred to arbitration.

The composition of the arbitral tribunal is left to the parties to decide and may be set out in the agreement. If not so agreed, the Act includes procedures that have to be adopted. The fall back is for the appointment of three arbitrators and if there is a failure to appoint, then the courts have the power to do so and this appointment is not open to any appeal.

The Act makes it clear that impartiality of the arbitrators is a fundamental requirement. The parties have fifteen days to appeal to the courts to remove an arbitrator after their appointment if they find out that the arbitrator is not impartial or independent for some reason. Removal, retirement or death of an arbitrator does not extinguish the arbitration — provisions for replacement are incorporated in the Act.

The arbitral tribunal has the right to determine questions as to its own jurisdiction and on the validity of the agreement. Further, the arbitration clause within the contract is independent of the contract. So should the tribunal rule that the contract itself does not exist, the clause will stand on its own. This is in accordance with the widely accepted principle outlined previously.

Under the 'Conduct of Arbitral Proceedings', s. 14 requires that the parties are accorded equal treatment and that each party is given the chance to present their case. This effectively imposes the principle of general justice and fairness on the proceedings. The Act includes a section that sets out specifically that unless other-

wise agreed by the parties, the arbitral tribunal may meet anywhere it considers appropriate, whether to take evidence, inspect documents, goods or property. The Act covers the use of language and effectively means that whichever the language used in written statements will be the language of all the procedures including the award. The Act clearly covers the need for any correspondence (of any sort) to the arbitral tribunal, to be communicated to the other party and likewise anything from the arbitral tribunal to one party must also be communicated to the other party.

The tribunal has the right to administer oaths or take affirmations and may issue a writ of *subpoena* but can only demand documents and so on to the limit that a court may do so. The Act gives the arbitral tribunal the right to appoint its own experts to investigate and report on specific items and requires a party to give that expert all evidence that could be required by the tribunal itself. The arbitral tribunal may decide as *aimable compositeur* (*ex aequa et bono*) if the parties agree to that — generally as per the Model Law.

The award must be in writing and signed, must include the date it is made, where the award is made and must include reasons unless the parties have waived the need for this in the agreement. Subject to an appeal (which must be made within three months of its issue) the issue of the award terminates the mandate of the arbitral proceedings and thus the power of the arbitrator/s.

An area of great significance is the inclusion of conciliation in the Act. This is effectively the same as s. 27 in the Australian Act, but sets out in great detail the way that the conciliation may be conducted. I discuss conciliation in detail in Chapter 7.

The other point of interest in the Act is the Arbitration Rules. In many countries mentioned in this chapter private organisations set the rules and the requirements for the running of the process. This is one of the few sets of rules incorporated into legislation. Generally they follow those of the private organisations, but are specifically based on the content of the main section of the Nigerian Act. The content extends to the statement of claim and defence, both in form, content and time lines.

CHAPTER 5

THE ARBITRATION PROCEDURE

INTRODUCTION

This chapter reviews the procedure of arbitration, including the way an arbitration is commenced, through to its completion by the issue of the award by the arbitrator. This chapter is divided into two sections: the first discusses the arbitration procedures from the notice of dispute through to the award, while the second considers some of the alternative systems to the full arbitration processes, although these are still based on the general principles of arbitration.

ANTICIPATED LEARNING OUTCOMES

An understanding of the arbitration procedure

An understanding of how an arbitration hearing is conducted including the preliminary conference and main hearing

TOPICS COVERED IN THIS CHAPTER

Launching the arbitration process

Appointing the arbitrator

The preliminary conference

The hearing

The award

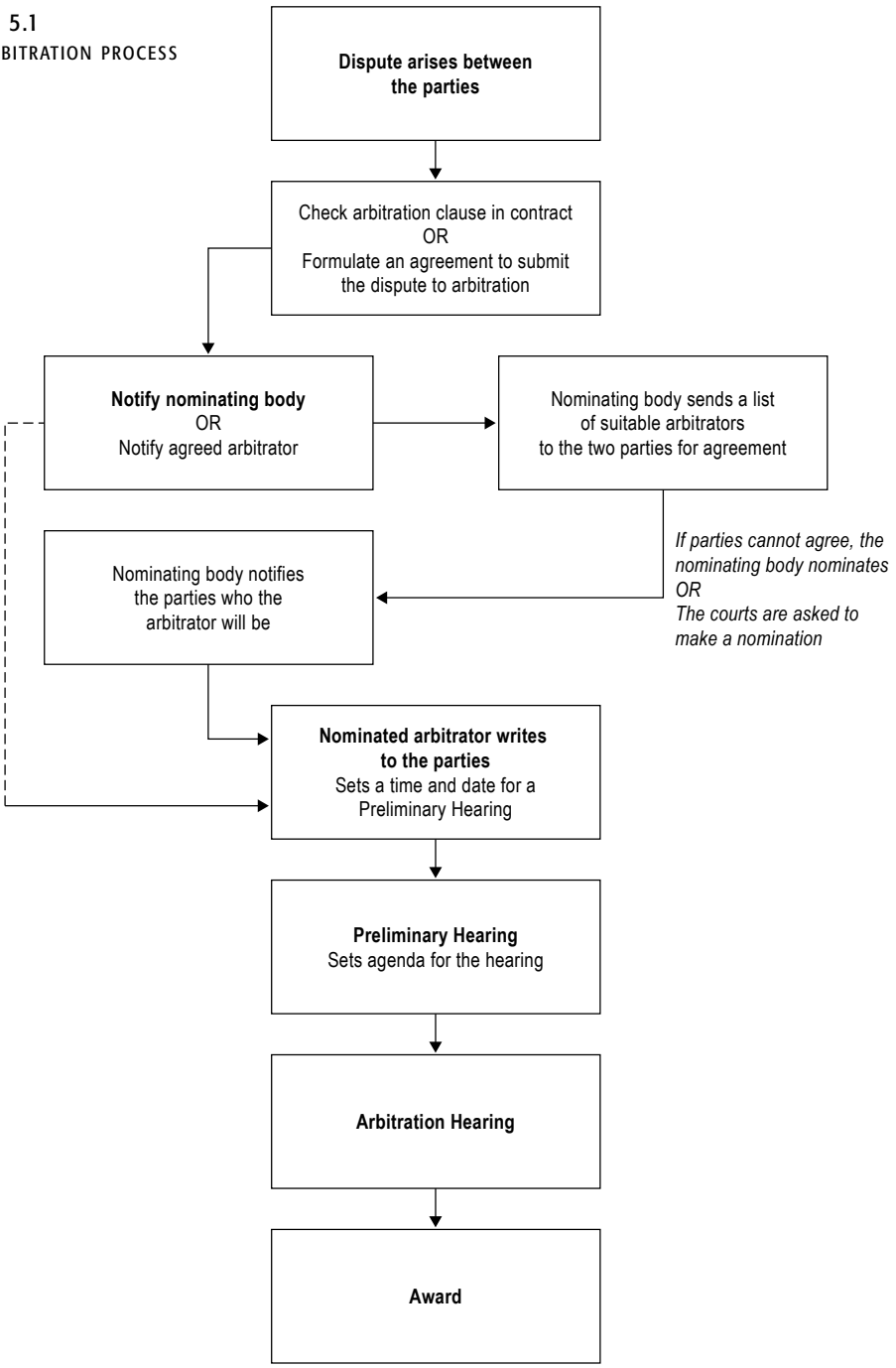
The expert witness

Scott Schedule

Paper arbitration

Alternatives to arbitration

FIGURE 5.1
THE ARBITRATION PROCESS



Whilst the matters under dispute will vary widely, the actual procedure of the arbitration is fairly well set and generally proceeds along fairly well practiced lines. The arbitration process is summarised in Figure 5.1.

Initial step

The initiating step in the procedure is to notify the other party to the contract that a dispute exists, in accordance with the form set down in the contract. A party who wishes to take a dispute to arbitration may contact the controlling organisation — in Australia it is usually the Institute of Arbitrators and Mediators Australia (IAMA). They will require a copy of the relevant clause of the contract to confirm that there is an agreement to arbitrate.

It is possible to nominate the arbitrator at the time of signing the contract, but this has the associated problem, that when a dispute does arise, the nominated person may be involved in another case or for some reason not available, thus creating delays before the hearing even commences.

Initiating the arbitration

Before the arbitration can begin, there must be a written 'Agreement to Arbitrate' between the parties. Most arbitration agreements are incorporated into the contract between the parties to cover the eventuality of future disputes. There may also be *ad hoc* arbitration agreements entered into after disputes have arisen. These are rare, as at the point of a disagreement it will be hard for the parties to agree to anything the other side proposes.

A party who wishes to arbitrate a dispute must ensure that the matters to be arbitrated fall within the scope of the agreement. Most such agreements, made at the beginning of the contract, are very broad and will cover most eventualities and often employ words such as, 'all disputes and difficulties arising under or in connection with the contract or the performance or non-performance ... of the contract ...' will be settled by arbitration.

Today, most arbitration clauses include a specific body to nominate the arbitrator — usually the relevant professional institute or association. In early contracts in Australia, the provision was made for the arbitrators to be selected prior to the commencement of the project. There was an advantage in this approach, in that the arbitrators could be kept abreast of the project itself and be, at least to some extent, aware of the full picture with respect to the matter under dispute. In reality this seldom if ever happened. The *Lump Sum Contract Edition 3,* published by the Royal

Australian Institute of Architects (1956) included a detailed clause with respect to dispute resolution:

> (a) If the dispute or difference shall arise under clause 3 of the Articles of Agreement (variations) or under clause 8 of these Conditions (dispute with a Clerk of Works) or if a dispute shall exceed £1,500, it shall be submitted to the arbitration of ..... (insert name and address of the nominated arbitrator).
>
> Or in the event of his death or unwillingness to act to ..... (insert name and address of alternative arbitrator).

In the case of a dispute for less than A£1500 then only architects were to be appointed.

The development of dispute boards in recent years has had the same intent. The problem with early nomination was that when a dispute did arise, the nominee/s could be involved in other work that precluded their use in this instance.

One of the best-known arbitration clauses in the Australian construction industry was to be found in the *Lump Sum Contract Edition 5* published jointly in November 1967 by the Royal Australian Institute of Architects (RAIA) and the Master Builders Federation of Australia (MBFA):

> Clause 32 (a). In the event of any dispute … at the expiration of seven days from the date of receipt of such notice by the Builder or the Proprietor … shall be and is hereby referred to the arbitration of an architect member of the Royal Australian Institute of Architects being the President for the time being of the Chapter or Area Committee of that Institute in the State or Territory in which this Contract is made, or his nominee, and a member of the Master Builders' Association, being the President for the time in the State or Territory in which this Contract is made, or his nominee. If the said Arbitrators shall fail to agree or to make an award within one month of the completion of the hearing … an Umpire to be appointed by the Arbitrators upon entering upon the reference shall enter the reference in lieu of them.

In a later edition the President (of the then titled) Institute of Arbitrators Australia (now the IAMA) was the nominee rather than the RAIA or MBFA Presidents. In this contract there was no provision to nominate the arbitrator/s at the signing of the contract or prior to a dispute actually arising.

Current construction contracts have changed somewhat. In many of the current contracts it is a requirement that the parties to the dispute proceed to some form of negotiation, either a face-to-face meeting — often simply referred to as a conference — or a mediation, before it goes to arbitration. In the latest construction contract from the Property Council (Australia) 'PC-1 1998',

the dispute resolution method includes expert determination as well as arbitration. The latest Standard's Australia contract 'AS 4000', requires a conference to be held prior to taking the dispute to arbitration. Likewise in the United States the 'Series 200 Standard Contracts' by the Associated General Contractors (2000) adapts similar requirements. Indeed, this contract has some unique clauses for dispute resolution:

> 12.2 Initial Dispute Resolution. If a dispute arises out of … this Agreement … the Parties shall endeavour to settle the dispute first through direct discussion between the parties' representatives who shall have the authority to settle the dispute. If … not able to … settle … the senior executives for the parties, who shall have authority to settle the dispute, shall meet within 21 days after the dispute first arises.

If this does not result in a settlement with seven days of the procedure commencing, then the matter is sent to mediation. The Agreement refers the matter to the AAA and the parties are required to be concluded within sixty days of the time of filing. The fall back position, should the dispute not be resolved, is that the parties have to go to Exhibit No. 1 of the Agreement. This allows the parties at the time of signing to decide on the system to be employed to finally arrive at a resolution — ranging from a dispute review board, to an advisory arbitration, a mini trial, binding arbitration or litigation. Some of these are discussed later in this chapter.

Appointing the arbitrator

The arbitration process is not uniform around the world, although there are more similarities than differences. There are at least two clear systems used. In the first case, used in Australia and New Zealand, the nominating body has a role in appointing the arbitrator and usually acts as a manager of the trust fund for the fees. They will usually either have their own hearing rooms, or will organise the hearing rooms elsewhere, but otherwise the procedure is totally in the hands of the arbitrator, who will not only arrange all hearings directly with the client, but will also be responsible for sending out the accounts and other relevant paperwork.

In the second system — typically used by the AAA — most of the day-to-day work is undertaken by a case administrator appointed by the nominating body to handle the daily paperwork. The case administrator will negotiate the most suitable dates and times for the preliminary conference and main hearing. They will also manage the fees, room bookings and any other administrative requirements. The advantage here is that the arbitrator will only meet the parties at the actual hearings and will

not have to be concerned with payments or other mundane administrative requirements. The argument against this system is that the more the arbitrator is involved, the better able they are to manage the procedure and be seen to be in control. A further point raised is that the arbitrator-run system is cheaper as there are less overheads — this is countered by the extra time the arbitrator needs to spend on the matter, thus making the process seemingly more expensive. In reality the costs may be very similar.

In most jurisdictions, once the nominating body has viewed the contract clause they will forward to both parties a list of recommended arbitrators who are experienced in the area of the claim. It is usual for the nominating body to list a number of arbitrators for consideration: in Australia it is commonly between three and five depending on the circumstances. A brief background of each nominee can also be supplied if requested. In most countries, because of the generally small nominating areas (major cities rather than whole countries), the majority of the arbitrators in a given field are well known. The solicitor and/or barrister will know the arbitrators they would, or would not, select for their particular case and client. The parties normally have a given number of days in which to make a selection. With the IAMA it is seven days, with the AAA, ten days. One or both parties may ask for a further list of nominees. If the parties cannot agree on an arbitrator, the managing organisation through the nominee (usually expressed in the arbitration clause as the President or his/her nominee) will nominate a person that he/she considers most appropriate. When the parties have agreed in writing to the appointment of the arbitrator (see Appendix 1), the nominating body will write to the arbitrator and to the parties informing them of the formal appointment.

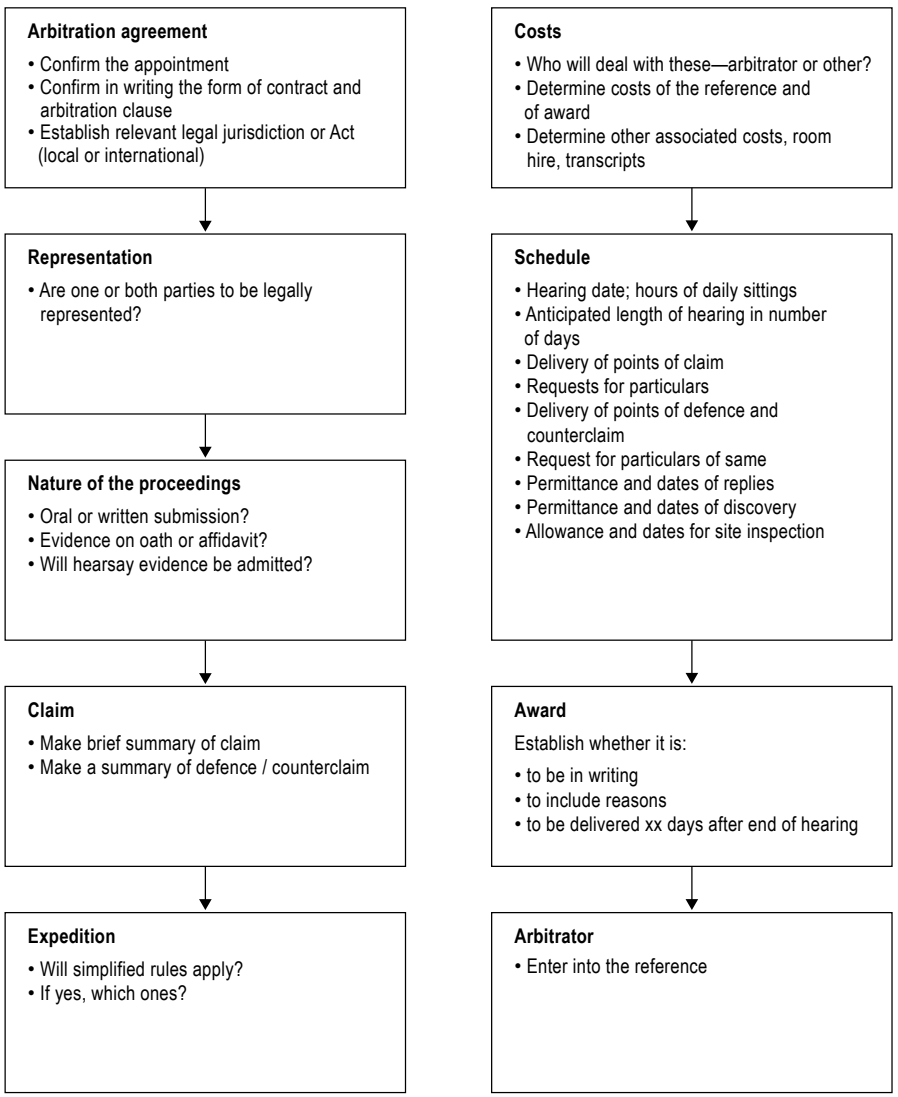
THE PRELIMINARY CONFERENCE

The following details outline the procedures that are generally undertaken by those using the first system just described, where the arbitrators undertake their own administration.

When the arbitrator receives the letter of nomination, he/she will write to each of the disputing parties (or their legal representatives if that is the instruction to the managing organisation) informing the parties that they have been nominated as the arbitrator and that they plan to hold a preliminary conference on a given date, time and place. An example of this notice is given in Appendix 2. Subject to any objection from the parties, the preliminary conference will take place as soon as practicable after the notification. It is common to hold these at the proposed hearing

rooms after the courts close their session for the day (so that the legal representatives are free to attend this short meeting). They can also be held at any suitable office, but the institute/association offices in all jurisdictions are considered to be neutral for this meeting. The steps that a preliminary conference follow are outlined in the section below and are summarised in Figure 5.2.

FIGURE 5.2
THE PRELIMINARY CONFERENCE



Meeting agenda

The first thing to be done at the conference is to confirm the correct appointment of the arbitrator. The second is to confirm that the arbitration authority clause is correct and that the appointment is in accordance with that clause. This clause may also contain a number of other requirements, such as disallowance for either party to have legal representation.

As discussed in Chapter 4 there are a number of items that cannot be heard by an arbitrator under most jurisdictions, and especially in Australia. These are:

- a dispute arising from a contract that is illegal
- a question on fraudulent misrepresentation
- a claim to have a contract set aside because it was entered into under duress.

There has been some argument as to whether it can be shown that there is not, or ever was a contract, if the arbitration clause can stand alone. The Nigerian Act for example is specific on this point and clearly states that the arbitration clause stands alone. Indeed ever since *Heyman and Another v. Darwins, Ltd,* House of Lords 1941–1942, and other subsequent cases, this is the generally accepted position.

Once these matters are confirmed as correct, a number of other items need to be considered. These will include some or all of the following.

Confirm representation

The matter of representation is often one of great debate, because most legislation does not give automatic right to legal representation. But representation does not have to be legal: it may be an expert witness or some other person. (If using a non-legal representative be aware of the matter of costs discussed in Chapter 4.) There are also other considerations that should be made. One such is whether the matter/s under dispute are mainly regarding technical matters. If yes, then it may be that the legal representative would not assist the hearing, but an expert witness or building consultant representative would. If one side is a builder who is familiar with arbitration, then not to permit representation of the other party would definitely penalise them.

Nature of proceedings

At the opening of the preliminary conference the arbitrator will explain how they intend to run the arbitration and will ask for

any suggestions, especially any that may shorten the procedure. The arbitrator will explain that no correspondence, either written or oral, must be made with the arbitrator without the other party being present, or a copy of any document forwarded to the other party. Likewise none of the parties or their representatives may correspond with one party (including the arbitral tribunal) without duly notifying the other party as soon as possible. Failure to strictly adhere to this can lead to claims of bias and lead to court intervention in the hearing or even the setting aside of the final award.

Some of the matters to be confirmed will include those relating to evidence:

- whether evidence will be on oath and if so which holy book should be used; or whether affirmations only will be adopted
- the nature of the evidence that will be accepted – will a special case need to be made to admit hearsay evidence?
- will the evidence be verbal, written or a combination of each?

General nature of claims and any counter claims

The arbitrator may ask each side to give a brief verbal summary of the matters under dispute, as the parties believe them to be. This is important because it may be the first time that the two parties have been face-to-face. Hearing the case of the other side may lead one party to reassess their own case, which in some circumstances can lead to negotiations commencing prior to the start of the full hearing.

Simplified arbitration

The parties may agree to simplify the arbitration procedure and adopt the expedited rules as set out later in this chapter.

The need for costs

This will be an agreement as to whether the arbitrator is to deal with all matters regarding costs associated with the hearing, or whether all cost related matter should go to the Taxing Master or whether the matter should be dealt with in an alternative manner.

It is often agreed that the arbitrator will bring down an interim award setting out the rulings on the principal matters under dispute, especially if the hearing is affecting the on-going works, but leave costs to later submissions.

Costs to be incurred

The question of the cost of running the arbitration needs to be resolved. These will include a number of items including (but not exclusive):

• *Costs of the reference*

This term is generally taken to mean all the expenses properly incurred by the parties in the course of the entire case, including the costs of negotiations and settling the terms of the submission and legal expenses incurred by the parties in the conduct of the arbitration.

• *Arbitrator's fees*

The scale of the arbitrator's fees will vary, depending upon the experience and seniority of the arbitrator (even if only in his/her own mind). There are generally no set fees published by the various institutions, leaving this to the market place. Both parties must agree to the daily fee. There will also be an agreement as to the fees to be paid to the arbitrator should the matters be adjourned. It is normal to set several different fees:

1. if the notice for the adjournment is in excess of forty-eight hours, then many arbitrators will waive any fee
2. if less notice is given than this, a partial fee may be required
3. if adjournment occurs during the hearing, then usually a full day's fee will apply.

The reason for this is that the arbitrator will usually set the hearing dates some considerable time prior to the hearing and so an adjournment or cancellation once the preliminary conference has been held will mean that the arbitrator cannot reschedule other matters, thus losing expected potential income. This is one area of argument regarding arbitration and its associated expense.

• *Room hire*

If the hearing is not to be held on the building site, then a room will be required at the offices of the institute/association offices or some other commercial establishment. The parties must agree to any associated costs. Sometimes it is only possible to agree to pay in principle as the actual costs may not be known or the actual location of the main hearings may not have been resolved.

• *Transcripts*

This involves two decisions. First, are transcripts of the

proceedings required? And second, who will pay for them? For most arbitration hearings transcripts are not required, but large, complicated cases may justify the high expense of a court-trained shorthand specialist and the typing of the resultant scripts. Today, the technology will permit the transcript to be typed in real time in full language, on a computer screen in the hearing room in tandem with the short hand typist entering the shorthand into their machine.

