Arbitration Explained Along with its Strengths & Weaknesses

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Definition

An arbitrator has been defined *as "A person to whom a dispute or difference is referred to be resolved by arbitration. The arbitrator's decision is termed an 'award'. An arbitrator is not bound by the formal rules of evidence, or precedents in other arbitral awards, in conducting the arbitration hearing and making the decision, but is bound to follow the rules of natural justice (procedural fairness)"*.[1]

Another definition for arbitration is "*The hearing or determination of a dispute between parties by a person or persons chosen, agreed between them, or appointed by virtue of a statutory obligation".*[2]

In Australia arbitration is governed by the states' respective Commercial Arbitration Acts.[3] This state based framework is currently in the process of change towards a nationally uniform Model Law governing arbitration in Australia. The Commonwealth passed the *International Arbitration Amendment Act 2010*[4], with the aim of creating an arbitration framework that is consistent with international models. The Act was complemented by the *Commercial Arbitration Bill 2011*[5] that aims to create conformity within the domestic jurisdictions. The explanatory memoranda to the Bill provides:

> *"The Bill will help align the domestic commercial arbitration regime with the Commonwealth Act, which is based on the Model Law and was amended in 2010 to ensure greater conformity with the model Bill."*[6]

Subsequently; Victoria, South Australia and New South Wales have passed legislation that is currently in operation and conforms to the Bill.[7] The Northern Territory, Tasmania, Western Australia and Queensland have all introduced Bills into parliament and are awaiting commencement of their respective Bills.[8] The ACT remains the only jurisdiction yet to introduce a bill. In New Zealand the relevant Act of Parliament is the

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[1] "*Butterworths Australian Legal Dictionary*", p. 70.
[2] "*The Macquarie Concise Dictionary",* p. 49.
[3] *Commercial Arbitration Act 2011* (VIC)
Commercial Arbitration Act 2010 (NSW)
[4] *International Arbitration Amendment Act 2010* (Cth)
[5] *Commercial Arbitration Bill 2011* (Cth)
[6] *Id.*
[7] *Commercial Arbitration Act 2011* (VIC)
Commercial Arbitration Act 2011 (SA)
Commercial Arbitration Act 2010 (NSW)
[8] *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT)
Commercial Arbitration (Consequential Amendments) Act 2011 (TAS)
Commercial Arbitration Bill 2011 (WA)
Commercial Arbitration Bill 2011 (QLD)

Arbitration Act 1996.[9]

Save for the resolution of international disputes and to lesser extent commercial disputes, arbitration in some jurisdictions is nowhere near as popular as it used to be. When I started my construction law career in the late eighties in Australia the large majority of building disputes in Victoria and NSW were resolved by arbitration; particularly residential disputes. Residential disputes made up most of building disputes in jurisdictions like Victoria and NSW.

What subsequently occurred in the late nineties in Australia was a proliferation of inter-jurisdictional acts of parliament such as the *Home Building Act NSW*[10] and the *Domestic Building Contracts Act Victoria*[11] and these Acts severed arbitration from the residential dispute resolution fabric.

These reforms were consumer driven and accompanied the promulgation of consumer oriented Acts of Parliament that were designed to afford consumers greater protection against residential building defects.

The reader may well ask why the legislature effectively outlawed arbitration in residential building disputes in jurisdictions like Victoria or NSW.

As arbitrators are remunerated often in the amount of many thousands of dollars a day, the remuneration expectations of arbitrators were considered to be too much of an impost upon consumers, “mums and dads” and the like.

There was also a view harboured by some, albeit a view that was never corroborated, that arbitrators by virtue of a great many of them being retired builders may not have been sufficiently impartial when they arbitrated over owner and builder disputes. There was a perception of an apprehension of bias and this perception troubled some in the consumer advocacy sector.

There was also a measure of circumspection about the fact that a great many of the arbitrators were not qualified lawyers and that the matter of resolving building disputes was best left to the legal fraternity.

Arbitration protagonists on the other hand contended that it was better to have someone who was qualified in disciplines like engineering or architecture albeit with some legal training retained to preside over building disputes. These protagonists were of the view that the technical qualification was more suitable to deal with disputes over defects and quantification of same.

