A Word from the CEO

As I welcome you to our June AIDC Bulletin, our Training Manager, Lynne Richards, has just completed another successful mediation training week and the accreditation of a new crop of budding mediators from various parts of Australia engaged in many fields of daily activity including building and construction, public service, teaching, community work and the law. The next mediation training will be from 25 - 29 June.

Over 150 matters have been mediated at or through AIDC in the last 18 months either in our rooms in Sydney or by our case management process throughout Australia. The vast majority of the cases mediated have resulted in successful settlements for the parties. We are always particularly encouraged when we hear parties arriving for their case wondering what the process can possibly achieve and at the end of the day enthusiastically expressing their delight at the resolution reached.

AIDC hearing room in arbitration mode.

Anecdotal evidence suggests that domestic and international mediations, conducted by a competent mediator, enjoy over 80% settlement success. Mediation can be very effective in terms of reducing the time and cost of bringing a case to trial as, even if mediation does not achieve a final settlement of a dispute, it brings the parties to the table and can narrow the real issues in dispute, change perceptions, or turn the parties' minds to the possibility of settlement.

We encourage everyone to have regard to the seven key National Principles for Resolving Disputes developed by the *National Alternative Dispute Resolution Advisory Council* (NADRAC) The National Principles' statement sets out some basic ADR ideas. NADRAC is also developing a supporting guide for users of ADR services, "*Your Guide to Dispute Resolution*", which will be launched later this year. This Guide and the National Principles are intended to help make disputants feel comfortable about using ADR. To stay in the loop regarding progress on the Guide, and what NADRAC is doing more generally, I

encourage you to visit www.nadrac.gov.au.

As we all work to broaden our thinking about mediation and other dispute resolution mechanisms, it is timely to remind readers that the 11th National Mediation Conference with its theme "*Emerging dynamics in mediation—new thinking, new practices, new relationships*" will be held from 10 to 13 September 2012 at the Sydney Convention and Exhibition Centre. In our February Bulletin, AIDC's Training Manager, Lynne Richards, spoke with National Conference Convenor, Janice McLeay.

In this Bulletin's update section we also extend our dispute resolution horizons beyond Australia as Lorraine Hui, one of our former intern case managers, and her colleagues at Ashurst look at mediation as an international dispute resolution mechanism and how, in many jurisdictions in our region, mediation is viewed in the business community as a primary method of dispute resolution rather than an 'alternative' (Mediation, Not So Alternative After all?). Our new visiting intern from Hong Kong, Oma Lee, also shares some insights into mediation and arbitration in China.

Over the past 2 years, AIDC and its partner organisations ACICA and the Chartered Institute of Arbitrators (Australia) have been the driving forces behind important reforms of the arbitration regimes in Australia and the successful implementation in Australia of world class arbitration laws at the national and state levels. We reported on the new national arbitration laws in our December 2011 Bulletin. ACICA and AIDC have also been active in leading several other initiatives to further strengthen arbitration in Australia, including selling Australian arbitration overseas, positioning Australia as a preferred venue for ADR and, in particular, increasing the international arbitration profile of Australia in the region, and promoting Australia as a safe seat for international arbitration and develop Australia as a regional hub for commercial dispute resolution.

AIDC's CEO, Michelle Sindler and the Hon. Tom Bathurst, Chief Justice of NSW speaking at an arbitration forum in New Delhi, India

Continuing with these initiatives, ACICA, supported by AIDC and the Australian Government, Attorney-General's Department, is holding forums in China early in June (6 June, Shanghai and 7 June, Beijing). Speakers include AIDC Board member and ACICA President Doug Jones AM, ACICA Vice President Peter Megens and the Hon Marilyn Warren AC, Chief Justice of Victoria. If you are interested in hearing more about this and other similar initiatives visit the ACICA website.

In this Bulletin you will find an update of our current public training and professional development courses. Bookings are open not just for June and July but also for our August, October and November and December courses. ACDC's Mediation Training and Accreditation programme is recognised worldwide by the Chartered Institute of Arbitrators (CIArb) and participants who complete ACDC's mediation training course are eligible to apply for Associate Membership of CIArb while those who complete ACDC's Mediation Training and Assessment Programme are eligible to apply for Membership of CIArb (see more details at www.ciarb.net.au/join).

CIArb Young Members International Arbitraiton Forum held at AIDC in April

Our next professional development session will be on 7 June on “The Art of Facilitative Option Generation” with a session on “Mediating Workplace Disputes” on 10 July, followed by “Fast Track to Mediation” on 17 July.

