

## PROCEDURAL INNOVATION IN THE FEDERAL COURT?

*Managing commercial disputes under the new Federal Court Practice Notes*

Jonathan Kay Hoyle<sup>1</sup>

---

It is probable that ever since litigation was invented, people have been complaining about how long it takes and how much it costs. Those complaints, often borne of reality, bring with them the ideal of the perfect court proceeding: taking no longer than it ought to, costing no more than it needs to, addressing only the issues it has to and providing the correct answer in a manner that is dispositive, fair and just.

Concepts of efficiency in litigation, pliable at the best of times and evolving with the differing expectations of every generation of litigants, are framed by a number of broad and sometimes competing considerations. Principal among them is the competing tension between each party's narrow desire to win and the curial desire to dispose of disputes in a manner that not only renders justice but also conforms to the public policy considerations inherent in the administration of justice.<sup>2</sup> What is efficient is often predicated upon what is sought to be achieved: a dispute about the defects in a power station will frame the question differently from a dispute about the scope of a government's regulatory decision-making power. What happens in litigation, and perceptions of its effectiveness, may also be coloured by the litigants' narrow tactical or strategic concerns and by the inevitable *ex post facto* rationalisations of unsuccessful litigants; the views about cost and time in litigation tend to fluctuate depending on whether you are the winner or the loser. Even the winning party may conclude that the cost and time required in order to secure a victory rendered it pyrrhic at best.

Public debate, and attempts at reform, are familiar and, historically speaking, regular. Most lawyers will be aware - if only because it is mentioned often in papers such as this one - of the portrayal of the Court of Chancery in *Bleak House*. Even at a distance of 165 years (Dickens wrote the novel in instalments in 1852 and 1853), the description of the state of litigation in *Jarndyce v Jarndyce* has a contemporary flavour:

*"It's about nothing but Costs now. We are always appearing, and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death, about costs."*

In 1895, in a response to complaints about the cost and speed of the cases in the High Court, the Queen's Bench Division set up the Commercial Causes List, a venture designed to appeal to commercial parties interested in more "*efficient*" management of cases. The influence of that reform led to a flowering of the London Commercial Court

---

<sup>1</sup> Barrister, 11 St James' Hall Chambers, Sydney. The paper was delivered at an 11 St James' Hall seminar on the new Federal Court Practice Notes.

<sup>2</sup> Individual litigants may choose (or at least not be bothered by) approaches that make cases longer and more expensive but the administration of justice requires the balancing of many factors including, generally speaking, the deleterious impact of cases taking far longer and costing far more than they should.

but its example did not prevent the need for the Woolf Reforms in England that attempted to simplify the litigation process and address perceived deficiencies in the speed and cost of access to justice. A similar approach can be seen in the process of the commercial list statement in the NSW Supreme Court. Many will be familiar with other examples closer to home: for example, the use of more active judicial management of cases by use of the docket system in the Federal Court and the modification of curial rules to focus on the potential elimination of the wasteful use of the process-driven aspects of litigation such as discovery, along with a greater emphasis on mediation and alternative processes (such as the referee procedure for technical issues).

In short, we return again and again, as practitioners, users and judges, to ways in which to have a litigation process that is more responsive and timely and less expensive within the framework of the legal and factual issues that actually need to be decided, as opposed to the ones that often form part of the case as it is actually fought. In the words of Lord Denning, in *Marsden v Regan* [1954] 1 AER 475 “*this case ought to have been simple, but the lawyers have made it complicated*”. For lawyers, one might, in appropriate cases, substitute the words “parties” and “judge”.