Lodgement of fees

The arbitrator is in a unique situation. They almost always have their fees paid prior to the hearing proceeding. On the basis of a two day hearing, the arbitrator will normally request each party to pay the possible fees for those two days. The fees are usually paid into a trust fund held by the nominating body, but a special bank trust account can be opened for major hearings or lawyer trust funds can be used if appropriate. The reason for this is simple. It may be difficult to obtain the money afterwards from a losing party, or a party that does not agree with the quantum of the decision. Should the case go longer, the arbitrator will request lodgment of further sums at the end of the day's hearing covered by the lodged fees. They will then ask if the deposit has been lodged (proved by a receipt) by the parties before the hearing will proceed. A short adjournment may be granted if a party has not yet lodged the deposit. In my opinion this is a strong argument for the use of a case administrator as this interruption interferes with the proper role of the arbitrator.

Schedule

A schedule of matters pertaining to the running of the arbitration is then prepared. The time factors will change in every case, dependent on the size and scope of the dispute. The minimum time between the preliminary conference and the main hearing is usually determined by this schedule. In most cases this is never less than seven days, and may well be a matter of weeks or months.

Where the schedule is over a number of months, intermediate meetings with the arbitrator to ensure that everything is progressing as it should are also scheduled. Either the arbitrator or one or both of the parties can hold other conferences if they find matters which may affect the timetable.

The general items that need to be covered will include:

- delivery of the Points of Claim and Points of Defence

- particulars of the opponent's claim or counterclaim
- discovery and inspection of documents

• *Discovery*

This is one of those areas in dispute resolution that has been accused of not only delaying the process but also adding considerable cost to the dispute hearing. 'Discovery' is the disclosure of the documents that the parties are going to rely on in the hearing. It usually begins with an exchange of a list of the relevant documents between the parties. This is then followed by a physical inspection of those documents. One definition of what should be discovered was stated in a decision of the High Court of Australia, in a case regarding discovery of documents and a claim to allow additional discovery:

> Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would lead to a chain of inquiry which would either advance a party's own case or damage that of his adversary (*Mulley v. Manifold* (1959) CLR 341 at 345).

If additional documents are to be produced during the hearing, permission is usually required from the other party. It is seldom refused, but they do have the right not to admit.

At the preliminary conferences of many arbitration cases, as well as in the directions hearing for building case list matters, the quantum of the discovery is often limited to those documents directly related to the matter. To do this a list may be prepared with all the documents included, and then both parties agree on those they will rely on in this specific instance. This has the effect of reducing the time and thus the cost of the discovery itself and the inspection of those documents.

• *View of property or things by the arbitrator*

A general agreement will be reached as to whether the arbitrator will undertake a 'view' of the works under dispute, or if such is relevant. Any party may request this, including the arbitrator if they consider that it is necessary in this case. The inspection may be of the site, documents in a specific location or some other matter.

• *Time and place for the hearing*

With respect to the schedule discussed above, the time and place for the main hearing to take place will be decided.

Once all these and any other time related issues are agreed to by the parties, the arbitrator will have the matters written up and

sent to the parties for signing. The arbitrator will seldom proceed any further until they receive the agreements duly signed by both the parties.

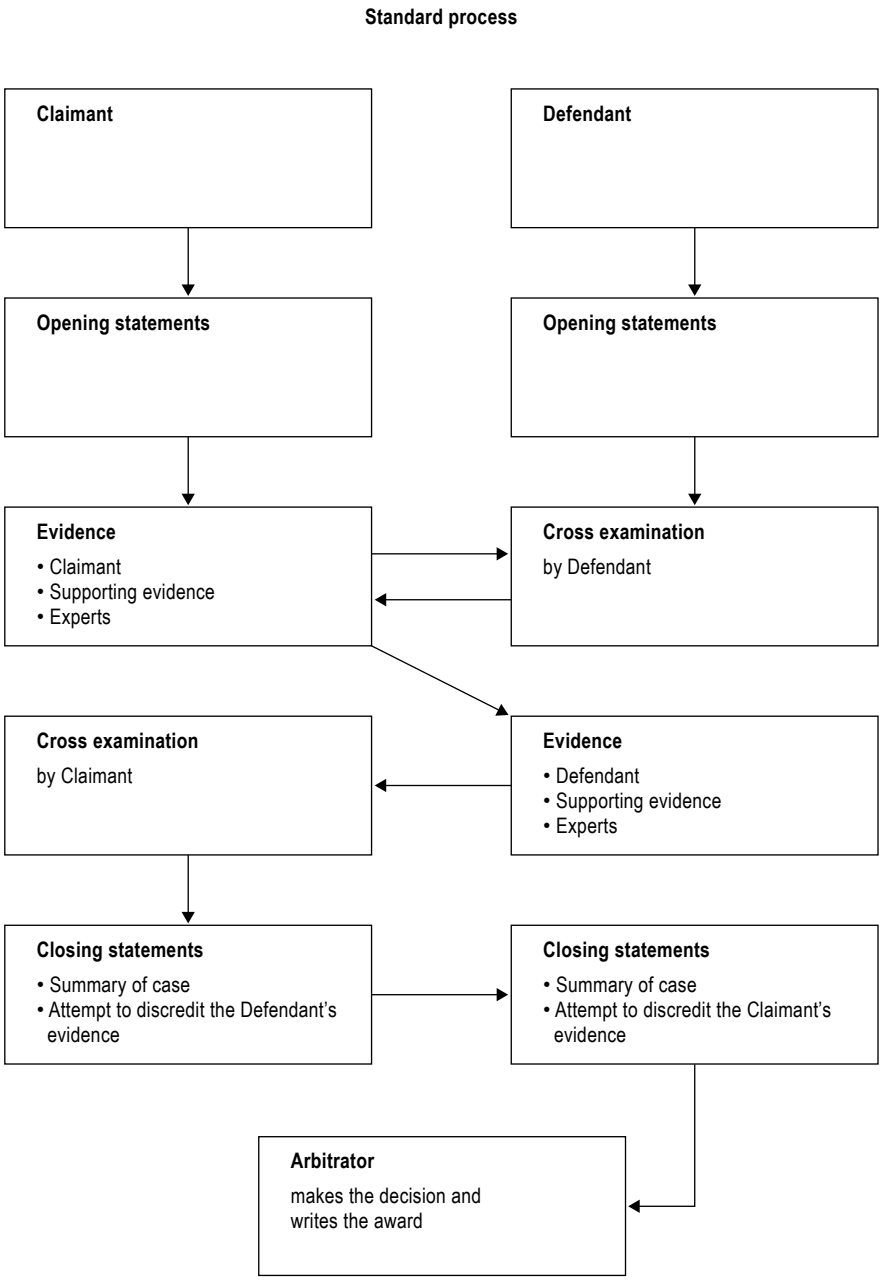
THE HEARING

Whilst the preliminary conference is usually only an hour or so long, the hearing itself may be from as little as one morning to many days, weeks or months. Indeed, in the case of a major arbitration hearing over a hospital contract, the hearing ran for some six months. Whilst it may be agreed to run the procedure in a variety of ways, the most common form is described below and is summarised in Figure 5.3. In most respects the average arbitration procedure is a reflection of most court proceedings. This is not surprising considering the procedures of the majority of cases are in the hands of barristers who spend most of their time in the court system. Other forms of arbitration as discussed later in this chapter may modify or even completely eliminate this formality.

Opening statements by each side

It is not essential to have opening statements, but it is the customary practice. (In some cases the arbitrator will ask that the opening statements be in writing, but this is unusual. The idea is that both sides exchange the statement and save time on the preliminaries.) Here the parties will outline their case. It is normal, but not a requirement, that the party who lodged the notice of the dispute (the claimant) will be the first to give their evidence. This will usually include the details of the contract and some background to how and why the dispute arose. The length of this presentation may or may not be in direct relation to the size of the dispute, but may reflect the state of the relationship between the parties. It is an opportunity to paint a picture of the problems, actual or perceived, which have been suffered by the party. This is not evidence in itself, but a more broad-brush presentation as to what the case is and how the evidence will be presented. The number of people that will be called to give evidence on behalf of the party and some reason as to why they will be called is also often provided at this time. Once the claimant has given their version, the defendant will then present the picture of the case as they see it. It is normal practice for the barrister, if one is present, to deliver the opening statement, but the advising lawyer will almost always be present to listen to the arguments.

FIGURE 5.3
THE ARBITRATION HEARING PROCESS



When this process is completed the arbitrator, or even the parties themselves, may request a short adjournment. The reason for this is quite simple. In many arbitrations (and indeed in many court cases) this may be the first time that both sides have heard a full summary of the case as perceived by the other party and what evidence each party is going to present to the hearing. The parties may appreciate their strengths, but may also realise their weaknesses. This is another good reason for a written opening statement so that this may occur before the hearing and so save the time and cost of a hearing at all.

Having heard each side, the arbitrator may have already begun to draw conclusions as to how they will rule on the case. It is not uncommon for the arbitrator to address the two parties and to make his/her feelings known. Whilst an arbitrator would never make a statement such as, 'I have heard all I need to, Party X has won', before hearing all the evidence (which is hardly following the procedures of natural justice and fairness), they may make a statement such as, 'I have heard the opening comments from both sides and now have a much clearer picture of the matter under dispute. I would suggest that in light of what we have all heard this morning, the parties might like to consider their position and perhaps would like to discuss this amongst themselves outside. I will adjourn this hearing until …'. Here the arbitrator is making a point that something raised in the opening remarks has a strong bearing on the case of one or other of the parties and that negotiations should be at least considered by the parties. It is not an indication that the arbitrator has reached a conclusion, simply that the arbitrator believes that it would be appropriate for the parties to consider what they have heard. Naturally the parties don't have to accept this and may request the arbitrator to keep the hearing going.

In many cases once this happens, the party representatives, especially the lawyers or barristers, will go and have a discussion over the matters raised and suggest to their clients that they start serious negotiations. Up to this point each of the parties may have been advised by their representatives of the possible outcome, and by hearing the opening remarks, the party might now have a more open mind to listen to their advisors, which they may not have done previously. However, this does not always succeed and the parties may either ask the arbitrator for a longer adjournment, perhaps until the next day or longer, or may return to the hearing and tell the arbitrator that they wish the matter to proceed.

There have been many arguments put forward about the use of legal representation in arbitration and some good reasons can be raised for not using them. However in this specific context, the legally trained person will often pick up the nuances of the arbitrator and realise the strengths and weaknesses of the cases, even at this early stage, and act accordingly. The unrepresented party, whether the owner or the builder (or another party) who has had little if any experience in this situation, will often not hear the nuances and proceed regardless.

Claimant party case evidence

Having cleared the way for the formal part of the proceedings, it is normal for the claimant to give the evidence for their case first. The party will be led by its representative through all the evidence.

The representative for the other side will then cross examine the first party and try to elicit further details or find defects in the evidence. The aim of this cross-examination will be to destroy or at least mitigate any damaging evidence that may have been given. Under strict rules of evidence, this examination can only refer to matters raised in the original evidence, however in reality, this rule is not always observed in arbitration hearings and the defendant's representative may try to 'muddy' the evidence by raising other matters. The representative for the claimant may then redirect (that is, to further clarify some matter raised under cross-examination) any evidence that has been raised. This is especially important if some matter has now been raised that may be detrimental to the claimant's case. Once the presentation of the primary evidence is completed, the claimant's legal representative will call to the hearing experts and other parties to give evidence.

Respondent puts its case

The respondent party to the case then undertakes a similar procedure. In this case cross-examination is undertaken by the claimant of the proceedings.

Closing argument

Upon completion of the presentation of all the evidence by each side, each party will make a speech summing up the evidence. It is usual to promote evidence in your favour and to try and discredit that which is not. The length of this speech or summary has come under great discussion in legal circles. There are recorded

cases where the length of the closing argument has been longer than the primary evidence itself. Many arbitrators are now trying to limit the time given for this procedure and in some cases this is agreed to at the preliminary hearing.

The view

It is common, especially in building cases, for the arbitration hearing to be adjourned once the opening statements have been delivered. The arbitrator and nominated representatives of the parties will then meet at the nominated location. The actual matters under dispute can then be inspected first hand. It is common (but not always) for the building consultants to give the evidence at the location — often the construction site itself, especially in the smaller residential housing disputes. They will point out to the arbitrator the matters they consider important. The parties and their advisors usually agree as to what these matters are prior to their visit to the site.

The place of the inspection can be where ever it is considered relevant by the arbitrator. It may be the construction site, the supplier's yard or elsewhere as deemed necessary by the parties.

THE AWARD

Whilst the actual format of the award is not prescribed, what it must cover is clearly defined. The requirements of its contents are covered by most arbitration legislation and further set out by the actual arbitration agreement.

Answers

The arbitrator must make his/her award on the basis of the facts and exhibitions presented to them. It is essential that all the information on which the parties are going to rely is clearly presented to the arbitrator. As both sides will try and put forward a different view of the evidence, it will be up to the arbitrator to sort through the evidence and determine the answers to the questions put to them while deciding the award.

The requirements

There are several rules that apply to all arbitrations unless there is a written agreement to the contrary. I have included details of legislation in several countries to illustrate certain differences.

Model Law

Article 31 of the Model Law states these requirements as follows:

(i) The award must be in writing
(ii) The award must be signed by the arbitrator/s
(iii) The arbitrator must provide reasons for the decisions
(iv) The arbitrator must state the date and the place of the arbitration.
(v) A signed copy of the award has to be delivered to each party.

Domestic legislation

Part 4 of the various *Uniform Commercial Arbitration Acts* in **Australia** sets out the three requirements for the form of the award, these being that:

(i) The award must be in writing
(ii) The award must be signed by the arbitrator/s
(iii) The arbitrator must provide reasons for the decisions.

New Zealand (s. 38) and **Singapore** (s. 38) incorporate the Model Law wording including all five of the Model Act requirements. In **France** the code is quite specific in that the award must contain:

(i) The names of the arbitrators/s
(ii) The date on which it was rendered
(iii) The place it was rendered
(iv) The names of the parties
(v) The names of any lawyers or representatives.

Section 52 of the **United Kingdom's** Act is a little different. Subsection (1) states that 'the parties are free to agree on the form of an award'. If no agreement is reached, then the fall back requires:

(i) The award to be in writing,
(ii) The award to be signed by the arbitrator/s,
(iii) The award to contain reasons and state the seat of the hearing and the date thereof.

Section 55 again leaves the method of delivery of the award up to the parties to agree, or failing this, it will be served on the parties without delay.

General requirements of an award

There are also some general requirements that have to be met for an award to be fully acceptable and less likely to be open to a court challenge. These include:

- *Time*

The award must be written and published within the time set out in the arbitration agreement. It is strange, but the majority of agreements do not include a time frame and this then reverts to the 'within reasonable time' principle. Very often the arbitrator at the conclusion of the hearings will state a time in which the award will be issued. This is not legally binding, but may serve as at least a point of argument if the parties go to court to have the arbitrator issue his/her award.

- *Certainty*

The arbitrator must state his/her decisions with precision leaving no area of doubt. The award must not require 'interpretation'. If it does, the courts will tend to send the award back to be rewritten to make it precise. For example, if the award states that a party is to receive damages (unless the agreement says otherwise) it is necessary to spell out the exact quantum of those damages.

- *Completeness*

One very important requirement for the parties, once they agree to arbitration, is to make sure that they ask the arbitrator all the questions that they wish answered. The arbitrator can only answer questions that are agreed and put to the arbitrator in the agreement. Additional questions may be added but normally require both parties to agree to this occurring and if one party can see it may be against their own interest, they will object. Even if evidence is given to the arbitrator that may have a bearing on the overall case, they cannot address those matters if they have not been asked to do so. This is often a problem when the arbitrator can only make reference in the award to matters that are shown to them. I have taken part in a site inspection when clearly a specific item was relevant and the arbitrator said more than once, 'Is there anything else you would like me to see before we finish?' Luckily for my side, the other did not pick up the hint or show the arbitrator the offending item. Talking to the arbitrator after the matter had been concluded, I was told that the arbitrator had felt very frustrated and indeed even uncomfortable that this point had not been picked up during the inspection, as it would have altered the final award.

• *Ambiguity or contradiction*

The rule is that the arbitrator's answers to the questions put to him/her must not be inconsistent, ambiguous or contradictory. This can be partially overcome if when the arbitrator receives the original questions, they read them carefully and point out any wording that could lead to any or all of these problems. Most parties will happily change the wording so long as the actual sense of the question remains the same. The problem of contradictory awards goes back many years. In a case in 1740 (*Johnson v. Wilson* (1740) 57 ER 295), the dispute was over division of land and the arbitrator ruled that the land should be divided but did not provide how this was to be done. The award was set aside for uncertainty. In other cases the courts have remitted an award back to the arbitrator for clarification. These matters are covered by the various legislation in different ways. The sections regarding appeals generally are covered in Chapter 4, and these apply to the four specific areas mentioned above.

Remission of the award

Model Law

Chapter VII in the Model Law makes a number of grounds for recourse against the arbitrators' award. These include (amongst other items) that the award deals with a dispute not contemplated by, or falls outside, the terms of the arbitration, or contains decisions on matters beyond the scope of the submission to arbitrate.

Domestic legislation

In **Australian** legislation this is covered in s. 38 and is also discussed at length in Chapter 4. Unlike the 1908 Act, the current Act in **New Zealand** basically incorporates the wording of the Model Act, modified to incorporate the New Zealand law (s. 34). 'Questions of Law' in s. 5 also gives the party further rights. It would appear that the courts still have the discretion to remit the award where there are patent defects in the award. In the **United Kingdom** the current Act is by far the most detailed in this respect. Section 68 (2) sets out a number of appeal areas, but includes specifically:

(f) uncertainty or ambiguity as to the effect of the award

(h failure to comply with the requirements as to the form of the award.

In the **United States** an award may be vacated under legislation of both federal and state arbitration, if it fails to render a final and definite arbitral award.

FORM OF THE AWARD

A copy of an actual award is to be found in Appendix 3. This has been slightly modified for confidentiality reasons. I have deliberately chosen a simple example, but the principles are the same no matter what the size of the award.

The introduction

This specifies the Act or legislation under which the award is made. It usually includes the name of the arbitrator, the name of the parties and whether they are the claimant or defendant.

Preamble

The arbitrator then proceeds to set out how he/she was appointed and entered upon the reference. Some arbitrators also include the name of any legal or other significant representatives or experts. They may also include any special instructions in the agreement — such as the waiver of the oath, the allowance of hearsay evidence or that the determination was reached on the basis of fairness and justice rather than strictly in accordance with the law. The list of the questions that the arbitrator has been asked to answer forms the bulk of the preamble. Sometimes this is done at the start of each determination. There is no firm rule for this.

The determination

There is no set way to write the determination. In Australia, as a result of IAMA training, most awards today will commence with the wording, 'I therefore award and determine the following', but there is no formal requirement for this and often the phrase 'I now answer each question as follows' will suffice. Where work is to be done or payments made, the party responsible must be very clearly identified. This also includes who is to pay the arbitrator's fees and how the costs of the arbitration will be determined and what steps to be taken if the costs are not agreed (that is the use of the Taxing Master or other arrangement).

Award by consent

There is nothing in the Uniform Commercial Arbitration Acts in Australia that permits (or in fact forbids) a consensual award. It is common for the parties to ask the arbitrator that such an award be issued and it has seldom led to a court appeal. In England the law has long recognised the right of the arbitrator to make an award in agreed terms.

The Model Law is far more direct and states that the arbitrator shall, 'record the settlement in the form of an arbitral award on agreed terms' (s. 30). This section is adopted by the **New Zealand** Act (s. 30), the **Singapore** Act (s. 37) and with minor word changes, the **United Kingdom** Act (s. 51). Likewise the **Ontario** Act permits the same action in s. 36.

Final step

The final step is the publication of the award by the arbitrator. Depending upon the terms of the agreement, the arbitrator will adjourn and write the award. This may take a few days, weeks or even months, depending upon the complexity of the matters under dispute. Once the award is ready, the arbitrator will notify the parties of the final monies required in the trust account to cover his/her costs. When the full expenses are covered, the arbitrator will issue the award. This may be the final award, but more likely, the arbitrator will issue an interim award and request the parties to make a submission as to costs, as discussed above.

If final payment is not made, a party to the agreement may appeal to the courts to rule that the award be published and to address the matter of the costs. This is unusual, but may occur when large sums are involved. This is another good reason for the arbitrator to ensure that the payments to the trust account are sufficient to cover the anticipated expenses. Additional time in writing up the award is the most common reason for this problem arising. Once the costs are finalised, the arbitrator will issue the final award.

Functus officio

Once the arbitrator publishes an award he/she cannot alter it (except for correction as permitted under the various legislation) or take any further actions whatsoever and their authority ceases.

EXPERT WITNESSES

In recent years there has been a growth of the so-called expert witness. As their numbers have increased, so has criticism of their credibility. Expert witnesses are, strictly speaking, people who have an expertise in a specific area. They will be employed to provide evidence, either written or oral, first to their clients and then to the arbitrator (or judge) on the matter under dispute. In the construction arena this may be on the quality of construction, costings of building works, rate of progress (extensions of time) or

about contract documentation. Most experts will cross over each of these divides. A major problem has been that many do not know their own limitations and will try to cover a much wider area than their real knowledge encompasses.

The jurisdiction of many courts now requires an expert statement to be lodged prior to a hearing so as to provide the opposing side with knowledge of the experts to be called and to allow them to lodge a notice of objection if they believe there are grounds to do so. The other area where experts are used by the courts is where they may send out specific matters to be investigated. This has been a common practice in the United Kingdom for many years. The result of the enquiry is then tabled to the court who may or may not accept or reject the report. This assists the court to have industry specific matters investigated by those who are believed to be the best qualified to do so. In Victoria this is covered by the Victorian Supreme Court and the County Court Rules, 'Order 50 — References Out of Court'.

SCOTT SCHEDULE

One of the difficulties for an arbitrator is to wade through the vast amount of information that is provided during the hearing and to arrive at a defensible decision. The bigger the case, the bigger the problem. One way to overcome this, or at least reduce the size of the task, particularly where there are a large number of items being disputed, is by the use of a Scott Schedule. This was first used by G.A. Scott (1920–1933) who was an official referee in the United Kingdom and who was involved in building cases.

There is no set format and most practitioners will have developed a format that works best for them. The only requirement is that the parties to the dispute are prepared to provide the necessary information. If most of the claims are about money, then figure columns may be more appropriate. The layout given in Box 5.1 is but one format. It is common to use A3 or even A2 sized paper so that there is plenty of room for the information. Use of an electronic white board is also possible. The content however is fairly uniform with the matter under dispute on the left and the reasons for and against being entered by the parties (if more than two parties additional columns can be inserted). The arbitrators will enter their data in private as part of their deliberations.

