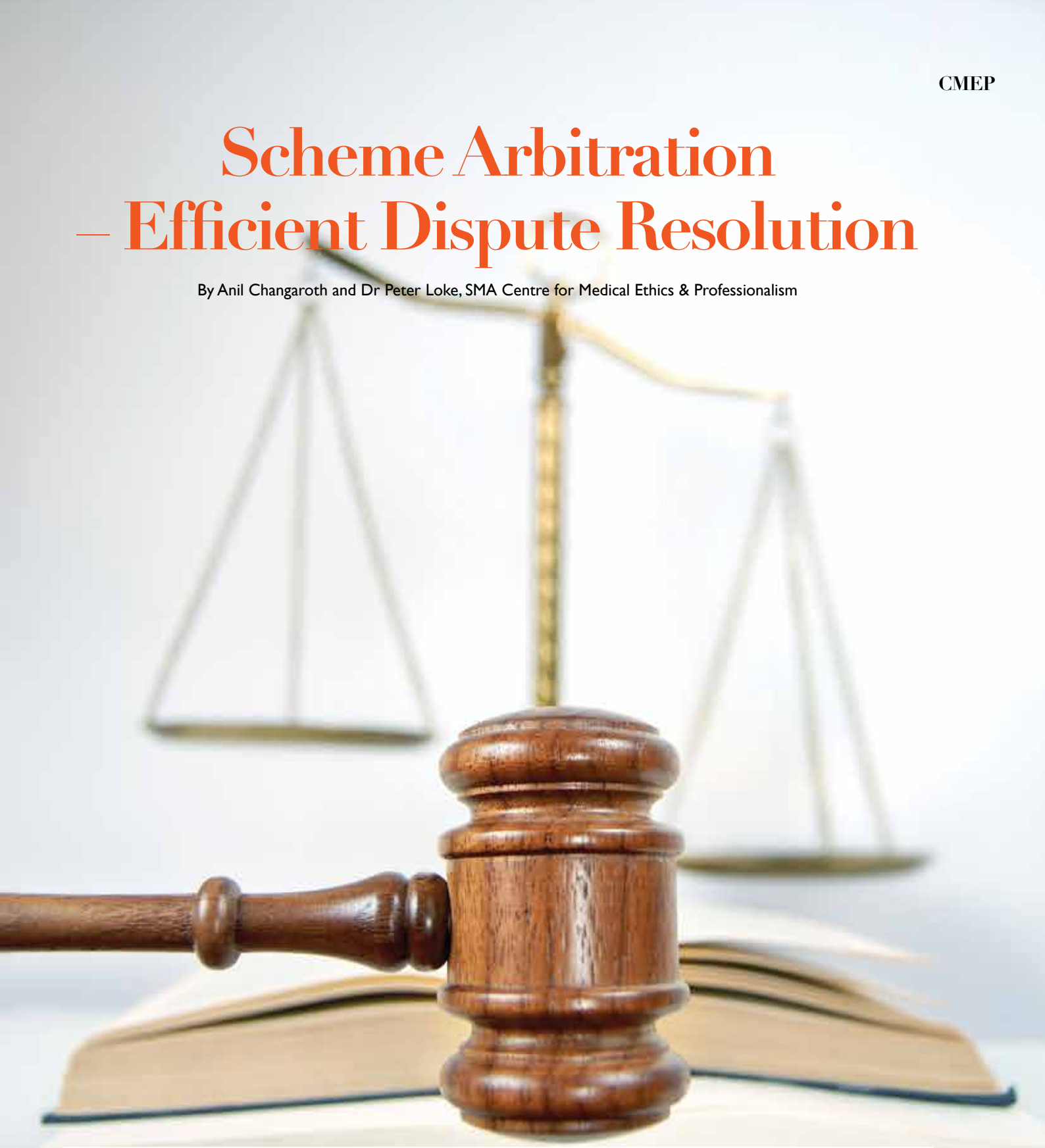
Scheme Arbitration – Efficient Dispute Resolution

By Anil Changaroth and Dr Peter Loke, SMA Centre for Medical Ethics & Professionalism



What is arbitration?

Arbitration is an alternative dispute resolution technique conducted privately, where parties agree to refer their dispute to an individual or a group of three persons. The decision, an award which is confidential, is binding on parties and enforceable internationally. The arbitrators hear the case and make a written award which is binding on all parties. Simply put, arbitration is akin to a conventional court, but the whole procedure is conducted in private and is confidential.