The Federal Court has recently undertaken a re-organisation and re-structuring of its curial and administrative activities. The administrative changes are, in part, a reflection of the changes brought about by the *Courts Administrative Legislation Amendment Act 2016* (Cth) which provides for the Federal Court to take responsibility for the corporate administration of the Federal Circuit Court and the Family Court of Australia. At the curial level, the business of the Court has been restructured into distinct practice areas with judges assigned to those practice areas, within what is now described as the National Court Framework (or “NCF”). The restructure has resulted in the Court being organised broadly in line with its major jurisdictional areas, known as National Practice Areas (or “NPA”). The NPAs are: administrative and constitutional law and human rights; admiralty and maritime; commercial and corporations; federal crime; employment and industrial relations; intellectual property; native title; taxation; other federal jurisdictions. There may be sub-areas in each NPA.

The purpose of these changes, at a broad level, is, in the words of the Chief Justice of the Federal Court to organise the Court’s work “*in a more subject specific and nationally focused way*”.<sup>3</sup> It fits with both the historical aspiration for a national court and the continuing need for the Federal Court to evolve in the management of its jurisdictional portfolios and the disposition of individual cases within those portfolios. More specifically, as his Honour Chief Justice Allsop explained:

*“Each of these national practice areas has one or more judges in charge of running the practice areas in consultation with [the Chief Justice] and with the new national operations registry. The aim is to see the operation of the Court focus on development of the deep skill of its judges and registrars in what are in some, but not all, respects very specialised areas of practice.”* (at page 6).

The best primer for understanding both these new structures and the evolving approach of the Federal Court to issues of procedure is the new Central Practice Note (**CPN-1**) entitled “*National Court Framework and Case Management*”. CPN-1 sets out the “*fundamental*

---

<sup>3</sup> “*The role and future of the Federal Court within the Australian Judicial System*”, a paper by Allsop CJ given on the 40<sup>th</sup> Anniversary of the Federal Court of Australia Conference. Accessed from the website of the Federal Court of Australia at: <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20170908>.

*principles*” of the NCF together with the key principles of “*case management procedure*”.<sup>4</sup> It acts as the over-arching practice guidance against which other practice notes in each NPA must be read and within which they are designed to operate. The new regime of practice notes reflects a new administrative structuring and variations to practice within the Court: like all practice notes, they continue to operate conformably with, and subject to, the requirements of the Federal Court of Australia Act (the “**Federal Court Act**”) and the Federal Court Rules (the “**Federal Court Rules**”).

A number of general observations can be made about both the structure of the NCF and the particulars emphasis placed on procedural and case management issues.

First, CPN-1 identifies both the aims and structure of the NCF. It emphasises the fostering of consistent national practice, use of specialised judicial skills and, most importantly in the present context, the “*effective, orderly and expeditious discharge of the business of the Court*”.<sup>5</sup> Work is allocated, consistently with the docket system, to judges within the particular NPAs. The NPAs are managed nationally by National Co-Ordinating Judges along with a specialised Registrars and a National Operations Registrar. Matters are allocated as a matter of judgment within a particular NPA. Where necessary, that judgment will be based, in part, on the dominant character of the matter.<sup>6</sup> It is worth noting that one of the purposes of this allocation appears to be to drive efficiencies by marrying particular cases to judges well-versed and experienced in the managing and determination of disputes within their specialised areas.<sup>7</sup>

Secondly, the overall aim remains the same: to facilitate, within the individual docket system, the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible, in conformity with s.37M and s.37N of the Federal Court Act. CPN-1 emphasises the duty placed on litigants and their lawyers to co-operate in achieving the overall purpose and “*in identifying the real issues in dispute early and in dealing with those issues efficiently*”.<sup>8</sup> More specifically, the vision in clause 7 of CPN-1 is of a more active Court in which there is a continuing dialogue between the bench and the parties as to how to achieve the overarching purpose in order to eliminate, among other things, unnecessary process-driven costs. In this context, it is worth noting that the Chief Justice of the Federal Court has commented that the provision of legal services is not a business or an industry but a profession, concomitant with which is a fiduciary duty to consider, and where applicable implement, cheaper, more efficient and more focused ways of operating.<sup>9</sup>

Thirdly, again in broad terms and read in conjunction with the specific requirements of the Practice Notes for each NPA, CPN-1 outlines various procedural processes designed to facilitate the overarching purpose and allow parties, in conjunction with the docket judge, to manage cases in more efficient ways. Such processes cannot be applied

---

<sup>4</sup> Cl. 1.1 CPN-1.

