Arbitration - The Media Debate

- John Tyrril

It is probably fair to say that there has been a good deal of criticism of commercial arbitration in recent years in relation to domestic construction, i.e. at the consumer end of the construction market. This was raised again in the media earlier this year in the ABC's 7:30 Report. Set out below are some comments about the issue and a proposal which might remove one of the sources of criticism (whether that criticism is well founded or otherwise).

Often domestic proprietors have no prior experience, nor any particular understanding, of the construction process. Perhaps understandably, some proprietors have complained vociferously when they have been compelled to meet claims through the arbitration process. There has been a tendency by some to blame their ills upon the arbitration process and to do so publicly. Whatever the merits of the complaints and depth of understanding or otherwise by the complainants and by media researchers and presenters, the issue makes good controversial television.

Earlier this year, the criticism was renewed on the ABC's 7:30 Report. Thereafter, in response, a debate was conducted for a while in letters to the editor in the Australian newspaper (see the Australian 15, 21 and 26 March 1991). Correspondents to the Australian included Mr Quentin Dempster, the 7:30 Report's presenter, Mr John Muirhead, The Institute of Arbitrators, Australia's New South Wales Chapter Chairman and Mr John Murray, Executive Director of the Master Builders Construction And Housing Association Australia; Messrs Muirhead and Murray had appeared on the programme.

Some of the comments made by Mr Dempster in his letter to the Australian indicate the thrust of the programme and, perhaps, also generally public criticisms of arbitration in relation to domestic construction. Mr Dempster said:

> "Mr Murray believes arbitration is better than other process of law because it uses technical experts, does not intimidate consumers and is cheaper and faster. As many studies and owners have found, arbitration as practised by the building industry demonstrates that the opposite is the case. ... [Mr Dempster then cited certain examples of lengthy and, presumably, costly arbitrations.]
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> The question raised by our story is whether a single builder/arbitrator is really qualified or equipped to conduct hearings of this magnitude after just a few weeks of training by the Institute of Arbitrators.
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> The Australian Commercial Disputes Centre submitted to the Building Services Corporation Inquiry that a great disservice had been done to arbitration by industry associations (such as the MBA) because they appointed arbitrators 'in recognition of past service to the association rather than for any inherent quality as arbitrators'. It has been noted that many MBA arbitrators are former MBA presidents.
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> Our report did not say MBA arbitrators are 'not acountable for the quality of their arbitrations'. We reported arbitration as a process is private and secret with no public record, hence no public accountability."

The purpose of this article is not to take issue with the points stridently made by either side in this debate; nor is it to condemn or to praise arbitration for domestic construction disputes. Rather, the intention is to comment about one issue raised in the programme and in Mr Dempster's letter - the nomination of arbitrators by trade organisations in relation to disputes involving members.

Prior to the establishment of The Institute of Arbitrators, Australia, arguably, there was both reason and need for industry organisations to take an active role in making commercial arbitration readily available to the industry. That need has passed with the establishment of The Institute, its education programme, system of examination and grading of arbitrators and its role in nominating arbitrators upon request. A continuance of industry organisations' historic nomination role may now be counterproductive to the general reputation of commercial arbitration. Certainly, in the age of consumerism, this appears to be so at the consumer level in relation to disputes involving association members.

It is worth noting that this issue has come before the courts on several occasions. In *Iselin v Sommer & Davis* (1983) 7 BCLRS 362, the proprietor to a building contract brought an application in the Queensland Supreme Court for an order declaring that a dispute had not been referred properly to arbitration and for an injunction to restrain the arbitration from proceeding. The contract contained an arbitration clause in the *Scott v Avery* form and provided for the nomination of an arbitrator by the Queensland Master Builders Association. So far as it is relevant to this issue, McPherson J. held:

1. The provision for the nomination of an arbitrator by the President of the Queensland Chapter of the Master Builders Association in a standard form contract issued by that Association was not an "exclusionary provision" within s.4D of the Trade Practices Act, nor did it have a competition lessening effect within the meaning of s.45 of the Act.
2. The fact that the arbitrator and the builder were both members of the Queensland Master

> Builders Association, whereas the proprietor was not, was not a breach of the rule of natural justice that a person be precluded from performing a judicial function "when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal ... that the tribunal ... may not bring to the resolution of the questions before the tribunal fair and unprejudiced minds"; *Ex parte The Angliss Group* (1969) 122 CLR 546, 553-554, which passage was applied in *Ex parte Qantas Airways Ltd; Re Horsington* (1969) 71 SR (NSW) 291.