If parties agree to resolve their disputes via arbitration, a clear advantage is that they can choose experts in a particular field (eg, Medicine) to conduct the arbitration. This conceivably results in a better and more in-depth understanding of the technical issues involved, without the need for long-drawn-out explanations that may otherwise be required to bring parties up to speed on the matter and proceedings.

When entering into contractual agreements, parties often agree to resolve their disputes via alternative dispute resolution. This is the accepted practice in industries, such as construction, oil and gas, and commodities, where a level of expertise is relevant and even required. If it has been properly worded in the contract, arbitration becomes the chosen dispute resolution mechanism and not the court. Of course, this does not preclude formal court or Singapore Medical Council disciplinary proceedings in the event of criminal or disciplinary cases.

One of the other oft-stated advantages of arbitration is cost savings. However, current trends have indicated that such proceedings often cost more and take longer for dispute to be resolved than via the conventional court process. Arbitration can involve a large volume of documents (formal documents in the proceedings and/or evidence in writing), innumerable hearings and last several weeks. The chosen arbitrator must also be available to attend the hearings. Thus, there is growing concern within the arbitral community and institutions that the traditional benefits of arbitration – namely speed, cost and efficiency – have been eroded over time, and clients are becoming increasingly disenchanted with the system.

With arbitral clauses appearing in healthcare contracts (eg, in the managed care schemes between the managed care company and doctors), unsuspecting doctors fail to realise the sizeable cost of arbitration, only to discover that when the need to enforce contractual rights occurs, the recourse is even more costly and difficult than the conventional court process. As such, cost- and time-saving methods of arbitration are now an important priority for many clients. Such methods of arbitration will also allow for better access to justice for all.

Scheme and/or fast-track arbitration

With increased focus on various ways in which the length and cost of arbitration proceedings could be controlled, techniques and measures aimed at improving the efficiency of procedures are being examined. These can vary from setting shorter time frames afforded to the procedural stages, such as the Statements of Case and Defence (and Counter Claim), to allocating shorter times within which an award is to be made in a documents-only arbitration, to a slightly longer allocated time frame if there is an oral hearing. These methods are not just time saving, but also result in a huge reduction in costs.

Scheme and/or fast-track arbitration for less complex disputes involving smaller amounts, have been developed by arbitration institutes along these lines.

Parties can opt for specific scheme or fast-track procedures by submitting themselves to such procedure where in addition to the Statements of Claim and Defence, only one set of written statements is allowed, including the statement of evidence. As a hearing is generally not required, unless it is requested by a party and deemed necessary by the arbitrator, there is a significantly shorter time frame for both parties, who are then committed to achieve a resolution as quickly as possible.

> ***SMA could potentially work with the Law Society, Singapore Mediation Centre, or a private mediation-arbitration company to set up a scheme that combines mediation with documents-only arbitration.***

The scheme and/or fast-track arbitration dispute resolution mechanism can be agreed upon by parties and drafted into their contract. This will preclude either party, especially the one with significantly more resources at hand, from opposing this method of resolution after a dispute has commenced.

Institutional scheme arbitration

Some institutes (arbitral or otherwise) have, as an alternative to traditional arbitration, adopted specific sets of rules for scheme and/or fast-track arbitration on their own accord. Past experiences with such procedures have shown that they also result in other less quantifiable but still notable benefits, such as forcing the parties to focus on the essence of the dispute and be more efficient during the arbitration process, as well as reducing lengthy adversarial arguments presented at extensive hearings and ancillary disputes which would only increase costs.

One example of such a scheme is the Law Society of Singapore's Arbitration Scheme, which was launched on 1 August 2007 to address the growing demand for quick and cost-effective ways to resolve civil and commercial disputes by means of an arbitration system that is quick and user-friendly, and could facilitate time and cost savings for all parties.

The Law Society's Arbitration Rules 2011 provide for a default documents-only arbitration for disputes below $60,000 (being the value of the claims and counterclaims in total) unless both parties mutually opt for hearings. The details that need be addressed or dealt with are to be spelt out in the Statements of Case, Defence and Reply. The fees payable for the administration of arbitrations and to the arbitrators are fixed and made payable before proceeding further.[1]

Specific legislation in relation to particular industries has also been passed to facilitate resolution of disputes via such scheme or fast-track proceedings.

