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Developments in Dispute Resolution in Australia, New Zealand and Singapore

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1. Introduction

Dispute resolution in the Asia Pacific region has not developed in isolation. Instead, it has developed in parallel with international and regional developments. Particularly in the construction context, the use of mediation, statutory adjudication and arbitration has become standard, with exciting developments being made in emerging dispute resolution tools, such as dispute boards. Of course, while it is possible to identify some broad trends in dispute resolution within the Asia Pacific region, the development process has been far from uniform across jurisdictions.

One of the peculiar aspects of the Asia-Pacific region is the diversity of the legal systems within the region. While Australia, New Zealand and Singapore are all common law jurisdictions, many jurisdictions within the Asia-Pacific are of the civil law tradition. These include China, Indonesia, Cambodia, Japan, South Korea, Thailand, Taiwan and Vietnam. As a result of this legal diversity, dispute resolution can become an exercise in compromise. Practitioners from different legal backgrounds can struggle to reconcile different approaches to various procedural issues such as document discovery, witness testimony and the use of experts. Thus, an important consideration in dispute resolution that involves parties from various jurisdictions is how best to accommodate each parties' expectations.

This issue is particularly conspicuous in international arbitration due to the relative formality of the proceedings. Thus, a significant amount of attention has been paid to procedural convergence in international arbitration. A number of practices have come to be accepted in order to bridge the common/civil law divide. For example, where lawyers from common law jurisdictions often expect a short a plain statement of the claim in order to commence proceedings, civil law lawyers often expect the case to be fully developed before it is filed. Thus, a compromise has emerged whereby statements of claim in international arbitration will contain as much information as possible at that stage of proceedings. While this may fall short of the detail expected by civil lawyers, it will be significantly more than the mere 'notice pleading' to which common law lawyers are accustomed. Similarly, a number of other practices have emerged in international arbitration in order to ensure that it is a truly neutral dispute resolution mechanism.

It is in this context that dispute resolution in the Asia-Pacific must be considered. In addressing the expectations of various parties, a neutral and mutually acceptable procedure must be available to the parties in order for it to be effective. As mentioned, this is most evident in international arbitration, but it also has relevance for other dispute resolution mechanisms such as adjudication and mediation. It has also affected the way in which these mechanisms have developed in the Asia Pacific region.

This paper will examine the most important developments in mediation, statutory adjudication and arbitration within Australia, Singapore and New Zealand. These developments have occurred at a legislative, judicial and cultural level. In order for a dispute resolution framework to be successful, modern and effective legislation will need to be implemented. Additionally, a supportive judiciary is required to ensure that the legislation is applied in a sensible and supportive manner. Finally, and possibly most importantly, a culture must be fostered within the legal profession that is open to, and informed of, a

[*] The author gratefully acknowledges the assistance provided in the preparation of this paper by Timothy Zahara, Legal Assistant, of Clayton Utz, Sydney.

wide variety of dispute resolution options, and understanding of different approaches that might be taken to dispute resolution by parties from different legal backgrounds. It will be seen that each jurisdiction provides a modern, supportive and stable context for dispute resolution, each with its own peculiarities, advantages and disadvantages.

2. Arbitration

2.1 Australia

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. Particularly within the construction context, arbitration has always been a popular dispute resolution option. Recently, however, the strong and steady growth of the Australian economy over the past decade and the opening of the Asian markets in the mid-1990s has further advanced the use of arbitration in other areas, particularly the energy and trade sectors.

Arbitration in Australia has experienced significant growth in recent years. This can be attributed to the growing familiarity on behalf of legal practitioners and their clients of the importance and advantages of arbitration. In 2011, changes to the Australian arbitration landscape both internationally and domestically have helped develop Australia as an attractive hub for international arbitration and put Australia at the forefront of international arbitration practice. Amendments to the *International Arbitration Act 1974* (Cth) ("**IAA**") and the new Commercial Arbitration Acts (collectively referred to as the "**CAAs**") represent a new dawn for arbitration in Australia. Coupled with the pro-arbitration approach taken by Australian courts, Australia is well positioned to keep pace with international standards, user expectations and ready to grasp the growing opportunities that arbitration has to offer.