Box 5.1
Typical Scott Schedule

Item no.	Matter in dispute	Details from claimant	Response from defendant	Summary claimant's evidence	Summary defendant's evidence	Summary Arbitrator's reason	arbitrator's decision
1	Completion date	15 days	5 days	1 Rain 5 days 2 Rock 6 days 3 Steel delay 4 days	1 Agree 2 Builder's knew 3 Builder's responsibility, could have been prevented	1 Agree 2 Engineering report clear on rock 3 Industrial action outside builder's control	1 5days 2 None 3 4 days

PAPER ARBITRATIONS

Whilst the majority of arbitrations follow the procedure as set out above, it is not the only way they have to be conducted. If the parties agree (in the arbitration agreement) then the arbitrator may receive all the evidence upon which the parties will rely, in writing. This may be accompanied by affidavits (a sworn statement in front of a person recognised by the courts for this purpose) from the parties or not, as decided by them. The arbitrator will usually hold a preliminary conference so that the dates for the submissions and replies can be scheduled. In some but not all cases the arbitrator may hear opening and closing arguments. He/she may also be given the power to request any additional information that they consider necessary although the extent of this power needs to be carefully documented. In some cases the arbitrator will publish the award and forward to the parties. In other cases they may call a meeting to clarify the costs of the arbitration and the arbitrator's fees.

ALTERNATIVES TO ARBITRATION

In an attempt to restore the faith in arbitration a number of alternative arbitration systems have been developed. Amongst these are:

- expedited commercial arbitration
- advisory arbitration
- final offer arbitration

Expedited commercial arbitration

In August 1988 the IAMA published its 'Expedited Commercial Arbitration Rules'. Most arbitration organisations now publish their own set of expedited or simple arbitration rules. In most cases the notice of a dispute and the nomination procedure will be the same as for the normal binding arbitration however there are some specific changes to the way that the arbitration is conducted.

Generally the arbitrator is permitted to conduct the arbitration proceedings in such a manner as he/she thinks fit. In most of these systems there will be no pleadings, or if permitted they will be severally limited — often to one statement of claim and one defence of that claim only. There may be limited discovery of documents and in some instance none permitted at all. In most instances there are no opening or final address. If they are permitted, a strict time limit will be applied. Written opening submissions are common in this system so that the arbitrator may read them before the hearing commences.

Most of the expedited rules limit the number of expert witnesses to be called and again often require written submission rather than personal appearances. Reports of experts to be relied upon in the arbitration are usually exchanged at least a week prior to the hearing commencing. Depending on the situation, there may be no oral evidence given at all, but whilst permissible this is unusual in a normal expedited system. Very strict time limits are set regardless of how the hearing is to be managed and in the majority of these expedited hearings, the arbitrator is also permitted to determine any question by reference to considerations of general justice and fairness.

One furthermore point clarified in Rule 20 of the IAMA guidelines is that the arbitrator is permitted to use conciliation and/or mediation and that any such action taken by the arbitrator cannot be used in subsequent court proceedings as evidence of his/her partiality or bias or a breach of the rules of natural justice.

The award is also of a simpler nature. Most arbitrators will follow the form previously discussed with one major exception. In the simpler form, the agreement will frequently waive the requirement to provide reasons for the decision. This is at least partially to permit the arbitrator to bring down the award in a very short time — usually within seven days. Most agreements will include a clause stating that if one or both of the parties then require reasons, the arbitrator will have a given time in which to provide them.

Advisory arbitration

This provision is included in the 'American General Contractors 200' series of contracts. It is basically the same as for normal binding arbitration with one exception: the award is not binding, but rather advisory, so that the parties may or may not adopt all or some of the award.

Final offer arbitration

A variation on the standard arbitration is the final offer arbitration (FOA). This is a system where the arbitrator is constrained to decide for one or the other side a final offer in a dispute. According to Metcalf and Milner (1992), 'the theory behind this type of dispute procedure is that it provides an incentive for both sides to moderate their positions to such an extent that third party intervention is not required'. This has been used in labour disputes in the United States. The credit for devising the FOA is given to Carl Stevens who suggested this method in 1966 in his paper 'Is Compulsory Arbitration Compatible with Bargaining?' (cited in Fulton 1989, p. 38). It is also referred to a 'baseball settlement' in America, being widely used in that profession. It is based on the theory that if the arbitrator can only select one or other of the parties' final offers, then the parties will be forced to negotiate, so as to arrive at as close to an acceptable position as possible.

There are other adaptations to this idea. One such is for the disputants and the arbitrator to all draw up an offer. The disputants' offers are then opened and if they agree to one or the other, the matter is so resolved. If not they can try again. If they still do not agree the arbitrator's submission is opened. If the arbitrator's figure falls between the other two final offers, the nearest figure is adopted. If above or below the disputants' figure, the arbitrator's figures are adopted.

CHAPTER 6

BASICS OF NEGOTIATION

This chapter provides the reader with the key elements for successful negotiations. It is inevitable that the parties to a contract will have a difference of opinion, and good negotiation skills may be sufficient to resolve the difficulty without the matter progressing to a major dispute, thus saving time, money and frustration. The purpose of this chapter is twofold: the first section sets the background to good negotiation skills whilst the second provides guidelines for successful negotiation.

ANTICIPATED LEARNING OUTCOMES

An understanding of the principles of negotiation

The ability to prepare for and achieve a successful negotiation

TOPICS COVERED IN THIS CHAPTER

The outcomes of negotiation

The four steps of negotiation

Other principles of negotiation

The art of listening

Some guidelines when preparing for a negotiation

Coping with a more powerful adversary

Dealing with deadlocks

Alternative negotiation systems

INTRODUCTION

The *Shorter Oxford Dictionary* (1987) defines negotiation as the act of conferring with another 'for the purpose of arranging some

matter by mutual agreement; to discuss a matter with a view to a settlement or compromise'.

The process of negotiation receives comment in most books on dispute resolution, but assumes the reader already knows what it is. In this chapter I will discuss the process of negotiation and how it can be used for the resolution of differences before they reach the formal dispute stage as discussed earlier in this book.

Negotiation is also the basis for most other dispute resolution processes. Conferring may occur between the parties at any time during a court or arbitration hearing; often it is between the legal representatives, or between the parties directly without their representatives (although admittedly this is unusual if legal or other representatives are present). The very basis of mediation is negotiation, but with the assistance of a third party who attempts to assist the parties to reach a mutually agreeable arrangement. Chapter 7 discusses mediation in further detail.

There are also some misconceptions about negotiation, often as a result of newspaper publicity, or bad experiences suffered by parties during some form of negotiation.

WHAT IS NEGOTIATION?

The simplest form of negotiation is between two people who wish to come to an agreement, whether this is a child after another biscuit from its mother just before dinner, or an employee after a pay rise from their boss. Fisher & Ury (1981) cite negotiation as:

> … a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.

There is no formal negotiating system as there is for the courts or for arbitration, or even in mediation. It involves no 'third party neutral' or any party present except those actually involved in the negotiations. At the conclusion of the negotiations there is no solution imposed; the parties themselves must reach it.

It is not compulsory for the parties to produce a legally binding agreement at the end of negotiations, but a binding contract may result from it. The parties are at liberty to draw up a formal document including the resolutions that they have reached, or not, as they prefer. Whatever the outcome, the terms are completely under the control of the disputing parties themselves.

There are a number of elements that should be included to ensure a successful negotiation. The first is that the parties actually have a commitment to settle the matter at hand. If one party

is not so committed, then the best negotiations will be to no avail. The second requirement is good communication skills. This includes not only talking and sending your message to the other party, but the ability to actually listen and hear what the other party is really saying to you. A third requirement, which may at first glance seem obvious, yet very often is not, is agreement between the parties on what is actually the matter under negotiation. Many negotiations start with each party having a different idea about the specific matter in question. One party may be seeking a pay rise, whilst the other side is simply meeting to assess the continued employment of the person. This is even more common in the dispute arena. I discussed this in Chapter 5 when talking about arbitration, where very often the opening statements are the first time that one party has clearly heard the situation with respect to the other.

For a successful negotiation, there should be a set of rules established and agreed as to how it will proceed. This can be from a simple arrangement — you start and tell me your position and then I will tell you mine — through to a whole series of steps from opening comments to the summary.

There are conflicting arguments as to whether an offer should be on the table before a negotiation starts, or whether the parties should come to the table with open minds, ready to talk about any, and all options. The disadvantage of an opening offer is that it sets a point at which to start the negotiations: 'I am able to offer you a $10 a week increase' is hardly going to be of help if the other party wants $100 a week increase. An opening statement such as, 'I am glad we are here, your work is excellent and I am happy to talk about a pay rise, but we need to talk about the size and conditions of the rise', is much broader and gives plenty of scope for subsequent discussion. No position has been taken which could be open to misinterpretation by the other. I will talk more about this shortly.

Should the matter be resolved to the mutual agreement of the parties, the terms should be formalised in writing and signed by all parties concerned.

Is negotiation an alternative dispute resolution method?

It can be argued that negotiation is not part of an ADR at all, largely because it is not a specific, detailed system such as arbitration or even mediation. Some texts do not refer to the system of negotiation when discussing alternatives to the court system (Jacob 1990). Others do refer specifically to negotiation, but not as a method separate to arbitration and mediation (Fulton 1989),

while Bevan (1992), for example, relies on other scholars for comments on negotiation, but refrains from making specific observations himself.

Mediation can be seen as a system that uses the principle of negotiation, being discussion between two parties, but involves the use of an agreed neutral third party. The rules for both processes are very similar: comparable attentions in the preparation for the mediation and openness of mind are essential for the eventual success of both negotiation and mediation. In that case, it is probably fair to say that negotiation in itself is not a form of ADR, but the basis for most of the systems that are collectively called ADR.

The following ideas on negotiation are based on a range of sources as well as the experiences of the author. For an in-depth study of negotiation I recommend *Getting to Yes* (Fisher & Ury 1981). The material in the book is also covered in the video series published by Harvard University and it is worth the time of anyone who will be involved in negotiations, to view this video. Various organisations also run commercial workshops using this video as their basis.

OUTCOMES OF NEGOTIATION

There are three outcomes that are not just applicable to single party-to-party negotiation, but apply equally to neutral third party conferring (usually called mediation and covered in more detail in the next chapter).

Most writers on the subject usually refer to the three outcomes as:

- **Win/Win**
- **Win/Lose**
- **Lose/Lose.**

Win/Win

This concept meets (within reason) the needs of both parties. It is the direct opposite to the lose/lose result. In particular the decision is acceptable to each party. Everyone involved in the negotiation will feel that they have obtained what they set out to achieve without having to compromise their considered positions.

It is useful to define what is meant by 'win' in this context. It does not necessarily mean that each party will gain everything they had hoped for, or even every part of each objective they

wished to negotiate. In this instance the win is an agreement by both parties to those points with which they both feel comfortable. Whilst the final agreement may not be the full extent of what either party would have desired if everything went entirely their way, the agreement reached is clearly the best for which they could hope, without having to compromise to the point where they felt they were uncomfortable with the result. They will come away from the negotiation feeling that they have had a successful outcome, without any (or slightly any) regret at the result. Certainly a result that they can live with. It is important to note that the achievement of this requires two-way communication. This requires that each party will not only talk to the other party, but far more importantly, they will listen to the other party.

We have already noted that a key approach to successful negotiation is flexibility. That is, both parties do not commence with fixed and rigid goals. They will probably have a number of objectives that they would like to achieve, but they come to the negotiation prepared to listen to the other side and consider the other party's interests as well as their own.

Concentrating of these objectives is an important part of this situation. Each side must consider and understand the long term aims of the other parties and then evaluate the best way of achieving these. In this system, success hinges on the maintenance of the relationship between the parties no matter what the final result, so long as both sides can appreciate that they have reached the best possible solution.

A simple example is the tree branches over the fence. This is a constant cause of neighbourhood disputes. (A barking dog is surely another — and one not so readily resolved — it is hard to communicate two ways with a dog!) One solution is to make the owner chop down the offending branches and take them away. This requires access to the other property and co-ordination of their schedules so they are home at the same time. Another is for the neighbour over whose fence the branch hangs to cut the branches and take them away — but this requires effort and possibly cost to the neighbour.

As a beginning of the negotiation, it would be interesting to ask the owner why they have the tree in the first place: is it for the looks, shade, privacy or perhaps fruit for eating or for making jam? This will provide a guide as to how to enter the negotiations and what proposals could possibly be discussed. If the reason for the tree is mainly for fruit to eat and make jam, a simple negotiated compromise might be that if the over hanging branches have fruit on them, then the neighbour over whose fence the branch

hangs is free to take any fruit on their side if they will cut down the offending limbs afterwards, and these limbs can be placed out the front of the owner's property, who will dispose of them. Another might be that if the neighbour over whose fence the branch hangs will cut down the branches and stack them in the front of the owner's property, then the owner will provide one or more jars of the jam made from the fruit.

In the construction industry examples of a desire for an ongoing relationship may be a supplier/contractor or an owner/contractor relationship, as well as numerous other equivalents within the industry. For instance, it is in the supplier's interest to maintain a long term relationship with a contractor to ensure a hopefully reliable cash flow. From the contractor's point of view, they want a supplier with the right quality of materials at the right price and delivery time. In many ways this has a direct relationship to the concept of 'total quality management' that has been used in manufacturing, and especially the car industry, for many years.

An example of owner/contractor relationships, from the contractor's point of view, would be the desire to construct the future buildings for the owner — such as fast food outlets, shopping centres, private hospitals and so forth. Good steady work, and the associated cash flow, is important for a contractor and the ability to cover the base line overheads is always desirable. This is especially so where the client has a record of regular secure payment — typical with most large chain or franchise organisations.

From the owner's perspective, dealing with one contractor on a continuing basis makes the administration much easier: many problems only need to be resolved once. The owner is usually not in the construction business and they will want to be free of worries about the building process so that they can concentrate on their primary business undertaking — whether it be selling hamburgers or treating patients.

Win/Lose

In this situation one party will achieve more than the other side believes is reasonable under the circumstances. It does not have to be a complete win or loss, but comparative. This may be where one party has to pay more to achieve some other gain, which the other party does not believe is equitable.

Take for instance a builder who has walked off site because the owner would not pay the progress claim. The owner did not want to pay the builder until certain defective works were made good, prior to any more work being undertaken. The negotiations are around these two points.

The outcome of the negotiations is that the owner agrees to payment of the full progress claim of the builder. The builder agrees to go back to the site and repair the defective work and then complete the project based on the understanding that the claim is to be paid in full. The offset in the negotiations is that no time penalties would apply over the period of delay caused by this disagreement. In effect the owner has won most of the points and the builder has received his payment, but at what he considers a considerable cost, compared with what he had originally hoped for.

But from the owner's viewpoint, they may feel that they have been disadvantaged by loss of the time penalty because they have had the work period extended and this will add more interest to the loan that they took out with the bank to carry out the building works. The advantage is that the work will be made good and the project finished under the original contract and for the original contract value. The owner was aware that failure to have the original builder complete the contract would have resulted in more lost time, the need to re-tender the work, and a significant probability that the price to finish would be much higher than the original contract. Thus the owner was at a disadvantage and will feel badly done by.

This situation leads to the creation of an 'them and us' distinction between the parties. The individual's energies are directed only towards victory and their own point of view and self-interest. The strong emphasis is on immediate solutions regardless of whether the long-term objectives are met. This is typical where money is the prime concern. The need to pay the bills now may overcome the aspiration, no matter how desirable, to undertake future work.

This type of result is common where there are too many personalised conflicts and it is typical of many residential building disputes. The parties start off with one common aim — to successfully carry out the building work. The owner wants the building; the builder wants the money and a satisfied client. Initially both the builder and the owner hopefully wanted a product they could show off with pride — a building that would provide the functions for which it was designed (Eilenberg 1999).

Then personalities come into play. From the builder's point of view the owner is on the telephone every day complaining about something and is late with payments. From the view of the owner, the builder is uncooperative, claims excess variations (change orders) and is too understaffed on site to complete the job on time. At this point the attitude of both people is probably very

much against the other party — even to the point of making them 'suffer'. It is sad but true that I have personally known a number of people who have said that win or lose they 'will at least make the other party suffer as much as they have made me suffer'.

The whole emphasis is on short-term concerns — a long-term relationship is forgotten. The builder wants their money; the owner wants penalties for time delays, possibly for what they consider defective work. There develops an atmosphere of hostility. In this situation, one party may feel happy at the end of the process. However even this is unlikely. The reality is that whilst one party may 'win' it will probably not be the win that they had hoped for when they started the negotiations. On the other hand, the 'loser' in the negotiation will probably feel 'hard done by' and be even unhappier. The loser will have 'given-in' because they felt that they had nowhere else to go.

Lose/Lose

This outcome is the worst possible for the disputants, more so than the win/lose result, as here none of the parties have won anything and probably lost much more than they could afford. The parties will feel disillusionment with the negotiating process and will generally feel frustrated. In most cases this lose/lose situation results in both parties feeling that they have to compromise in order to settle the matter. For instance, suppose in the case above the builder agrees to take a lower payment for the claim (probably as a result of the lost time) and the owner agrees to mutually terminate the contract and find another builder, thus facing all the problems and costs that this may produce.

This situation leads to the parties feeling a loss of respect and trust for the negotiation process and also for the people who recommended this recourse of action — usually the legal advisers — leading to a problem for any possible resolution, even in arbitration or the courts, which is where this failed negotiation is likely to lead. The other outcome is that usually the long-term relationship between the parties will be soured rather than being resolved agreeably, often beyond the point of ever truly arriving at a satisfactory resolution.

Where the negotiations fail altogether, time will have been expended on what is now seen as non-productive effort and has generated no mutually acceptable solutions. Usually time means money, so where the parties were advised that negotiation would be the quickest and cheapest solution to the matter under discussion, in the end, time and money have been expended and

nothing achieved. The worst situation is that both sides will come away with an even deeper and positive ingrained belief in their own case and the perceived intransigence of the other party.

It is going to be that much harder for the advisers for each party to convince their clients to use alternative resolution solutions in the future. If the matters proceed to arbitration and the arbitrator has indicated their opinion of the strengths of each case, the faith in the advisers will be such that the clients will not listen to what may be very sound advice and insist on continuing to fight a lost battle. The cost in time and money can be readily appreciated.

The best outcome of a failed negotiation will be that both parties appreciate that they cannot reach an appropriate compromise and agree to a third party assisting them (a mediator) or to take the matter to another forum (arbitration) but without ranker and with the genuine aim of finding a solution. Regretfully this is all too rare.

THE FOUR MAIN CHARACTERISTICS OF NEGOTIATION

There are many ways of approaching a negotiation, but achieving success requires a well thought out plan and a clear understanding of the various parts of the negotiating process. Simply put, it requires good management. The four steps in a successful negotiation can be summarised as:

- **preparation**
- **discussion**
- **proposing**
- **bargaining.**

Preparation

Assess your objectives

What do you really want to achieve? For most builders the primary aim is to receive the payments that are due for the work completed. The builder will also probably want a satisfied client. After all a satisfied client may use them on the next project or recommend them to other prospective clients for another project. Hopefully the builder will also want the opportunity to complete the work and to rectify any perceived defects noted by the client.

The owner will probably want to pay the builder what is really due. They may believe that some of the variations are too expensive, or not justified. They will also want the work finished (if not by this builder, certainly by someone) if possible within the original budget and to have any defects corrected at no expense to themselves.

At the beginning of any negotiation it is important to plan your approach and sequence the issues you wish to raise. Prior to the first negotiation session always decide what are the fixed terms of agreement and what are variable. For the builder, the main fixed item is of course to be paid for his actual expenses. As to the variable, the builder will want what they believe is a reasonable profit for the work undertaken. The actual figure that is paid may be negotiable. The same will apply to variations that have been completed. As to whether the builder completes the work or not, that again is a desire, rather than a fixed requirement. It may be a very strong desire, (as it may affect the cash flow) but so long as the builder is not out-of-pocket this item is negotiable. For the owner, the only fixed position is that they will not be prepared to pay for work that has not been completed and to only pay for work completed to the specified standard.

Discussion

It is necessary that the parties who are going to enter into the negotiation begin the process as early as possible. Exchange messages with the other side. In particular keep the messages in a friendly climate and avoid making demands. The wording should be 'we would like/we suggest/would you consider …' and so forth. By doing this you set the climate of openness.

The Department of Veterans Affairs in the United States published 'The Dirty Dozen of Communication' (<http://www.va.gov/adr/dirtydzn.htm>, viewed June 2001), a collection of words and phrases to be avoided in good communication. Try to stay clear of:

- using phrases such as 'you must/you have to/you will'. These may produce fear or active resistance and often promote rebellious behaviour and retaliation.
- warning or threatening phrases such as 'if you don't then…' which can cause resentment, anger and rebellion.
- moralising, for instance saying 'you should/you ought to'. These types of phrases can cause a person to become defensive of his or her position.
- advising or giving solutions by telling the person how to solve the problem. These can imply that the other party is not able to solve the problem and that you know best.

- teaching or lecturing. This provokes defensive positions and counter arguments and may cause the other party to stop listening altogether.
- judgmental phrases like 'you are not thinking maturely'. This implies incompetence, stupidity or poor judgment and it may cut off communication from the other party for fear of negative judgment.
- praising or agreeing. Remarking that 'I think you did a great job' implies high expectations which can appear patronising or as a manipulative effort to encourage desired behaviour.
- shaming, ridiculing or chastising by making the other party feel foolish. Referring to someone as 'Mr Smarty' can cause a person to feel unworthy which can have a devastating effect on self-image and which often provokes verbal retaliation.

I have to admit to having heard most of these at some time during both mediations and arbitration hearings.

Socialisation

When the negotiations start, it is important to be sociable. Small talk is often important — ask about their health, their families and things that make both sides feel at ease. The aim is to establish an atmosphere that is tension-free and trusting. Personally I am a great believer in the 'coffee and chocolate biscuit' approach, which I find successful with unions and clients alike, for setting a more relaxed and less hostile atmosphere.

Asians are renown for this approach to most business discussions. The Japanese have made the tea ceremony a fine art, where socialisation may go on for many hours while the actual business takes only a few minutes. The secret is to establish trust first, with the firm belief that each party can 'do business' with the other. It also ensures that the parties are aware of what they are going to negotiate about.

Once the atmosphere is set, the next item on the program is to confirm the broad objectives of both parties. It is necessary for the first party to listen carefully to what the other side desires. In particular, the second party must listen and be aware of any surprises (often points either not known or not appreciated by them) and how they affect the second party's plan for the negotiations. One suggestion at this stage is not to take notes, as this will distract the listening process. Use a recording device or have someone else take notes so that all present can concentrate on what is being said. Jotting down a few key words may substitute if no other means is available. Concentrating on the message being given by the other side is essential — almost more so at this point than later in the negotiations. Receiving the wrong message at

this initial stage means it is that much harder to correct later.

It is vital for both parties to review the background to the disagreement and to review the proceedings leading up to the meeting. This is so differences of fact are clarified and the possibility of negotiating on the basis of a false premise is reduced.

Proposing

Once the trust has been established it is time to clearly define the issues that the parties wish to resolve. It is a time for each party to provide detailed description of the matters that they wish to resolve, but in a way which doesn't intimidate the other party. At the same time the parties must not appear weak. It is best to link these issues where appropriate to the other party's objectives.

Consider the following situation. Person A, the builder, desires to get paid for the work completed to date, while Person B, the owner, wants the work finished, but believes that A has not carried out the amount of work for which he is making the claim for payment. The builder disagrees.

One solution that could be proposed would be for both the builder and the owner to jointly obtain the services of an independent surveyor. They would then agree to abide by the assessment of the surveyor. The owner may feel that this is possible, but who will pay for the surveyor? The owner believes it is not their responsibility.