Other examples are driven by legislation. The Private Education Act (21/2009) Section 64 and its Private Education (Dispute Resolution Schemes) Regulation 2010, and the Estate Agents Act (Chapter 95A) Section 66 and its Estate Agents (Dispute Regulation Schemes Regulation 2011) provide for disputes to be referred for mediation at the Singapore Mediation Centre first. If the dispute is not resolved through mediation, it will be referred for arbitration by an arbitrator appointed by the Singapore Institute of Arbitrators.

These scheme arbitration rules state the detailed procedures to follow, with shorter timelines and a documents-only procedure. This means that parties do not attend hearings where the witnesses are cross-examined, and each side seeks to emphasise and "prove" their side of the story, which often result in increases in acrimony and costs.

Application of scheme arbitration in the medical field

Documents-only scheme arbitration can be coupled with mediation for a complete dispute resolution option for civil disputes in the healthcare industry below a specified quantum of claim, similar to the scheme offered by the Law Society.

Mediation as a preferred first-pass method for resolving disputes in healthcare has previously been discussed.[2] While mediation is particularly ideal for clarifying the unhappiness arising from communication issues that often predisposes patients to making claims and complaints, this does not detract from the potential for mediation to also more amicably resolve the substantive issues. With the substantive issues, it can be a simple matter of reasonableness on the part of all parties, including their lawyers and medical indemnifiers, coupled with the mediator's familiarity of the substantive issues. Documents-only arbitration increases the versatility of the dispute resolution option in that it can be performed after mediation, in the event there is failure to resolve or even before mediation.

The conventional model is that of mediation-arbitration, where the matter goes through arbitration in the event that mediation does not achieve resolution. The mediator is usually also the arbitrator, as this saves time and cost of hearing the parties' stories again. However, a concern surrounding the mediation-arbitration option is that the arbitrator can become influenced by the personal sharing of the parties which might not necessarily be legally relevant or admissible, hence inhibiting parties from being open and forthcoming which is crucial to the success of mediation. One way this concern can be addressed is for the potential arbitrator to be a co-mediator who will, however, be precluded from the individual caucus when more personal and confidential matters are discussed.

Another way around the concern of patients' reservations is for documents-only arbitration to be done prior to mediation. The arbitral award is sealed with mutual agreement for it to be opened and thereafter binding only in the event that mediation fails. This provides certainty for parties that no matter what, the dispute can be resolved by the date of the mediation, assuming no adjournment is required.

As in the scheme run by the Law Society, documents-only arbitration could be utilised to resolve disputes under a specified quantum of claim. This quantum need not be the same as that of the Law Society's, but could for example be pegged at $100,000. This can be adopted for both disputes arising from patients and also intra-healthcare, as in disputes between managed care companies and doctors. SMA could potentially work with the Law Society, Singapore Mediation Centre, or a private mediation-arbitration company to set up a scheme that combines mediation with documents-only arbitration. SMA

References

1. *Law Society of Singapore. The LawSoc arbitration rules 2011. Available at: http://goo.gl/4xWeHB. Accessed 1 October 2013.*
2. *Loke P. Mediation in doctor-patient dispute resolution. SMA News 2013; 45(1):14-5. Available at: http://goo.gl/CxS75h. Accessed 1 October 2013.*

Anil is a partner with Aequitas Law LLP, and has been in practice since 1995 after graduating as a Barrister of England and Wales (Middle Temple). Having worked as an in-house counsel and with an international law firm, his work primarily involves commercial, civil, corporate & criminal litigation and dispute resolution with a focus on construction-related adjudication and arbitration (including as an arbitrator), and represents parties in Singapore and the region. He is the Chairman of the Society of Construction Law (Singapore), and Fellow of the Chartered Institute of Arbitrators (CIArb) and Singapore Institute of Arbitrators (SIArb), involved with the SIArb's Scheme Arbitration committee for over four years.

Peter is a partner of Mint Medical Centre, a Family Medicine clinic located at HarbourFront. He is the Regional Medical Advisor for Syngenta Asia Pacific Pte Ltd, a multinational agribusiness, and adjunct senior lecturer at the National University of Singapore Centre for Biomedical Ethics in Yong Loo Lin School of Medicine, where he mainly teaches medical law. He is a Fellow of the CIArb and SIArb, a Fellow of the Singapore Mediation Centre, and a partner of the Resolvers Pte Ltd, a private mediation service. He is also a member of the teaching faculty of the Medical Protection Society.