The amendments to the IAA introduce a number of significant changes to the international arbitration regime. Significantly, the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") replaces the 1985 version as the applicable law under the IAA. As a result, provisions on the enforcement of interim measures to which parties could previously opt-in have become obsolete and have therefore been repealed.

Reforms are also taking place on a domestic level. In early 2010, the Standing Committee of Attorneys-General agreed to introduce uniform arbitration legislation in all states and territories based on the 2006 Model Law. This is a significant step forward in modernising Australia's domestic arbitration legislation and bringing domestic arbitration legislation into alignment with the federal system. The transition to arbitration under the Model Law also means that practitioners of domestic arbitration in Australia will be able to transfer their procedural skills to the group of over sixty foreign jurisdictions where the Model Law is in force. For the parties involved in arbitration, these amendments will increase the efficiency of the arbitral process and translate into greater cost and time savings. At the time of writing, all states and territories aside from the Australian Capital Territory have passed new legislation bringing Australia's domestic regime into line with international best practice.

The Australian Centre for International Commercial Arbitration ("**ACICA**") is Australia's premier international arbitration institution. Following the successful launch of the ACICA Arbitration Rules in 2005, ACICA has recently revised its Expedited Arbitration which were first published in late 2008. The ACICA Expedited Rules aim to "provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and the complexity of issues or facts involved."[1]

More recently, ACICA entered into a cooperation agreement with the Australian International Disputes Centre ("**AIDC**"), from which it operates at a new venue in Sydney. In addition to the state-of-the-art hearing facilities, the AIDC also provides all the necessary business support services including case management and trust account administration provided by skilled and professional staff.

[1] *ACICA Expedited Arbitration Rules* Art 3.1.

The changes to both the legislative framework in which international and domestic arbitration operates in Australia, and the improvements to the ACICA rules and facilities shows that arbitration is very much alive in Australia.

2.2 New Zealand

Both international and domestic arbitrations are governed in New Zealand by the *Arbitration Act 1996* (NZ). The *Arbitration Act 1996* (NZ) closely follows the Model Law, and was amended in 2007 to bring it into line with the 2006 amendments to the Model Law.[2] Additionally, Schedule 2 of the *Arbitration Act 1996* (NZ) provides a number of additional optional rules, which parties may apply on an opt-in basis. These additional rules supplement the provisions of the Model Law, for example, by providing an avenue for appeal on the basis of an error of law, should the parties so desire.

In addition to its modern legislative framework, the New Zealand judiciary has shown a willingness to uphold the ideals and principles of arbitration. A relatively recent pro-enforcement decision of the New Zealand Court of Appeal indicated the court's commitment to upholding the objectives of the arbitration act, namely:[3]

> (a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
>
> (b) To promote international consistency of arbitral regimes based on the Model Law; and
>
> (c) To promote consistency between the international and domestic arbitral regimes in New Zealand; and
>
> (d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
>
> (e) To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
>
> (f) To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in the Third Schedule).

The court set out these objectives in its decision, and noted that

> "*Of particular relevance here are the purposes of encouraging the use of arbitration as an agreed method of resolving disputes; the promotion of international consistency of arbitral regimes based on the Model Law; and the facilitation of the recognition and enforcement of arbitration agreements and arbitral awards. Consistent with these purposes, the courts of New Zealand have followed the decisions of courts in other jurisdictions in setting a high threshold when considering applications to refuse recognition or enforcement of an arbitral award under article 36*."[4]

While there is a relative paucity of decisions from New Zealand courts on international arbitration issues, it is clear that New Zealand judiciary's solid reputation for independence and high-calibre decision-making is well founded, particularly in the arbitration context. Given the importance of impartiality and independence to international arbitration, it is likely that New Zealand will continue to grow as an attractive destination to parties looking for a neutral venue for arbitration.

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[2] *Arbitration Amendment Act 2007* (NZ).

[3] See *Arbitration Act 1996* (NZ) s 5.

[4] *Hi-Gene Limited v Swisher Hygiene Franchise Corporation* [2010] NZCA 359, [19]-[20].