The builder now needs to consider his options. By agreeing to pay for the surveyor, he at least should get paid for the outstanding claim. But supposing he refuses? It may then go to court, causing not only time delays but further financial outlays with no guarantee of a satisfactory outcome. However it would be wrong to suggest this first. The builder is after all negotiating. One suggestion could be to split the cost 50/50 between the two parties.

The second proposal could be to suggest that the losing party pay. That is, if the surveyor says the builder is entitled to the full monies claimed, then the owner would pay the surveyor. If less — if the builder has over claimed for the work completed — then he would have to pay. From his point of view, the worst position would be that he pays for the surveyor, but receives his money reasonably quickly, and at best the same applies and he pays nothing. The middle ground will probably result in the builder receiving less from the owner, but at least getting some money and the work can proceed.

There are several other options. Each side could employ their own surveyor and these would meet and agree on the sum to be

paid. But another problem may be that the builder believes the owner does not have the money and so there is a question of security of the money for the payment once the sum is agreed. Perhaps it could be paid into a joint account and so on. Whatever the possible solutions, remember always to keep the problem to the fore and not put the other party in a position where they cannot move. Be flexible.

Bargaining

Negotiate the issue. A party should start by asking for what they actually want, but accept that goals may have to be modified. Link compromises to other objectives, rather than make concessions.

A good phrase to remember is:

If … then

In light of the above point regarding payment, perhaps the builder could say: 'If you pay me the money I have claimed, I will have two gangs of men on site tomorrow and finish the work quicker than the contract stipulates so you can use the room ahead of time'. Or propose that if the owner pays now, the builder will have the surveyor on site tomorrow, and the builder will pay the costs, so that work can recommence as quickly as possible. Any adjustments could be taken care of in the next progress claim.

The secret of good negotiation is to:

Be creative

Summarise

It is vital to confirm the understanding of the points that have been mutually agreed, by summarising points during the discussion, particularly where complex issues are involved. Use feedback such as, 'Now I understand that we have agreed to…' but do not leave it until the end of the discussion. Memories can be short, and subsequent discussion can alter the perception of what has already been agreed.

Settlement

Finally, agree on what has been agreed. Unless the resolution is fully understood by both parties, the settlement may not last. Where appropriate, provide at least a hand written summary of the agreement at the end of the session. The full agreement can by typed and exchanged later if deemed necessary. In some

circumstances a handshake may establish the bond better than the written word, so long as both sides clearly understand to what they have agreed.

OTHER PRINCIPLES OF NEGOTIATION

There have been a number of principles suggested by other writers on negotiation, which they believe need to be observed for a successful result. Fisher and Ury (1981) suggest the following:

- separate the *people* from the problem,
- focus on the *interests* and needs of the parties and not on the positions,
- invent *options* for mutual gain,
- insist on using objective *criteria.*

These and other principles are discussed below.

Separating the people from the problem

It is important that the problem is the centre of the negotiations. Personal dislikes and preconceptions need to be put aside. This is not always easy to do. One party may think that the other has a certain opinion about them.

This is seldom the case. Most people who are prepared to undertake a genuine negotiation in the first place will have already put aside their prejudices, or they would not be negotiating. A reference to Chapter 2 on the psychology of the people who are in dispute will help you to understand the behaviour and thoughts of the other party.

It is worth mentioning the technique of changing the shape of the table. Rather than sitting the parties in direct opposition to each other, arrange the seating so that all the parties are sitting together facing a flip chart or other board on which information can be written and where the problem can be clearly presented. This helps to reinforce that the parties are facing the problem together — and helps to reduce the 'them and us' scenario.

Focusing on interests, not positions

This is similar to that which was covered above, when considering the interests not the people. Look at the actual items under dispute, rather than the people who are raising them. Do not assume their positions: that is, that 'all builders are crooks and are only interested in the money'. Or that 'all owners dislike builders and want as much for nothing as possible'. It is seldom that these preconceived

positions are completely (if at all) true. Think about why the person may want to dispute a given item. It may well be that people feel threatened or perceive a threat to what they would consider their comfort zone — be it physically or financially.

Options

Generate a variety of possibilities before deciding what action to take. In successful negotiations, it is important that more than one alternative possibility be considered. One method is to prepare a list all the possible acceptable solutions and then to classify these from the most preferred to the least preferred. Once the list is made, the party should consider what the result would be if only the least preferred option was implemented. How bad would that be in view of the overall situation?

For a negotiation to be successful it is essential to enter with a number of options and to allow plenty of room to manoeuvre. One inflexible proposition does not a negotiation make! Besides, the advantage of negotiating between a variety of options is twofold: it makes it easier to diagnose the problems, and it increases the possibility of mutual gains.

However, Fisher & Ury (1981) also identify four obstacles to offering a variety of options because they tend to create:

- premature judgment of either the problem or the solution
- the assumption that there is a single answer. There is seldom such a thing.
- the assumption that the problem is 'a fixed pie': that there are always other options and it is simply necessary to try and find them
- the thinking that 'solving their problem is their problem'.

As I suggested in Chapter 2, people often only see things from their perspective. In successful negotiations the 'them and us' syndrome has to be replaced with 'our' problem. Successful negotiations can only take place when both parties share the aim of a mutually satisfactory outcome. This requires the parties to consider all perspectives of the matter under negotiation.

Objective criteria

How do the parties to a dispute resolve a problem? In most cases, a precedent can be employed. The use of hard data is a good beginning. If negotiating to buy a house, check the current prices being paid for similar houses in the area in which you wish to buy. If it is over the quality of a building item, use of the recognised International Standards Organisation (ISO) or local standards such as the *Handbook of Building Construction Tolerances* (Standards Australia 1992). The same principles apply if a pay rise

is being negotiated: research what other people at the same level, in similar companies, in a similar city/country receive. It is always easier to negotiate using facts as your basis as against what you feel may be correct.

Fisher and Ury talk about being hard on the problem and soft on the people. That is, it is the problem you are trying to resolve, not change the people with the problem. Indeed, a good negotiated settlement should improve your relationship with the people, not destroy it.

The perception of problems

It is often the perception of a problem rather than the reality that will influence how you approach a negotiation. There are several simple rules to follow to minimise this possibility:

- **Don't deduce their intentions from your fears**

You may think that the other party will not agree to some point, simply because 'they don't look as if they will'. We can often allow prejudices of all kinds to influence our thinking about how others will think. The biggest cause of war is often this very fact (for further discussion on this point see DeBono 1985).

- **Don't blame the other party for your problem/s.**

This is often the case in construction disputes. For instance, a builder may have a serious problem relating to cash flow, with the potential to put them out of business. They have failed to complete some of the work in a specified manner and the owner will not pay until it is made good. It is not the owner's fault that the builder has a cash flow problem, although they may be contributing to it. The problem is company management rather than failure by the owner to pay the builder and that is the issue that needs to be resolved.

It is necessary for each side to discuss the other's perceptions. The need is for good communication between all the parties. Be open and honest with each other. For instance, the owner may believe that the builder will not fix the defective work, because the last time they were asked, the builder appeared stubborn and would not do it.

In negotiation, one party should look for opportunities to act inconsistently with the perception of them held by the other party. If it is clear that the owner believes the builder will not correct the defective work, because they are a 'stubborn' person,

confound them. The builder could open up the discussions by saying that they want to carry out the rectification work. Following up with the 'if/then' process discussed above would further the congenial start. Give the other party a stake in the outcome by making sure they participate in the process.

THE ART OF LISTENING

Before we look at some of the things that can be done prior to commencement of the negotiations to assist in the presentation of a party's case, consider the most important factor of all — the need to listen to the other side.

Most people can only do one thing successfully at any given time. Whilst some people may do more things, like watching television and reading a book, whilst their companion is talking to them, it is unlikely that at the end of the evening they will be able to remember either what their companion has been saying, what was on the television or what was in the book. Only one of these will remain in the memory to any major degree — unless they are an extraordinary person and therefore probably do not need these notes anyway! Many people are not so lucky.

Most need to concentrate and focus on the matter in hand. This is paramount in negotiations. Whilst the other side are stating their point of view, it is no help if the other side is thinking about what they are going to say and not listening to the first party at all. First they will not hear everything that is actually said, but even more importantly will miss the nuances of what that person is saying. Most people give away a lot of clues while they are talking, often without realising it themselves. And whilst concentrating on what a person is saying, it is also possible to observe their body language (Lowen (1958) is an informative read for those who wish to follow up on this issue). This is hard to do if you have your head down writing. Indeed, the other party may also be put off if all they can see is the top of your head when they are talking to you. At best it will be annoying, at worst it may make them feel that you are not really interested in what they are saying, but are just intent on recording everything.

I remarked earlier that I strongly disfavour taking lengthy notes whilst the other side is talking. I (and others who know better than me) recommend waiting until the other party are finished talking and then summarise the discussion to that point. This gives the first party the opportunity to say: 'Now I understand you to be saying …' giving the other side a chance to clarify the point as the negotiations proceed. The process may take longer

this way, but at least at the end, the positions of both parties will be fully understood by the other.

SOME GUIDELINES WHEN PREPARING FOR A NEGOTIATION

Behind opposing positions lie shared and compatible interests, as well as conflicting ones.

One approach to negotiations is to identify interests of the other party. Fisher and Ury suggest asking 'why' and then asking 'why not'.

In most instances each side will have multiple interests. Of these interests the most powerful are those of basic human needs I discussed earlier. In brief these include security, economic well-being and a sense of belonging, recognition and control over one's life.

If the issue being negotiated is perceived by one side as affecting one or more of the above, then it is necessary to consider how to approach the problem. This has to be done so as not to immediately have the other party offside or develop a feeling of being threatened. Suppose a builder's monetary claim would result in the owner having to sell their house, thus resulting in a loss of security for them. If the claim has a sufficiently high monetary value, it may well affect their long-term economic well-being — the value of their assets, the need for a higher mortgage and so forth.

The more formal models of dispute settlement have an especial affect on security issues. That is, when most ordinary, non-legally trained people have to appear in court or arbitration proceedings they feel that they are just players in someone else's game. The beauty of negotiation is that it gives the control of the system to the players themselves without third party domination.

The starting point for negotiation is for a party to stand back and look at the situation as they perceive it, and then to try and see the situation as the other party may perceive it. This will prepare the party for the negotiation and enable them to get a greater appreciation of the total situation.

The think-tank — your case and ideas

It was said earlier that successful negotiations require good management. One principle in particular is to obtain as many opinions and ideas as possible and to then evaluate these opinions and to apply those that are considered to best suit the company strategies. One method of obtaining opinions and ideas in the shortest space of time is to hold a think-tank or brainstorming session.

Clearly this is easiest when the negotiations are between large companies but the principles can be adapted for the smaller negotiations as well. If it is to be one-to-one, talk the matter over with another person. The idea is to find the strengths and weaknesses of your arguments and to anticipate those of the other party. Any help is better than none in this process.

Like all good management decisions, preparation for a think-tank session is imperative. Be sure to:

- define the purpose. Why are the people here, what do they anticipate getting out of the session and how will they apply the final outcome?
- choose the participants. Make sure that these are people who are familiar with what is being done. Preferably they should have some knowledge of negotiation.
- change the environment. It is best to carry out the brain storming outside of the normal environment – the office, construction site or the home. The actual negotiation process will probably occur on neutral territory so it is worth becoming used to not having the 'familiar' atmosphere around the group.
- design an informal atmosphere. Ensure the session is held in a similar space to where the actual negotiation will take place. Have refreshments and writing materials available. A lot of hotels now provide venues that are ideal for this type of undertaking.
- choose a facilitator. The use of an experienced third person to run the session will bring out various ideas that the group may not have. The facilitator in this type of situation is discussed in more detail in the partnering section of Chapter 8.

During the think-tank session

Keep in mind that the session is a trial run for the real negotiation process. Seat the participants side-by-side facing the problem — not themselves. This is good management practice and applies to many such situations: seating the parties opposite to each other, even over a coffee table, introduces a 'them and us' atmosphere. Remember the discussion in the earlier chapter on the role of the manager's desk and their authority. Likewise remember the comfort zone, that is, the personal space of the party. Sit people on the same side, but not like sardines — placing them in cramped conditions will only add to the discomfort you are trying to avoid. Across a large boardroom table is even more threatening: the object is to make the whole process as informal as possible. Before you begin the session ask the participants how they feel. Are they comfortable and ready to start to work? The replies will give you further information on how to set up the real session.

Before the session begins, clarify the ground rules. I touched

briefly on these at the beginning of the chapter. The most important is the 'non-criticism' rule. Even the wildest suggestion should be noted and recorded. It is not uncommon for the idea that at first appears the wildest may in the end, either as proposed, or in an amended form, become the basis of the final solution. It is essential that the participants let their imagination go. Things that have already been tried should not bind them. This is where a good facilitator will demonstrate their skills in eliciting new ideas. Record the ideas in full view — a whiteboard is ideal — so the ideas can be put down in a permanent form and easily referred to later in the process.

After the think-tank session

Go through all the ideas that have been proposed and highlight the most promising ones. Then further discuss these ideas and try to improve each of them. Once this process is completed, provide each party with a copy of the final versions and set up a time to meet again. This will be to evaluate these concepts and to decide on the ones that will be used in the negotiations. This should be the next day if possible, which will give the participants time to consider the points raised.

Reverse the process

When the group has finished looking at their own case, reverse the process. Use the ideas raised in the first session to judge how the other side might react. Act out the roles of the other side of the disagreement. This will give the group some knowledge of the strengths and weaknesses of the other side. It can never be a complete success, but it will at least give some feeling for the other side and their case, which is better than none at all!

OTHER METHODS FOR OBTAINING IDEAS AND OPTIONS

There are a number of other things that can be done to obtain a better appreciation of the strengths and weakness of the matter under negotiation. These can include:

- talking to a number of different experts in the area under discussion. Doing so will give your group a broad consensus of opinions; even a short telephone conversation can elicit new ideas.
- proposing agreements of different strengths. Whilst there will be a preferred solution, do not overlook the possibility that there may be a need to end up

negotiating something less than this preferred solution. Consider this possibility and how it might be dealt with and what benefits can be obtained, even at this level.

The main point to remember in negotiation is that to achieve a satisfactory solution it is necessary to make the decision as easy as possible for the other side. Pick one or two people with whom to negotiate — do not take on the whole of an organisation.

COPING WITH A MORE POWERFUL ADVERSARY

A common dilemma when people are preparing for a negotiation is how to cope if one side of a negotiation is stronger than the other. This is quite common in many situations, but especially in construction negotiations. The major commercial clients are generally more financially powerful than the contractor. In residential construction, the opposite is often true (especially in the small to medium sized market). Whatever the situation, never yield to pressure, and as Douglas Adams says in *The Hitchhiker's Guide to the Galaxy* (1979), 'Never panic'.

Even if one side is not more powerful, either financially or conceptually, they may still have a stronger or better planned argument, especially if the situation being negotiated is more important to one party than the other. It is essential in this situation that the parties have a 'fall back' position. This has been referred to as the 'Best Alternative to a Negotiated Agreement' (BATNA).

It is always necessary for a party to protect itself. Negotiations are voluntary undertakings between two parties and the settlement must be mutually agreed. When one party is placed in such a situation that it is virtually forced by circumstances to accept a settlement with which it does not agree, they will not feel well inclined either to the process or to the other party.

In all circumstances it is essential to know the cost of the bottom line. Avoid the situation where the apparently successfully negotiated settlement will actually cost far more than was ever intended to be spent. Make the most of the assets available — these may be the people, not necessarily the financial aspect.

DEADLOCKS

The final situation that may arise is where the negotiations become deadlocked. The other side just won't play by the normal rules of negotiation. They have made a proposal and refuse to look at any other possibilities.

At this point it is vital that the other party to the dispute does not attack the position taken by the opposition, but looks behind that position. Try and find out why they are being so stubborn. If the reason for their stance can be understood, it may be possible to find ways of overcoming the block to the negotiations. It may be stating the obvious but a good starting point is to ask them why.

Put forward suggestions and invite criticism and advice. How can this matter be handled? Get the other side to think with the ideas, not against them. People may well start by saying, 'Well, we don't like your approach/suggestion/proposal'. Try and recast a personal attack as an attack on the problem. The reply should be something like, 'I see what you mean'. Then recast their comments in a problem related manner: 'I think what you are saying is that it is not an appropriate solution in this instance, but given such and such a situation, it could work'. Turn the negative attack into a positive proposal.

Let the other side hear what is really being said. Ask questions and pause to let the other side adjust their thinking along these lines. Don't rush. Give people a chance to appreciate the question and to give a thoughtful response. If things are really going badly from your point of view, suggest the parties break for refreshments together. In extreme cases, make up an excuse to leave the room. Perhaps mention that you need to call a spouse or the office.

Try to limit the options to some extent. Slowly progress through each point. Most people cannot deal with a wide range of options all at once. Someone once remarked that, when trying to get a client to make their mind over a colour scheme, offer them three colours: one you know they will hate, one that is obviously wrong and the one you actually want them to choose. If offered the whole catalogue they will feel overwhelmed and pick the least offensive, simply to make a decision. Either that, or they will never reach a decision as there are too many choices! The same applies to negotiation.

ALTERNATIVE NEGOTIATING SYSTEMS

Besides the negotiation process discussed above, there are two further approaches that have been developed based on the fundamentals of negotiation but with their own specific variations.

Independently assisted negotiation

Tyrill (1992) suggests a slight variation to simple negotiation by employing a 'neutral third party' who simply chairs the negotia-

tions and attempts to keep them on track. Independently assisted negotiations may also help in avoiding deadlocks by encouraging the parties to stay with the process when it might otherwise fail. This should not be confused with mediation. The role here is simply to act as the peace keeper, not the chair.

Step negotiations

The Centre for Public Resources (1991) suggests the step technique. If the representatives of the parties who are most intimately involved in the disagreement are not able to resolve it at their level, their immediate superiors, who have not been closely identified with the disagreement, are asked to confer and try and reach agreement. If this is not possible, the disagreement will be passed on to higher management in both organisations. Because of an intermediate manager's interest in keeping messy problems from bothering higher management and to demonstrate his/her ability to solve problems, there is sometimes a built-in incentive to resolve disputes before they have to go to a higher level. It is interesting to note that this description could be applied with very few changes to the concept of partnering discussed in Chapter 8.

SUMMARY

Negotiation is one of the basic skills that we use every day in business and personal relationships. At its simplest level, it will be used by children to gain what they want from their parents — or vice versa. In its most complex form, negotiation may prevent war or attempt to bring about peace — as in the Middle East or the Irish situations. A person with good negotiation skills is more likely to avoid ending up in serious and often costly disputes, by resolving minor disagreements when they arise — a skill that has clear advantages in the litigious atmosphere of the construction industry. The next chapter looks at systems that have been developed by combining the art of negotiation with third party assistance.

CHAPTER 7

APPLIED NEGOTIATION

The aim of entering a contract is to achieve a successful outcome. This is not always the case, and disputes between the parties do occur. In the previous chapter I discussed the basic skills of one-to-one negotiations. Regretfully, once a disagreement reaches a level to be considered as a dispute, this form of negotiation may not succeed. This chapter considers ways to resolve disputes with the aid of a third party.

ANTICIPATED LEARNING OUTCOMES

A knowledge of third party assisted negotiations in the resolution of disputes

TOPICS COVERED IN THIS CHAPTER

Mediation and its uses

The mediator

Guidelines for mediation

The mediation agreement

Social versus commercial mediation

The mediation process

Conciliation

UNCITRAL rules

INTRODUCTION

This chapter considers what are commonly referred to as third party negotiations. The best known of these are the mediation and conciliation processes. The skills of negotiation, as discussed in Chapter 6, form the basis of these two systems, but with the addition of a third party to assist in the process. In mediation this third party is considered to be totally neutral, whilst in conciliation, the

third party has a much more active role to play in the activities. Mediation is widely used in the social arena, and whilst the name is used for commercial activities, in reality the system is more likely to be a conciliation process, especially in relation to construction disputes. There are many similarities between these two processes, but also some significant differences.

MEDIATION AND ITS USES

The National Alternative Dispute Resolution Advisory Council (NADRAC 1997) defines mediation as:

> … a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Another definition of mediation describes the process as:

> being where both parties come before an independent mediator who plays an active role, essentially acts as chairman and leaves matters to the parties, guiding them back to the point when they start to stray. He may adjourn the parties to negotiate directly (Smart 1986).

The mediator is also referred to in various textbooks as the 'neutral third party' or (especially in American texts) as the 'third party neutral'.

So why use mediation?

There are a number of good reasons for using assisted negotiation techniques, these being essentially to:

- save money

In most instances the parties will save on financial outlays because there are reduced legal costs and the hearing times are usually limited — one day is common for an average hearing — although this is not always so in complex commercial issues.

- preserve relationships

The parties improve their chances of preserving a satisfactory ongoing commercial or business relationship, especially with a mediator who can control the hearing and allow the parties to

really say what they mean in an atmosphere of mutual respect. This is unlike a court or arbitration where the evidence may try to discredit the other side and thus lead to a serious breakdown in the relationship between the parties.

- maintain confidentiality and privacy

In many respects, mediation is even more private than face-to-face negotiations. This is because the parties can meet separately with the mediator and reveal facts that they may not want the other side (either because revealing certain facts may affect their ability to negotiate or simply for commercial considerations) to know.

Essentially, the difference between negotiation and mediation is that mediation is a process that involves the use of the neutral third party. This person will assist the other parties to develop the best solution to the problem. There are now a number of sets of guidelines for the running of mediations, published by various organisations including the Centre for Dispute Resolution (London), The Chartered Institute of Arbitrators (United Kingdom) and the American Arbitration Association (AAA). In 2001 the Institute of Arbitrators and Mediators Australia (IAMA) also published a set of rules for mediation and conciliation (<http://www.iama.org.au/rulesmc.htm>, viewed 2001).

The mediator

The role of the mediator is not to enforce a settlement on the parties as in arbitration. Nor is it to simply participate in the direct negotiations. The role of the mediator can be related to an electrical circuit breaker. He or she is there to act as a break between the parties when matters might otherwise become overheated, and is there to assist the parties to arrive at a mutually acceptable solution to the problem. In face-to-face negotiations, if one party or both cannot agree on a solution, the negotiation will falter. This is especially true if personalities begin to interfere with rational thought. A neutral party can step between the parties and help to reduce any personal animosity that may arise. They can act, as has occurred in much international mediation, as a peacemaker.

A good mediator, unlike an arbitrator, need not be, and usually is not, an expert in the topic being mediated, especially in socially related disputes. Many mediators are barristers or trained communicators, whilst others are trained social workers or similar. It is their people skills that are important, especially their ability to listen to each side and to be inventive or creative so as to be able

to make suggestions to keep the discussions moving forward. A good mediator will be able to assist the parties to explore new alternatives that they may not have previously considered.

According to the AAA Construction Industry Mediation Rules (1989) the authority of the mediator is as follows:

> The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorised to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of a dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.

Guidelines for mediation

The guidelines from the Chartered Institute of Arbitrators (CIOA) in the United Kingdom recommends that the mediator use his/her best endeavours to commence the mediation as soon as possible after appointment. Surprisingly though (and possibly wishful thinking), it also states that the mediator will conclude it within three months of commencement. The parties may, however, agree to an extension of time (CIOA 1992). The Institute of Arbitrators & Mediators Australia has also issued their own set of guidelines as mentioned above. These rules are silent on a time, leaving it to the parties to set a time limit should they so desire.