ACDC Professional Development Session for Mediators - at AIDC in May.

Don’t forget to check our website (www.disputescentre.com.au) regularly for updates and new offerings. On request, all our public training courses and PD sessions can be delivered in-house at your premises or customized to meet your specific organizational needs.

AIDC and ACDC are also endorsing the 8th Annual Public Sector In-House Counsel Conference 2012 to be held in Canberra on 30-31 July 2012.

As always, I encourage you to register for our mediation training, professional development sessions and events or to book our rooms as the venue for your proceedings. I look forward to welcoming you here at AIDC very soon.

Michelle Sindler, CEO

Mediation - Arbitration: China's Practice and Perspective

1. Introduction By Oma Lee

Mediation and arbitration are proceedings which are widely used in China. Considering China's rapidly-expanding economy and global presence, these processes have seen great development in recent years, even intertwining and incorporating the other to achieve more efficient dispute settlements. The combination of mediation and arbitration, known as Med-Arb, creates a new hybrid dispute resolution process where the practitioner plays multiple roles as both mediator and arbitrator. If the parties are not able to agree on a resolution in mediation, the med-arbiter is empowered to make a binding decision.

This form of hybrid dispute resolution process has been practised in many countries. Mediation is known for its flexibility of approach, exploration of options and party autonomy. Binding arbitration provides finality to the dispute, while not being restricted by certain formal court rules. However, both processes have their drawbacks. Mediation, based on mutual agreement of parties alone, may be hard to achieve dispute settlement when parties are unable to agree; arbitration may render parties less control in dictating the terms of their settlement. As such, in using Med-Arb, clients not only have the flexibility of mediation, but also greater control over the process than they would in a separate arbitration process, but also enjoy greater finality in their settlement than they would have in a separate mediation. It's been suggested that the combination of mediation and arbitration complements the advantages of both proceedings, and reconciles the drawbacks of both, resulting in a fair, efficient and cost-effective process for resolving disputes.

However, Med-Arb has also led to the loss of some valued qualities and features of separate mediation and arbitration, such as neutrality, confidentiality and ownership of the outcomes by the parties. This has generated some criticisms, especially in common law countries. In Australia, Med-Arb is currently not as widely used as in China. Some are particularly sceptical about the fairness of an arbitral award from someone who has received confidential information in the mediation process. In Hong Kong, the dangers of potential bias in Med-Arb were highlighted in Gao Haiyan v Keeneye Holdings Limited (2).

China's Med-Arb is also subject to these criticisms, however, they need to be read within a Chinese context. Despite these reservations, Med-Arb is still preferred by many, and holds a prominent position in Chinese dispute resolution. The Chinese Med-Arb process is well-established in Chinese society. With China's rapid expansion in trade, it is crucial for Australia and other foreign trading partners to embrace the methods of dispute resolution commonly used by China.

2. China's Practice: Background

Part of Med-Arb's success in China could be attributed to the long history of alternative dispute settlement (ADR) in China, where mediation and arbitration have been long preferred over litigation. Given her strong emphasis on social harmony, China has had a strong history of ADR which continues to play an increasingly important role in the field of dispute settlements. The Chinese have always preferred mediation over litigation, seeing the former as adhering to the maintenance of social harmony, and the latter as a destructive force against it. These values are partly moulded by deep-rooted Confucianism, which have been further consolidated into the governing concept of "building a harmonious society" by the Chinese Communist Party. The unpredictability of outcomes, high costs and time-consuming proceedings have

further deterred people from seeking litigation, preferring to mediate or arbitrate instead.

Mediation was already widely practised in ancient China. Today, mediation is a very developed system and is subdivided into various categories such as People's Mediation, Judicial Mediation and other forms such as Administrative Mediation and Institutional Mediation, to name a few. People's Mediation is the mediation of civil disputes by people's mediation committees. These committees are set up in local villages and towns, and serve as the first gateway to peace for many local disputes. According to figures posted on the official website of the Chinese Ministry of Justice, over 840,000 People's Mediation bodies have been established across China. Judicial Mediation (also known as Court Mediation or Mediation with litigation proceedings) is mediation before the litigation process to reduce the pressure on courts. Other forms of mediation all serve various purposes and apply in different situations. With its values deeply rooted in traditional societal norms and philosophy, mediation is extensively used in Chinese society today, and is also holds an increasingly dominant presence in Arbitration proceedings as well.