<sup>5</sup> Cl. 2.1 of CPN-1.

<sup>6</sup> Cl. 4.2, 4.3 of CPN-1.

<sup>7</sup> Based, perhaps, on the simplistic (but crudely correct) notion that a judge with expertise in a particular area and long experience in managing particular types of disputes will be in a position to undertake effective and efficient management of cases within her own jurisdictional bailiwick.

<sup>8</sup> Cl. 7.2 of CPN-1.

<sup>9</sup> “*Judicial Case Management and the Problem of Costs*”. Paper by Allsop CJ dated 8 September 2014 accessed from the website of the Federal Court of Australia at: <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20140909>.

inflexibly; procedural innovation eventually becomes stultified and ossified by unthinking and uncritical acceptance of its applicability and efficacy. Bespoke tailoring is the true lodestar of procedural efficiency. The effectiveness of each procedural mechanism is referable to a finely-tuned appreciation by each party of its case and what is required in order to determine the relevant issues in that case.

In this context, CPN-1 identifies a number of procedural stages and mechanisms which may assist the parties and the Court, in particular by allowing case management to provide for fewer issues in dispute, no greater factual investigation than justice requires in relation to those issues and the minimisation of interlocutory applications.<sup>10</sup> These include but are not limited to the following:

1. The use of technology, including eTrials, eCourtroom and video and audio-link hearing arrangements.<sup>11</sup>
2. The first case management hearing, with an emphasis on identifying issues at the earliest possible stage and focusing on questions dealing with the “*appropriate course of efficient preparation*” including the need for discovery, approach to evidence, the listing for hearing and the appropriate method of trial.<sup>12</sup>
3. The application of the Court’s “Case Management Imperatives” which include taking to trial only the critical issues, considering the use of alternative dispute resolution, management of justiciable issues (including use of preliminary hearings), minimising interlocutory steps, management of lay and expert evidence and use of collaborative steps between the parties such as agreed facts, use of the “chess-clock” approach to hearings and appropriate use of admissions.<sup>13</sup>
4. Protocols in relation to the presentation of evidence. These include consideration of appropriate use of statements of agreed facts and issues, joint and concurrent expert evidence and identification of evidence by issues or phase in the litigation (e.g. preliminary issue, liability and quantum). There is no particular presumption in favour of written evidence but rather a more nuanced approach which encourages identification of where matters may best be presented using oral evidence rather than written evidence (and vice versa).<sup>14</sup>
5. Guidelines for the use of discovery within the framework and requirements of Part 20 of the Federal Court Rules. These include an expectation that parties will have discussed discovery issues prior to approaching the Court and given consideration to agreed procedures that obviate the need for strict compliance with Part 20. The Court will focus on the nature of any Request for Discovery by reference to its utility, relevance, targeted nature and its proportionality.<sup>15</sup>
6. Emphasis on the use of ADR, specifically with the assistance the Court’s Registrars, where the ADR processes can be used to resolve issues at the earliest

---

<sup>10</sup> Described in cl. 8.1 of CPN-1 as the key objective of case management.

<sup>11</sup> Cl. 8.2 of CPN-1.

<sup>12</sup> Cl. 8.4 of CPN-1.

<sup>13</sup> Cl. 8.5 of CPN-1. Note that CPN-1 confirms that one of the aims of the parties and their lawyers should be to “*eliminate all unnecessary process and procedural costs*”.

<sup>14</sup> Clauses 8 to 11 of CPN-1.