The guidelines of most arbitration and mediation institutes assume that they will be the appointing body. For this reason, they stipulate that the parties must make a joint written submission to that body for the appointment of a mediator, accompanied by the appropriate fee. This of course is a convenient money making approach, but at least ensures the relevant institute has control over mediation standards through their various training programs.

The guidelines for mediation tend to mimic those for arbitration, but without the formal legislation imposition. The basic recommendation is that the proceedings will be confidential and privileged, thus ensuring that any evidence, information or facts given in the mediation cannot be used in any subsequent actions, namely arbitration or litigation. And whilst not obligatory, it is normal for the hearings to be conducted by one mediator. Indeed, Rule Four of the IAMA guidelines states that a mediator or conciliator must '… keep all information disclosed during the mediation or conciliation process confidential'.

It is the usual situation, under most legislation outlined in Chapter 6, that the mediator may conduct the hearing as he/she sees fit but must take into account:

- the general circumstances of the case
- the business relationship of the parties
- the parties' wishes
- the need for a speedy and economical settlement
- whether the matter may be resolved with the use of 'documents only' procedure (that is, written rather than oral submissions).

The mediation agreement

As for an arbitration hearing, it is normal for the parties to sign an agreement confirming how the mediation will be conducted and the role of the mediator. Unlike arbitration, most mediations do not involve preliminary conferences, although in larger commercial cases these are often held to establish the guidelines for the main hearing. Should a preliminary conference be held, it would be along similar lines to that of an arbitration hearing, and Rule Seven of the IAMA guidelines outlines the procedure well. The details may be submitted to the parties in the form of a pre-written standard contract. The matters encompassed in this agreement will include the time limits for both the running of the hearing and also for lodging of documents and 'discovery' (a legal term for finding the various documents that a party will rely on in their case), should these be part of the process.

In addition, it is essential that provision is made to cover methods of settlement, termination of the proceedings and the arrangements which will permit the matters to go to arbitration or litigation, should the matters not be brought to a successful resolution.

Costs are a further matter that must be included in the mediation agreement. As a general rule the costs will be shared equally by both parties. If the matter is run through one of the professional bodies, then use of their trust account may be incorporated. A typical clause may read:

> Further, my charges will include as applicable; out-of-pocket expenses which shall include the (professional body) service fee, room hire, travelling expenses calculated as below, accommodation expenses, secretarial expenses, preparation of the determination and other charges generally as permitted by the (relevant legislation) and required for the proper conduct of the arbitration. Should the hearing be cancelled, postponed or adjourned at the request of either or both parties with less than two (2) full working days' notice, I will charge a fee of $X (plus professional body surcharges) to re-arrange my program.

Confidentiality is a major factor in the use of mediation. Unlike arbitration, where anything said to the arbitrator by one party must be conveyed to the other party, and between the parties to the arbitrator, it is usually accepted that any facts given to the mediator are confidential and will only be conveyed to the other party with the express consent of the first party. This should also form part of the information given to the parties, and may or may not be incorporated in the agreement.

The independence of the mediator is essential. It is possible for the parties to know the mediator, because the mediator will not be imposing any decision without the agreement of the parties. This said, it is better if the mediator is unknown to the parties:

> The mediator will be neutral and impartial. I, Mr/s … state that he/she does not know any of the parties personally nor is there any conflict in his/her accepting this appointment. Should a conflict become evident during the hearing or during further investigations, then Mr/s … will notify the parties and request written directives before he/she will proceed any further.

The final clause of most mediation agreements is along the following lines:

> The parties to this engagement hereby covenant and agree that Mr/s … shall not be liable, without limiting the generality of the clause, either in tort or contract or otherwise, to any party to this engagement or any third party by reason of any act or omission on his/her part under or pursuant to this engagement.
>
> The parties hereby further covenant and agree that they shall or any third party by reason of any act or omission on his/her part and agree that they shall both jointly and severally, indemnify and keep indemnified, Mr/s … against any claim brought by either party or any third party, in relation to or arising from any act or omission in the performance of his/her obligations under or pursuant to this engagement and expressly agree and warrant not to bring any cause, action, suit or claim against Mr/s … in relation to his/her determination pursuant to this engagement.

Thus mediation:

- should be inexpensive (especially when compared to court or arbitration hearings)
- may require a relatively small investment in time
- is non-binding
- is private and confidential
- is flexible, limited only by the imagination, ingenuity, and resourcefulness of the mediator and the parties
- focuses on common interests, with intent to achieve win/win solutions (Groton 1997).

Appendix 4 will assist in the preparation for a construction industry negotiation or mediation.

Social versus commercial mediation

Of course, there is more than one form of mediation. The most common use of mediation is in the social context, especially in the area of family disputes. Simply put, it is aimed at leading the parties to a settlement that they can live with, with absolutely no input by the mediator.

Therapeutic mediation

In its guidelines on therapeutic mediation NADRAC (1997) describes the term as:

> A process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement, and in this process seek also to resolve intrapersonal and interpersonal difficulties in their relationship. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Expert mediation

Again, NADRAC sums up the process thus:

> This is a process in which the parties to a dispute, with the assistance of a neutral third party chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

It will be noted that in the expert mediation, unlike the other versions of mediation, the industry expertise of the mediator is of paramount importance.

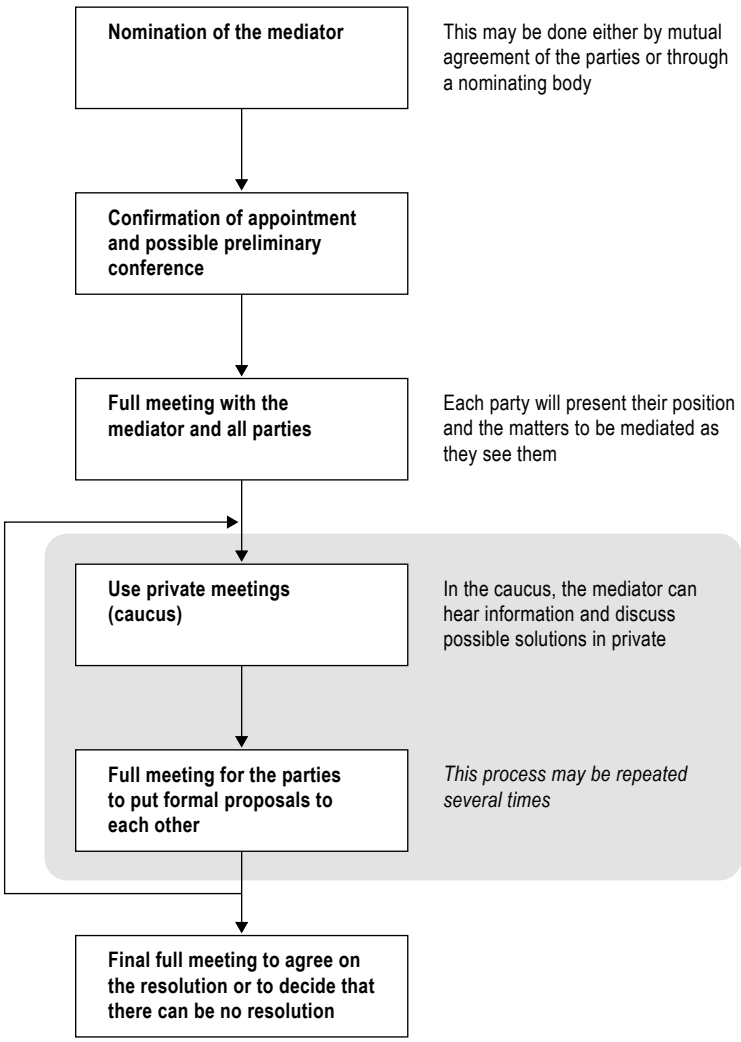
In construction disputes, I strongly recommend that this form of mediation be considered as it is more directly related to the industry and is the most similar of the two methods to an arbitration hearing. The use of an expert will minimise the need for laborious explanations and will assist in the assessment of the offers and discussions.

The following section on the mediation process can be applied to therapeutic mediation, but is directed more towards the settlement of a commercial dispute, such as between a contractor and the client.

THE MEDIATION PROCESS

Whilst there is no set way of running a mediation hearing, there are, as in the other resolution systems (namely the courts and arbitration), some basic processes that most mediators follow. The standard course of action is summarised in Figure 7.1. The AAA has prepared the video 'Mediation of a Construction Dispute' which provides examples of the issues discussed below.

FIGURE 7.1
THE MEDIATION PROCESS



Preparation

Having agreed to the mediation, it is necessary for the parties to undertake the preparations discussed in Chapter 6. Later in this chapter I will consider the steps for a building dispute in particular. In mediation there is usually not the extensive period available for discovery. It encourages the parties to focus on the important facts and issues. This does not mean that thorough preparation is not necessary — it is. Remember the four steps discussed in the previous chapter: preparation, discussion, proposing and bargaining. Good preparation will make you better able to deal with the facts raised by the other party/s during the early discussion period. It will also help you assess the real strength (or weakness) of your case for the proposing and bargaining period.

Opening session

At the first session with the mediator, it is necessary for some basic information to be provided. The mediator should introduce him/her self and explain their background and their qualifications. This is especially important if they have been nominated by a professional body and not selected directly by the parties themselves. The mediator should then explain the way that mediation works in general and the rules that have been developed by the nominating body — such as the Institute of Arbitration and Mediation Australia — and their own role in the process and the procedures to be followed. They must emphasise their own commitment to confidentiality and impartiality. The mediator should then discuss the order of presentation, decorum, the discussion of unresolved issues and especially the confidentiality of the proceedings.

Further, it is essential that the mediator explain that he/she is not an arbitrator or a judge. The mediator will not make any decisions but will facilitate the discussions. It is up to the opposing parties to decide the final outcome with which they believe they can live. The mediator will need to guide the parties through the process, to elicit the facts and help each party separately to develop possible solutions.

Opening statements

Each party then takes a turn to present their case to all the parties and their representatives. This may take some time and the skill of the mediator is required to keep the process to a neutral atmosphere — it is important that each party can explain their case and

hear the initial position of the other parties. At this point it may be possible for the parties to agree to a number of issues — usually minor — which can then permit the rest of the mediation to concentrate on the major issues.

First round of private conferences

The next step in the process is for the mediator to meet each of the parties in private — referred to in some texts as a 'caucus'. A caucus can be organised in a number of ways. One way is that the parties will each occupy a room and the mediator will move between their rooms. Another is that the mediator stays in the main room and the parties move to another room when not talking to the mediator. The former has advantages where there a lot of people involved. There must also be a main meeting room where all the parties can convene for full discussions. The use of a number of rooms is of course more expensive, but will at least minimise the time factor. There is also less chance of the parties meeting and commencing arguments outside of the control of the mediator. More rooms may thus be cheaper in the long run.

The mediator will normally first hear the party who initiated the mediation — as in any normal hearing system — but it does not have to be the case. Having heard the opening statements, the mediator may choose to talk to another party if they consider that it might move the whole process to a speedy resolution.

The mediator must work to keep the process moving forward. They need to reiterate to the parties that all discussions are strictly confidential. No information told to the mediator can be told to the other parties without the permission of the informing party. Once this trust is gained, the mediator may well be told information that they consider should be told to the other side, in the belief that it will speed up the resolution. However permission is needed, and this is often the hardest hurdle to overcome. The ability and experience of the mediator comes into play in these circumstances.

Second round conferences

Once the mediator has met each party in a private conference, it is necessary to move the process along. The mediator should now be in a position to go back to the parties with a reasonable idea of the problem and the viewpoint of each side.

The mediator is in a position to point out the strengths and weaknesses in the case of a particular party. Whilst the mediator cannot persuade a party to take a particular course of action, they

can alert the party of any problems that might arise from taking, or not taking, a particular course of action. In effect the mediator becomes the sounding board for possible solutions and can make non-committal responses to those suggestions.

Reconvened conference

Once the mediator has reason to believe that some progress can be made, (or of course if it appears that none will ever be reached) they will reconvene for a full conference. Assuming the best, the mediator will hold a meeting of those parties who wish to progress to a resolution. This may not necessarily be all the parties. It may be just two of the parties in the hearing, for instance the builder and the insurance company but not the client, to resolve one part of the dispute only.

If all the matters are resolved, then the mediator will move on to the final stage. If not then the process of individual hearings and regular full meetings will continue until such time as a final resolution is reached, or it is agreed by the parties that no further resolution can be reached by this process, resulting in the termination of the mediation. Conversely, if clearly no progress is being made and in the opinion of the mediator unlikely ever to do so, he/she may also suggest ending the mediation.

Final conference

A final meeting is convened once all the parties have reached the point where they agree on a resolution. The mediator will go through each of the points on which they have agreed. He/she may draw up an interim agreement for all the parties to sign, or may simply withdraw from the situation altogether leaving it for the parties, or their lawyers, to draw up the final agreement.

It is perfectly in order for no formal agreement to be drafted: it is not mandatory unless the parties wish for one. However unless the agreement is made in writing, it is almost impossible for the agreement made by the parties to be enforced by law.

Other ideas

The IAMA uses a diamond to provide a checklist for running a mediation, and which has been reproduced in Figure 7.2 and Table 7.1. This works best for issues of a social type, but can be adapted for use in commercial processes mentioned above. The shape of the diamond reflects the significance of each process in mediation: the widest parts are those of most importance. It starts with limited time and significance at the start and opens up for

the important stages of exploration; and then the separate meetings to develop and consider the options that can be proposed and further discussed by the parties in the next stage, as the parties move closer to a possible solution. Finally, the diamond shrinks down to the agreement and closing stages of the process.

FIGURE 7.2
IAMA MEDIATION DIAMOND

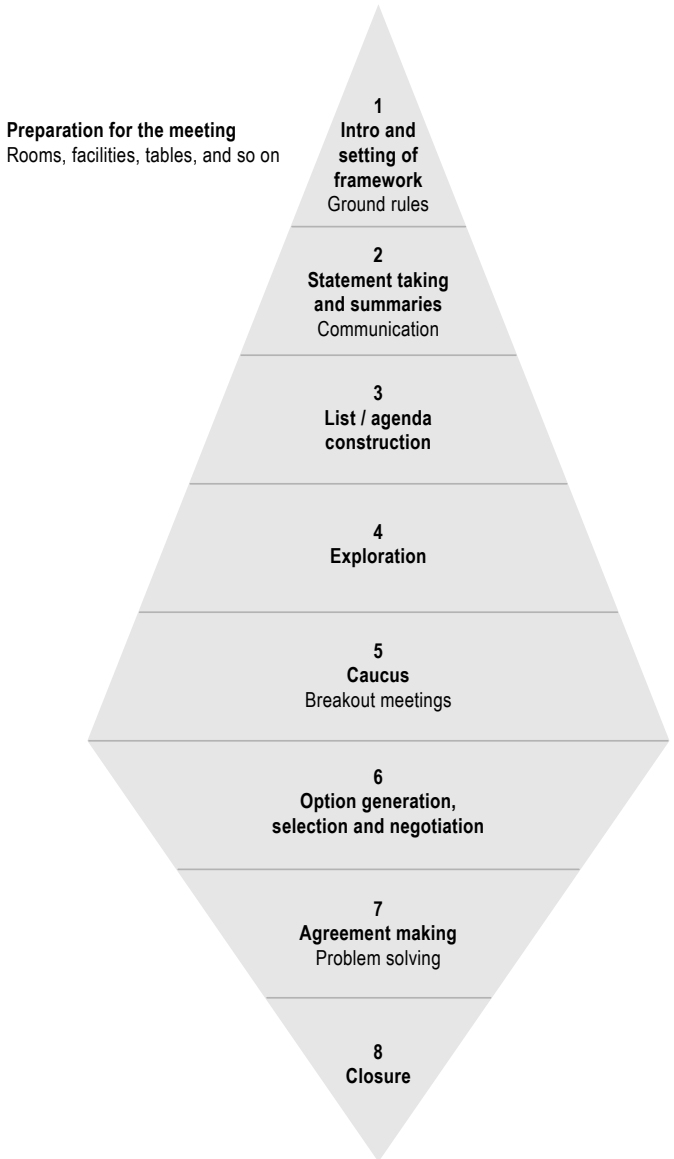


TABLE 7.1
IAMA MEDIATION DIAMOND

ITEM	STAGE OF MEDIATION	ACTIONS	DISCUSSION TOPICS
2	Statement taking and summaries		Do not allow comments on the other party's statement during this period
			The mediator will read summaries of the statements back to the parties
3	Agenda	The agenda provides a visible structure to the proceedings	Move from the PAST to the FUTURE
		The mediator should reframe and mutualise the dispute	What, when, how? Consequences for future
		Ask for agenda topic suggestions in turn	Use one- or two-word phrases only
		Use POSITIVE language	
4	Exploration	Parties talk TO each other	Dialogue
		Clarify the issues. Do not try for solution yet	Transition
		Look BEHIND the positions of the parties	Paraphrase
5	Caucus or meetings with each party separately	Focus on OPTIONS and resolutions	What would work best for you …?
		Ask how the party thinks things are going with the meeting	Have you thought about options that could satisfy what both of you are asking for?
		What has been left UNSAID?	What might happen if you do not agree today?
		Party's own interest. What do they want to get out of the meeting?	What needs to happen for you to feel comfortable about that? How do you think the party will respond to …?

SOME THOUGHTS ON MEDIATION

A negative perception of mediation is the 'day in court' syndrome. A familiar comment from many disputants is that they know how the courts work and believe that this is their best chance at justice. This perception in itself is not often true: there have been many instances where one or more parties leave the hearing saying they did not 'get justice' or that the system was not what was expected. There is often so much emotion in these disputes that they need the formality of the courtroom or arbitration setting to restrict their emotions.

On the other hand it may also be true that whilst many mediators have formal legal training, most, especially in the family court situation, are trained in the social sciences. This makes them more experienced in managing the emotional conflict that is common in family disputes as well as construction disputes — especially in residential disputes where the owners have such a close emotional tie to the property.

Commercial considerations versus legal argument

There is another very important aspect of mediation, and also conciliation for that matter, which is discussed in the next section. These processes concentrate on the personal side of the problem, rather than the purely legal side. There is virtually no legal argument. Indeed in most mediations the legal representation for a party is there to advise their clients, not to lead the discussion. Mediation is not there to bring down legal rulings but to assist the parties to resolve a problem in the best way possible for each party — or to achieve the best possible win/win solution as discussed in Chapter 6.

CONCILIATION

NADRAC (1997) defines conciliation as:

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

Conciliation is in many respects similar to mediation. The

conciliator is still an independent third party but the difference is that the conciliator may make more specific suggestions to resolve the dispute. The conciliator may also have a more forceful and powerful role in the various meetings.

UNCITRAL

Unlike mediation, there is an international set of rules for conciliation published by the United Nations for use in international trade and accepted by the General Assembly in 1980. Articles 5 and 7 of the 1980 'United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules' defines the role of the conciliator. It provides the basis for the running of the conciliation itself. The following is an extract from that document:

Article 5

Under the UNCITRAL rules, once the conciliator has been duly appointed, they will request from each party, a brief written statement describing the general nature of the dispute and the points at issue. Each party will also exchange the same document. The rules also permit the conciliator to request further documentation should they think it necessary.

The rules contain other directives for running the conciliation, including the need for the conciliator to keep both sides informed of any factual information received, but also permits the information to remain confidential if the party divulges the information with that proviso.

Article 7

7(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement to their dispute.

7(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, amongst other things:

(i) the rights and obligations of the parties

(ii) the usages of the trade concerned

(iii) the circumstances surrounding the dispute, including any previous business practices between the parties.

7(3) The conciliator may conduct the conciliation proceedings in such a manner as he/she considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements and the need for a speedy settlement of the dispute.

7(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

SUMMARY

Conciliation is relatively inexpensive and time saving. Its basic premise is the same as mediation, the main difference being that the conciliator can make suggestions to the parties to facilitate expedition of the negotiations. Like mediation, it is generally held in private rooms, thus permitting commercially sensitive issues to be discussed openly.

Conciliation is more forceful than mediation and is well suited to disputes involving commercial situations. Whilst in theory the situation may be described as mediation, in reality the rules for conciliation are far more useful in achieving a commercial solution as against a purely social one and as such are more appropriate for use in construction disputes.

CHAPTER 8

AVOIDANCE SYSTEMS

Up until now this book has considered the various systems for resolving a difference or a dispute once it has arisen. The purpose now is to try and put in place systems that will help to prevent, or at worst, short circuit differences before they reach that level. The aim is to save time and money and to best retain the working relationship between all the parties. This chapter considers the various systems that have been developed for improved relationships in the construction industry.

ANTICIPATED LEARNING OUTCOMES

An appreciation for some of the alternative systems that can be instigated to minimise disputation and maximise co-operation between the parties to a construction contract.

TOPICS COVERED IN THIS CHAPTER

Partnering

Project partnering

Strategic partnering

Alliancing

Standing neutrals

Dispute review boards, their constitutions and operations

INTRODUCTION

There is some argument as to who was the first to introduce the concept of partnering. The important thing is that someone did come up with the idea of trying to find a way to reduce the size and cost of disputes in construction industry. Since then a number of alternative systems have been developed, all with the idea of minimising (if not eliminating) two traits of disputes. The first

is the cost and time associated with the process, and the second is the long term damage that a major dispute can cause between the parties: both in terms of collegial relationships and future opportunities for employment.

PARTNERING

Most of the work on the development of partnering, as well as the current understanding of the partnering process, occurred in the early 1990s. As a first comment, this was not about partnerships as such. It was developed as a single project arrangement, although subsequent developments have tended to change this. I will discuss this later, but for the present will focus on the original concept and the way it is still often applied in projects. It was developed for very large projects — dams and the like — although it has been used in smaller projects of only a few million dollars.

The construction industry is not as renowned for its construction quality as it is for its confrontation, claims and litigation. The attributes of honour, integrity and pride in workmanship have been replaced with conflict, claims, delayed projects and cost over-runs. The real tragedy of the last twenty years is the quantum of resources that was expended on low-value or no-value activities. These activities are generally in a form such as obstructing the other party's progress, withholding vital information, basing decisions on future legal manoeuvring and so on. Whether you are an owner, designer, contractor or supplier, the costs of this political fracas is substantial. In addition, the years of confrontation have taken a huge personal toll on the lives of countless individuals in the industry. The hatred and negative feelings that have been characteristic of so many projects have opened deep wounds of cynicism and distrust (Warne 1994).

The Associated General Contractors of America (1991) says that partnering is simply about using common sense. It's about getting along with people you work with and it's about getting the job done in an honourable, dignified, efficient, and profitable way. One of the people credited with developing the concept of partnering, Charles Cowan, a member of the United States Corps of Engineers, said that partnering is about going back to the way people used to conduct business, and putting the handshake back into the profession. Partnering empowers those involved in the project with the freedom and authority to accept responsibility and to do their jobs by encouraging decision-making and problem solving at the lowest possible level of authority. It encourages

everyone to take pride in their work and to form productive work relationships (MBAV 1993).

Partnering provides mechanisms for co-operation between the participants to occur, so that energy-sapping disputation is removed, and productive working relations are carefully and deliberately built based on mutual respect, trust and integrity (Cowen 1992). The aims of partnering are to develop a co-operative culture, achieve better project buildability, lower project cost through the process of value management and to eliminate contractual conflict. These aims are equally applicable to residential work as to large civil or construction projects.