In pursuing this objective, the New Zealand Dispute Resolution Centre houses the New Zealand International Arbitration Centre ("**NZIAC**"), which provides institutional and administrative support for arbitrations seated in New Zealand. The NZIAC has its own set of institutional rules for both domestic and international arbitrations, and maintains a panel of arbitrators who are globally recognised as leaders in international dispute resolution. The NZIAC aims to promote New Zealand as an arbitral seat on the basis of its supportive legal system, independence, location and strong legal profession. As links between Asia-Pacific nations continue to strengthen, New Zealand plays an important role in strengthening the region's position as a dispute resolution destination.

2.3 Singapore

Singapore is well known for its commitment to ensuring that there is minimal court intervention and maximum party autonomy in arbitration. A pro-arbitration policy has been a feature of the judiciary since the mid-1980s when Singapore signed the New York Convention, and passed the *Arbitration (Foreign Awards) Act 1986*. Since then, Singapore has been focused on being a pre-eminent arbitral seat for international users, and other jurisdictions can look towards Singapore to see the advantages of pro-arbitration judiciary. The Singapore International Arbitration Centre ("**SIAC**") became operational in 1991, and has been a tremendous success in the region. SIAC can be considered as an important international arbitration centre in Asia. In 2012, SIAC handled 235 cases, more than tripling the number of cases it was handling a decade ago.[5] Singapore has been successful at marketing itself as a seat for international commercial arbitration because it understands that international arbitration can be a lucrative business and as a result has followed the advice of the private sector and specialists in arbitration to implement a strategy to lure international arbitration its way.

Singapore offers many advantages to uses of international arbitration: physical and telecommunications infrastructure, ease of access and central geographical location. It also offers a familiar legal system for many western parties and minimal judicial intervention. Singapore's judiciary is also highly pro-arbitration as can be seen from the 2009 Court of Appeal decision of *Tjong Very Sumito v Antig Investments Pte Ltd*[6] in which the Singapore Court of Appeal stated that:

> "*An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy in deciding both the method of dispute resolution...as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration.*"[7]

Singapore continues to have a twin regime with a separation between international and domestic arbitration. This had allowed a more interventionist regime to take hold in the domestic sphere without this affecting the international arbitration regime. The Singapore Act closely resembles the Model Law which makes it a favourable jurisdiction to practitioners from both common and civil law countries.

In 2009, the Singapore International Arbitration Act was amended.[8] These amendments came into force on 1 January 2010. The changes conferred powers on the Singapore court to make interim orders in aid of international arbitrations including freezing parties' assets, giving evidence by affidavit and for the preservation of evidence related to the dispute.[9] The Singaporean Courts are granted this power regardless

[5] Singapore International Arbitration Centre, *Annual Report 2012*, p 4 accessed at <http://www.siac.org.sg/images/stories/documents/SIAC_Annual_Report_2012.pdf>.

[6] [2009] SGCA 41.

[7] *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] SGCA 41, [28].

[8] *International Arbitration (Amendment) Act 2009* (Singapore).

[9] *International Arbitration Act* (Singapore) s 12A.

of whether the arbitration is seated in Singapore. While this power could be considered outside the scope of Singapore's policy of minimal intervention, the Minister of Law made an effort to outline how this new discretionary power could be properly used.[10] These situations were focused on situations where the arbitral tribunal had no power to affect the change.[11] While the power is discretionary, if it is used within the pro-arbitration framework already established in Singapore, there is no reason it will be used in a way which would be detrimental to the arbitration industry. Another change that was introduced by the amendments was the transferral of the power to order security for costs from the courts to arbitral tribunals in both domestic and international arbitrations.

The success of arbitration in Singapore is based, partly, on the pro-enforcement policy of the judiciary and the amendments to the Singaporean regime compliment this policy.

3. Adjudication

Adjudication is a method of binding dispute resolution distinct from arbitration and litigation. It is unsupported by arbitration laws and international conventions, the adjudicator decides based on his or her own skills and enquiries rather than purely on the submissions of the parties. It is often interim though binding, and its enforcement is fraught with some difficulty. Nevertheless, it is capable of producing a quick, inexpensive determination of a disputed matter. It is normally carried out under strict timeframes in order to ensure that its potential for speed and efficiency is fulfilled.

