Editor's Commentary

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Welcome to the December 2014 edition of *The Arbitrator & Mediator*.

Our first contribution is from the Hon. Murray Gleeson AC, former Chief Justice of the High Court of Australia. The Hon. Gleeson discusses arbitral award writing in international commercial arbitrations. The article examines the formal and structural requirements of foreign arbitral awards under the *International Arbitration Act 1974* (Cth) (**IAA**) which are essential to the enforceability of the award. The Hon. Gleeson discusses the statutory requirement of an arbitrator to provide reasons and highlights the differences between the reasoning that is required in an arbitral award compared to a court judgment. In giving reasons, an arbitrator may consider the governing law of the arbitration, how to clearly express arguments of both law and fact (pitch), the evidence and findings of fact, legal argument and authorities and the opinions of expert witnesses. The Hon. Gleeson also outlines the way in which an arbitrator may engage with counsel. In ordering relief, an arbitrator may consider the currency of the award, whether the award is to be partial or final, the jurisdiction of the arbitral tribunal and matters related to arbitrability, whether or not the award will grant interest and the costs to be awarded.

Dr Josh Wilson QC analyses the approach that the Australian courts have taken when construing 'best endeavours clauses' in commercial agreements. In particular, the High Court of Australia's decision in *Electricity Generation Corporation v Woodside Energy Ltd (Woodside)* in March 2014 has shifted the traditional focus. Prior to Woodside, the traditional approach taken by the courts when construing best endeavours clauses was that the obligor was required to 'leave no stone unturned' to achieve the contractual object. However, the *Woodside* decision demonstrates that the courts may now assess compliance with a best endeavours clause with respect to reasonableness, as well as other factors that affect the obligor's own business interests. Dr Wilson provides a detailed account of the case law prior to the *Woodside* decision and how the construction of best endeavours clauses has changed since this recent decision.

Hussain Agil and Bruno Zeller discuss the use of questions in mediation and the crucial role that a mediator plays in framing and delivering those questions to the parties. Questions are critical during the

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various stages of mediation including the introductory stage, during caucus, at the discussion stage and when the mediation has reached the closing stage. The authors also analyse the types of questions that can be asked during mediation and at what stage it is appropriate to ask those questions.

Maritime arbitration is of significance in Australia due to the nation's dependency on trade by sea. The Australian Maritime and Transport Arbitration Centre (**AMTAC**) is a Commission of the Australian Centre for International Commercial Arbitration (**ACICA**) and provides dispute resolution services in Australia and the Asia-Pacific region under the AMTAC Arbitration Rules and AMTAC Rocket Docket. In the context of international commercial arbitration, Peter McQueen describes how both AMTAC and ACICA promote Australia as an attractive arbitral seat in maritime disputes. The article also analyses the case law in relation to the key provisions of the IAA, including the pro-enforcement approach to foreign arbitral awards by the Australian courts. McQueen concludes by considering the steps that Australia should take to continue to facilitate the conduct of maritime arbitration in Australia.

ADR processes continue to evolve with the digital age. Arnaud Deutsch's article examines the current demographic trends in e-mediation. The article argues that better information and training in online mediation processes is required in enable mediators to cater for the needs of their clients. This means that online dispute resolution practices should be integrated into traditional face-to-face mediation. The article discusses the differences between digital natives (those who have learned communication through online systems) and digital migrants (those who have learned to use online communication to replace the traditional communication tools) and how those demographic groups influence the uptake of e-mediation. The article also provides a practical example of the sequence of communication used in a recent mediation conducted by the author and how a variety of communication techniques are often required during mediation.

Steve White focuses on the role of customer service in arbitration. The article asserts 22 customer service proposals which should be considered in light of the paramount object of the revised *Commercial Arbitration Acts* (CAAs). White discusses how customer service strategies should be adopted by arbitrators in order to secure an 'arbitral advantage'. Those customer service proposals range from how the arbitrator should communicate with the parties, counsel and witnesses; the preparation required before the hearing; how to conduct proceedings; the general etiquette that is required during proceedings and the arbitrator's approach to award writing.