Arbitration also enjoys a long history in China. A formal arbitration system was set up after the founding of the People's Republic of China (PRC) in 1949, whereby the government actively promoted arbitration and mediation as the preferred means for resolving domestic economic disputes. The modern Chinese arbitration system developed very quickly alongside the development of China's government. From dealing mainly with administrative measures and being strictly under government control, it has slowly developed into an internationally recognized arbitration system with much independence, party autonomy and enlarged scope of cases with the introduction of the 1995 Arbitration Law. The recent Interpretation on Certain Issues Relating to the Application of the Arbitration Law issued by the Supreme People's Court (SPC) in 2006 further served to strengthen the arbitration system in China. The China International Economic and Trade Arbitration Commission (CIETAC) is now one of the busiest commercial arbitration bodies in the world.

However, with the development of a more comprehensive system, some initial advantages of arbitration such as efficiency, flexibility, confidentiality, and cost have been compromised. Due to its procedures having been challenged in courts, arbitration now possesses more stringent procedural requirements. To reconcile these setbacks, the current development, is to combine these two proceedings. The long tradition of peacemaking and social harmony, as well as the deep-rooted presence of mediation in Chinese society provides a much advantageous backdrop for incorporating mediation into arbitration proceedings.

3. Mediation-Arbitration in China

In fact, even before the enactment of the Arbitration Law, the CIETAC had already encouraged parties to mediate their arbitration cases before the commencement of formal arbitration procedures. The CIETAC Rules allow for a combination of conciliation and arbitration. The 1995 Arbitration Law, also actively encourages the incorporation of mediation into arbitration, with the current 2005 rules of the CIETAC further setting up an established system for the combination of mediation and arbitration. In the past 60 years, mediation has successfully been used and helped to conclude many arbitration cases.

Accordingly, Chinese arbitrators would normally ask parties whether they would be willing to seek mediation. Either party may also propose mediation. If parties are willing to engage in mediation, the arbitral tribunal would start mediation proceedings. Mediation continues to be an option even after the

commencement of the arbitration process in China. Provided that an arbitral award has not been made, proposals for mediation can be raised several times at any stage of the arbitration.

If mediation is proposed and accepted, the arbitrator would step into the shoes of a mediator and meet separately with both parties to better clarify their positions, evaluate the merits of their case, and find common ground. If differences are fundamental, the arbitrator can end the mediation and continue arbitration. Either party can also withdraw from mediation and terminate the proceedings at any stage. If mediation ends, arbitration continues and an arbitral award is given. If consensus is possible, the arbitrator could suggest a settlement proposal at times. If mediation is successful in the arbitration process, the arbitral tribunal will draw up a mediation statement or consent award.

4. Critique of Med-Arb in China

Med-Arb in China opens a new page for more efficient and less costly dispute settlement, and many advantages have been attributed to it. It entails all the benefits shared by mediation and arbitration; the mutual agreement in entering into proceedings, the non-reliance on state power, as well as the advantages of confidentiality and flexible, simple procedures. It also helps reconcile some of the drawbacks of both, especially for arbitration, which is now subject to more stringent procedural requirements in China.

Med-Arb in China has fewer restrictions, and to a certain extent, it is arbitration with the perks of mediation. It achieves the reaching of a settled outcome based on consensus, saving of costs, enhancement of efficiency and cooperation, and most importantly for commercial parties, the maintenance of long-term business relations. It is less restrictive than arbitration alone, and has the ability to personalize settlements and adapt to each specific case requirement. Through Med-Arb, parties are able to play a more active role in determining the outcome, thus even when settlement is not reached and an arbitral award is given, they are less likely to challenge the outcome after extensive negotiation.

There are other advantages. An arbitrator already knows the case very well; avoiding time and cost spent by the parties in educating a new neutral party. The tribunal's services are used with much more flexibility, and the arbitrator could apply appropriate and relevant measures in order to reach the best dispute settlement results. The enforceability of a settlement agreement coming from Med-Arb is further protected by rendering the settlement as an arbitral award and having it enforced by the courts directly. Even more, settlement agreements under mediation could form part of a consent award and become enforceable under the New York Convention.

Nevertheless, Med-Arb does have its disadvantages. Med-Arb in China has been criticized for being subject to strict rules under the Arbitration Law, and providing less confidentiality than mediation. In particular the question of impartiality of the mediator/arbitrator has garnered most scepticism. Many believe that a person who mediates and then assumes the role of arbitrator may be biased by what has been conveyed to him informally and confidentially in the mediation process, especially during "caucus". As a result, parties are likely to be inhibited in their discussions with the mediator it they know that there is a possibility that he might become an arbitrator at a later stage. This deters effective dispute resolution.

