above. He accepted that the implied term could be rested on the "custom of the country"; it could be precisely formulated; it is supported by judicial dicta uttered over many years and the opinions of text writers; there are no practices and no judicial dicta which conflict with the term; it is an "equitable" one; and it derives support from the consideration that the room for the hearing is private in the sense that the parties provide it either directly or through their arbitrator.

He held that the second implied term i.e. that the parties shall keep confidential what takes place in the course of the arbitration could not be rested on "the custom of the country" and he was not satisfied that it is reflected in any uniform course of conduct in Victoria or for that matter any other common law jurisdiction. His Honour indicated that it was manifestly untenable to suggest that it would be a breach of confidence in the necessary sense for one of the parties to disclose or use otherwise for than for purpose of the arbitration any document or other information which was not "in the public domain" and which had been disclosed for the purpose of an arbitration under a relevant agreement made between the parties.

Adrian Bellemore, Colin Biggers & Paisley, Sydney.

COURTS ATTITUDE TO SPECIAL REFEREES REPORTS

New South Wales Court of Appeal
(Gleeson CJ, Mahoney and Clarke JJA), Unreported
18 December, 1992

Super Pty Ltd v. SJP Formwork (Aust) Pty Ltd

It has become increasingly common in recent years, particularly in New South Wales, to refer matters to referees pursuant to the Rules of Court. This decision states authoritatively the attitude a Court should take when presented with a referee's report.

The matter arose out of a dispute between the builder and a sub-contractor in the construction area with the builder claiming monies owing on three building projects and the builder cross claiming for damages for alleged delay. The whole of the proceedings were referred out of the Construction List to an architect acting as a referee. The hearing proceeded before the referee over a number of days. The referee handed down an eight page report in which he awarded the sum of $351,470 to the sub-contractor indicating in his view there was no merit in the builder's cross claim.

Giles J. adopted the referee's report and entered judgment for the sub-contractor. He ordered the builder to pay costs including the referee's costs. The builder appealed against this decision to the Court of Appeal.
The builder contended that it was entitled to a re-hearing by a Judge on all issues where it was not satisfied with the referee's report and in particular that

where there was a conflict of evidence, a party was entitled to demand that the Court should re-hear the evidence in question and form its own view as to its reliability.

The lead judgment of the Court was delivered by Gleeson CJ in which Mahoney and Clarke JJA agreed.

His Honour gave a detailed analysis of Part 72 of the New South Wales Supreme Court Rules and of the history of this provision. He then set out succinctly the principles to be applied by a Court presented with a referee's report.

He did not accept "... that a party who is dissatisfied with an arbitrator's report is entitled as of right to require the judge acting under Pt 72 r13 to reconsider and determine afresh all issues, whether of fact or law, which that party desires to contest before the judge". One of the reasons given by His Honour for rejecting this approach was that it "... be inconsistent with the modern trend towards encouragement of alternative dispute resolution, as reflected, for example, in the provisions of the Commercial Arbitration Act 1984 (as amended)" which was to minimise judicial intervention in commercial arbitration.

A Judge considering a referee's report had a wide judicial discretion as to how the report would be received. If there was genuine dissatisfaction with a question of law raised in the referee's report, it woud be an appropriate exercise of judicial discretion for the Judge to re-open the referee's report on such a question.

His Honour's attitude is summarised in the following passage:-

> "... it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised (c.f. *Nicholls v Stamer (1980) VR 479* per Brooking J at 495). The nature of the complaints made about the report, the type of litigation involved, and the length and complexity of the proceedings before the referee, may all be relevant considerations. The purpose of Part 72 is to provide, where the interests of justice so dictate, a form of partial resolution of disputes alternative to orthodox litigation, and it would frustrate that purpose to allow the reference to be treated as some kind of warm-up for the real contest. On the other hand, if the referee's report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it (of *Jordan v McKenzie (1987) 26 CPC (2d) 193).* So also would perversity or manifest unreasonableness in fact-finding."

In His Honour's view, the decision of Cole J. in *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd (1988) 17 NSWLR 60* (noted in The Arbitrator Vol. 8 p.14) and of Marks J. in *Integar Computing Pty Ltd v Facom Australia Ltd* (Supreme Court of Victoria, 10 April, 1987, unreported) (noted in The Arbitrator Vol. 9 p.192) were particularly relevant to reports involving technical expertise.