Arbitration in Australia: the black sheep of ADR?

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Arbitration has become the black sheep of alternative dispute resolution (ADR) processes in Australia's domestic sphere. Over the last two decades arbitration has descended into a costly, rigid and time consuming process.

As noted in my July 2010 blog 'A return to Arbitration?', Australia's domestic arbitration regime is currently the subject of legislative reform with each state and territory agreeing to adopt the Model Law.

This raises the questions:

- will adoption of the Model Law improve the effectiveness of arbitration as an ADR process and make it a more attractive ADR option, or
- will its success depend on arbitrators taking full advantage of the new legislative framework in managing the process.

Declining popularity of arbitration

In the 1970s and 1980s construction disputes were commonly resolved by arbitration. Increasingly, arbitral awards were challenged on the basis of 'technical misconduct'. The technical misconduct umbrella opened to include requiring arbitrators to write detailed decisions to a standard similar to a judge's judgment.

The arbitration process became more cumbersome and time consuming as arbitrators managed the process more cautiously, mirroring procedures used in civil litigation (although ironically not the fast tracking procedures adopted in case management regimes in commercial lists) in order to avoid challenge on the basis of technical misconduct.

New Law – New opportunities

In May 2010, the states and territories agreed to overhaul the current domestic arbitration regime and adopt the Model Law. New South Wales has lead the way with its *Commercial Arbitration Act* 2010 (NSW) (NSW Act) commencing operation on 1 October 2010.

The new legislative framework, which is expected to be adopted by the remaining states and territories, enhances the arbitrator's role as the master of the process. It opens up an opportunity for

arbitrators to restore arbitration to its former glory as a efficient, informal and cost effective ADR process.

Examples of amendments that should instil confidence in arbitrators to manage the process effectively include:

- clarification that the parties are to be given a ‘reasonable’ opportunity to state their case; including power to order a stop clock arbitration;
- imposing a direct obligation on the parties to do all things necessary for the proper and expeditions conduct of the proceedings;
- the power to dismiss proceedings in the face of inexcusable delay
- powers to grant interim measures such as disclosure, security of costs, costs and damages and preservation orders; and
- most significantly the removal of the court’s power to set aside an award for technical misconduct and the provision of limited appeal rights.

End result?

Changing the domestic arbitration procedural rules alone may not be enough to make arbitration a more attractive ADR option. The onus is on parties, their advisors and ultimately arbitrators to utilise the tools provided by the Model Law. Whether the Model Law delivers on its promise to provide a fast, fair, cost-effective and less formal option for resolving disputes remains to be seen.

Perhaps Australia should draw on other nation’s experiences in the application of the Model Law?