Arbitration and ADR in Australia — meeting the needs of international trade and commerce

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> The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.
>
> – Sandra Day O'Connor

The availability of effective alternative dispute resolution (ADR) is integral to supporting and enabling performance of the range of agreements which underpin international commerce. Australia is an attractive venue for international commercial arbitration, and other forms of ADR. It is a Model Law country and has been a party to the New York Convention for many years.

Introduction

The increasing internationalisation of trade has led to agreements between businesses of different nationalities and across multiple jurisdictions becoming more commonplace. Cooperative agreements between commercial entities from different countries take many forms, with joint ventures being an example.

In recent years, joint ventures have become a popular business vehicle for Australian companies, especially in the resources sector, to gain access to opportunities and markets in foreign countries. In the current environment of commodity price volatility and uncertainty in financial markets, joint ventures arrangements are often considered a safer option than an outright merger or acquisition of a new business.[1] Entering into a joint venture enables companies to share scarce capital resources and project-specific risk, while leveraging their relative organisational strengths, be it technical, commercial or financial. Despite the relative advantages that joint ventures may have in a given commercial context, a number of problems common to these types of agreement can and frequently do arise.[2] By its nature a joint venture is an alliance between two or more companies, often with differing corporate cultures, that have a stake (often 50/50) in an independently operated business entity. Although one partner is usually charged with running the operation, every major decision affecting the business needs to be made by the board of each of its owners, given that the project is under joint control. Disputes commonly arise around:

- capital calls to be paid by each joint venture partner,
- the question of who retains the ultimate veto on major decisions of the entity,
- the percieved failure to participate appropriately in the business,
- misusing joint venture assets, and
- the dilution or compulsory buyback consequences when a party is in default of the agreement.

Anticipating the nature of disputes that are likely to occur, and obtaining the meaningful input of one's client, is essential to matching appropriate ADR mechanisms with the different type and levels of diputes that may arise when considering dispute resolution clauses.

Dispute resolution clauses in agreements of an international nature need careful consideration and crafting in order to ensure that the agreement remains resilient for its intended duration. The content and flow of dispute resolution clauses are often considered in a deal environment overshadowed by the focus to reach agreement on the content and wording of the commercial clauses of the draft contract. Astute and informed drafting of the commercial terms is as important to ensuring resilience of the contract in future as is focus and diligence in drafting the dispute resolution provisions most appropriate to the conract. This article focuses on arbitration, its Australian and international context, and the world class enabling environment Australia has developed to support dispute resolution in international trade agreements through local laws and institutions.

Australia — hub for international arbitration

International commercial arbitration is a consensual dispute resolution process for transnational commercial disputes.[3] As an important aspect of international commerce, it has in recent decades proven spectacularly successful and is recognised as the preferred method for resolving such disputes.[4] Its proliferation has led to the development of an "internationally recognised harmonised procedural jurisprudence",[5] which combines the best practices of both the civil and common law systems, taking into account diffuse cultural and legal backgrounds and philosophies. The new jurisprudence is

establishing a generally accepted procedure for dispute resolution which is of benefit to international arbitration, as well as modern jurisprudence generally.[6]

Arbitration (international and domestic) is readily distinguishable from other forms of ADR and has been described as "litigation in the private sector".[7] It is seen to offer many advantages over litigation including the choice of a neutral seat, confidentiality, expedition, party autonomy, flexibility in procedure, relative informality, the ability to choose the "judge", and transnational enforceability of awards in other New York Convention countries. These perceived advantages are integral to its success.

The commonwealth and state parliaments have recently legislated to improve the laws that govern commercial arbitration both internationally and domestically which has served to enhance Australia as an arbitration friendly venue.[8] Superior courts have established specialist arbitration lists to facilitate the resolution of disputes by arbitration. The Australian International Disputes Centre, now the Australian Disputes Centre (ADC) has been established in Sydney as Australia's leading dispute resolution venue. Recently the Melbourne Commercial Arbitration and Mediation Centre (MCAMC) was launched as part of a national arbitration grid of excellence.[9] The Perth Centre for Energy and Resources Arbitration (PCERA) was recently established as a specialised arbitral institution to coordinate and facilitate the resolution of disputes in the energy and resources sector.[10] The recent High Court decision in the *TCL* case,[11] confirming in emphatic terms the constitutional validity and juridical basis of the International Arbitration Act 1974 (Cth),[12] has emphasised this process.

While international commercial arbitration (ICA) is still the preferred process for resolving transnational commercial disputes, consumers of ICA are increasingly demanding that other forms of ADR such as mediation and facilitated negotiation are readily available as an adjunct to the ICA process.