McPherson J. distinguished the *Qantas* case, in which the Union had a pecuniary interest in the outcome of the proceedings, from this case in which the Association had no interest whatever with the proprietors and no interest, pecuniary or otherwise, in the outcome of the proceedings between the parties other than the interest which an association of builders might be thought to have in the proper resolution of disputes between one of its members and a client who is a member of the public. McPherson J. said:

> "It is quite temerarious to suggest that a reasonably minded member of the public would suspect [the arbitrator] of being partial to the builder's case in the arbitration, simply because both he and [the builder] are members of the same Association."

In *Hooper Bailie Associated Ltd v President, Master Builders Association of the ACT & Ors* (1989) 8 ACLR 83 (reported in Issue #4 of the Newsletter at p7), Davies J. held that "the parties did not agree to be bound by the appointment of an arbitrator, if the appointment were made in a manner procedurally unfair to one of the parties". Whilst it was held that the requirements for procedural fairness did not require the President to give the parties a hearing before making an appointment, it was found there was a lack of procedural fairness to one of the parties and the other party was regarded as accruing an unfair advantage. The President had nominated the arbitrator without answering or considering the disadvantaged party's correspondence concerning the nomination. Thus, that party was not given the opportunity to object to the names of five possible arbitrators on a panel.

Based upon these cases, it would seem that the courts take the view that there is nothing askance about a clause in a contract issued by a trade association providing for the nomination by the trade association of an arbitrator who is a member of the trade association in a dispute involving another member of the association, provided that the requirements of procedural fairness are followed in the nomination process.

Nevertheless, cognizant of *Iselin v Sommer & Davis*, the 1988 report by Australian Construction Services et al entitled "Strategies For The Reduction Of Claims And Disputes In The Construction Industry - A Research Report" questioned the practice and recommended (see pages 67 and 73) that "neutral" organisations such as The Institute of Arbitrators, Australia or the Australian Commercial Disputes Centre should be chosen to nominate the arbitrator(s), in the event of failure by the disputants to agree upon an appropriate person or persons to arbitrate a dispute. Of course, this recommendation would not impact upon nomination of arbitrators (or dispute facilitators) with appropriate expertise by organisations such as The Institution of Engineers or The Australian Institute of Quantity Surveyors as a service to non-member disputants.

At a luncheon address at a construction industry conference, Justice Smart of the New South Wales Supreme Court criticised the practice of associations nominating arbitrators in disputes involving members and made an identical recommendation to that contained in the Strategies report.

Subsequently, the Australian Federation of Construction Contractors developed and published a policy statement that it would not nominate arbitrators in disputes involving members (see Issue #6 of the Newsletter at page 2, where the policy is set out in full). BISCOA has adopted the same policy.

Despite these criticisms, recommendations and policies, some trade associations have not altered their historic practice of nominating arbitrators in disputes involving members. It is not suggested that there is anything at all untoward about that practice, which may well be conducted for the general good of all in the industry - including the proprietors. However, not all proprietors (or reporters it seems) share the view of Justice McPherson that it is quite temerarious to suggest that a reasonably minded member of the public would suspect the arbitrator of being partial to the builder's case in the arbitration, simply because both he and the builder were members of the same association.

Despite the proper conduct of the process of nomination by trade associations, good intentions and the apparent backing of the courts, the practice continues to attract criticism by the public and the media in relation to domestic construction. The perception seems to be that the practice is not appropriate and, perhaps, that thereby the playing field is somehow tilted. The perception exists that there is something untoward about the practice. That perception problem needs to be addressed. It is an issue for the industry generally that criticism of the practice might denigrate unnecessarily commercial arbitration.

Of course, there is a serious risk that members of the same association may have, or have had, business relationships or personal dealings that might give rise to a perception of bias; even one member having voted for, or nominated, the other for an office in the association might give rise to that perception. Therefore, having a member of an association arbitrate a dispute involving another member presents a risk that the arbitrator or the arbitral award might be challenged on the grounds of bias.

In conclusion, there seems to be no compelling need for the continuance of the practice now that arbitration and neutral dispute facilitation organisations are well established. Perhaps it is time for a legislative prohibition on the practice - possibly by amendment of the Commercial Arbitration Acts.