With respect to the development of dispute avoidance systems, John E. Barden, Assistant Executive Director of the Dispute Avoidance Resolution Task Force (DART) wrote 'that hard evidence in the use of alternative dispute resolution is becoming available'. He went on to say that:

> … liability insurers advise us that the number of claims is down and the use of alternative dispute techniques are on the increase. Partnering is becoming the rule rather than the exception and owners are getting better products while at the same time reasonable profits are being achieved. I somehow doubt that this is still so, but certainly the consideration of how to avoid getting into a dispute, rather than just resolving them when they occur, is certainly on the rise (Barden 1994).

There is some confusion as to the origin of partnering. In America the first full partnering took place in 1984 between Shell/Parsons/SIP (NEDO 1991). Another account credits the development of partnering to the United States Corps alone, who are said to have conceived the idea in the 1980s and trialled it on a multimillion dollar contract with FRU-CON Construction Corporation for the construction of a replacement lock and dam on the Black Warrior-Tombigbee Waterway in Tuscaloosa.

An alternative version is given by the joint MBAV/CIDA (1993) document on partnering which credits the concept to the US Army Corps of Engineers in conjunction with the Arizona Department of Transportation (ADOT) and cites the first ADOT project using partnering as the Rose Garden Traffic Interchange project in 1991.

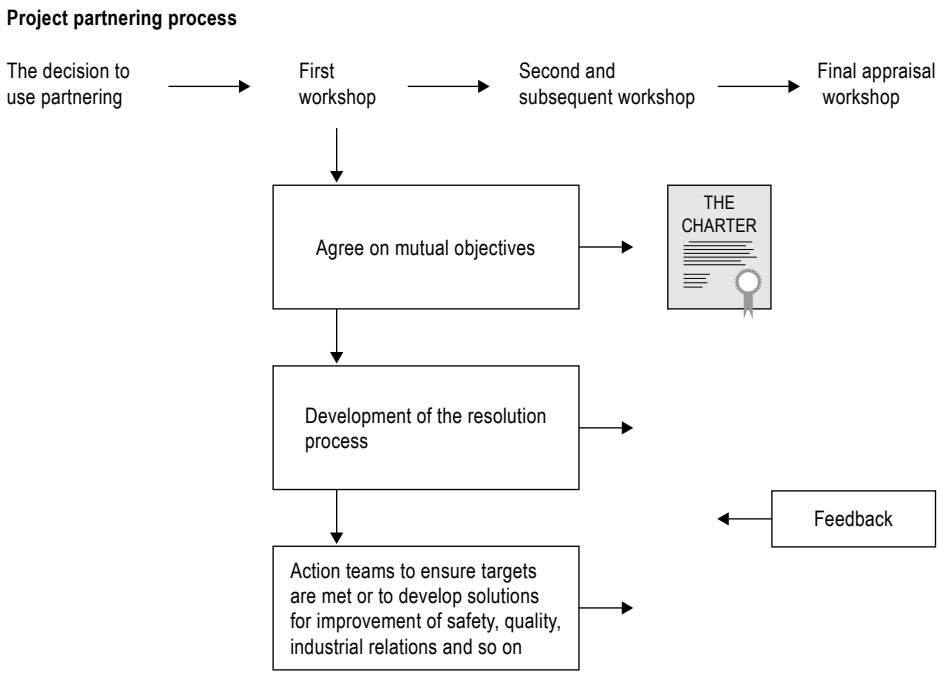
There now appears to be two forms of partnering as defined superlatively in the document 'Trusting the team' published by the Reading Construction Forum (NPWC/MBCC 1990). The first is project partnering, where the relationship is specific to one project only and is set up as a one-on-one relationship. The second form is strategic partnering, best suited for long term relationships and for more than one construction project, or for

continuing construction activity such as ongoing maintenance work. Strategic partnering provides the full benefits of partnering because it allows time for continuous improvement. The result is a substantial productivity increase.

PROJECT PARTNERING

Its proponents have said that the goal of partnering is to eliminate the 'them and us' attitude in favour of a collective 'we' mentality. Some client organisations, such as the Corps of Engineers in America and various state governments in Australia, include (or have at some stage included) a requirement that a construction contract with them must incorporate partnering provisions. In other cases the tenderer has included a proposal to use the system.

FIGURE 8.1
THE PARTNERING PROCESS



SOURCE Reading Construction Forum 1990

Figure 8.1 illustrates each step in the partnering process. The basis of the system is a retreat or workshop at the beginning of the contract, where all the decision-makers from each of the contracting parties meet together. On construction projects this

includes representatives of the client, the architect, the various consultants, the contractor and all the subcontractors and the major suppliers. The workshop may be one day or longer, depending upon the scope of the project. This workshop is best conducted by a facilitator, who is selected by the main players; usually the owner and major (or as referred to in American literature, the prime) contractor, who will also usually share the costs of the workshop.

The participants complete the workshop by drawing up a charter which encompasses the aims of the project and of each of the participants. A typical charter will include expectations of completion times, mechanisms for dispute minimilisation, quality of work and so forth. Some will be less than one page, others much longer.

If necessary, reinforcing retreats can be held during the progress of the works. These are particularly important when new trades or suppliers join the project, and are especially useful on projects that extend over a number of years.

Stakeholders' aims and goals

Each person working on the project, whether it is in a large or small capacity, is a stakeholder in the project. Each has common aims for themselves or their company, as well as for the project. The individual/company aims will include:

- making a profit
- completing as fast as is practicable so as to move onto the next project and thus maximise cash flow
- to have an accident-free project.

The project aims will include:

- completing on time
- minimising variations (change orders)
- minimising rework
- maximising quality as required by the specification
- a safe working environment and so forth.

Attributes of partnering

Amongst the most important of these is the creation of a culture of mutual trust in each stakeholder. The parties must therefore rise above the deceit, distrust, innuendoes and hidden agendas of the old processes (Warne 1994).

This is not easy to do and may take some time to achieve. There is one important overriding requirement for partnering to operate: the top management must support it. Not just in words. It is important that the top management leads by example. As mentioned below, it is essential that the management attend the workshop and actively take part in the development of the charter.

The workshop

This is a vital part in the implementation of partnering which begs the question: who should attend? There are at least three questions that can be asked when considering who should participate in the workshop:

- can the organisation being considered impact on project completion?
- who from this organisation has decision-making authority for the contract?
- who from the represented organisations will determine the day-to-day progress on the project?

Dombkins (1992) suggests a further set of criteria for choosing the right staff to attend, which includes:

- flexibility
- the ability to work in a team environment
- the respect of their peers
- a commitment to the principal organisation
- a willingness to participate – which may involve overtime
- an openness and honesty with their colleagues
- availability for the full length of the project.

It is general recommended practice that staff at the CEO/Executive level should attend the workshop because it provides an opportunity for the various personal from one company to meet their equivalents from other companies. With current business methods, it is rare for the head of a plumbing firm, for example, to have regular (if any) communications with the senior management of a major contractor, estimator or project manager for the day-to-day business of the project. Even less perhaps for a major supplier with a major contractor. The workshop provides the opportunity for this to happen.

There are other advantages of the workshop. By having senior personnel present, the philosophy of partnering will be seen to be supported from the top, not just imposed as another 'good idea from up there'. However, bringing together senior management from different companies, perhaps all with

slightly different agendas, can cause its own problems as NEDO (1991) sums up:

> For companies, both principal and contractor, who have been working under the usual adversarial contractual conditions for many years, open communication is one of the most difficult aspects of partnering to accept. Indeed at an individual level there are probably certain people that will never be able to work under these sorts of condition and should not be involved in partnering arrangements.

There are a number of considerations to be made as to not just the personnel, but also which companies should attend the workshop. Clearly the owner/client and the major contractor should be present. The same can be readily accepted for the architect and the various consultants on the project. However it is also important that the people who will carry out the work are also present.

Currently on most major projects, the head contractor is more of a construction manager, employing numerous teams of specialist subcontractors, from the excavation and concreter, right through to the finishing trades and especially the various service (electrical, mechanical, plumbing, transportation and communications) subtrades. Many of these will have never met, seldom being on the site at the same time, let alone reviewed the total project and their own role in the construction process. Good communication between the parties is of utmost importance: people generally will work better when they understand what they are doing and, more importantly, why they are doing it.

Location

The location of the partnering workshop is very important. Some people believe that it should be held on or near the project site so that issues directly related to the project can be viewed. Others view the workshop as a retreat which should be held away from the day-to-day activities. In this arrangement, weekend workshops at resorts specifically established for this type of meeting can be used. The advantage here is that there are no distractions during the sessions. In addition, the various people can get to know one another better — by playing golf, tennis or simply relaxing and talking about family and matters of mutual interest. This provides the chance for people to appreciate others as 'all round' people, not just voices at the end of the telephone.

Wherever it is held, the workshop should be away from the offices of any of the major players — the owners, architects or contractors — so that an atmosphere of neutrality can be established and maintained.

Facilitation

Having established the time, location and the attendees, it is essential to ensure that the discussions will maximise the opportunity. This is best done by the use of a leader or facilitator. This person does not have to be an expert in partnering, but must be able to focus the group and to generate ideas. The best facilitators also have experience in team building and the ability to minimise conflict (or resolve any that may arise) between the various parties. In effect the facilitator is the manager of the process.

The workshop agenda

A successful workshop requires a detailed agenda. Warne (1994) suggests two such programs: the first for a one-day workshop, and the second for a workshop held over two consecutive days. Box 8.1 gives an example of both of these, which include team-building exercises, issue identification and evaluation and resolution methods.

Team building

This is an activity designed to get the participants working together as quickly as possible. It is usual to break the participants into groups and to allocate to each group people who would not usually be in contact with each other in their day-to-day business activities. Mixing up the participants so that they hear other people and other ideas is the main concept of the retreat.

Many facilitators will get each group to carry out some task in a competitive atmosphere — often a puzzle or a game of some sort. In nearly every case, one part will be missing, or swapped with another group, requiring the groups to start working co-operatively together. These sessions must not be skipped. They are essential to set the pattern for the rest of the workshop. They also permit the facilitator to assess the personalities of the various people undertaking the workshop.

Issue identification and resolution

This session is where the various issues that will have a direct bearing on the project can be raised and discussed, including the importance of certain aspects of the project. Such items may be the need to have certain sections finished early: for instance the owner may be expecting specific equipment to be installed, or the tight deadline may be as a result of needing to catch the Christmas shoppers. It is also an opportunity for the architect to explain why he/she has designed the building in a fashion that

BOX 8.1
THE PARTNERING AGENDA

ONE DAY AGENDA	TWO DAY AGENDA
8.00 Introduction and welcome	DAY ONE
8.15 Team building exercise	8.00 Introduction and welcome
9.00 Organisational goals and objectives	8.30 Overview of the workshop
9.30 Common goals and objectives	8.45 Team building exercise
10.00 Charter development	10.00 Organisational goals and objectives
11.00 Issue identification and resolution	11.00 Common goals and objectives
12.00 Luncheon	12.00 Luncheon
1.00 Issue identification and resolution (cont.)	1.00 Charter development
2.00 Team presentation of issues	2.00 Issue identification and resolution
3.00 Issue escalation	5.00 Adjourn
3.30 Joint escalation	6.30 Dinner
4.00 Charter signing	
4.15 Wrap up	
4.30 Finish. Some other form of social activity is best planned after this, for example an informal dinner	DAY TWO
	8.00 Review day one and overview of day two
	8.30 Issue identification and resolution (cont.)
	11.00 Team presentation of issues
	12.00 Luncheon
	1.00 Issue escalation
	2.00 Joint escalation
	2.30 Charter signing
	2.45 Wrap up
	3.00 Finish

SOURCE Warne 1994

may be unusual to the workers. The Hong Kong Bank or even the Lloyd Bank in London would be typical examples.

Now is the chance for the participants to raise matters that may be of a worry to them: poor access provided to install a part of the air-conditioning system would be an example. It is also the time to discuss possible solutions. It has been found that this freedom to discuss matters that might not otherwise be raised often saves both time and money in the long run. The identification and resolution of issues can be taken further by incorporating a full 'value engineering' session, but this is best dealt with in a separate workshop.

The charter

At the soul of partnering is the charter. In basic terms it is a mission statement for the life of the project. The first step is to list the general aims that the participants have for the project. The use of a flip chart, or electronic white board, is very useful in this process. The typical wish list will often include:

- finishing the project ahead of time
- finishing the project ten per cent below bid budget
- producing the best quality building ever constructed
- having an accident-free project
- having no job-produced variations (change orders)
- minimising project re-working
- no disputes between the various parties.

The final list will probably aim to:

- construct a quality product, doing it right the first time
- complete the project within twenty-four months (for example)
- ensure no project cost over-runs and complete the project within the contract sum
- have no dispute claims or litigation
- enhance mutual trust between the partners
- ensure a safe working environment with no time-lost accidents
- provide an enjoyable work environment.

The actual wording will vary with every project, but in the end a charter is a written commitment to excellence. It should not be too specific or it will inevitably be retracted or ignored thus neutralising the whole aim of the exercise. The final action in this exercise is to sign the charter, but this does not mean it becomes a legally binding document. For example, ADOT includes the following clause in its contract:

> The establishment of a partnering charter on a project will not change the legal relationship of the parties to the contract nor relieve either party from any of the terms of the contract.

Thus a charter is a firm commitment by the parties to the principles agreed, while not altering their legal standing. It provides something for the parties to strive for and to use as a goal throughout the project. Box 8.2 is a typical example of a charter agreement, signed by all parties present at the workshop.

Box 8.2
A CHARTER AGREEMENT

Melbourne Landmark Project

23 January 2002

We are a team committed to establishing and maintaining mutual respect at all levels of the project and to provide a safe, quality project to the Melbourne Landmark Consortium.
We hereby incorporate the following principles:

- to take pride in our work
- to meet or exceed the contract specifications
- to have no claims at the end of the project
- to strengthen project communications by regular meetings and having open and honest communications between all people on the job
- to have an accident-free project
- to complete ahead of time and under budget.

Signed

Fred Issal, *Ian Homns*, *John Brown*, *Adam Grey*, *Mike Hassell*, *John Castel*, *Jim Gates*, *Ken Master*, *Emma George*, *Lucy Howse* and *Jim Bell*

Communications network

A second decision that emanates from the workshop is the communications network. This is often referred to as the empowerment and issue resolution matrix. An example of a typical matrix may look something like this:

Ground rules for the communications:

- resolve issue at lowest level
- no jumping levels of authority
- ignoring the issue of 'no decision' is not acceptable
- unresolved issues are to be escalated upwards by both parties, in a timely manner prior to causing project delays or costs
- the decision time frame may be extended by mutual agreement for data gathering of both parties.

The aim of the exercise is to establish the person responsible for a particular decision and to also provide a time frame for the decision-making process. The following uses the task of laying concrete as a typical example. Person A may have the authority

to order the concrete and to organise the pouring and testing of the concrete. If there is a question as to changing the mix for hot weather, with the resultant cost escalation, that person will have the authority to give permission for this work. There will also be a time limit on making that decision, in this instance let us say one day. If Person A believes that the extra cost is excessive, they may wish to postpone the decision to see if the weather forecast may change. With the decision matrix, if Person A does not make the decision within the time frame, or is unwilling to commit to the extent of the extra cost involved, the problem will go to the next level of decision making for a resolution. Person B will also have a time frame and so on. Most users of the partnering process have found the matrix useful and time effective. However, one criticism of this system is that it will simply promote the problem 'up the ladder' and all the problems will end up on the CEO's desk. In reality this has not been the case for normal day-to-day problems. It does tend to become a fact when very large sums of money are in question, such as project variation claims worth millions of dollars. Then it could be argued that a problem with that much money at stake should be of interest to the CEO of a construction company anyway. Table 8.1 illustrates this escalation of the decision-making process.

TABLE 8.1
ISSUE RESOLUTION MATRIX

LEVEL	PROJECT MANAGER	CONTRACTOR	ARCHITECT	STRUCTURAL ENGINEER	SERVICES ENGINEER
1 (4 hours)	John Wright	Peter Anderson	Harold Jupp	Fred Owens	Jim Bean
2 (1 day)	Bob Edwards	Tim Watson	Michael Low	Freda Ward	Alan Soo
3 (2 days)	Paula Smith	Jim Shmidt	Greer Jacobs	Hak Free	Jeff Nardin
4 (5 days)	Scott Stephens	Larry Hodge	Michael Brown	Garry Turner	Ben Smith
5	Grant Wilson	Harry Long	Robert Grey	Loy Beatter	Graham Roberts

Reinforcing the charter

A once-off workshop may be the start of the process, but it is not the end. To succeed, the partnering atmosphere must be reinforced and emphasised throughout the project. There are a number of ways that this can be done:

- distribute copies of the charter, preferably framed, throughout the various lunchrooms and offices of the parties involved.

- raise the matters on the charter at the various site meetings – both between the contractor and subcontractors, as well as between the contractor and the client and so forth. A summary of how well the aims are being met will permit the participants to discuss the problems encountered, to examine why the particular aim has not been met and will hopefully produce methods of overcoming the problem.
- schedule regeneration meetings. As partnering tends to be used on major projects, the time scale will be quite long – one to two years or more. In these cases it is often wise to reconvene the workshop and to revisit the points raised and the solutions devised. With projects of this length, often the parties to the original workshop may not have yet even been on site. This follow-up workshop allows them to reacquaint themselves with the project, learn of any changes and reinforce their role in the works.

Even more, in a long project, some of the contracts may not have even been let at the time of the original workshop (for instance, some design may not have even been completed). Further, there may be a change of personnel, or a change in subtrades for a number of reasons (for example, a company is no longer in business). This workshop allows for the new participants to take part of the 'ownership' process.

Review process

The last action of the partnering process is to call one final workshop. Here the overall results can be assessed. It is good practice to present reward plaques to the people who have made the process work. Whilst it will not help the completed project, it is useful for the participants to dissect the project, to look at each section and to analyse why some things succeeded and others did not. This should all be documented and used in future partnering workshops and projects.

Contractual considerations

Most contracts do not have a specific reference to partnering. In the United States, the 'AGC Form of Contract No. 200' includes a range of options for resolution of disputes, but does not include partnering as a prevention option. ADOT on the other hand inserts the following clause in its construction contract:

> Voluntary Partnering – the Arizona Department of Transportation intends to encourage the foundation of a cohesive partnership with the contractor and its principal subcontractors and suppliers. The partnership will be structured to draw on the strengths of each organisation to identify and achieve reciprocal goals. The

objectives are effective and efficient contract performance and completion within budget, on schedule, and in accordance with plans and specification.

This partnership will be bilateral in makeup, and participation will be totally voluntary. Any cost associated with effectuating this partnering will be agreed to by both parties and will be shared equally.

STRATEGIC PARTNERING

As stated above, strategic partnering is where a long-term relationship is envisaged, as against a single project relationship. A question to be asked then is: where can strategic partnering be used?

The answer lies in the number of projects planned or where the client wishes to continue the relationship for maintenance purposes after the work has been completed. However, there is really no limit to the subject of the contract — it can apply equally to any form of procurement, such as general contracting, design and management, design and building, management contracting and construction management amongst others. It also applies at all levels of relationships, from client/contractor to contractor/subcontractors or suppliers and so forth.

In its comments on strategic partnering, the Reading Construction Forum (1995) found that most of the strategic partnering agreements are related to long-term maintenance. Strategic partnering can also be used to deal with a planned increase in construction activity where a client is unable to handle the increase with their existing staff. It can be used to bring new skills and experience into a client organisation without the need to recruit new staff (Bennett & Jayes 1998).

The similarity between strategic partnering and quality assurance and especially total quality management is clearly apparent. The development of one-to-one relationships between manufacturers and suppliers, as in the case of Toyota, has been well documented and is widely used in the whole car industry today (Deming 1982; Reilly 1994). To this end, many other manufacturers have now adopted similar relationships. The significance in this instance appears to be one of semantics, with the term partnering being specifically applied to construction. Yet even this is not necessarily so, as Tony Lendrum (1995) uses the wording, *The Strategic Partnering Handbook*, for his book on a business guide for managers.

In most other ways, partnering and strategic partnering are very similar in process. With strategic partnering the time frame

is longer — often in excess of five years — and involves more regular workshops and meetings. The other major difference, in most cases, is that partnering is generally post contract: that is the head or prime contractor will tender in the usual way and then hold the partnering workshop and set up the system. With strategic partnering, the initial contract may be the same, but on subsequent projects, the system is in place and continues on a basic one-to-one basis. However, with strategic partnering the beginning of the process may well be pre-tender, so that a group of companies will meet as a group, using partnering principles to submit the tender, working closely together to a common end.

ALLIANCING

Alliancing is generally a tender arrangement where all the principal tenderers organise into groups with common aims, prior to submitting the tender. There is some move to what is being called pre-tender partnering — but this is in reality just a briefing of the tendering contractors and interested (usually the larger) subcontractors. It does not lead to a formal agreement until the normal tender process has been completed. The briefing is basically to explain the principal of partnering and how it will be applied to the successful tenders.

While there is now a perception that partnering represents a long-term relationship and alliances are focused on a single project, the reality appears to be slightly different to that. Partnering, in its original concept, was post-contract. That is, the coming together of the parties to produce a mutually focused group occurred once a tender was won and a formal contract was entered into by the parties. In many cases, the parties to the partnering process may never have met or may hardly know each other except through the written word, in the form of the tender. The contractor may have been invited to tender by the architect, totally unknown to the client, and possibly even the specialist professionals: engineers and quantity surveyors (cost engineers) and so forth may be strangers to each other and especially to other parties within the successful tenderers. Alliancing is the other extreme.

In alliancing, a group will form to tender for a specific project. One party — usually but not always the principal contractor — will select a number of other partners from the various engineers and designers through to subcontractors and other relevant parties. There is only one profit put on by all the tendering parties,

as a group profit. This may be in the form of an agreed amount that will be divided amongst the group in accordance with a pre-agreed formula. If everything goes exactly according to plan, each party will receive the original agreed sum. If one or more parties have problems, such as delays of industrial disputes which would affect the whole project, or even part of it, then they will be penalised, also according to a pre-agreed formula. Likewise, exceeding agreed parameters might lead to a greater share of the profits. With the parties working collaboratively together, they will use open-book techniques to eliminate duplication of costs, so reducing overheads and contingencies.

In addition, there is usually a contingency built into the final price, which will form a buffer for the above distribution. Thus savings on the project through collaboration, innovation, synergies between the parties to the alliance partners and risk avoidance, may increase the amount available for the alliance partners. As costs go down, profits for the alliance partners go up, whilst the opposite also applies.

COMMENTS ON PARTNERING AND ALLIANCING

The common basis of partnering and alliancing is that the decision-makers in the process are all (or eventually become) fully acquainted with one another and can contact each other on a personal basis. In the first instance, this can alleviate a major cause of disputes: that is, lack of good communication. When a problem does arise, the relevant parties can talk to the decision-maker directly, without the usual layer of subordinates. The parties also have a common aim and are fully acquainted with the project and its importance to the major parties such as special equipment deliveries, early opening for a specific production target and so forth.

The US Army Corps of Engineers estimates that it is currently saving half a billion dollars a year on its projects: for them the elimination of major disputes has resulted in better cost control and earlier completion.

There are other systems that have been devised in an attempt to prevent or minimise disputation, rather than try and resolve it once a dispute has arisen, but it is not the purpose here to elaborate on them. Suffice to say, that all systems require four basic ingredients: the alignment of goals, corporate and personal cultures, commitment and trust. If they exist, then a successful project is almost certain. Without them, then the normal turmoil so common in the construction industry may result.