It is believed that the dangers of caucusing are less serious in China, scholars Gabrielle Kaufmann-Kouler and Fan Kun(3) have written extensively on this. It is clear that the critics of Med-Arb are actually

expressing doubts about the abilities of mediators/arbitrators to perform their role, rather than about the Med-Arb process itself. Experienced mediators/arbitrators will be able to move from one role to the other and ensure that their judgement is not affected when arbitrating. The ability to disregard damaging facts or inadmissible evidence when adjudicating is practiced often in Chinese courts. The Chinese believe that well-trained arbitrators would have the ability to remain impartial. Even more, the danger of caucus is open to interpretation in the Chinese context: although some questioned the impartiality of the arbitrator/mediator, others have claimed that the trust built between arbitrators and the parties through mediation could actually facilitate a more accepted arbitral award. In fact, some Chinese believe that after a failed mediation, the mediator is the most ideal person to arbitrate the case and deliver a fair and acceptable arbitral award. Despite the drawbacks of Med-Arb, it is still preferred and used by many in China.

5. Comments

Med-Arb has also gradually been accepted and reformed in other countries. In Australia, s27D of the Commercial Arbitration Act 2010 (NSW) provides an arbitrator with powers to act as a mediator. To encourage the use of Med-Arb, the Act has introduced some new provisions to combat some its problems. For example, a written consent is required from parties seeking to engage the same mediator as arbitrator(s27D(4)), it also requires the arbitrator, before taking any further steps in the proceedings, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration (s27D(7)). The Hong Kong's Arbitration Ordinance and the Singaporean International Arbitration Act have both incorporated similar provisions on Med-Arb in recent years. With China's boom in commercial dealings, Med-Arb will continue to develop and play a prominent role in both domestic and international cases. Much could still be done to reform the existing Med-Arb framework in China, the proceedings would have to adapt and develop along with China's economic globalization. Currently, foreign investors recognize international commercial arbitration as the most effective and systematic form of ADR in China. It is hoped that they would also embrace Med-Arb. Currently, parties are much more willing to seek Med-Arb when the case concerns domestic affairs. While the Chinese are more willing to seek peace through mediation, echoing this long-stemmed tradition, foreign parties are usually less willing to mediate and have more faith in the arbitrator acting as an independent adjudicator in their dispute. Foreign companies should recognize the efficiency and fostering of strong business relations that Med-Arb brings in settling disputes with their Chinese counterparts. Taking advantage of the rich tradition of mediation in China, and further combining it with Arbitration, such practice would surely maintain Chinese ADR at the forefront of effective international dispute resolution.

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1. Oma Lee is an intern at AIDC and ACICA. She recently completed her penultimate year of study for an LLB at the Chinese University of Hong Kong. Part of this article was written with reference to research done by scholars Gabrielle Kaufmann-Kouler and Fan Kun, in "Integrating Mediation into Arbitration: Why it works in China" ?", 25 Journal of International Arbitration 4 (2008), pp. 479-492.
2. [2011] 3 HKC 157

3. Id. Note 1

Not-so "alternative" after all?

Mediation as an international dispute resolution mechanism

Mediation has been described as the "alternative dispute resolution method of choice in the business community" (1) , and is widely recognised for the time and cost savings that it offers. It is a dominant form of dispute resolution in certain regions of the world, including the Asia-Pacific, where consensus-based mechanisms for dispute resolution are a part of local culture.

As Australia increases its global commercial ties, particularly in the Asia-Pacific region, the risk that disputes will eventuate in cross-border transactions increases. In addition, Australian parties are likely to be faced with greater insistence by counterparties to the inclusion of mediation in dispute resolution clauses or have mediation proposed when a dispute arises. Australian parties should be aware of and understand mediation as a method of dispute resolution that may be favoured by their trading partners in these regions. Doing so provides greater business opportunities and a stronger foundation for long term stability in trading relationships with Asian counterparties.

What is mediation?

Mediation is an informal and confidential process whereby a neutral third party facilitates negotiations between disputing parties to work towards finding a mutually acceptable outcome. The mediator can be actively involved in discussions but generally has no power to adjudicate any issue or determine which party has the stronger case (unless the parties agree to the mediator taking on a more evaluative role).

There are numerous advantages to mediation. In the current economic climate where outcome certainty and financial pressures pervade daily business life, mediation offers a highly flexible and cost effective process that boasts success rates in the 75-85% range (2).