Building Information Modelling (**BIM**) is an emerging technology which can be used in the construction industry. BIM is a new approach to design, construction and facility management and is where a digital representation of the building process is used to exchange information. John Fisher discusses the development of BIM, its effect on the construction industry and how it will impact ADR practitioners. The benefits of BIM include increased design quality, improved productivity, cost predictability, reduced conflicts and rework, increased prefabrication and reduced construction time. With the increasing uptake of BIM in the construction industry, there is no doubt that these developments will be important to ADR practitioners, particularly arbitrators, adjudicators and mediators.

Selina-Jane Trigg, Kirsty Swadling and Deborah Sim discuss the recent developments in Collaborative Practice in New Zealand which has largely been driven by Collaborative Advocacy New Zealand

(CANZ). Although widely adopted internationally, Collaborative Practice was first introduced in New Zealand in 2009 and remains a relatively new concept within New Zealand's ADR landscape. One of the hallmarks of Collaborative Practice is that it fosters a greater level of participation from the parties than other ADR processes through the use of four-way meetings. The authors also discuss how Collaborative Practice provides mediators with opportunities for skill development, such as where the mediator may adopt the role of 'case or team manager' or 'process advisor'.

Jeremy Johnson examines the arbitration of trust disputes in New Zealand in the context of the Arbitration Act 1996 (NZ) and the equitable jurisdiction in which trust law is based. There are various types of trust disputes, including disputes between trustees and third parties or between beneficiaries and third parties; disputes between the settlor and trustee; disputes between the trustee and beneficiary and disputes between trustees. Arbitration offers a range of benefits to both commercial and family trust disputes, namely privacy, speed of process and procedural flexibility, expertise in decision-making, cost and international enforcement. Whether trust disputes are arbitrable is a fundamental question and the article considers the various arguments with respect to jurisdiction and the arbitrability of trust disputes.

Nick Gillies focuses on the potential impact of New Zealand's largest construction boom and argues that Dispute Resolution Boards (**DRBs**) should be considered as an attractive and effective way to resolve the inevitable building and engineering disputes that will arise from this increased construction work. The article discusses the relative success of DRBs, particularly where the parties to a contract establish a DRB from the commencement of a project. DRBs have been successfully used in New Zealand although their uptake to date has been low. Despite the benefits of DRBs, their establishment and operational costs may be considered a disadvantage. The article also sets out the requirements for the creation and operation of DRBs which will assist practitioners who are considering adopting this method of ADR.

The first of our case notes examines the August 2014 Federal Court of Australia decision in *International Relief and Development Inc v Ladu*. International Relief and Development Inc (**IRD**) sought enforcement of a foreign arbitral award (made in Virginia, United States) under the IAA. The dispute between IRD and Mr Ladu arose out of the termination of a contract of employment for foreign aid work in South Sudan. The main issue was whether the respondent, Mr Ladu, was given proper notice of the appointment of the arbitrator or of the arbitration proceedings pursuant to section 8(5)(c) of the IAA. Mr Ladu also submitted that enforcing the award would be contrary to public policy (section 8(7)(b) of the IAA) as there was a breach of natural justice in connection with the making of the award under section 8(7A)(b) of the IAA. Ultimately, the Federal Court, finding in favour of IRD, ordered the enforcement of the award.

The New South Wales Supreme Court handed down the decision of *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* in October 2014 which concerned the enforcement of a foreign arbitral award under the IAA. Beth Cubitt and Brittany Guilleaume analyse the decision which involved a subcontract between Aircraft Support Industries Pty Ltd (the contractor) and William Hare UAE LLC (the subcontractor) regarding construction works at the Abu Dhabi International Airport. The issue before the court was whether the enforcement of the foreign award would be contrary to the public policy of Australia under the IAA. The authors examine how Justice Drake considered the case law with respect

to the public policy exception and the rules of natural justice in arbitral process in comparison to administrative law. The Court also considered the issue of severance and whether in the circumstances severing part of the award would be unjust. The Court enforced the majority of the foreign award in favour of William Hare and allowed severance of the unenforceable parts of the award.

I trust readers will find the December edition of *The Arbitrator & Mediator* both informative and enjoyable. I recommend these articles and case notes to readers, and thank all contributors for their scholarly work.