[9] *Arbitration Act 1996* (NZ).
[10] *Home Building Act 1989* (NSW).
[11] *Domestic Building Contracts Act 1995* (VIC)

Not all antipodian jurisdictions outlawed arbitration in domestic building disputes. The ACT has never done this nor has New Zealand and in both of these jurisdictions residential building disputes can still be remitted to arbitration.

Unlike the courts and a good many tribunals, arbitrators need not be qualified lawyers. In the building sector for instance they are often retired builders, architects or quantity surveyors who have a working grasp of the elementries of construction law or in other arenas arbitrators may have a grasp of the rudiments of the apposite law.

In financial or partnership disputes, accountants are sometimes appointed as arbitrators and are deployed to resolve financial disputes where sophisticated accounting forensics are required and high levels of numeracy.

There are some arbitration clauses that require a couple of arbitrators to be appointed such as an architect and a lawyer or a building consultant qualified arbitrator and a quantity surveyor qualified arbitrator. In Australia arbitrators must have an arbitration qualification.

The qualifications are far more exacting than those that are required by adjudicators or mediators. One can become a qualified adjudicator in Australia with a day's training. Mediators are not required by law to have any qualification in mediation, although 3 day courses on mediation abound and many referring bodies will only give mediators accreditation if they have done a particular institute or professional body`s course.

If the amount of training one has to do is an indicator of one's dispute resolution dexterity then there is an argument to suggest that arbitrators may be better able to apply the requisite level of rigour to resolving a dispute than an adjudicator. Having said that, many adjudicators are qualified arbitrators.

The only parties that can involve themselves in arbitration are those entities/persons that are party to the contract. Furthermore the contract must have an arbitration clause that states that arbitration is the exclusive dispute resolution forum.

Ordinarily the interlocutory process is akin to the courts and the tribunals in that statements of claim, statements of defence, counterclaims discovery processes and ultimately the setting down of hearings, are the order of the day. People tend to say that the process is less formal than the courts. This is possibly misleading. It is probably more accurate to say that the arbitration settings are less austere as there are no "wigs or gowns" and the arbitrators are not referred to as your Honour or your Worship. Having said that it would be ill-behove one to neglect to comply with an arbitrator's determination.

The Arbitration Process

Arbitration is triggered by an arbitration clause in a contract. The arbitration clause will typically provide that if a dispute arises in respect of the contract or matters that come within the ambit of the contract, the matter must be referred to arbitration.

Either party to the contract is at liberty to issue a notice of dispute and the notice of dispute need only make mention of the fact that there is a dispute or difference.

The Commercial Arbitration Acts limit the intervention of the courts in matters of arbitration.[12] If a litigant were to issue proceedings in an alternative jurisdiction to arbitration, the opponent would be well within its rights to apply to a court of law for the proceedings to be referred to arbitration. It would be most unusual for a court of law to fail to show sympathy to such application. The consequence of this would be that the matter would be referred to arbitration and the party that naively issued in the wrong jurisdiction, would in all likelihood have a costs award visited upon it.

A disputant will also after having had regard to the arbitration clause under the contract refer the matter to the body that is contractually identified as the body that nominated the arbitrator. Some arbitration clauses stipulate that the parties can agree upon an arbitrator but in the absence of agreement the parties are required to refer the matter to the nominating body.

The nominating body may be the Law Society of New Zealand or the Law Institute of Victoria, or it may be the Institute of Arbitrators Queensland Chapter. The body that is nominated in the contract is the body that chooses the arbitrator.

The arbitrator must be a qualified arbitrator. Alas some contracts provide that there must be two arbitrators. The problem with this is that the cost of retention of the arbitrator doubles.

Upon accepting an engagement an arbitrator will require moneys to be placed in trust prior to the crystallisation of their appointment. The monies are normally placed in an account held by the nominating body. Once the monies are placed in the account the arbitrator will write to the parties and order them to come to a directions hearing.

The norm is that lawyers are engaged as advocates for the disputants and at the initial directions hearing a synopsis and description of the issues that define the conflict will be presented.

The process is then very much reminiscent of the courts. The arbitrator in cohorts with the advocates will typically make the following types of orders.

A statement of claim will be filed that articulates the particulars of the dispute.

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[12] *Commercial Arbitration Bill (2010)* (Cth).

A statement of defence will be filed and in circumstances where there is a counterclaim the counterclaim will be filed with the statement of defence.