Mediation allows the parties to focus on objectives rather than on strict legal rights, promoting greater flexibility of process and creativity of outcome, all of which remain in the hands of the parties. Because the outcome is consensual rather than imposed, it is more likely to be implemented in practice. Even if a mediation does not result in a binding agreement, it may assist the parties in narrowing the issues in dispute. All of these factors increase the likelihood that the parties will be able to maintain a healthy business relationship after resolution of the dispute.

Critically, mediation is a less time consuming and more cost effective mechanism for dispute resolution than either litigation or arbitration. A recent audit of mediation services in the United Kingdom found that by achieving the early resolution of cases that would otherwise have been litigated, the commercial mediation profession will save businesses around £2 billion in legal fees, wasted management time, damaged relationships and lost productivity per year (3).

While mediation may not be suitable in all circumstances (for example, if the parties require a remedy not available through mediation) or appropriate for all disputes, it is flexible enough to apply to a wide variety

of issues.

Mediation in an international context

In many regions, in particular in the Asia-Pacific, Middle and Far East, mediation and other consensus-based forms of dispute resolution are preferred to more adversarial approaches. For example, mediation is the primary method of dispute resolution in China, where the administrative and social advantages of the process have long been recognised . In the main, this preference stems from a cultural philosophy that elevates the importance of mutual compromise as a way to ensure the maintenance of harmony in relationships.

While mediation is used in many jurisdictions at a domestic level, it is employed less on an international level. There are likely to be many reasons for this, key ones being the lack of professional and regulated norms existent in the process. Mediation does not yet have internationally recognised standards for practice, nor does it benefit (as international arbitration does) from having in place the infrastructure to ensure the enforceability of decisions at an international level. However, given its evident advantages and with the support of governments, users and institutions, it is expected to grow. An example of such a leadership initiative is the organisation of regional forums such as the Asia Pacific Mediation Leadership Summit held in Bangkok in December 2011. The objectives of the summit included the promotion of cross-cultural awareness and understanding of mediation, and the development of strategies for change to advance mediation, other conflict transformation and peace building processes that ensure sustainable peace in the Asia Pacfic Region.

Given the emphasis placed on consensus-based, flexible, dispute resolution processes in the Asia-Pacific region, companies entering into cross-border contracts with counterparties in these jurisdictions should consider including mediation in their dispute resolution strategies. This can be done by way of a tiered dispute resolution clause that provides for mediation in the first instance (prior to arbitration or litigation) or on an ad-hoc basis when a dispute arises. In doing so, parties should be conscious of the fact that their contemporaries in other jurisdictions may hold different perceptions of the mediation process and be prepared to be more flexible in their approach.

There are a number of institutions worldwide that provide model mediation clauses and guidance on mediation procedures, including procedural rules (which could be referred to in an agreement or used for guidance in drafting ad hoc procedures). These institutions also administer mediations and can provide support and administrative facilities for international and domestic mediations. Some examples include:

In Australia:

- ACDC (the Australian Commercial Disputes Centre); and
- IAMA (the Institute of Arbitrators & Mediators Australia).

In the Asia Pacific region:

- HKIAC (the Hong Kong International Arbitration Centre);
- SMC (the Singapore Mediation Centre); and

- JCAA (the Japan Commercial Arbitration Association).

Further abroad:

- CEDR (the Centre for Effective Dispute Resolution);
- ICC (the International Chamber of Commerce); and
- LCIA (London Court of International Arbitration).

Conclusion

In many jurisdictions, mediation is viewed in the business community as a primary method of dispute resolution rather than an 'alternative'. It can be used as effectively on an international level as it is domestically and may provide a culturally sensitive and relationship-focused approach to dispute resolution. It is important for Australian companies entering into contracts with Asian counterparties to be aware of the potential preference for mediation (as an initial step or as part of a hybrid process) and the advantages that mediation can bring, and to consider agreeing to mediation when contracting or after a dispute arises.

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1. T Martin, International Dispute Resolution, Independent Petroleum Association of America & Association of International Petroleum Negotiators, p. 2
2. T Martin, opt sit, p. 3
3. Centre for Effective Dispute Resolution (CEDR), The Fifth Mediation Audit: A survey of commercial mediator attitudes and experience, 15 May 2012
4. D Chow, Development of China's Legal System will Strengthen its Mediation Programs, Cardozo Journal of Conflict Resolution, Volume 3.2 p. 1, viewed May 2012 at http://cojcr.org/vol3no2/notes01.html

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Major partner organisations