STANDING NEUTRALS

In 1991 the Centre for Public Resources made several suggestions for the improvement of dispute resolution, one of which was for a 'standing neutral'. The concept of a standing neutral involves an independent person, or persons, who is/are totally neutral to the project. Terms such as dispute review boards (see section below) standing mediator, referee, standing arbitrator and adjudicator are also used. At the inception of the construction phase of the project, the parties select one or more independent construction industry experts to be available as a standing board, panel or single neutral throughout the project. The neutral acts immediately to resolve any dispute which the parties cannot resolve themselves. The most common form is that of dispute review boards.

Dispute review boards

The earliest forms of dispute resolution were all bought into existence after the event. In recent years there has been a growing awareness that the prevention of a dispute, or a very quick, short circuit of the matter causing the dispute, would be a better solution: it would be quicker, cheaper and less disruptive to the ongoing relationship of the contractual parties. The long-term nature and complexity of many projects and the claim-prone nature of the industry means that a variety of both large and small claims can be anticipated throughout the duration of the project.

The Technical Committee on Contracting Practices of the Underground Technology Research Council in the United States (as part of the American Society of Civil Engineers) published its model specification for avoiding and resolving disputes in underground construction in 1989. This was updated and republished in 1991 with the title, *Avoiding and Resolving Disputes During Construction*. The recommended contract provisions includes three parts:

- escrow (an amount of money to be held by a third party and only released once the negotiations are completed) of bid document, to be used to facilitate financial negotiations
- a geotechnical design summary report to establish a baseline for differing site conditions
- the dispute review board.

The first project to be credited with the use of a dispute review board (DRB) was the second bore of the Eisenhower Tunnel Project in Colorado in 1975. Between that year and 1990 there were in excess of one hundred similar projects which used a DRB

totalling approximately US$6.5 billion in construction costs. Of these, close to one hundred were successfully resolved by a DRB.

More recently, an organisation has emerged to help spread the use of dispute board resolution. The Dispute Review Board Foundation is a non-profit organisation for professionals involved in the resolution of conflict through the use of dispute review boards. The foundation's website, at <www.drb.org> (viewed March 2002) states that the DRB process has proved itself beyond all expectations. In terms of dollar value, the growth of DRB use around the world has been compounding at twenty per cent a year. The total value of completed, ongoing, and planned projects with a DRB is now US$67 billion. In addition to the 480 completed projects, DRBs are functioning on 277 ongoing projects and are planned for many others. A major DRB was established for the Hong Kong Airport project.

The dispute review board commonly consists of three members: a representative from the owner, one from the contractor and a third, selected by these two representatives. The third member chairs the board. The members usually have experience in the kind of construction work being undertaken and are also familiar and experienced in dispute resolution. It is important that all the board members are independent of any of the contracting parties, although they are paid by them.

Eight elements of a dispute review board

According to the *Construction Dispute Review Board Manual* (Smith & Sperry 1996) there are eight essential elements necessary for a DRB to be successful. If any of these elements are missing, success is jeopardised. These requirements are that:

1. all three members of the DRB are neutral and subject to the approval of both parties
2. all members sign a Three-Party Agreement obligating them to serve both parties equally and fairly
3. the fees and expenses of the DRB members are shared equally by the parties
4. the DRB is organised when work begins, before there are any disputes
5. the DRB keeps abreast of job developments by means of relevant documentation and regular site visits
6. an informal but comprehensive hearing is convened promptly
7. the written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation
8. the members are absolved from any personal or professional liability arising from their DRB activities.

Constitution of the board

The way the board is constituted is very important and must be done prior to the start of the project, as this information will have to form part of the prime and subcontractor contracts.

The constitution should include such details as the frequency of board meetings, the arrangements for site visits, the time frame for handing down decisions, whether decisions must be unanimous and what will happen if the Board cannot come to a resolution. There should also be clear details as to appeal procedures (if they are to be permitted).

Operations of the board

Initial procedures

The normal procedure is that the board will be constituted at the beginning of the project and will have full access to all documents. The members will be given a detailed briefing including a set of plans and specifications and sufficient details so as to have a complete understanding of the project, its construction methods and owner targets, expectations, possible areas of dispute and any other relevant details.

There are a number of preliminary items that should be considered at the first meeting. These may include:

- period and length of regular meetings, for instance, monthly/quarterly for one hour/one day
- standard items to be included in the periodic agenda, such as progress of the works, any industrial action, variations, state of the contract and subcontracts still to be let
- the minutes of subsequent meetings. Who will be responsible for taking, typing and distributing the minutes? Will a program like Expedition be accessed for data and control?
- scheduling, circulating agenda and time for amendments of the next meeting
- the requirement of regular reports. Again, will access to the management control system be available?
- subsequent meeting venues. The place selected should be isolated from day to day activities and should provide meeting areas and relaxation possibilities: country golf/sporting clubs and so on are ideal locations.
- will the same room be used to hear disputes as for the regular meetings, or will a different location be preferred and/or available?
- parking and travel arrangements. It sounds basic but if the project is in the inner city, parking may be a problem. Similarly, transport will need to be organised if the project is off shore.
- catering for subsequent meetings (Smith & Sperry 1996).

Ongoing processes

This initial information is kept up to date by regular on-site meetings of the board; being supplied with copies of all additional documents; and regular site visits to see the progress for themselves. It is essential that the board be kept familiar with the actual conditions on the site at any given time.

Standard meetings

At the regular meetings it is normal for the owner and his/her various representatives (architect, engineer, project manager and so forth) to attend and give a verbal report to the board of the relevant events that have occurred since the last regular meeting.

The further apart the meetings, the more time and details will need to be provided. Special attention must be given to progress and any events which are affecting the work schedule (positive or negative) and any variations that have been raised which may affect the overall project, size, time and value.

A review should be made of any previous disputes and the current situation with respect to the agreed resolutions of those disputes. Any site inspections that may be considered necessary or desirable, over and above any regular inspections that may be scheduled, should also be logged and reviewed.

The dispute hearing

Should a dispute arise, a meeting of the board can be convened at short notice. The board members can assess the dispute and pass a ruling; depending upon the urgency of the matter under dispute the board will control the timing of the hearing and the period of issuing the decision.

The primary objective of the DRB process is to facilitate the early resolution of disputes by means of an alternative dispute resolution. This may take the form of simple negotiations through to mediation and any other system believed necessary. The main aim is to keep the process simple, informal and non-adversarial.

Summary

John Kohnke, discussing the five DRBs with which he has been involved says:

'Not only have there been no cases where DRB recommendations have not been accepted by both parties, but also, on successive projects involving the same owner and contractor, the number of disputes brought before the DRB diminished considerably'.

There are few records of DRBs being used in Australia, but one recorded use was with the Sydney Water Board's ocean outfall contract, where the Board was composed of a senior executive of the client organisation, a senior executive of the construction company and a third party. Whilst there are few published details, it is believed to have been successful with few if any disputes arising during the project.

CHAPTER 9

THE FUTURE: BRING IN THE PEOPLE

INTRODUCTION

Whilst this book has reviewed the manner of resolving disputes, it still appears that the solution lies with the people who actually initiate the dispute. In the main these conflicts arise as a result of the breakdown of the interpersonal relations discussed in Chapter 2.

RELATIONSHIPS

Research has shown that serious deterioration of working relationships between the parties over the project duration has led to one of the parties initiating the formal dispute process. This has occurred between the builders and the clients, in both the domestic and commercial sectors of the industry.

Domestic relationships

The worst of all construction related relationships has been recorded between the domestic clients and their builders and is characterised by an overwhelming level of hostility towards the builder by the end of the project. This result is opposed to common interactions shown at the beginning of the project where the domestic clients have a relationship with the builder that, if not overwhelmingly professional, was at least friendly and agreeable. Invariably, by the middle of the project this often changes with the relationship moving quickly towards one of hostility. The question that has continually been asked is, 'Why did this happen?'

The first explanation would appear to be that there exists at the outset of the project an unrealistic expectation by the domestic

client concerning the builder. This is compounded by the fact that, in most cases, the domestic client only builds one house in a lifetime. It follows that their experience with contracts may have been through an unrelated work environment, such as an office or a well organised manufacturing company. In these situations one would expect systems in the workplace to be precise and to proceed according to a well-regulated schedule, often according to prescribed quality assurance procedures. Indeed, in many industries there are strict regulations with respect to occupational health and safety, and all employees are often required to understand the related procedures.

The construction industry, especially the domestic arena, provides a very different working environment. Most domestic builders are not highly educated, having come up through the trade. In fact the majority of people in the domestic building area do not hold diplomas or degrees in management. Yet they are highly skilled at the physical exercise of building and often employ as a work practice the old 'hammer and nails' approach. What they perceive as a safe and tidy site, is probably not what a person (or client) used to working in a traditional commercial environment would classify in the same way. And the very nature of the domestic construction industry means that it is composed mainly of small subcontractors. Further, these builders usually employ only a few people, and are themselves possibly only able to attend each site for a few hours a day, making the control of the workforce very difficult — many small builders can have twenty-five houses or more under construction.

Consequently, the failure of the builder to notify delays, or more importantly, to explain the implications of those delays, does not inspire confidence in the mind of a domestic client. Especially one who expects to hold their fast approaching family Christmas dinner in their new (or newly renovated) house, but who has seen almost no progress on the project for days on end. The perceived lack of progress is putting this high expectation in jeopardy. This will, in turn, affect the self-respect of the client who has, in good faith, selected this builder. Further, the client may see this lack of progress as a betrayal by the builder who has 'let them down'. Many times it has been pointed out in this study that this perceived lack of progress is often ill conceived by an inexperienced (or under-informed) client.

This lack of communication is compounded where the client, who has stayed home to meet the builder to discuss some matter that they perceive as important, is let down by a builder who fails to turn up. The client, it follows, is not likely to view the matter

in a friendly light. The corollary from the point of view of the owner is that if they make appointments with their own business related clients, they are expected to be there, or risk losing that business, or even their employment. Yet a builder, who is costing the client not just their current savings, but considering the mortgage, their future income for many years, is treating them with apparent arrogance. This will extend to often not even ringing up to say they cannot make an appointment, or even to apologise. Of course by now the reasons do not matter as the client's mind is already racing and a crisis on another site is of no concern to the irascible client (who is now late for work). This scenario is exacerbated when the only instance the builder ever turns up on time to an appointment is to collect a progress payment.

Two clear problems arise in the domestic relationship from the viewpoint of the client. The first is that they have unrealistic expectations of the builder, and the second is a concern over who actually owns the construction site during the work, especially when the client is in residence.

A domestic client generally does not expect the builder to be polite and to listen to their suggestions: they believe the builder will try to intimidate them. Further, they believe that the builder would not know his/her own obligations under the contract. And it has to be acknowledged that the domestic client often finds that these negative expectations prove prescient.

Differing work expectations, workloads, educational backgrounds and even cultural backgrounds can all reinforce these preconceived notions. And because the builder is in effect working in a client's personal space there may be feelings of invasion and lack of privacy. These two issues coupled together do not lend themselves to a congenial working atmosphere. This fact leads us to the second perceived problem between the domestic parties which is, 'who owns the project in progress?' Most builders believe that the building site belongs to them and that the contract says so. The client, it is fair to say, also has a personal connection to the site, an emotional tie as well as a major financial interest already mentioned. For the builder, however, the project is a source of income and may be considered his/her creation (an example of this is the Master Builders Association of Victoria slogan, which reads, 'Pride in the Job'). It follows that when a client questions something about that creation, the builder may take it as a personal affront.

How then can these problems be overcome? Simply rewriting the contract cannot be the whole solution. Contracts have been

written and rewritten time and again over the years, apparently to no avail. Part of the challenge may be to improve the clarity of the contract so that both parties more readily understand the terms, but so it is still legally viable.

Another solution may be to educate the two parties as to what they can realistically expect from the other party to the contract. This solution is again twofold. The first begs a general improvement in the education of the industry and the second, a clarification in the specific requirements of a particular project.

It is now generally accepted by the construction industry that, in order to create better management of domestic sites, there needs to be general improvement in the educational level of the domestic builder. This is currently being addressed to some degree in Victoria and other Australian states. An increased level of education is now required to become a registered builder and to receive adequate insurance cover — this may still only involve a six week or so course run by the various industry associations (MBAV or HIA) but may extend to a Technical School Certificate or higher. The applicants also require more years of experience in the industry. Even further education, however, does not address the main issue; that of the psychological climate on site and the directly related communication problems.

There is likewise a need to educate the clients as to what they can reasonably expect from their builder with regard to the actual construction and also the playing out of personal relationships. The best way to educate clients could be to run formalised information sessions prior to the initiation of a construction project. Here the two parties to the contract could be instructed in all matters (including possible outcomes) and have the chance to ask questions and receive clear answers. The time necessary, however, and the cost involved in individual tutorial sessions, seems to make this kind of re-education impracticable. Furthermore, large impersonal sessions may create more problems than they set out to solve *a priori* by failing to address specific problems of one party.

It seems that the most practical way to educate the parties to a new domestic building contract would be to develop an education pack. This pack could include a video depicting typical domestic building sites (both ideal and normal) as well as providing a simple explanation of the contract and the obligations of the parties in simple, straightforward language. When a builder registers a new project, the relevant building authority would be compelled to send on the information pack to the new client.

Further, a requirement could be that the builder and the client view the material together and return a signed form to the authority stating this viewing has occurred. Obviously this could not always happen, with some parties viewing the educational video separately, but at least the requirement would begin to make the parties appreciate the need to do things together. The authority could run further regular sessions for those people who, having viewed the material, wish to obtain more information.

Commercial relationships

One would think it reasonable to assume that commercial builders and commercial clients would, on the whole, have a professional, effective, businesslike relationship. Further, one would expect that each party to a contract would in most cases respect the ability and knowledge of the other. It follows that each party would be trusted to get on and do what they do best. Yet it has been clearly demonstrated that in commercial construction this is not so.

Recent research shows that commercial builders record the largest shift in perceptions by clients throughout the construction process. This fluctuation moves from perceptions of professionalism and friendliness at the beginning of the project to a relationship perceived as unco-operative and hostile by the end of the project (Eilenberg 1999).

On this basis it could be said that the commercial clients had nearly double the expectation of professionalism in the builders at the beginning of the project compared with the domestic clients. By the end of most commercial projects, however, the relationships have dissolved largely into poor relationships (but not as dramatically as for the domestic clients). The perception of professional or even friendly qualities in relationships had almost disappeared altogether. The question naturally follows: why did these perceptions deteriorate the way they did?

To start with, the commercial builder expects the client to act in a professional manner with the client being aware of their obligations under the contract. The builder also expects that the client will not interfere in any way with the running of the project. Further, they expect the client to respect them, not invade their body space and to maintain eye contact when conversing (Eilenberg 1999).

Furthermore, the commercial client expects that the site would be clean, tidy, and safe, and that the builder will complete the work on the agreed date (keeping the client fully informed of any

potential delays). The commercial client also expects the builder to act in a professional manner by being polite, promptly returning telephone calls and generally having effective and respectful communications with the client. And from the point of view of the commercial client, the one major reason they cite for initiating a formal dispute is that the builder constantly fails to speak to them. Furthermore, it seems that in instances where the commercial builder does talk he will not tell the client what is actually happening on the job. Conversely, the same research shows that the major reason the commercial builders give for initiating a formal dispute is that the commercial client constantly finds fault with the work. This indicates a personal involvement in the project, or a valuation of the project that at first may appear unexpected (Eilenberg 1999).

Again the failure to communicate on both sides is crucial. And it appears the breakdowns in communication are perceived in fairly similar matters to those reported for the domestic constructions. In the commercial arena, however, the problem goes even further, with the builder not only failing to return telephone calls, but also actually walking off the site when the client arrives. Similarly, the commercial builders report that their clients only want to be superficially friendly, and avoid discussing matters that the builders consider important, such as project variations and other money related matters.

It appears there is a significant difference between the concerns and perceptions of parties within the commercial and domestic sectors of the construction industry. And it seems the difference is the participants themselves, and the day-to-day necessities of working relationships. In the domestic sector, the builder and the client are generally the primary persons on site: they must interact as the relationship is really between the bosses. In the commercial sector the bosses seldom if ever meet. Interactions are mostly between people employed specifically for the task of organising the building (the employees). The development of partnering on commercial projects has attempted to overcome some of the problems induced by this separation of the major management entity and the employee. Yet in the commercial arena there persists a definite division between parties in regard to their approach to the project, or how it is valued. The client is interested in the project, but only as to when they can take possession, whilst, conversely, the builder is interested in the project as a means of receiving money. And on some occasions the interest is not the building itself, or even the money invested in it, but

rather in what the building represents. It follows that fault finding may be an indication that the client needs the building for a specific purpose such as offices or a manufacturing process plant. It seems there are all types of hidden pressures acting on commercial clients, particularly deadlines for official openings or Christmas sales.

The second reason for heightened client involvement in a project is often that the troublesome employee is working for the company and wishes to ensure their continuing employment. The employee will be keen to show their superiors that they have the situation under control, that budgets will not be exceeded and time restraints will be met. It seems that here the simple single driving factor is self-preservation. The need for security as detailed in the earlier chapters, could be the motivating force for this type of client.

The commercial builder, however, is really in the same situation; that is, the person who is directly involved in the work will seldom be the ultimate 'boss'. It follows that job security, as well as personal security, will also be a driving force for commercial builders. In commercial construction, the primary interest is often not the building itself — it is the process of getting the building constructed. The commercial client, or their representative, may never occupy or even see the building that is being constructed, but their future security depends upon the successful completion of the contract. In other words, for the commercial builder or their representative, it is not simply the building that is important, but more so that the employer sees a 'job well done'. The employer, after all, has entered into the construction process to generate a profit.

Given the above, it seems a major difference between the commercial and the domestic construction industries can be purported. The difference may lie in the relationship of the parties to the project. Usually in the commercial sector there is no direct personal link or relationship between the client's representative and the building.

The opposite is true for the domestic sector. The client has a very personal connection to the building, namely their house, which translates into an issue of security for the owner. Therefore any perceived threat to that security usually leads to the domestic client feeling a loss of control. To regain that control (and therefore their security), domestic clients will often invoke a formal dispute situation in order that a perceived third party will 'take care of them'. For the smaller, individual domestic builder

the concerns are similar. Here any additional expense incurred by them, and not recovered from the client, comes out of their own pocket. And in most domestic building companies, there is usually a close employer/employee relationship as domestic companies are by nature modest operations with few permanent workers on staff. Therefore the security aspect is very personal where continuing financial security as well as psychological well being for workers in small companies depends upon 'winning'.

There are no simple solutions. Certainly improved education of the participants in the domestic construction arena would assist in improving the communications between the parties. Education would also go some way to improving the understanding by one party, of the problems of the other party.

In the commercial sector of the construction industry, the use of partnering needs to be developed further. For this to occur the system would need to be simplified in order that it suits the smaller (by comparison) projects, and not just large civil projects.

SPECIFIC RECOMMENDATIONS

Below are some specific considerations for ways that the relationships between the parties could be improved to minimise the possibility of disputes.

Contractual problems

Supervision and communication

One of the major differences in the nature of the domestic and commercial construction industry is reflected in the different administration of the relative contracts. In commercial work it is normal, and indeed in most a requirement, for the builder to have a full time foreman on the site. The foreman communicates with the client and keeps them abreast of the on-site activities, answering many of the questions the client may pose. One problem that the commercial clients raise is that this person usually cannot make decisions and has to continually contact his/her superiors. The domestic construction industry, however, works very differently.

In the average domestic construction project subcontractors undertake most of the work. The supervising builder only visits the site as needed, usually when the subcontractor commences and to check up when they are finished. It follows there is minimal supervision on the site with, in general, no single person in charge full time. Clients become alarmed when, during the anomalous stages of the construction, they cannot find anyone on the

site at all (or at least no one with whom they can talk about the project). If the builder is a single entity, the owner of the construction company will be the supervisor (and possibly everything else; estimator, accountant and so forth) spending most of their time out on the road and therefore not readily available to the client.

Part of the training of the builders discussed above must include the importance of returning telephone calls. If no one is on site, a regular telephone call to the client, explaining processes, or asking if the client has any problems and so on, will help keep the relationship on a high level of trust and facilitate good workplace communication.

Completion date

A further problem with the current domestic form of contract is with the wording within the contract itself. Ambiguity and a lack of clarity lead to problems with communication, often the failure of one party, especially the client, to understand the full implications of the contract they are signing.

In terms of the completion date, the actual time is determined within the contract by the number of days**,** as opposed to an actual date for completion. This often leads to confusion by the client who just wants to know the date that they can move into the dwelling. The very least that is required to overcome this problem is to insert a completion date into the contract. An additional form could be added to the standard contract information forms supplied by the industry associations, which could be filled in and presented to the client. Any revisions to that date would become clear as the works progressed, which brings us to the next point.

Progress claims

The domestic contract is extremely vague regarding the submission of progress claims, making it very difficult for the client to understand the process. It cites stages of construction, which themselves have led to many disputes.

For the majority of people, the construction of a house is something they only do once in their lifetime, involving as it does, large sums of money. A house is often the largest single purchase an individual will make. The current contracts for domestic construction only use words to describe what items are included in the various stages of completion for a house, with no supporting diagrams or photographs. Progress payments have to be paid by the client when these various stages are completed. Even with the

layman language used in most current domestic construction contracts, many clients will (and do) have great difficulty interpreting this data — especially when making evaluations about the work in progress.

A problem often arises when a builder contacts his/her respective client and tells them that a specific stage has been reached in the building works and that now a progress payment is due. Once the builder submits the claim for payment, often domestic clients do not have the experience to satisfy themselves that the building works have indeed reached the stage claimed. Consequently the client becomes tense and often accusatory because they are in an unsure and insecure position.

The most radical and by far easiest way to overcome this confusion could be to introduce into the domestic arena regular, scheduled payments in accordance with a properly prepared program (and cash flow schedule) similar to those employed in commercial contracts. This change could make a dramatic difference to the domestic construction industry. Where inexperienced clients do not make progress payments in advance, financial pressure lands firmly on the shoulders of the builder who would have to have sufficient financial resources available to them to regularly carry out their business. This change would flow on to the subcontractors who eventually would have to look at their own financial practices. Perhaps it would have the effect of eventually removing from the industry many of the small builders who do not have sufficient financial backing, and who consequently make their staged claims early in order to finance their business, effectively with the client's capital.

To enable domestic builders to undertake this radical change, continuing education would be vital and could be provided by the various trade associations. Additional content could be added to the curriculum in the existing pre-registration courses for new builders. Similarly, special courses could be run for existing builders, and these could include distance learning material and audio and video versions of lectures, tutorials and workbooks. These could be readily adapted from existing university or TAFE course material.

On the assumption that this is too radical a step, the alternative is to improve the way that the various stages of the work are documented in the contracts. Firstly, stages could be clearly explained and annotated by the use of photographs — perhaps in the video and information pack referred to previously. A further improvement would be to clarify the written description of the items included in each stage.

To this end, the Australian Society of Building Consultants (1998) proposes using a detailed checklist. Each item to be included in each section of the work would be clearly pointed out by the builder; conversely, the client would have a very specific checklist where items could be ticked off as they are completed, minimising any confusion.

Public relations

It is clear that the construction industry, in both the domestic and commercial sectors, does not have the best of reputations with the public. This has been evidenced by the reportedly low expectations clients have of their builder, especially the domestic clients. Yet it does not necessarily follow that this poor reputation is justified.