The plaintiff will be ordered to file a response to the defence and counterclaim.

An order for discovery will be forthcoming and both parties will be ordered to draft and file an affidavit of documents comprising all documentation relating to the contract of the dispute.

There will be an order for discovery whereby both parties will be afforded the opportunity to inspect the other party`s documents.

Normally the parties will be desirous of retaining expert witness to provide specialist opinion on matters that make up the ingredients of the dispute. Expert witness statements then have to be prepared, served and filed.

There may be an order that the matter is sequested out to mediation although this is optional.

There will be further orders providing that the parties will be required to attend further compliance directions hearings to ensure that the time frames for submitting and filing interlocutory pleadings are indeed filed by the due date.

Once matters have been progressed to the extent that relevant pleadings have been filed and served, discovery has been completed and expert witness statements filed the matter will be set down for hearing.

Throughout the process the arbitrator will require the parties to place in trust monies in advance.

Virtues

As arbitration in a number of Australian jurisdictions has been largely replaced by tribunal, court and adjudicatory systems in the residential disputation arena one would surmise that in this particular jurisdiction its virtues have not been sufficiently compelling for its retention as a primary form of dispute resolution. Within the sovereign setting it is a system that has experienced diminishing patronage and to reiterate, in the residential sector in many Australian jurisdictions has effectively been “outlawed”. Nevertheless arbitration is still used in some commercial and many international disputes. There are still many standard form commercial contracts that contain arbitration clauses. Where such clauses exist the parties are compelled to go to arbitration.

It is however, save for the international area, difficult to identify any particular virtue of arbitration that is sufficiently commendable to promote its virtues as being superior to the Courts. Judy Clarke, Associate Editor of Oil and Gas Journal states in her article International Arbitration -

> *"Dispute resolution and arbitration can be good strategies for mitigating risk because they enable companies …to avoid hostile local courts, where the location and language may put them at a disadvantage, where resolution could take 5-10 years, and national pride or political intervention could influence the outcome"*[13]

Shortcomings

The fact that one cannot consolidate proceedings where there are multi party responsibilities is a very serious shortcoming. The only parties that have standing at arbitration are those that are party to the given contract. This means that in a given dispute if an engineer, an architect, a building surveyor and a builder are implicated in defective building work with a developer, the developer and the builder would not be able to join other responsible actors as either co defendants or third parties.

This is highly problematic because it can lead to very cumbersome, duplicatory and convoluted multi party proceedings. Take the case of the above in circumstances where the clause prevents the joining of third parties. This would be the case in the significant majority of arbitration clauses, the disputants would have to issue separate legal proceedings in separate decision making arenas such as the courts. So instead of having a consolidated set of legal proceedings in the one dispute resolution theatre to preside over a multi defendant, multi responsibility matter, there may well be a plethora of proceedings running in parallel.

When one considers that in so many litigations, in particular in the construction sector, there will be a number of responsible actors, it is paramount that there are consolidated legal proceedings for matters in common to be held in common.

Some would say that they are troubled that arbitrators need not be legally qualified. The point is moot, for to reiterate arbitrators are required to be qualified arbitrators and the qualifications are rigorous and comprehensive.

Decision Making Considerations and Reservations

The Honourable Justice Patrick A Keane states in his article Judicial Support for Arbitration in Australia,

> *"In the case of Oil Basins Ltd v BHP Billiton Ltd, the Court of Appeal of the Supreme Court of Victoria insisted that arbitrators must address each of the arguments advanced by the parties, and the evidence adduced in support of those arguments and explain why the arguments of the successful party were*

[13] *Judy Clark,* 'International arbitration' *Oil & Gas Journal;* May 10, 2004; 102, 18 p. 15.

> *accepted and why the arguments of the unsuccessful party were rejected a failure to meet these standards meant that the award would be set aside"*[14]

His Honour quotes the Victorian Court of Appeal's reasoning, stating that a

> "*Judge is bound to enter into the issues canvassed before the court and to provide an intelligible explanation as to why the judge prefers one case over the other. In our view, an arbitrator is subject to similar obligations."*[15]

Keane then states that

> *"the strict approach tends to slow the process, and to diminish the value of the expertise of the arbitrators for which the parties have bargained in opting to agree upon arbitration by an expert in a particular field of commerce rather than in the judicial art of judgment writing."* [16]

It is a given that the strict approach would in the main slow the process. This observation is supported by the writer in the chapters devoted to statutory board and decision makings. The Bench prides itself in judicial decision making rigour and is to be commended. Whether the application of a strict approach diminishes the expertise of an arbitrator is moot. Very senior lawyers and Queen's Counsel are appointed as arbitrators and there does not appear to be any evidence of any compromising of decision making rigour.