In recent years, adjudication has rapidly risen to prominence in construction dispute resolution, especially in the UK and Australia. It is now spreading to several other countries, including New Zealand and Singapore. One interesting feature of this is that the adjudication method is used for a number of quite different purposes. These different purposes broadly fall into the following categories:

- as part of a statutory scheme for ensuring progress payments are made to contractors and subcontractors (for example, New South Wales' Security of Payment legislation);
- as part of a statutory scheme which entitles all construction disputants to an initial adjudication of their disputes, the result of which is binding in the interim, pending a final arbitration or litigation (such a scheme operates in the UK);
- as a contractually agreed mechanism for "on the run" dispute resolution, which is binding in the interim but does not replace final arbitration or litigation (for example, the FIDIC Dispute Adjudication Board); and
- as a contractually agreed mechanism for final dispute resolution, instead of arbitration or litigation.

This paper will focus on statutory schemes ensuring progress payments to contractors and subcontractors, as this species of adjudication is of most relevance to the construction industry.

3.1 Australia

As adjudication falls within the powers of Australia's state and territory governments, the various states and territories have implemented slightly different statutory adjudication schemes. New South Wales' scheme, however, was the first of the statutory schemes introduced in Australia, and it has for the most part served as a model for the rest of Australia.

Under the NSW Act,[12] if a construction contract makes provision for progress payments, the legislation effectively turns the contractor's contractual entitlement into a statutory one. (If the contract does not

[10] Singapore Parliamentary Debates, Official Reports, vol 86 (K Shanmugam, Minister of Law).

[11] Ibid.

[12] *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**NSW Act**").

make such provision, then certain default provisions take effect so that the contractor is entitled to monthly progress payments.)

Armed with this statutory entitlement to progress payments, the contractor may make a "payment claim" setting out an amount it claims to be due. The owner must respond with a "payment schedule", setting out the amount the owner believes to be due and giving reasons for any difference from the payment claim.

If the amount shown in the schedule is less than the amount claimed (or if the owner fails to pay), the contractor may apply for adjudication of the matter. This triggers the appointment of an adjudicator. The owner is entitled to make a written response to the contractor's adjudication application, but apart from that, the Act does not specify any other procedures to be followed. Procedure is effectively at the discretion of the adjudicator. A determination must be made within 10 business days of the adjudicator's appointment, unless the parties agree otherwise.

If the owner does not pay the amount due under the adjudicator's determination, the contractor may give notice of an intention to suspend work, and may also obtain an "adjudication certificate" which can be filed in court as a judgment for a debt.[13]

The NSW Act applies to construction contracts that relate to work carried out inside New South Wales. This is true even where the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.[14] It is important to note that it is not possible to exclude the operation of the NSW Act by contract.[15] Further, the NSW Act does not affect any other rights that parties may have under contract, and does not affect any civil proceedings that may be commenced under the contract.[16]

For the first few years of its operation, the effectiveness of the NSW legislation to improve contractor cash flow was severely limited, for two reasons. Firstly, the owner was able to bring a cross-claim as a defence against contractor proceedings to enforce an adjudication determination as a debt. Secondly, an owner could opt to provide security pending the outcome of final dispute resolution proceedings instead of paying cash. This meant that a contractor could still be required to undertake full-scale litigation before receiving payment—the very thing the Act was trying to prevent. However, now that these options have been eliminated,[17] the NSW Act has experienced an enormous increase in use.[18] (In Victoria there is still a limited right to provide security instead of paying an adjudicated amount.[19])

In construction contracts to which the NSW Act applies, the methods available to a claimant to enforce the adjudication have been significantly increased. Further, the statutory scheme prescribes a strict timetable for the resolution of disputes, provides for enforcement of the adjudicator's decision and provides a general exclusion of liability on the part of the adjudicator in respect of "anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions"[20] under the Act. The ultimate aim is that the NSW Act encourages the quick and efficient resolution of disputes. In the First Reading Speech to the 2002 Amendment Bill, the Minister outlined the importance of ongoing payments:

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[13] Having obtained an adjudication certificate, a subcontractor may apply for a debt certificate under the *Contractors' Debts Act* 1997 (NSW) so that it can claim the amount due from the head contractor directly from the owner.

[14] NSW Act s 7.

[15] NSW Act s 34.

[16] NSW Act s 32(1).

[17] By the *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW).

