AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 29, Number 4

2019

EDITORIAL

The Panel of Editorial Consultants – *Ruth Charlton* 205

CASE NOTES – *David Spencer*

New Zealand Edition – Ordering Specific Performance of a Mediated Settlement Agreement; Mediated Settlement Agreement Not Privileged; and Mediation Media Watch NZ Edition 207

Mediation Media Watch – New Zealand Edition 213

ARTICLES

International Arbitration in Australia: 2017/2018 in Review – *Albert Monichino QC and Alex Fawke*

This annual article updates readers on the most important developments in international arbitration in Australia in the past year. It surveys legislative, case law and other developments between 1 September 2017 and 31 December 2018. 215

Australia and Singapore – Differences in Applications to Set Aside an Arbitral Award? – *Craig Edwards*

Both Singapore and Australia (referred to as States under the UNCITRAL Model Law on International Commercial Arbitration) have adopted the Model Law. However, there are subtle differences in the local legislation implemented by each State supplementing the Model Law in relation to the grounds for setting aside arbitral awards. The purpose of this article is to review the key cases on applications to set aside arbitral awards and critically analyse whether there are any legal or practical differences of significance between Singapore and Australia on which arbitral awards may be set aside under the Model Law. It is argued that while there are legal differences in terms of the legislative content, there are no practical differences of significance in interpretation by the Courts of the States. ... 234

Comparative Study of Asian Arbitration Centres vis-a-vis Public Interest and Transparency Measures – *Aayushi Singh*

Undeniably impending public interest in publication of awards and transparency of proceedings is worthy of attention, however till what extent should this right be strained remains contentious. The seemingly overwhelming benefits of transparency need to be weighed against the legitimate interest of parties in having disputes settled swiftly and confidentially. To make the analysis more detailed, attention has been devoted to institutional transparency in Asian arbitration centres (Singapore International Arbitration Centre, Asian International Arbitration Centre (erstwhile Kuala Lumpur Regional Centre for Arbitration), Hong Kong International Arbitration Centre and China International

Economic and Trade Arbitration Commission) vis-à-vis public interest. Measures that may be adopted by arbitral institutions during terms of pre-award and post-award transparency have been suggested. 244

Final Offer as a First Choice? Police Arbitration: A New Zealand Case Study – *Giuseppe Carabetta*

Arbitration has become the chosen method of resolving disputes over wages and conditions for police and other emergency workers in Australia, Canada, the United States, Europe, and elsewhere. This is because emergency workers, by virtue of their essential status, cannot necessarily engage in industrial action such as strikes. In the police sector, New Zealand takes a unique approach to resolving such disputes by utilising a blend of mediation and "final-offer arbitration". As this article shows, New Zealand has seen more mutually acceptable negotiated outcomes and ensured the reliable provision of police services under this model. Ultimately though, as explained by interviews with leading practitioners, broader structural and environmental factors may in part explain New Zealand's success, suggesting it may not entirely be repeatable by police forces overseas. 251

The Arbitrator as Mediator: Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610 – *George Pasas*

It can be tempting, as a party engaged in a lengthy arbitration, to seek to leverage the arbitrator's knowledge of the dispute to facilitate the process of settlement. Such a process is allowed, with strings attached, by s 27D of the Uniform *Commercial Arbitration Acts*. For the first time, Australian parties have guidance as to just how tangled those strings can become, with the recent Ku-ring-gai Council v Ichor Constructions proceedings revealing the dangers for parties seeking to have their arbitrator wear the hat of a mediator. 266

The Empty Idea of Mediator Impartiality – *Jonathan Crowe and Rachael Field*

Mediator neutrality has attracted significant criticism in recent decades. Some authors, such as Laurence Boulle, have suggested that these criticisms can be avoided by focusing instead on mediator impartiality. This shift is now enshrined in mediator codes of conduct in several jurisdictions, including Australia. This article argues that mediator impartiality fails to provide a tenable foundation for mediation ethics. The concept either reproduces the traditional problems of mediator neutrality or offers mediators and parties little practical guidance in understanding the mediator's ethical role. In either case, the notion of mediator impartiality itself is effectively empty, meaning it cannot supply a solid foundation for ethical practice. 273

Will the Creation of AFCA Be of Benefit to the Parties That Come Before It? – *Andrew Greenhalgh*

External dispute resolution (EDR) schemes have become a popular method of providing a low-cost, expedient and procedurally fair forum for eligible parties to attempt to resolve their disputes, particularly in the financial industry. The Financial Ombudsman Service, Credit and Investments Ombudsman and Superannuation Complaints Tribunal were among the most used EDR services in the financial and superannuation industries, but were found wanting in a recent report by a panel reviewing the financial system's EDR and complaints frameworks. These EDR bodies have now been replaced by the Australian Financial Complaints Authority (AFCA), a move which has been heavily criticised. This article argues that in spite of the limitations of the AFCA, if it is effectively managed such that the problems of its predecessor schemes can be overcome, complainants that come before it should be generally better off than they otherwise would have been. 281

A Comparative Analysis of the Mediation in Kazakhstan and States of Victoria and New South Wales – *Saida Assanova, Almas Serikuly and Arhat Abikenov*

Alternative dispute resolution is a popular means for resolving disputes in many countries, including Australia. Parties to a dispute in Australia try to avoid the lengthy litigation and prefer to mediate. Therefore, Australian experience of the development of mediation may serve as a good example for Kazakhstan, a country in Central Asia, which shares many similarities with Australia. This article discusses history of the use of mediation in Australia and Kazakhstan and provides an overview of legislation governing mediation in Kazakhstan and the Australian States of Victoria and New South Wales. In addition, authors of the article propose several recommendations the implementation of which may help Kazakhstan develop mediation in the country. This, in turn, may help the parties to a dispute save their time and find the win-win solution, as well as reduce the workload of public courts and save budget money. 289