Many a litigant could well feel very uncomfortable about the notion of the casualty of speed, where a less than strict approach would be applied to the decision making process. If the consequence of speed is occasional error and that occasional error is pregnant with negative gravitas then there is a problem. If this indeed is a characteristic of arbitration and the writer is not convinced that is, then there is very little to commend arbitration. His Honour is nevertheless I surmise correct when he makes the observation that superior rigour does tend to "slow the process".

Cost Impacts

The parties have to pay for arbitrators. An arbitrator can cost anywhere between $1500 & $10,000.00 a day and anywhere between $200 & $800 an hour. The parties also have to pay for room hire. These are costs that neither the courts nor the tribunals visit upon the parties at dispute and they add another very significant layer to the cost dispute resolution.

Ms Wong Mew Sum a lawyer who practises commercial law in Malaysia and who is an associate of the Chartered Institute of Arbitrators in Malaysia identifies in her article 'The Advantages and Disadvantages of Arbitration in Malaysia' that:-

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[14] P.A Keane 'Judicial Support for Arbitration in Australia' (2010) 34 Aust Bar Rev 1 (Keane) at 3.
[15] *Ibid at 4.*
[16] *Id.*

> *"The costs of court proceedings are borne by the public purse, parties have to pay the arbitrator's fees and other incidental costs such as hire charges for the venue. However, when one considers that arbitrations proceed at a much quicker pace, the savings may be negligible"*[17]

Whether or not the costs savings are negligible is very much a moot point and in the absence of evidence or statistics to verify this contention the view is no more than an opinion. For fear of labouring the point the author has had conduct of cases in both the courts of higher jurisdiction and arbitration that have involved Queens' counsel, junior barristers and instructing solicitors. These cases were plagued with litanies of adjournments in both jurisdictions and the court disputes and arbitrators alike assumed tenures of many years. However, arbitrations were more expensive because the arbitrators were charging $3000.00 a day, plus preparation and perusal time.

Little wonder that Professor of Law Thomas Stipanowich stated in his article Arbitration: The New Litigation -

> *"Once promoted as a means of avoiding the contention, cost, and expense of court trial, binding arbitration is now described in similar terms – "judicialized", formal, costly, time-consuming, and subject to hardball advocacy."*[18]

Consistent with Stipanowich's observation sceptics would opine that where an arbitrator can be so handsomely renumerated the desire to expedite a conclusion of a matter may not be as powerful as circumstances where a servant of the Crown, a salaried servant of the Crown that is, does not require remuneration, that is derived from similar criteria.

Mazirow, quoted earlier, picks up on this theme in that he notes that members of the Bench are not remunerated by the parties and this in itself could be one of the factors that augers well for impartiality.

> *"The judge, by law, must be impartial and the judge's paycheck is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case."*[19]

It is correct to observe that judges are not personally affected by the outcome of a case. However this may not strictly be the case in the emotional sense in that judges are not emotionally bankrupt and they may on occasion be affected by a case and a decision of moment. A relation of mine who presided over a case in circumstances where a gentleman was released having engaged in a first time act of violence and then subsequently within a few days found a spade and chopped an innocents head off was

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[17] Wong Mew Sum, '*The Advantages and Disadvantages of Arbitration in Malaysia'* Goh Wong Pereira Advocates and Solicitors www.gohwngpereira.com/artilces/arbitration.htm.21st June 2011.
[18] Thomas J Stipanowich, *Arbitration: The New Litigation*, (2010) U. Ill. L. Rev. 1 at page 1.
[19] (Arthur Mazirow 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' Speech delivered at the Counsellors of Real Estate, Chicago, 13 April 2008.).

personally affected by the case. But this was an emotional consequence. In no way was the judge compromised nor did he have any relationship of any persuasion with the subject criminal.

