Editor's Commentary

Russell Thirgood,[1] *Editor*

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

Our first contribution is from the Hon. Justice Clyde Croft. In the context of the Asia-Pacific region, the article discusses the role of the courts in supporting the development and success of international and domestic arbitration. With the recent reform of Australia and New Zealand's commercial arbitration legislation, the courts are well placed to support arbitration, facilitate its processes and provide expeditious enforcement of arbitral awards. Justice Croft analyses a number of recent decisions in Australia and New Zealand and outlines some procedural and other steps that have been taken to ensure the judiciary in both countries are recognised as being arbitration-friendly. Astute readers will notice that Justice Croft's article was printed in the December 2013 edition of *The Arbitrator and Mediator*. This article has been reprinted in the current edition due to a publication error. I trust readers will find this to be an informative article on the judiciary's ongoing involvement in domestic and international commercial arbitration.

Albert Monichino QC, Warren Fischer and I examine the 2014 Institute of Arbitrators and Mediators Australia (IAMA) Rules which have operated on and from 2 May 2014. The article discusses the theoretical and historical background to the recent reform process, including changes to the arbitration landscape in the Asia-Pacific and legislative changes to commercial arbitration in Australia. The article then outlines the key changes to the 2014 IAMA Rules and how they compare to the former 2007 IAMA Rules. This article should be of particular interest to practitioners.

Restorative Engagement is an innovative ADR approach to addressing allegations of abuse in the Department of Defence and the Australian Defence Force. The Hon. Len Roberts-Smith RFD, QC details the Restorative Engagement Program of the Defence Abuse Response Taskforce (**DART**), including the lead up to its inception, implementation, insights and comments from complainants. The DART has received feedback that its approach to addressing abuse has provided a unique opportunity to acknowledge and directly respond to people who have suffered abuse.

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One of the benefits in using ADR is the time it will save compared to litigation. In her article, Professor Tania Sourdin discusses how the data on the extent to which ADR saves time is unclear, mainly due to the lack of information collected in this area. The article examines current court and tribunal processes that deal with timely referral to ADR, such as initiatives led by the Supreme Court of Victoria, the Magistrates' Court of Victoria and the County Court of Victoria.

The domestic commercial arbitration landscape has seen dramatic changes with the enactment of the revised uniform Commercial Arbitration Acts (**CAAs**). Michael Heaton QC discusses seven key benefits arising under the new CAAs – privacy and confidentiality, efficiency, informality, specialist expertise, the ability of the arbitral tribunal to exercise a great degree of control, interim measures and limited rights to recourse against awards and appeals. Attention is also given to recent case law developments in the area.

John Bond QC analyses and critiques the decision of the Victorian Court of Appeal in *Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3) (Dura)*. The dispute involved a building contract which incorporated general conditions of the AS2124-1992 form. The three issues before the Court were whether Dura (the contractor) was entitled to dispute the correctness of the Superintendent's certificate (and on what basis); if the Superintendent, under the contract, complied in ascertaining the cost to complete and in certifying the difference; and if the Superintendent did not comply, was Dura precluded from challenging the certificate as it had not complied with the dispute resolution provisions of the contract. It is discussed throughout the article that the Court of Appeal's decision in *Dura* is inconsistent with two lines of earlier Australian cases which were not referred to by the Court of Appeal in *Dura*.

As ADR processes have evolved and expanded, a number of 'hybrid' processes have emerged. Mediation followed by arbitration, commonly known as 'med-arb', is one of these hybrid processes. Campbell Bridge SC discusses the benefits and criticisms of med-arb and other such hybrid processes. In this discussion it is apparent that common law and civil law jurisdictions often differ in their approach to hybrid ADR processes. The practicalities of whether the mediator should also conduct the arbitration in med-arb are also explored.

Dr Paul Gibson and Katherine Evans focus their discussion on the way in which we can make conflict constructive rather than destructive. Constructive disagreement has potential benefits for disputes and disagreements that arise in everyday life whether they are in personal, professional or community settings. The article considers each facet of constructive disagreement including communication and relationships, mindfulness, the 'third side' and forgiveness. In considering this approach we can alter the way we view conflict.

The first of our three case notes examines the Singapore Court of Appeal's decision in *PT First Media TBK v Astro Nusantara International BV*. Professor Doug Jones AO focuses on how the Singapore Court of Appeal analysed Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) in the dispute between The Malaysian Astro Group and the Indonesian Lippo Group. The key issues discussed in this case were whether the arbitral tribunal had the power to join third parties to

the arbitral proceedings and whether an unsuccessful party was precluded from resisting enforcement of the arbitral award on the grounds of the arbitral tribunal's lack of jurisdiction (where the unsuccessful party had not raised the issue at an earlier stage). With reference to the competence-competence principle under the Model Law, the case raises the question of the continuing utility of Article 16(3) of the Model Law. This decision is important for international commercial arbitration and it has practical ramifications for arbitral disputes seated in Singapore.

The Federal Court of Australia recently made its decision in *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited*. Ross Glover and I discuss how the case raises some important issues on the Court's discretion to enforce foreign arbitral awards and the grounds on which a party may seek to do so. Two of the issues before the court were whether the arbitral tribunal was comprised of 'commercial men' under clause 5 of the contract and if the enforcement of the second arbitral award was contrary to the public policy of Australia under s 8(7)(b) of the *International Arbitration Act 1974* (Cth). This decision reinforces the pro-arbitration policy of the Australian courts.

Michael Heaton QC discusses the New South Wales Supreme Court's decision in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* where the Court determined that a contractual dispute involving patents was not precluded from being an arbitral matter as it did not impinge on the jurisdiction of the Commissioner of Patents or the Federal Court of Australia. Again, the decision reflects Australia's pro-arbitration policy and highlights some of the key benefits of arbitration under the CAAs.

I am sure readers will find the September 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.