<sup>15</sup> Cl. 10 of CPN-1.

and most effective stage with the assistance of technology and other innovations, including meeting arrangements, information and document exchange and expert conferencing.<sup>16</sup>

A number of these issues are familiar for those practising in the Federal Court (and, in slightly different ways, in the NSW Supreme Court). CPN-1 represents a further step in the evolution of the Court's processes in using more flexible approaches to a range of problems such as identification of issues, production of evidence and management of hearings. However, CPN-1 generally, and the Practice Note for the Commercial and Corporations NPA (**C&C-1**) more specifically, take this evolution a step further by emphasising, encouraging, and potentially requiring the use of novel or unfamiliar techniques. In some instances these techniques have been borrowed or adapted from procedures that have, up to now, been more common in international arbitration.

CPN-1 notes that use of expedited or truncated hearing processes may now be used in any NPA where it is considered appropriate as part of what it describes as "*innovative pleading processes*".<sup>17</sup> In addition, parties or the Court may seek to use processes from other NPAs, notably the matters set out in C&C-1 (which is discussed in further detail below). These procedures reflect a broader exhortation on the part of the drafters of the CPN-1 to focus on the use of "*appropriate and efficient mechanisms for case management*" in light of the nature of the case and the need of the parties. In this respect, the terms of CPN-1 are facilitative: to adapt a familiar phrase from a different context, the categories of procedural innovation are never closed so long as they are appropriately and properly adapted to the needs of the particular case.

This approach is usefully exemplified by some of the provisions of the Commercial and Corporations Practice Note designated as C&C-1. There is specific focus in parts of the C&C-1 (and CPN-1) on different procedures, notably the Concise Statement Method, the Memorial-based pleading system, the Redfern Schedule for document production and the so-called "Chess Clock" or "Stop-Clock" hearing method. In addition, some other procedures are outlined below that are not referred to explicitly in the Practice Notes but which come within the philosophical underpinnings of the broader approach in CPN-1 and which parties, and the Court, may consider using in appropriate cases. These procedures have been, or are being, used in international arbitration to grapple with similar issues of efficient resolution.

Before examining these procedures (in outline at least), it is worthwhile pausing to note a few things about procedural control – and procedural creativity – in international arbitration. One reason for this is because the contents of aspects of the new Practice Notes avowedly take their inspiration from processes that are commonly used in international arbitration.<sup>18</sup> Another reason is that international arbitration has often, but not always, been a testing ground for procedural innovation.

Many years ago, the person once described as the father of the UNCITRAL Model Law on International Commercial Arbitration 1985, the distinguished international jurist Professor Pieter Sanders, was asked about the advantage and disadvantage of arbitration.

---

<sup>16</sup> Cl. 9 of CPN-1.

<sup>17</sup> Cl. 6.4 of CPN-1.

<sup>18</sup> Although the processes identified in CPN-1 and C&C-1 can be used in any form of arbitration, the inspiration is international arbitration as domestic arbitration has rarely, until recently, employed such procedures.

His reply to both aspects was: time and cost. Many years ago, Lord Denning, as is often the case, summed up the issue pertinently when he observed, in *Bremer Vulkan v South Indian Shipping* [1981] AC 909, as follows:

*“When I was young, a sandwich-man wearing a top-hat used to parade outside these courts with his boards back and front, proclaiming ‘Arbitrate, don’t litigate.’ It was very good advice so long as arbitrations were conducted speedily: as many still are in the City of London. But it is not so good when arbitrations drag on for ever.”*

For many, both users and those familiar with it only by reputation, international arbitration is often held up as a means for resolving international commercial disputes in a manner that is cost and time-efficient. Whilst that perception has been, and is to some degree still is, grounded in reality the true picture is a little more complex.