[18] Over 1,000 adjudications were made in the two years after the amendments were made, compared to only 116 applications in the first four years of the Act's operation.

[19] Victorian Act s 25.

[20] NSW Act s 30.

> *"Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act."*[21]

Statutory adjudication in New South Wales, indeed within Australia, has been a successful measure in providing prompt, inexpensive and effective dispute resolution options for the construction industry.

3.2 New Zealand

In 2002, New Zealand introduced a statutory adjudication scheme that was similar to the Australian scheme.[22] The New Zealand scheme applies to contracts that related to carrying out construction work, with only selected provisions applying to residential construction work.[23]

The NZ Act creates a statutory right to progress payments, subject to the express agreement of the parties.[24] The progress payments provisions in the NZ Act only "apply to the extent that those provisions relate to any matter for which a mechanism has not been agreed on between the parties".[25] The "to the extent" language has the potential to create quite a complex relationship between the Act and the agreement of the parties.

The NZ Act entitles the contractor to serve payment claims on the principal, and requires the principal to issue a response to such claims (often referred to as a "schedule").[26] Similarly to the NSW Act, "pay when paid" provisions are rendered of no effect.[27]

The NZ Act also creates a protected right in the contractor to suspend work for non-payment of amounts due.[28] The right to suspend arises in three sets of circumstances: first where the principal has failed to provide a payment schedule in response to a payment claim, secondly where the principal has failed to pay an amount set out in a payment schedule, and thirdly where the principal has failed to pay an amount set out in an adjudicator's determination.[29]

A party to a construction contract has the right to refer a "dispute" (which includes a disagreement) to adjudication, except where it is the subject of an international arbitration agreement.[30] A determination on the matter of a payment is enforceable and may be recovered as a debt due in any court.[31] However, a determination about the "rights and obligations" of the parties is not enforceable,[32] which means that if a party fails to comply with it, the other party may bring proceedings to enforce it, but the court need only have regard to, not be bound by, the adjudicator's determination.[33]

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[21] NSW Legislative Assembly Hansard, 12 November 2002, 6541.

[22] *Construction Contracts Act 2002* (NZ) ("**NZ Act**").

[23] NZ Act ss 9–10.

[24] NZ Act s 16.

[25] NZ Act s 15.

[26] NZ Act ss 20–21.

[27] NZ Act s 13.

[28] NZ Act s 72.

[29] NZ Act s 72.

[30] NZ Act s 25.

[31] NZ Act ss 58–59.

[32] NZ Act s 58(2).

[33] NZ Act s 61.

In January 2013, the *Construction Contracts Amendment Bill* was introduced into the New Zealand parliament. The Bill proposes to remove most of the differences in the NZ Act between residential and commercial contracts, expand the scope of the NZ Act to include design, engineering and quantity surveying and to extend the enforcement process to apply to non-monetary disputes. The Bill is presently being considered and if it is enacted will come into effect on 1 November 2013.

3.3 Singapore

Singapore adopted a statutory adjudication regime with the introduction of the *Building and Construction Industry Security of Payments Act 2004* (**"Singapore Act"**). After Australia and New Zealand, Singapore is the third state in the Asia Pacific region to introduce adjudication as a dispute resolution mechanism for construction contracts. The Singapore Act came into force on 1 April 2005, and was revised in 2006. The aim of the Act is to ensure, by mean of a statutory process, the completion of construction projects in Singapore through the improvement of cash flow. The Singapore Act bears the same name as the NSW Act on which it was modelled, although the acts are not identical.

Similarly to the NSW Act, the Singapore Act applies regardless of whether the parties express that the law of Singapore is to govern their contract,[34] and cannot be contracted out of.[35] The Singapore Act also bars any "pay when paid" or "pay if paid" clauses.[36]

Under the Singapore Act, a claimant has the right to apply for adjudication through an Authorised Nominating Body ("**ANB"**) if it does not receive a payment response (similar to a payment schedule under the NSW Act), or if the claimant disputes the response amount specified in the respondent's payment response.[37]

If a claimant make an adjudication application, the ANB is required to appoint an adjudicator.[38] The adjudicator must make a determination within 7 days after the commencement of the adjudication, and the adjudicator's determination is binding.[39] The adjudicated amount is payable within 7 days after the adjudicator's determination is served on the respondent, or by the date specified in the adjudicator's determination (whichever is later).[40]

