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In-House Briefing Memorandum
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Arbitration

'Alternative Dispute Resolution' ('ADR') is a term that refers to dispute resolution outside litigation, for example, through adjudication, arbitration, conciliation, early neutral evaluation or mediation. ADR continues to gain support in Australia and internationally. It generally gains its legitimacy through agreement between the parties or as a statutory requirement before litigation, for example under the *Family Law Act*. It can be preferred as an alternative to 'traditional' litigation for its low cost, confidentiality and flexibility.

In July – August 2013 Humboldt University of Berlin and Tulane Law School of New Orleans hosted a Dispute Resolution summer program in Berlin aimed at the development of ADR skills and understanding through practical exercises and presentations. Attendees were diverse, from undergraduate students to UN negotiation facilitators, all sharing a common interest in developing an understanding of conflict management and resolution procedures. All benefited from presenters representing a global 'who's who' of ADR practitioners and academics. Although over the two weeks every presenter offered tremendous insight into the practice and theory of ADR, two presentations stood out as particularly noteworthy.

Alexander Foerster, President of the Swedish Chamber of Commerce in Germany, focused on the value of maintaining party autonomy through appropriate control of the powers of arbitral tribunals. He noted increasing global trends limiting the flexibility of ADR processes. For example, instruments such as the Rotterdam Rules (the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) and judgments of Courts appearing to protect their jurisdictions' arbitration business are limiting arbitration to specific locations. He further noted that while there is a growing academic push for tribunals to ensure reasonable and efficient procedures despite any agreement of the parties, carefully considered and clearly drafted agreements will prevail almost without exception. Mr Foerster detailed methods that in his experience have been effective in upholding party autonomy with the aim of continuing consensual rather than 'top-down' tribunal arbitration wielding often unbridled power. This included stressing the importance of carefully and diligently drafting all documents associated with the arbitration, including highlighting areas where parties may be open to influence other than that the party desires. In his contention, giving more weight to the desire of the parties means cooperative arbitrations, less challenges to procedure and more satisfactory outcomes.

Dr Joerg Fedtke presented a somber and vivid account of his experiences as a member of the United Nations Mission for Iraq. Having conducted mediations between parties engaged in mass conflict where a failed attempt to reach agreement may lead to acts of violence, Dr Fedtke had a predictably well-developed understanding of the benefits of dispute resolution processes and the importance of properly maintaining relationships throughout. Though the material presented throughout his presentation was captivating, perhaps the most illustrative example of the positive possibilities well-conducted dispute resolution presents was in a short video captured on his mobile phone showing members of the various political and cultural factions of Kirkuk, a northern Iraq city, arm-in-arm and bound with smiles as they danced together. His 'take-home' message included the importance of relationship management and its unbreakable connection with the dispute, the importance of cultural continuity, and the lesson that there is no unifying method to adopt. The success of arbitration, he argued, is wholly dependent on the people around it.

The common theme of these and all other presentations was the importance of proper management of relationships, whatever their character. Relationships and related disputes are much of the day to day concern of a law office. Kellehers Australia holds strongly the view, as do sound lawyers in the ADR field, that the primary focus of lawyer and client should be on "operating with" rather than "in opposition to" other involved parties and taking every cost-effective effort to resolve conflicts quickly and flexibly, before adversarial dispute resolution becomes relevant. It was an absolute pleasure to hear from and work with the esteemed and skilled presenters at the Humboldt/Tulane program in developing understanding of, and techniques for, maintaining and respecting the importance of that focus.

KELLEHERS AUSTRALIA: www.kellehers.com.au / e: kellegal@kellehers.com.au
497 Swan Street, Burnley, 3121, Victoria, Australia