Arbitration was historically driven by, among other things, the requirements of commercial certainty, where a swift but fair decision, based on experienced individuals bringing particular knowledge and experience to bear, was rendered based often on a limited domain of facts and evidence. Such arbitration, familiar in industries such as reinsurance and international trade, was a creature of commercial necessity as time and cost had a direct impact on viability. In that regard at least, arbitration was a true alternative to litigation. The handmaiden of speed was often procedural ingenuity or, alternatively, a faith in the truncated but nevertheless tangible engagement of the decision-maker with the nub of the dispute.

Arbitration more broadly could not, and cannot, fit easily within the model of a commodity or reinsurance arbitration. Construction disputes, for example, do not readily allow for resolution in this way; nor do complex commercial disputes about failed mergers or broken investment contracts. In these cases, the emphasis on management of time and cost answered a different imperative: the resolution of the dispute in a manner commensurate with the optimal disposition of all of the issues. One calculus for the effectiveness of commercial arbitration became: if the parties ran the equivalent case in the curial jurisdiction would the case run longer and cost more? More often than not, the answer to that question was evident and not favourable to the courts.<sup>19</sup>

One way in which arbitration kept pace with the demands of users (who, after all, paid for the service, unlike its curial counterpart) was by greater emphasis on procedural creativity. This was not an accident. Arbitration - both in its *ad hoc* form and, as time progressed, in its institutional form where it was governed by written rules - gave very wide discretion to arbitrators to fashion the procedural structure of the arbitration as they saw fit. Even today, where much arbitration is conducted pursuant to institutional rules, the arbitral rules are usually silent about the procedural mechanisms to be adopted. In addition, procedural considerations in international arbitration reflected the cross-border nature of the disputes being addressed: the parties often came from differing legal traditions with differing views about the efficacy or suitability of certain types of procedural control. A simple, but relevant, example is the differing approaches to documentary and oral evidence between civil law and common law jurisdictions. The arbitral ideal came to be fashioning procedural solutions in tune with the parties’

---

<sup>19</sup> International arbitration also had one distinct imperative: the need to find a neutral mechanism for dispute resolution between parties from different countries where neither party wished to submit to the curial jurisdiction of the other party.

expectations and consent.<sup>20</sup> Put more elegantly, albeit in a broader context, Professor Jan Paulsson has stated that the one of the central ideas of arbitration is “*freedom reconciled with law*”.<sup>21</sup>

Many procedural solutions adopted in international arbitration became, with the passage of time, less innovation and more accepted practice, often used in default of anything better or used because they were particularly effective in most cases.

One example is the Bockstiegel Method, named after Professor Karl-Heinz Bockstiegel. The essence of the Bockstiegel Method is deceptively simple: the parties are given a fixed amount of time, in hours, for the hearing and are allowed to share that time equally. It is left to the parties as to how and to what extent they use the time allotted to them.<sup>22</sup> A record is kept of the parties’ use of time and it is tracked in the manner of a chess clock; each time a party stops using its time, time then starts to run for the opposing party (with adjustments for time used by the tribunal for questions or time that is neutral between the parties, such as procedural and administrative questions). To put this method in some practical context, in an investor-state international arbitration in which the author was recently involved, the tribunal allocated 6.5 hours to each party to present their respective jurisdictional cases, including openings, submissions, leading of evidence and examination of witnesses. It is a necessary function of this method that it imposes on each party’s representatives the necessity for clear-headed forensic choices. Given the restricted amount of time that is usually available, it is usually only possible to work within the time limits by focusing on the critical (or, some might say, relevant) aspects of the case you have to present. In most cases, parties are not permitted to go beyond their allotted time.

The Bockstiegel Method is now most commonly referred to as the “*chess clock*” or “*stop clock*” method of hearing. It is referred to in CPN-1 as part of one of the Case Management Imperatives under the general title of “*collaborative tools*”.<sup>23</sup> For the unprepared lawyer, or the dilatory party it is moderately terrifying for obvious reasons. However, for those wishing to embrace novel (or not so novel but, in the litigation context, unused) procedures to drive greater focus on efficient use of time it has much to recommend it, but with two important caveats: first, it must be appropriate for the case and, secondly, it must be designed and implemented – by parties, representatives and the judge – with the particular case in mind.