Judges are detached and removed from the parties and most importantly they are not retained by the parties as they have a permanent retainer with the crown to make decisions and determinations with respect to the conduct of those with whom they have no relationship with. Mazirow seems to suggest by implication that arbitrators lack the ideal level of detachment from the parties and they may be affected by the outcome of a case. In some instances they may, but equally in many instances the outcome would be immaterial to the arbitrator, arbitrators and adjudicators nevertheless have a pecuniary association with the parties as the parties pay them to arbitrate.

The author recalls that it was often difficult to agree upon the choice of arbitrator as there was a perception that the other party may have had some connection or proximate association with a nominee.

The Honourable Justice Patrick A Keane discusses the benefits of arbitration in his article Judicial Support for Arbitration in Australia stating,

> *"Arbitration as a method of dispute resolution is seen to offer the major benefits of enforceability, neutrality, speed and expertise over court based determinations; and, because arbitration is quicker and more expert, it is likely to be cheaper than the lengthier and more elaborate proceedings in court".*[20]

His Honour identifies that there are many benefits to arbitration including that it is quicker and therefore cheaper. His Honour does not support this finding with statistics or corroborative evidence to substantiate his opinion.

Further in the absence of being presented with evidence to suggest that arbitrations are cheaper the sceptic will still argue that in circumstances where an arbitrator is paid to arbitrate and paid handsomely, what possible incentive is there to expedite the conclusion of a hearing? It runs against the grain of all capitalistic instincts.

What troubles the writer is that the view that arbitration is cheaper than the courts has assumed a certain cache, yet it is at odds with the author`s and his litigation colleagues` experience and in the absence of statistical substantiation seems to rely upon anecdotal supposition.

Furthermore if arbitration was such a swift and inexpensive form of dispute resolution the question has to be put to the Crown in the States of Victoria and NSW, why did they enact Acts of Parliament that expunged arbitration from the residential dispute resolution fabric?[21]

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[20] (P.A Keane 'Judicial Support for Arbitration in Australia'. (2010) 34 Aust Bar Rev 1 (Keane) at 1).
[21] *Home Building Act 1989* (NSW).
[21] *Domestic Building Contracts Act 1995* (VIC).

Time Impacts

In the author`s personal experience arbitrations were no faster than the courts but were a little bit slower than tribunal experiences. Our law firm had one matter that spanned over 4 years. It was not helped by one of the parties taking technical appeal points to the Supreme Court of Victoria on a number of occasions. Nevertheless the matter went on for far too long and one of the consequences was that one of the parties ran out of money and had to abort the case.

Would the matter have been better dealt with in the Courts or in a tribunal? The answer would have to be yes, if for no other reason than the parties had to spend a great deal of money on the retention of the arbitrator. In either a court or a tribunal neither the judges nor the members are remunerated by the parties.

The author`s view is not unique Mr John Rowland QC in an article in the Australian financial Review 02.09.11 said that "Australian domestic arbitrators were inclined to mimic lengthy and expensive court processes…in Australia , you often have a lax timetable, wide ranging discovery and people getting adjournments routinely." In the same article Professor Doug Jones stated that "domestic arbitration had languished behind other forms of binding alternative dispute resolution"[22] and it was a poor cousin of court processes and it needs to be reformed" Messrs Rowland and Mehigan added that the problem was "cultural rather than regulatory".[23]

The cultural observation was probably correct, because there is by no means offshore consensus that arbitration is slower than the courts. A paper titled 'The case for Pre-dispute Arbitration Agreements for the National Arbitration Forum' quoted a number of lawyers and experts that had worked closely with arbitration in the USA recounted very different experiences of arbitration. In the executive summary it was stated that "individuals fare at least as well ... in arbitration, if not better, according to all of the reliable evidence on the use of pre-dispute agreements to arbitrate."[24] Further quotes revealed that "seventy – eight precent of trial attorneys find arbitration faster than law suits…seventy – eight precent of business attorneys find that arbitration provides faster recovery than law suits(Corporate legal Times)...arbitration is approximately 36% faster than a law suit[25]. The same paper quoted results compiled by the American Bar association that were compiled in a survey of lawyers in 2002 regarding alternative dispute resolution procedures tend their effectiveness. "78% of those surveyed said that arbitration was timelier than litigation, and 56% said that arbitration was more cost