What are the essential and foundational characteristics of arbitration?

Arbitration agreement — the foundation of the arbitral process

The foundation of the arbitral process is the agreement by which the parties refer their disputes to arbitration. Once a binding arbitration agreement is entered into, the parties will be subject to it so that if a dispute arises which falls within its scope, the dispute must be resolved by arbitration (if a party requires it). Unless settled by agreement, often reached through mediation, the arbitral process will culminate in an award capable of enforcement with curial assistance. The arbitration agreement's terms will bind the parties, as well as the arbitrator appointed pursuant to it.[13]

An essential quality of the arbitration agreement is that it is considered to be a contract independent of the contract in which it is contained. On this basis, the arbitral tribunal can rule on its own jurisdiction even if the underlying contract has been terminated or is set aside.[14]

An arbitration agreement will commonly deal with such matters as:

- the types of disputes which fall within its terms;
- the seat of the arbitration (which will determine the *lex arbitri*);
- the law according to which the dispute will be determined (the *lex causa*);
- a set of procedural rules;
- the number of arbitrators and their appointment; and
- the language of the arbitration.

Parties may decide to incorporate the rules of a recognised arbitration institution and adopt the institution as the appointing authority, or to proceed *ad hoc*.

In Australia it is possible to use both international and local arbitral institutions. The major arbitration institutions, such as the ICC, LCIA; regionally, the SIAC, HKIAC, KLRCA, and CIETAC; and in Australia, the ACICA, ADC and PCERA, have recommended arbitration clauses, or the parties can devise their own,[15] and also have other forms of ADR, principally mediation, as part of a suite of ADR services.[16]

Scope of agreement

An issue that often arises concerns the *scope* of an arbitration clause — whether a particular dispute falls within its terms. If it does (in the face of opposition), the matter (or part) cannot be litigated in the courts. This issue will often arise when a court is asked to stay a court proceeding on the ground that the issues fall within the terms of an arbitration agreement.[17]

Arbitrability

A similar issue is the question of *arbitrability* which involves determining which types of dispute may be resolved by arbitration and which must go to court. This determination will be made initially by the arbitral tribunal, but may ultimately be made by courts of particular states applying national laws. Despite the principle of party autonomy, there are disputes which by their very nature must be determined by the courts, for example, insolvency, criminal proceedings, divorce, or registration of land or patents.[18]

International arbitration dependent on local laws

For international commercial arbitration to operate and be effective, the process must be supported by at least two bodies of national, or local, laws: first, the *lex arbitri*, which will give legal force and effect to the process of the arbitration; and second, national laws which enact or legislate for the enforcement mechanisms of the New York Convention (NYC).[19]

The NYC is the single most important factor explaining the success of international commercial arbitration. So far at least 148 countries have acceded to it. The Convention is primarily concerned with two matters:

- the recognition of, and giving effect to, arbitration agreements; and
- the recognition, and enforcement, of international (non-domestic) arbitral awards.

It achieves the first by requiring a court of a contracting state to refer a dispute which has come before it, and which falls within the scope of an arbitration agreement, to arbitration; and the second by enabling the successful party to an arbitration award to easily and simply enforce the award in any country which is a party to the convention in accordance with that country's arbitration laws.[20]

Model Law — a template arbitration law

The next most influential international legal instrument in the present context is the United Nations Commission on International Trade Law Model Law (UNCITRAL) on International Commercial Arbitration, commonly known as the Model Law. The Model Law is not legally effective on its own, but is simply a template for legislation for an arbitration law (a *lex arbitri*) which may be enacted by individual states.[21] The Model Law has no referece to mediation or other forms of ADR.

In Australia, the *lex arbitri* is the International Arbitration Act 1974 (Cth) (IAA). One of its stated objects is to give effect to Australia's obligations under the NYC, as well as to give effect to the Model Law and the International Centre for Settlement of Investment Disputes (ICSID) Convention. The IAA gives the Model Law force of law in Australia and cannot be excluded by the parties. The two principal matters addressed by the NYC are dealt with by the IAA.[22]

How procedure and evidence are determined

If the parties to an international commercial contract have inserted an arbitration clause into their contract, which incorporates a set of arbitration rules, then these rules will govern issues of procedure and evidence, subject to the particular *lex arbitri* having mandatory provisions which govern procedural issues and which cannot be overridden by the parties or the arbitrator. Often these days the arbitration clause will be a tiered clause allowing for other forms of ADR such as mediation as a precursor to the arbitral process. Subject to this, the parties and the arbitrator will be able to adapt the chosen rules to suit the particular circumstances of a dispute, which may involve adopting other complimentary ADR processes.