C&C-1 makes reference to other alternative procedures. In this regard, it is important to note that it requires the parties at the first case management hearing to address the Court on the Case Management Imperatives in CPN-1 (and, as further explained below, whether the case is one that is amenable to modified forms of pleading).<sup>24</sup> C&C-1 identifies at least three different approaches to standard litigation that the parties may consider and which the Court may direct be undertaken, all three of which will be familiar to users of international arbitration.

---

<sup>20</sup> Arbitration being principally a method based on contract not on the judicial power of the state.

<sup>21</sup> “*The Idea of Arbitration*” by Jan Paulsson (2014) Clarendon Law Series, OUP.

<sup>22</sup> There is an illuminating study of the method and the ways in which it can be implemented in “*The Timely Arbitrator: Reflections on the Bockstiegel Method*” by Jan Paulsson in *Arbitration International* (2006) Volume 22, No.1 19-26.

<sup>23</sup> See Cl. 8.5(j) of CPN-1.

<sup>24</sup> Cl. 6.6 and 6.7 of C&C-1.

First, it provides not only for the traditional “*Pleading and Affidavit Method*” but also for something it calls the “*Concise Statement Method*”.<sup>25</sup> In the latter approach, the applicant must prepare a concise statement of no longer than 5 pages identifying the important facts, the relief, the primary legal grounds and the alleged harm. The statement is not a short-form pleading but a narrative-form presentation of the critical aspects of the case. The respondent may be required to file a responsive statement. The Court has noted that its expectation is that most cases will be amenable to the concise method unless it is “*clearly not an appropriate mechanism*”. This concise statement approach will be familiar to, among others, users of ICC arbitration who have to do something similar in the Request for Arbitration with which the arbitration is commenced.

Secondly, C&C-1 states that in appropriate cases a party may request or the Court may direct a “*memorial-style*” process be adopted.<sup>26</sup> The memorial method requires a party to file all of its case material at the same time. A party will file its “pleading” (for want of a better word), its legal submissions and all of its evidence (including expert evidence) in one document or set of documents. The other party will, in turn, file a counter-memorial and thereafter there may be reply and rejoinder memorials, all with a similar structure. This method of case presentation is often used in international arbitration, partly because it focuses, as some civil law jurisdictions do, on early and orderly presentation of, in effect, a party’s documentary case (as opposed to any oral evidence or oral submission). It is evident that this approach will front-load preparation of cases and therefore, as 8.11 of C&C-1 notes, may not be suitable for every commercial dispute.

Thirdly, the uses of the “*Redfern Schedule*” for what arbitrators sometimes like to call “*evidence gathering*” or what we traditionally understand as document production and discovery. The Schedule, given its name by another well-known international arbitrator Alan Redfern, took its inspiration from the now familiar – to construction lawyers at least – Scott Schedule. The Redfern Schedule, often in conjunction with the memorial style of case presentation, is predicated on narrow document production after many or all of the issues in the case have been identified by the presentation of argument and evidence. Categories are generally eschewed in favour of targeted requests where, critically, each request (set out in the form of a table) must identify the issue in the case that it addresses, its probative value and why the decision-maker in looking at the evidence will be assisted in resolving the issues in the case. In assessing the use of the Redfern Schedule the C&C-1 makes clear that the Court will be informed by sources of soft law such as the relevant International Bar Association Rules.

This brief summary of the specific procedures identified in C&C-1 shows a renewed emphasis and focus on dealing with cases in ways that sit outside the “cookie cutter” version of traditional litigation. However, CPN-1 and C&C-1 do not constitute a radical break with practice so much as a further evolution in procedural sophistication by the Federal Court. Changes to the Federal Court Rules and the practices of judges of the Court were already moving cases in the Court away from traditional and out-moded notions of litigation (for example, in the way that both Part 20 and the practice of judges in individual cases was moving practice away from traditional models of discovery). What the new Practice Notes do is identify further ways in which parties may utilise novel or under-utilised procedural methodology in the service of more efficient management and disposition of disputes. In particular, they seek to address procedural

---

<sup>25</sup> Cl. 6.8 to 6.11 of C&C-1.