[22] Mr John Rowland QC in an article in the Australian financial Review 2.09.11, p.42.
[23] *Id.*
[24] Delikat & Kleiner, 2003, *'The case for Pre-dispute Arbitration Agreements for the National Arbitration Forum'.*
[25] *Id.*

effective than litigation." [26] The research concluded that "plaintiffs are better served by arbitration relative to the federal courts in terms of speedy justice...and that arbitration provides the benefit of faster dispute resolution."[27]

Note however that the article makes a distinction between pre dispute arbitration and post dispute arbitration and the above research findings are corralled to pre dispute arbitration. The report in its conclusion found that "the success of pre-dispute arbitration in providing justice to parties does not transfer over to post – dispute – only arbitration. Numerous experts have concluded that the benefits of arbitration for consumers are completely lost when the parties may only agree to arbitration after a legal dispute arises".[28] [More damningly it was concluded that] attorneys for both businesses and consumers will rarely agree to utilise fast and inexpensive arbitration after a dispute arises because one party or the other will perceive a strategic advantage in leveraging of attrition by the existing lawsuit system".[29]

It is not quite clear the distinction between pre and post dispute arbitration. In Australia and NZ the trigger to arbitrate must always be a dispute or difference so one wonders what the trigger to arbitrate in a pre-dispute dynamic is in the US context.

Commercial Impacts

Again as arbitration is essentially an adversarial theatre it does not lend itself to the betterment of relationships between the parties to the dispute i.e. the applicant and the respondent. To this extent it is akin to courts, tribunals and adjudication.

Virtues of International Arbitration

International Arbitration is an area where arbitration as a means of dispute resolution comes into its own. It is nevertheless a "high end" type of paradigm as corporations, often multinational corporations are the maim patrons of this system. BHP Billiton Vice President of litigation, Damien Lovell, in the AFR 20911, stated that "international arbitration was an integral part of our global dispute resolution strategy."[30]

Some multinational corporations have little faith in local courts particularly if the courts are located in third world countries. Arbitration enables one to choose an appropriate expert to resolve the dispute, an expert who is mobile, prepared to travel and "slum it on occasion" in sometimes hostile environments far removed from the home comforts.

At the time of writing this chapter the author had been engaged by a household name international company to do an audit of the company`s contracts. Part of the exercise

[26] *Ibid* at p. 3.
[27] *Ibid* at p. 4.
[28] Delikat & Kleiner, 2003, *'The case for Pre-dispute Arbitration Agreements for the National Arbitration Forum'.*
[29] *Ibid at 15.*
[30] Damien Lovell, in the AFR 20911 [is that the date?]

was to harmonise the contracts with international contractual standards. As the contracts emanated from a Horn of Africa jurisdiction they had been designed to accommodate laws that were peculiar to the particular geographical theatre. When it came round to designing the dispute resolution clause it was resolved that arbitration would be utilised as the dispute resolution medium and moreover that the nominating bodies would be off shore nominating bodies.

Our election to use an arbitration clause and an offshore nominating body was in keeping with international dispute resolution conventions and the belief, rightly or wrongly that there would be more reliability and less surprises if international arbitration centres and international arbitrators were deployed.

Another advantage of arbitration within the international setting is that parties can nominate a particular city to be the dispute resolution destination. The point that Ms Judy Clarke makes about language is poignant. It would be problematic if a multinational commercial dispute comprising English speaking joint venturers found its geographical setting in a local dialect speaking equatorial country.

Simon Greenberg and Christopher Kee discuss the benefit of control over proceedings when using international arbitration -

> *"One of the enormous benefits of international arbitration is party autonomy. Given the uncertainty over the resolution of procedural questions, parties should resolve such questions in their arbitration agreements well before any dispute arises. Arbitration agreements should specifically empower (or specifically not empower, as the preference may be) the arbitral tribunal to order security for costs or make any other desired order arising in relation to the dispute resolution process."*[31]

Admittedly say in the case of building disputes there is a need for technical expertise, be it engineering, building surveying or architectural but some tribunals and many courts have the ability to appoint special technical referees to assist the legally qualified decision makers with the interpretation of technical issues.

[31] Simon Greenberg and Christopher Kee, 'Can you seek security for costs in international arbitration in Australia?' (2005) 26 Aust Bar Rev 89 at 7.