In contrast to the NSW Act, the Singapore Act provides a review system for adjudication determinations if the adjudicated amount exceeds the amount contained in the payment response by more than SGD100,000.[41] The respondent must, however, pay the claimant the amount specified in the determination before a review application can be filed.[42] Once a review application has been filed, the ANB is required to appoint a review adjudicator or a panel of three review adjudicators to review the determination.[43] The review is conducted in a very similar fashion to the original determination, with the review adjudicator (or adjudicators) either substituting the original adjudication determination for any other determination that is considered appropriate, or refusing the review application.[44]

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[34] Singapore Act s 4(1).

[35] Singapore Act s 36.

[36] Singapore Act s 9.

[37] Singapore Act ss 12(2)–(3).

[38] Singapore Act s 14.

[39] Singapore Act s 17.

[40] Singapore Act s 22.

[41] Singapore Act s 18(1) and *Building And Construction Industry Security of Payment Regulations 2005* reg 10.

[42] Singapore Act s 18(3).

[43] Singapore Act s 18(6).

[44] Singapore Act s 19(4).

An adjudication determination is enforceable by the court in the same manner as a judgement of the court.[45] However, in addition to the right to have the determination judicially enforced, the claimant is entitled to suspend work or supply if the respondent fails to pay the full adjudicated amount.[46] The suspension ends when full payment is made. Additionally, the claimant has the right to exercise a lien on goods supplied by the claimant.[47]

(a) *Case law on the validity of an adjudication determination*

The role of the court in exercising a supervisory role over an adjudicator's jurisdiction to hear and determine payment claims under the Singapore Act has been the subject of a number of recent decisions by Singaporean courts.

It should be noted that the Singapore Act has provisions for a dispute settlement period which affords the respondent a second opportunity to issue a payment response and also for a respondent, aggrieved by a determination to apply to a panel of review adjudicators.[48] Therefore, the courts had to adopt a special approach in deciding applications to set aside adjudication determinations.[49] In this context, a significant volume of case law regarding security of payment and construction adjudication has been rendered. Traditionally, the courts have adopted a restrictive approach towards interfering with an adjudicator's determination, on the basis that a court should not re-examine the merits of a determination—only the validity of the adjudication determination.[50] A recent decision has found that in order for a determination to be valid, the adjudicator must comply with the rules of natural justice.[51]

These recent developments highlight the fact that the Singapore courts are aware of the legislative intent behind the Singapore Act, which is to provide a statutory regime for payment disputes to be adjudicated quickly and cost-effectively. Therefore, Singapore's courts have been reticent to interfere with adjudicators' determinations unless the determination has failed to satisfy the basic and essential conditions for a valid determination or there has been a breach of natural justice.

4. Mediation

4.1 Australia

Australia has a strong history of mediation, and mediation has continued to grow in popularity as an option for dispute resolution both in commercial law and in other areas of the law such as family law. Two recent developments in Australia's mediation framework include the introduction of pre-litigation requirements and the National Mediator Accreditation System.

(a) ***Introduction of Pre-Litigation Requirements***

The introduction of pre-litigation requirements in both the Federal and New South Wales jurisdictions has the capacity to greatly expand the use of ADR mechanisms and highlights both governments' approval of ADR techniques in dispute resolution. The purpose of these requirements is to encourage ADR as the

[45] Singapore Act s 27.

[46] Singapore Act s 26.

[47] Singapore Act s 25.

[48] Under section 19 of the Singapore Act.

[49] Kik Fong Chow - *"Validity of an adjudication determination : recent decisions in Singapore"* - 18 November 2010 published by the Chartered Institute of Arbitrators

[50] *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733.