<sup>26</sup> Cl. 8.8 to 8.11 of C&C-1.

inertia by parties, lawyers and judges (that is, using the same methods for all cases just because they have been used before).

It is important to stress that the structure and language of both CPN-1 and C&C-1 is such that the focus is on outcomes and not process. Procedural processes, both established and alternative, are identified as ways in which the participants in the litigation process can or should, in appropriate cases, shape the process to allow for better (in the broad sense, more efficient) outcomes. There may still be cases where a more traditional approach will produce the best results. It should be borne in mind that the Practice Notes facilitate focus on tailored methods to each case; they do not close off or prevent parties, in consultation with the Court, creatively adopting procedures appropriate for resolution of their dispute (subject to it being in conformity with the Federal Court Act and Federal Court Rules). In this respect, the notes constitute one interesting example of what might be termed a convergence between arbitral and curial procedural mechanisms.

In this context, it is useful to note that procedural innovations continue to develop in international arbitration. There is perhaps a measure of irony, in the context of the present discussion, in the fact that much of the impetus for such innovation has been a growing concern that international arbitration has itself become too long, too costly and insufficiently attentive to the needs of its users. So, for example, some parties and arbitrators have started to adopt what is known as the Kaplan Opening.<sup>27</sup> This is not a cousin of the Sicilian Defence but rather a hearing that takes place, usually, after the first round of memorials. The parties' counsel are given an opportunity to address the tribunal (or Court) in order to allow both for a initial presentation of the issues and, critically, an exploration with the tribunal as to what the true issues in the case are likely to be and how they may best be addressed procedurally. Similarly, the Sachs Protocol,<sup>28</sup> used in complex technical disputes, allows for the tribunal to design a system for the presentation of expert evidence in which an expert panel is constituted from names nominated by each party and the panel reports to the tribunal directly (a modified version of what is now, in more mainstream cases, described as a type of expert conferencing).

These approaches will not suit every case. Indeed, they may not be suitable at all in some cases (for example, the use of what is now known as the Reed Retreat where tribunal members meet prior to a hearing to draw up a roadmap of the pertinent issues).<sup>29</sup> Rather, they reflect the same approach as CPN-1 and C&C-1: a recognition that procedural flexibility and creativity can provide, in each case, for an optimal way to manage disputes. Necessarily, the scope for such innovation is more limited in the curial case than the arbitral case. In the latter, the arbitrators must respect the limits of their jurisdiction and requirements of the seat of the arbitration but they are free to design procedural mechanisms as they sit fit in conjunction with the parties. In the former, the Court must fashion approaches within the statutory framework of the Federal Court Act, the requirements of the Federal Court Rules, appellate review and the broader policy considerations of the administration of justice. What the relevant principles set out in CPN-1 and C&C-1 demonstrate is a new judicial philosophy and a renewed willingness

---

<sup>27</sup> For an interesting summary of the process from its inventor see: "*If It Ain't Broke, Don't Change It*" by Neil Kaplan QC in (2014) 80 Arbitration Issue 2.

<sup>28</sup> Named after Professor Klaus Sachs, the international arbitrator who formulated it.

<sup>29</sup> Named after Professor Lucy Reed, the international arbitrator who formulated it.

of the part of the Court to nudge, cajole or, if need be, direct parties to work with each other and with the Court to fashion something that provides meaningful engagement with the idea (and ideal) of optimal disposition and determination of commercial disputes in a time-efficient and cost-efficient way. It also points towards, within appropriate limits, a more activist philosophy in how the judges of the Court may manage disputes in their individual dockets.

---