Editor's Commentary

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Welcome to the December 2013 edition of *The Arbitrator & Mediator*.

Our first contribution is from the Hon. Justice Clyde Croft. With a particular focus on the Asia-Pacific region, the vital role the courts have to play in supporting the development and success of international and domestic arbitration is discussed in this article. With the recent implementation of legislation in both Australia and New Zealand that reflects international best practice in arbitration, the courts in both countries are well placed within a pro-arbitration environment to enhance their attractiveness as arbitral seats and ensure that enforcement is expeditious. In this context, Justice Croft analyses a number of recent decision in Australia and New Zealand and outlines some procedural and other steps than have been taken in order to ensure that the judiciary in both countries are recognised as being arbitration-friendly.

Professor Doug Jones AO focuses his discussion on the three most lethal attacks on the integrity of an arbitration: arbitrator misconduct, counsel misconduct and parties approaching the arbitration in bad faith. The article addresses the important area of fair and just process in both international and domestic arbitration, the efforts of international arbitrational institutions and legislative regimes to maintain such a process, and the effectiveness of these attempts.

In *Gao Haiyan and another v Keeneye Holdings and another*, the Hong Kong Court of Appeal allowed the enforcement of a mainland Chinese arbitral award, reversing a decision of the Court of First Instance to refuse enforcement on the grounds of public policy. Josh Wilson SC and William EM Lye discuss a number of issues that emerge from this litigation and the divergent views that exist within the judiciary of Hong Kong regarding the arb-med process.

In her article, Sophie East takes a practical look at some of the issues to consider in drafting alternative dispute resolution (**ADR**) clauses. Attention is given to a number of matters that are commonly overlooked by parties, including appropriate definition of the scope of the dispute, the setting of clear processes and boundaries for multi-tier clauses, making key choices regarding place of arbitration and the particular rules to be applicable and addressing ongoing performance obligations.

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Neuroscience offers fascinating insights into the way that we as humans make decisions and respond to conflict. It is set to change the way in which dispute resolution is understood. In their article, Barbara McCulloch, Dr Cathy Stinear and Jeremy Scuse provide the reader with a lesson in basic neurobiology and show how by applying insights provided by this science to dispute resolution, conflict can be resolved more efficiently.

The recognition of arbitration as a preeminent form of dispute resolution has ebbed and flowed throughout history. I trace the history of arbitration from Ancient Greek times, through the medieval period (during which the common law courts of England exhibited a high degree of hostility towards the process), to the implementation of the first arbitration legislation in Australia and ending in an examination of the recently enacted Uniform Commercial Arbitration Acts. This survey of arbitration's rich history leads to the conclusion that, despite arbitration falling out of favour for a period of time, the new Uniform Commercial Arbitration Acts provide a real opportunity for arbitration to reach its full potential.

David Kreider focuses on the pros and cons of the well-accepted practice of the unilateral appointments of co-arbitrators by parties to disputes, or the appointment of sole arbitrators or the chair by mutual agreement by the parties themselves. The practical advice for parties and their lawyers is that it is beneficial to maintain a strong voice in the process of nominating a co-arbitrator (where the tribunal will consist of three arbitrators) and in agreeing with the other side upon the nomination of the presiding arbitrator (sole arbitrator or chair). Parties should engage diligently and proactively with the process, as it may shape the arbitration proceeding itself.

In order to commence investor–state arbitration under a Bilateral Investment Treaty (BIT), several requirements must be met, including the requirement that in order to benefit from the protections provided by BITs, an investor must be a national of a contracting state but not of state in which they have invested. In his article Sergei Gorbylev explores the complexity behind the seemingly-simple concept of nationality and the fact that in an increasingly-globalised world the nationality of individual persons can be difficult to determine.

ADR is an ever-evolving field. A number of creative dispute resolution techniques have been developed by extending, re-engineering and blending existing processes so that something'new' is obtained from the'old' and through the utilisation of new technologies. As Professor Tania Sourdin explains, at present innovation across the ADR sector has a tendency to be ad hoc and may not be shared or understood across the sector – something that must be rectified to ensure that the potential of such innovations and ADR can be realised.

Culture is the essence of communication. John Morhall demonstrates how, within the context of mediated dispute resolution, understanding the impact of culture on communication and negotiation is key to bringing the parties to a resolution that is on mutually-acceptable terms. John provides a useful practical guide for mediators, lawyers and their clients on how to navigate a mediation where parties are from divergent cultures.

The first of our two case notes examines *PT First Media (formerly known as PT Broadband MultiMedia TBK) v Astro Nusantara International BV and others and another appeal*, which has important ramifications for international commercial arbitration. Tamlyn Mills takes us through the key topical and controversial issues discussed in this case, including whether an unsuccessful party can resist the enforcement of an arbitral award on the grounds of an alleged lack of jurisdiction of the arbitral tribunal in circumstances where that party did not raise the issue at an earlier stage and whether a tribunal has the power to join third parties who are strangers to the arbitration agreement under the 2007 SIAC Rules without the consent of all parties.

The key issue in *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* concerned the interpretation of a clause in materially similar terms to clause 42.2 of Australian Standard 4000. The judgment reinforced that courts will continue to construct dispute resolution clauses robustly in order to give them commercial effect, but indicates that, in order to be valid the clause must set out the dispute resolution process or model to be employed in a way which does not leave the process subject to further agreement between the parties.

Thank you to all contributors for their scholarly work. Happy reading.