[51] *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658.

forerunner to considering formal ligation and to encourage both professional and public awareness of ADR as a preeminent dispute resolution mechanism.[52]

(i) Civil Dispute Resolution Act 2011 (Cth)

The *Civil Dispute Resolution Act 2011* (Cth) came into force in August 2011. It mandates that parties must take "genuine steps" to resolve the dispute before commencing litigation in the federal courts.[53] The parties must file statements outlining the genuine steps that they have taken before beginning litigation.[54] The requirements do not preclude the parties from litigating without having taken genuine steps to resolve the dispute, but the failure to do so may impact upon costs orders and increase the likelihood of court annexed mediation being recommended for case management purposes.[55] The requirement of 'genuine steps' is based upon recommendations from the National Alternative Dispute Resolution Advisory Council (**NADRAC**).[56] NADRAC recommended that a flexible approach be instituted so as to allow the parties a range of options to choose from.[57] While the options that parties can consider include both formal and informal dispute resolution mechanisms, there is an explicit affirmation of formal ADR processes within the Act.

The Act constitutes the federal government's response to the NADRAC report 'The Resolve to Resolve' which strongly advocated for pre-litigation steps to be included in any regime to boost involvement in ADR and to make the practice the natural forerunner to any steps in litigation.[58] NADRAC argued that the more that ADR is used to resolve disputes and provide benefits to the parties, the more receptive lawyers and disputants will be to its use. It is for this reason that "genuine steps" does not include too prescriptive a regime, and does not prescribe a high burden of cost or time on the parties.

(ii) Courts and Crimes Legislation Further Amendment Act 2010 (NSW)

The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) inserted the requirement that parties must take reasonable steps before commencing litigation into the *Civil Procedure Act 2005* (NSW).[59] This ensures that parties take reasonable steps to resolve the dispute or to at least narrow the issues in dispute. The standard of reasonable steps is defined by the pre-litigation protocols and is very similar to the genuine steps requirement outlined in the Commonwealth Act. The amendments operate in a very similar way to those outlined in the federal legislation and will very likely increase the use of mediation as a pre-litigation step.

(iii) Requirements in Other States

Currently no other state has pre-litigation requirements. A previous Victorian government introduced a regime that was later repealed by the current government. The current Victorian government argued that the regime added costs and had the capacity to allow parties to frustrate proceedings or attempts at settlements.[60]

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[52] *Civil Dispute Resolution Bill 2010* (Cth), Explanatory Memorandum, 2.

[53] *Civil Dispute Resolution Act 2010* (Cth),s 4.

[54] *Civil Dispute Resolution Act 2010* (Cth), ss 6-7.

[55] *Civil Dispute Resolution Bill 2010* (Cth), Explanatory Memorandum, 2.

[56] *Civil Dispute Resolution Bill 2010* (Cth) , Explanatory Memorandum, 2.

[57] National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) 31.

[58] Ibid.

[59] *Civil Procedure Act 2005* (NSW), ss 25-41.

[60] Victoria, Parliamentary Debates, *Legislative Assembly*, 10 Feburary 2011, 307 (R Clark - Attorney General) 207.

(b) ***National accreditation scheme***

Since 2001,[61] there has been much discussion about the need for a national accreditation scheme for mediation in Australia. NADRAC has been instrumental in lobbying for a national system for accrediting mediators.

The National Mediator Accreditation System ("**NMAS**") commenced operation on 1 January 2008. It is an industry based scheme which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. These organisations are referred to as Recognised Mediator Accreditation Bodies ("**RMABs**").[62]

In its discussion paper released in 2004, *Who Says You're A Mediator?*, NADRAC defined accreditation as: [63]

> *"[T]he process of formal and public recognition and verification that an individual, (or organisation or program) meets, and continues to meet, defined criteria. An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying the ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met."*

NADRAC identified the following objectives in moving towards a national scheme:[64]

- enhancing the quality and ethics of mediation practice;
- protecting consumers of mediation services;
- building consumers' confidence in mediation services; and
- building the capacity and coherence of the mediation field.

With consistent standards across Australia, mediation and other ADR tools are being used increasingly and on a larger scale. The successful implementation of this project has had a significant impact on dispute resolution in Australia, and it is likely that the use of mediation, as well as other dispute resolution options, will continue to grow.

4.2 New Zealand

The development of mediation in New Zealand has generally been on an *ad hoc* basis, in response to specific pragmatic needs.[65] New Zealand experienced significant growth in mediation in the 1980s-90s, mostly as a result of specific statutory schemes that created references to mediation.[66] During this time,

[61] See, eg, National Alternative Dispute Resolution Advisory Council, 'A Framework for ADR Standards' (2001) available at <http://www.nadrac.gov.au/>.