Poor public opinion is a major problem for the industry. The lack of public censure of renegade builders (who are often repeat offenders) has added to a perception that the industry is insufficiently monitored. Part of the reason quoted by the Victorian Government for the establishment of the current registration was to remove poor practices from the industry, and put poorly funded builders out of business. If this has been achieved, the public remains uninformed. This lack of publicity regarding actions taken to dissipate the poor performers does nothing to overcome the current general perceptions.

Where to from here?

There are some definite avenues worth considering. Although the court systems will remain as a major source of dispute resolution, their role is slowly changing, with the growing use of out-sourcing some of the initial hearing — from court annexed mediation to reference outs to official court referees (see Appendix 5 for a summary of dispute resolution systems). I believe that this will increase with more specialists used to assist the courts in construction matters, with only the main legal argument going before the judges. This is already happening in many jurisdictions.

Within the residential sector of the construction industry there is another branch of the courts developing. Whilst not necessarily officially an arm of the courts, the Victorian Civil and Administrative Tribunal Domestic Building List (<www.vcat.vic.gov.au>, viewed June 2002) has mainly County Court judges sitting as the Tribunal and as such is effectively part of the state's court system. With redevelopment of a similar system in Queensland and discussion of similar schemes being

introduced elsewhere, it is apparent that the alternative means of settling disputes in the residential arena are being reduced, rather than being improved.

Further to this, in Melbourne at the end of March 2002, the Department of Consumer Affairs announced a 'one-stop shop' for homeowners to tackle 'shonky' builders. This will further remove the ability of the consumer (or home owner) and the builder to devise their own, more appropriate means of settling a dispute.

The arbitrators must take part of the blame for this rise in legislated resolution. Many of them have been too rigid and set in their approach to the way arbitrations are run rather than using the flexibility provided for in the legislation. When questioned on this issue, most arbitrators say that if they don't strictly follow this process, they will be challenged in the courts. Yet the number of such challenge is relatively few and the legislation sets out quite specific grounds for such a challenge. My question then is: do arbitrators not trust themselves to even implement the simplest improvisation? I also ask, why is there so little use for expedited hearings? These have proved successful when adopted, yet very few arbitrations are run that way. I firmly believe that arbitration is a good solution for the determination of construction disputes, but that arbitrators need to look at where they go with the system, especially in this country, if they are not to become obsolete.

The use by the courts of mediation is clearly the way ahead. The adoption of more mediated settlements by both the courts and by the participants, and a feeling of satisfaction with mediation as a dispute settlement tool by these two groups, can only lead to a growth of this system.

In the larger commercial contracts, it is the development of the dispute avoidance systems that will provide the biggest growth area. Both the methods of partnering and alliancing are showing the way and I am sure that new and innovative systems are the future. After all avoidance is always better than resolution.

APPENDIX 1

CONFIRMATION OF APPOINTMENT OF ARBITRATOR

Date

We, ……..

Party details

Being a party to the disputes or differences as set out in the document dated ……, ref: ……., and having read the details and conditions set out therein, do agree to the said conditions and obligations expressed and/or implied there-in, as far as is permissible under the Commercial Arbitration Act (year and state),

and

agree to Mr/s …… acting as the Arbitrator of the said matters and to abide by his/her decision in this matter in accordance with the Act.

Signed ..... Dated .....

Witness .....

APPENDIX 2

NOTICE OF APPOINTMENT AND PRELIMINARY HEARING

Party 1 Party 2

Date

Reference

Whereas dispute and differences have arisen between parties

Party 1 Party 2

In connection with the construction of (works) at (address)

AND Whereas The President of (nominating body) is desirous of appointing (name) as Arbitrator in accordance with Clause … of … under Conditions of Contract, dated …… I am hereby requesting your agreement to the appointment in accordance with said clause.

AND Whereas subject to the agreement of both Parties.

NOTICE IS HEREBY GIVEN

(a) I (name) hereby agree to accept nomination as Arbitrator. My fees and expenses shall be calculated at the rate of $X per hour, including travelling time, plus out-of-pocket expenses which shall include secretarial expenses, preparation of the Award and other charges permitted by the Arbitration Act and required for the proper conduct of the Arbitration. There will be a minimum of six hours for each day on which the Hearing is held, and should the Hearing be cancelled, postponed or adjourned at the request of either or both Parties with less than two (2) full working days notice, I will charge a fee of $X to rearrange my program, plus any out-of-pocket expenses such as cancellation of room charges and so forth.

(b) Both Parties are responsible for the payment of my fees and expenses. From time to time, both parties will be given directions as to what further sums are to be deposited as security for my fees and expenses. Prior to my Award being made available, payment in full of my fees and expenses will be required. The Parties' liability in relations to costs will be dealt with in my Award. Any adjustments between the actual amounts paid and liabilities of the parties can be made after the Award has been made available to the Parties.

(c) Both Parties shall sign the attached forms of consent to my acting as the Arbitrator and lodge the sum of $500 as Arbitration Security with (institution) at (address).

(d) Subject to the approval of both Parties accepting me as the Arbitrator I request that a preliminary conference will be held at (place) at (date and time).

(e) I do not know either of the Parties to this dispute.

[Arbitrator to insert CV.]

(f) You are reminded that no communication should be made to me in the absence of or without the consent of the other Party after signing of the attached Agreement, and that if anything is sent to me, a copy must be sent contemporaneously to the other Party.

(g) At the Preliminary Hearing I will address:

(i) Confirmation of the correctness of the appointment and the Arbitration Agreement
(ii) The Parties to identify the matters in dispute as per ……
(iii) The dates by which the statement of claim, and the response are to be exchanged
(iv) The extent and manner of discovery of documents
(v) Whether the Parties are be represented by legal council
(vi) Whether a site inspection (view) is required and if so when and in what manner
(vii) The form of the Arbitration, whether Simplified Procedure is required and if so the manner of such a Hearing
(viii) Whether the form of the evidence is to be oral or in writing
(ix) The acceptance or not of evidence given under oath or affirmation
(x) Whether or not the Arbitrator is to be bound by the laws of evidence
(xi) Whether reasons are required
(xii) Whether costs are to be included or sent to the Taxing Master of other agreed determination
(xiii) The costs of the Hearing and items to be included, for instance room hire, transcripts and so forth

(xiv) Arbitrator's fees in accordance with above
(xv) Whether or not the Parties require Interim Awards and if so on which issues.

(h) The Parties agree that the decision of the Arbitrator in the form of the written Award shall be final and binding as per the Arbitration Act current in the (state).

Yours faithfully

Party 1 Party 2

We hereby agree to the Conditions of Arbitration as set out in the above.

Signed ……. Signed …….

Dated …….. Dated ……..

APPENDIX 3

ARBITRATOR'S AWARD

IN THE MATTER OF A BUILDING DISPUTE BETWEEN

Mr & Mrs J. Smith

in the State of Victoria
(hereinafter called 'the Owners') of the one part

– and –

HOME IMPROVEMENTS PTY LTD
in the said State
(hereinafter called 'the Builder') of the other part

WHEREAS by an Agreement made the 22nd day of January 1996 the Builder, for the consideration therein contained, agreed to carry out extension and alterations at 24 Outthere Street, Wendouree for the Owners in accordance with the Plan and Specification provided;

AND WHEREAS disputes and differences have arisen between the Parties over certain matters arising from the Agreement, the Parties in compliance with Clause 10 of the said Agreement have referred such disputes and differences to me Mr. Fixit, I.Arb.A.,.F.A.I.B. of Glenferrie Rd, Toorak in the said State for my decision;

I NOW MAKE MY AWARD AS FOLLOWS:

A THE PARTIES AT THE HEARING ON THE 2ND DAY OF MARCH 1997 AGREED THAT I SHOULD ANSWER THE FOLLOWING QUESTIONS.

1 Has the Builder carried out all the work required by the Agreement in a proper and workmanlike manner?

2 If the answer to A.1. is in the negative, what work is unsatisfactory and what amount is required to bring same to an acceptable standard?

3 Should the Builder allow to the Owners any and what sum for work carried out or material supplied by them?

4 In view of the answers to A.1.,A.2., and A.3 what amount do the Owners owe to the Builder or the Builder to the Owners?

5 Is the Builder entitled to any and what sum as interest on money that was due to him on his final account?

6 Who shall pay the costs of the Parties of and incidental to the Arbitration, including the amounts

set out in the Magistrate's Order No. D 860048 of the 27th of November 1996?

7 What are the Arbitrator's costs and how shall they be borne by the Parties?

B I THEREFORE AWARD AND DETERMINE THE FOLLOWING:—

1 No! The Builder has not carried out all the work required by the Agreement in a proper and workmanlike manner.

2 I consider the following items of work to be unsatisfactory:—

(a) New brickwork to the Fernery because it is not coursing with the brickwork to the existing house

(b) New brickwork is still dirty with mortar droppings and some additional cleaning is required to the brickwork

(c) Opening for the door into the Fernery is not as shown on Plan but I consider that the work as built is superior to that shown, from a structural viewpoint

(d) Window and door frames are not acceptable as they are not flashed

(e) Glass to the Fernery is pitted and has been damaged by the welder when burning off

(f) Roof to the Fernery is constructed below the correct pitch for corrugated galvanised iron cover and will have to be removed and reconstructed to a pitch of not less than 50

(g) There is some evidence of poor fixing of the Fernery roof back to the existing house and this must be strengthened

(h) Eaves are not finished, with lining missing and some beads not installed and generally do not comply with the Plan in width or design

(i) The front Carport is not well fixed

(j) The structure is not level with the house

(k) Roofing sheets do not protrude far enough into gutters

(1) Cement sheets are sagging

(m) Glass to the window of the house is as (e) above.

I consider that the Owners are entitled to receive an allowance from the Builder of an amount of $2102 to have the above items rectified. I have allowed the amounts quoted by F.J. Shean & Sons for items (f), (g), (h), (i), (j) and (k) and I have added my estimate for rectification of the remaining items.

3 The Owners obviously carried out work for, and supplied some materials to the Builder during construction and (excluding roof-plumbing works) also carried out some work after the Builder's departure. For example — hanging of rear door, placing of new front window and some brick cleaning.

For this work I allow the Owners $416.

4 The original quotation was for $11 450 of which the Owners have paid to the Builder $7000. The Builder claims extra for brick piers in lieu of the timber shown and I allow him the sum of $275 extra for this item.

The Builder agreed that the Owners would carry out the roof plumbing and he was originally to have supplied the material. However this he did not do and at the Hearing agreed that the sum claimed by the Owners for this work – namely $820 – was fair and reasonable and I allow this amount to the Owners.

Thus I find the Owners are indebted to the Builder in the sum of $4725 less the amount set out in answer to Question 2 namely $2102, less the amount set out in answer to Question 3 namely $416 and less the amount set out in the second part of Question 4 namely $820, and I find the Owners now owe the Builder the sum of $1387 in full settlement of the Agreement.

5 The Agreement calls for the Owners to pay the Builder's Final Account within seven days of its presentation and makes no provision for the Owners to withhold payment. I therefore must allow the Builder interest on $1387 at the rate of fifteen per cent per annum from 6 July 1996 to 2 March 1997. This sum I find to be $136.60.

6 The Builder, in his Final Account of 30 June 1996 offered to settle the matter for $2500. The Owners refused this offer and made no counter-offer, and as a result of my enquiries I find that the Owner, at that date, owed the Builder $1387.00. In view of this and the relatively small difference in the two sums, I direct that each Party shall pay their own costs of and incidental to the Arbitration, including the amounts fixed by the Magistrate.

7 The costs of the Arbitration, made up as follows:–

(a)	Preliminaries, 1.5 hrs	$120
(b)	Hearing 2/3/97 and 14/2/97, 6 hrs	$480
(c)	Travelling to Ballarat and return, 246 km @ 45c/km	$110
(d)	Preparing, typing and issuing my Award	$562
(e)	Nomination Fee to Institute of Arbitrators Aust.	$85
(f)	Administration Fee to Housing Industry Assoc'n	$35

and amounting to a total of $1392.70, shall be borne equally by the Parties for the same reasons as given in Question 6 above.

C I NOW DIRECT THAT, WITHIN FOURTEEN (14) DAYS OF THE DATE HEREOF THE OWNERS SHALL PAY TO THE BUILDER THE SUM OF ONE THOUSAND, FIVE HUNDRED AND TWENTY THREE DOLLARS AND SIXTY CENTS ($1523.60) AND SHOULD THIS SUM BE NOT PAID BY THIS DATE, THEY SHALL, IN ADDITION, PAY TO THE BUILDER INTEREST AT THE RATE OF 0.06% PER DIEM FOR EACH AND EVERY DAY THE MONIES REMAIN UNPAID.

Given under my hand this day of 20

Arbitrator

in the presence of:

NOTE: This award is in the possession of the author and has been modified to avoid any identification of the actual parties.

APPENDIX 4

PREPARATION FOR A CONSTRUCTION INDUSTRY NEGOTIATION OR MEDIATION

SOURCE Varghese 1997

IS THERE A VALID CLAIM?

The essence of negotiation is to arrive at an agreement that meets the legitimate interests of each side to the extent possible without doing serious damage to the relationship between the parties.

A primary requirement is thus the existence of a valid claim. A claim must be one which is recognised by law to have contravened the terms of the contract, or for breach of the contract by the other party, or where there is no contract, because no contract has been concluded or by operation of the doctrine of 'frustration' for a claim in quantum merit. Unless there is a legal obligation upon the principal to pay, the claim will fail in the absence of a philanthropic principal.

It is important at the outset to identify the legal basis of the claim and it is essential that this be clearly explained to enable the negotiating parties to arrive at a view of merits of the claim.

EVIDENCE IN SUPPORT OF THE CLAIM

Analysing the claim and preparing the information necessary to support it on a recognised legal foundation permits the party to the negotiation to present their case in the most persuasive and effective manner. The final preparation of the claim, with the attendant advantages as to strength of bargaining position at the negotiating table, depends upon thorough and efficient information gathering. This is particularly apparent, for example, in the context of a claim for delay costs with the difficulties of justifying a claim under the relevant contractual provision. This requires keeping records and reports to establish the facts, and the use of those records to establish the entitlement to what is sought.

For the purpose of illustration a claim for delay costs will be considered. Every event, which may delay progress, should be recorded and reported. Essential information includes:

- key activities and events
- labour on site
- plant and equipment on site
- events which cause delay.

Site personnel should keep a daily diary to log all:

- telephone calls

- meetings
- reports of instructions or variations.

Notices as required under the contract should be kept and referred to as one of the essential bases of claim.

Other useful documentation includes site instructions, correspondence (from and to), minutes of all meetings, documents relating to variations, time sheets, plant work sheets, cost records and weather records.

It is sensible practice to have records of progress maintained against the contract program and sufficient records to enable the effect of crucial issues to be determined. It should be possible to present a clear record of progress through the life of the project showing the overall effect of delay on each relevant part of the project.

Contractors are under an obligation to mitigate their damage and must take all reasonable steps to minimise the extent of any delay. Records should be kept of all such steps taken such as re-arrangement of available labour and resources.

QUANTIFICATION OF THE CLAIM

Quantifying a claim does not merely require knowing what has been lost on the job or what figures to add up. Arithmetical calculation of the claim serves little purpose unless the figures relate to 'heads of claim' that the law recognises.

Again in the context of delay claims, attention must be paid to the express provisions of the contract as to the entitlement to recovery and the extent of that recovery and the amounts claimable. Where the basis for claiming delay costs is a breach of an express term of the contract, the damages recoverable are those that arise naturally as a direct result from the breach of contract itself or which satisfy the 'reasonable foreseeability' test. Recovery under a quantum meruit is for a fair price for work performed.

PRESENTATION OF THE CLAIM

The format of the claim is of considerable importance in setting the basis for the negotiating process. It should contain a resume of the facts and circumstances giving rise to the claim, a detailed statement of the entitlement to financial recovery and quantification of the amount claimed.

All documentation to be relied upon should be included to establish the factual matrix for the negotiation. It is suggested that a claim should be clearly set out with the following:

- the background and history of the claim
- the legal basis for the claim
- the amounts claimed with the legal and factual justification for the amounts and an executive summary to assist those receiving it to easily report on it.

PRE-NEGOTIATION ANALYSIS OF POSITION

Proper preparation requires certainty that all information is current and complete. A party which has performed a thorough preparation by analysing the claim and anticipating the other party's viewpoint will be the most likely to benefit from the negotiations. Where a party has equipped itself in this way, it will be in a better position to control the negotiation content and be able to take command of the negotiation from the outset. Such a party possesses a clear psychological advantage particularly when facing an unprepared party.

Even where there is just claim to a clear entitlement, an imbalance of preparation between the parties is likely to affect the outcome. Where the claimant is seeking 'borderline' recovery, an opposing party who is well prepared and has identified the weaknesses of the other's position will quickly undermine his/her case in this aspect of the claim. Preparation to achieve these ends can be done adequately by the parties themselves but, because the parties are usually too close to a project, preparation is invariably enhanced by judicious use of legal and other professional assistance. If lawyers or consultants are to be used, they should be engaged as part of the team as soon as possible. In the negotiation process, the psychological value of preparation cannot be over-estimated.

APPENDIX 5

SUMMARY OF DISPUTE RESOLUTION SYSTEMS

SOURCE Devitt 1994

The following summarises most of the standard dispute resolution/avoidance systems currently being used in the construction industry, which are discussed in detail in this book.

1 TRIALS

Binding.
Trial in public courts is what all forms of ADR attempt to avoid. However it is where disputes are resolved unless the parties agree to an alternative dispute resolution mechanism.

2 ARBITRATION

Binding.
Arbitration is one of the oldest forms of ADR. It is designed to have disputes settled by experts in the field and to be more efficient than the public court system. Variations can involve bracketing the range of results the arbitration panel can reach or requiring the arbitration panel to chose between the final, best offer presented by each of the parties.

3 DIRECT NEGOTIATION

Not Binding.
Parties negotiate with each other. The purpose is to resolve disputes through discussion and compromise.

4 MEDIATION

Not binding.
A neutral mediator assists negotiations. In the most common scenario, the mediator listens to presentations from both sides but does not evaluate either side in front of the other. Rather the mediator uses his/her evaluation as a lever during 'shuttle diplomacy' to encourage each party to more objectively evaluate its position and ultimately to move towards a compromise.

5 MINI-TRIAL

Not binding.
Each side presents a condensed version of its case as if at a trial. Opening and closing arguments are presented. A condensed version of testimony is given. The mini-trial can be used as a starting point for direct negotiations or other dispute processes.

6 DISPUTE REVIEW BOARDS (DBRs)

Not binding, but a DRB decision may be admitted as evidence.
DRBs fall into the mid-range of dispute resolution because decisions or findings are made as in a binding arbitration or trial, but the decision is not binding, only advisory. The purpose is to facilitate dispute resolution without the risk of binding results.

7 PRIVATE JUDGES

Binding in the United States.
Not binding in Australia.
Some parts of America, including California, permit the use of private judges and even private juries. Their decisions can be appealed through the normal public legal system.

8 PARTNERING

Not binding but produces common aims.
A system of post contract facilitated association where the parties will work together once the contract has been let and the consultants all contracted to the client. The aim is to build a close-knit unit with common aims as set out in a formal charter produced at the end of the facilitated meeting.

9 ALLIANCING

Set up as a binding relationship between the parties concerned.
A system of pre-contract facilitated association of separate parties who as a group will bid for the project, including all the necessary consultants, the head contractor and the subcontractors.

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General housing contracts

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FURTHER READING

The following list of texts is for those who may wish to carry out additional research on a given country or have a better understanding of the process within their own country. It is not complete and only aims to make suggestions for some of the better known texts.

Actual sources of material used in this book will be found in the References.

1 AVOIDING DISPUTES

A major source of much of this chapter came from research by the author for his doctorate — Eilenberg, I (1999) An analysis of the causes of disputes in construction contracts. PhD Thesis, RMIT, Melbourne.

See also:

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The following are general sites from where you may obtain further data — including sources of current building related contracts:

Housing Industry Association www.buildingonline.com.au

Master Builders Association www.mbav.com.au

Property Council of Australia www.propertyoz.com.au

Standards Australia www.standards.com.au

University of Pennsylvania http://www.library.upenn.edu/resources/subject/social/psychology/conflict.html Library

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Cavendish Australia www.cavendishpublishing.com/default.asp

Butterworths Asia www.butterworths.com.sg

American Law Books www.alolaw.com/aschenbrenner.htm

Canada Law Book www.canadalawbook.ca

The following web sites provide specific court related information:

New Zealand www.courts.govt.nz
New South Wales www.search.nsw.gov.au/law.asp
Queensland www.courts.qld.gov.au/about/role.htm
Western Australia www.justice.wa.gov.au
South Australia www.sa.gov.au/gsd/section4
Victoria www.vic.gov.au/subindex.cfm?link_ID=15
Tasmania www.courts.tas.gov.au/index.htm
Northern Territory www.nt.gov.au/oca/
United States of America www.supremecourtus.gov/about/about.html

Typical USA State Court Systems

New York State www.courts.state.ny.us/ctstructure.htm
California www.courtinfo.ca.gov/courts/supreme/about.htm

4 ARBITRATION LEGISLATION

A list of readings relating to arbitration (including international arbitration) are to be found on the web site < www.internationaladr.com/ab.htm#Basic%20Library>

International

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Australia

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United States

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United Kingdom

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Tweeddale, A & Tweeddale, K (1999) *A Practical Approach to Arbitration*. Blackstone, London. Provides detailed examination of the law and procedure of the *English Arbitration Act 1996*. Andrew and Keren Tweeddale are Fellows of the Chartered Institute of Arbitrators. Keren Tweeddale is a lecturer at the University of Westminster and Andrew Tweeddale is a solicitor with Norton Rose.

The main references are the various Arbitration Acts for each country. These are now readily available from the various government web sites. Some of these are listed below.

The following URLs will provide additional information on the arbitration legislation:

United National Model Law on International Commercial Arbitration
www.jus.uio.no/lm/un.arbitration.model.law.1985/doc.html
International Dispute Resolution Information
www.internationaladr.com/Default.htm
Victorian Government (for other State Governments substitute the relevant States)
www.vic.gov.au
China www.cietac-sz.org.cn/cietac/English/
Convention/Arb1.htm
Japan www.internationaladr.com/japan.htm
New Zealand http://rangi.knowledge-basket.co.na/public/text/1996/an099.html
Nigeria www.nigeria-law.org/ArbitrationandConciliationAct.htm
Singapore http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_gettoc.pl?actno=2001-ACT-37-N
United Kingdom http://hmso.gov.uk/acts/acts1996/96023—n.htm

Further information is also available form the various organisations around the world:

American Arbitration Association www.adr.org
Institute of Arbitration and Mediation Australia www.iama.org.au
China www.cietac-sz.org.cn/cietac/English/Convention/Arb1.htm
New Zealand www.aminz.org.nz
United Kingdom www.arbitrators.org

5 THE ARBITRATION PROCEDURE

Maecki, R & Karniol, J (1999) *The Polish Courts: System and Procedure*. Commercial Law Center Foundation, Warsaw.

Websites

National Alternative Dispute Resolution Advisory Council (Australia)
www.law.gov.au/aghome/advisory/nadrac/nadrac.htm
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www.jus.uio.no/lm/un.arbitration.model.law.1985/doc.html
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