[62] National Alternative Dispute Resolution Advisory Council, *National Mediation Accreditation System* <http://www.nadrac.gov.au/>.

[63] National Alternative Dispute Resolution Advisory Council, 'Who Says You're a Mediator? Towards a National System for Accrediting Mediators' (March 2004), 3.

[64] Ibid.

[65] Grant Morris, 'Towards a History of Mediation in New Zealand's Legal System' (2013) 24 *Australasian Dispute Resolution Journal* 86.

[66] Ibid 100.

approximately 30 statutory references to mediation were implemented.[67] By 2008, the number of statutory references to mediation had increased to 43.[68]

Currently, New Zealand has been characterised as a "fast follower" rather than a leader in terms of mediation.[69] That is to say, while New Zealand has been fairly quick to adopt many developments that have occurred in jurisdictions such as Australia and the United States, relatively few innovations have emerged from New Zealand's mediation framework. The primary catalyst and initiator within the mediation context has been the government, through the use of various statutory schemes. While there has been little in the way of significant developments in recent years, that is not to say that mediation in New Zealand is struggling or has fallen behind. Mediation remains a popular dispute resolution option, and while growth may have slowed since its initial explosive expansion, it continues to grow as more and more legal practitioners (and parties) embrace mediation as a dispute resolution option.

4.3 Singapore

Modern mediation has developed more recently in Singapore, its roots being traced back to the 1990s.[70] While some practitioners report some opposition to mediation within the legal profession in its early stages, more recently Singapore's legal profession has come to embrace mediation.[71] This legal cultural change can be attributed in part to a commitment by Singapore's subordinate courts to encouraging the use of ADR by introducing a "presumption for ADR."

In 2012, the subordinate courts in Singapore introduced a scheme whereby all civil matters would automatically be referred to ADR unless any of the parties chose to opt out. The relevant form explains that:[72]

> "The Subordinate Courts regard Alternative Dispute Resolution (ADR) as the first stop of the litigation process. ADR is crucial in the cost-effective and amicable resolution of disputes. Early identification of cases is essential to help the parties save costs and improve settlement prospect... *Cases will automatically be referred to ADR unless the parties opt out through this form* [emphasis in original]."

A two-track system is established under this scheme. For civil cases that involve a disputed amount under $20,000, or where the disputed amount is between $20,000 and $60,001 and the trial will take *more* than three days, the case will fall within the 'Recommended ADR Track.' This means that parties must provide a good reason for opting out of ADR, such as having already attempted ADR, or that the dispute involves a precedent-setting question of law. It should be noted, however, that even where the party is unable to provide a good reason for opting out, the court does not have the power to compel the parties to attempt ADR. Parties to disputes that do not fall within the Recommended ADR Track do not need to provide reasons for opting out of ADR. In any case, the parties actions here may have implications for any cost orders that the court makes, as O 59 r 5(1)(c) of the Rules of Court provides that:

> "The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account… the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution."

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[67] Ibid.

[68] Ibid.

[69] Ibid 100-101.

[70] Rajan Chettiar, 'The Mediation Resolution' (January 2013) *Singapore Law Gazette* available at <http://www.lawgazette.com.sg/2013-01/654.htm>.

[71] Ibid.

[72] Singapore Subordinate Courts, Form 6A.

This initiative forces legal representatives in Singapore to strongly consider attempting ADR processes prior to commencing litigation. By falling short of compelling parties to undertake ADR, the process respects the consensual nature of ADR, whilst providing significant incentive to avoid litigation where possible. It remains to be seen whether Singapore's superior courts will adopt similar policies.

5. Conclusion

So long as the current trend continues, it seems likely that alternative dispute resolution will continue to grow within the Asia Pacific. The benefits of avoiding litigation are becoming increasingly apparent to courts, practitioners and parties, and the availability of mature dispute resolution options is essential in ensuring that disputes are managed in the most efficient manner. While the dispute resolution developments discussed in this paper have not emerged uniformly throughout the Asia Pacific, it is clear that Australia, Singapore and New Zealand have taken notice of international developments in attempting to implement the best dispute resolution options within their individual local legal frameworks. Through this process, each jurisdiction has developed to provide a modern, supportive and stable context for dispute resolution.