Interim relief

Arbitration rules, such as the UNCITRAL Arbitration Rules, and applicable national laws (*lex arbitri*) such as those based on the Model Law, give the arbitral tribunal and sometimes local courts power to make interim orders in aid of the final award (which relief may be enforced in local courts).[23]

What remedies are available

While in general terms in international arbitrations, arbitrators can give the sorts of remedies and relief that national courts can, what an arbitral tribunal can give in a particular arbitration will depend on the arbitration agreement including any arbitration rules the parties have agreed to, the *lex causa* and the *lex arbitri.* Awards that may be made include payment of a sum of money, declarations, specific performance, injunction, rectification, costs and interest.[24] The culmination of the arbitral process, the award, is facilitated, and made effective and enforceable by the NYC, something which mediation does not have readily available.

Awards, setting aside, enforcement and challenges

The making of a binding and enforceable award by the arbitral tribunal is the object and purpose — indeed, the culmination — of the arbitration process. For both the arbitrator and the parties (or at least the successful party), it is critical that this be achieved. If the arbitration can be settled by mediation the parties may wish to seek to fashion their settlement agreement as an award so that it has the advantages of international and streamlined enforcement under the NYC.

For the award to be enforceable it must, inter alia, be reasoned, deal with all the issues — but only those issues — referred to arbitration, effectively determine the issues in dispute, be unambiguous, be intelligible, correctly identify the parties and comply with all essential formalities.[25] The particular *lex arbitri* engaged will set requirements which an award must contain. The precise requirements for an award will principally be determined by the arbitration agreement (incorporating any arbitration rules) as modified by the *lex arbitri.*[26]

If the arbitral process is subject to some irregularity in procedure (and in a limited range of other circumstances), the award is liable to be set aside or refused

recognition or enforcement. The circumstances by which an award may be set aside are set out in Art 34 of the Model Law and those on the basis of which it may be refused enforcement or recognition are contained in Art 36. The circumstances under Arts 34 and 36 are virtually identical.

The domestic situation — the uniform Model Law Commercial Arbitration Acts

The Standing Committee of Attorneys-General (SCAG) meeting on 7 May 2010 agreed to implement a model Commercial Arbitration Bill 2010 based on the Model Law as uniform *domestic* arbitration legislation. The previous legislative regime of uniform Acts in force in Australian states and territories had several marked differences to the Model Law. New South Wales was the first state or territory to enact the Commercial Arbitration Act 2010 (NSW). Victoria followed with the Commercial Arbitration Act 2011 (Vic). Most other states and territories have now followed suit.[27]

Conclusion

Australia offers many attractions as a venue and seat for international commercial arbitration, and ADR, including:

- an adherence to the rule of law;
- an expert legal profession;
- an experienced pool of specialist arbitrators and ADR practitioners;
- a world class professional services environment;
- professional and dynamic arbitral institutions;
- a stable political system; and
- courts that have "an excellent record for enforcing foreign arbitral awards".[28]

Both internationally and domestically it is a Model Law country and has been a party to the NYC for many years. Given the constantly evolving nature of international trade and its underlying commercial/contractual relationships, the greater opportunities for trade and commerce on the international stage brought about by globalisation, and notably the rise of Asia, Australia is well positioned to be an important hub for international commercial arbitration and ADR.[29]

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Footnotes

1. General discussion in PwC "Being strategic in resources: JV's remain key" *Global Mining Deals Outlook* March 2014 www.pwc.com.
2. WD Duncan *Joint Ventures Law in Australia* (3rd ed) The Federation Press, NSW 2005 p 289.
3. This article is based on one published in the April 2014 AIDC E-newsletter. In its original version the article appeared in the November 2013 edition of the Victorian Law Institute Journal: John K Arthur "Australia — Hub for international arbitration" (2013) 87(11) *LIJ* 40. It is an abridged and revised version of a paper delivered at the Law Institute of Victoria, Essentials Skills, CPD program, 14 March 2013, entitled "An Introduction to International Commercial Arbitration" available at www.gordonandjackson.com.au/online-library. See M Holmes and C Brown *The International Arbitration Act 1974: A Commentary* LexisNexis, Australia 2011; and generally, A Redfern, JM Hunter, N Blackaby and C Partasides *Redfern and Hunter on International Arbitration, Student Edition* (5th ed) Oxford University Press, Oxford 2009 [Redfern and Hunter]; Phillip Capper *International Arbitration: A Handbook* (3rd ed) LLP, 2004; D Byrne, updated by D Bailey *Court Forms Precedents and Pleadings — Victoria, Arbitration* LexisNexis, Australia; Doug Jones "International Commercial Arbitration and Australia" (Paper presented at Australian-European Lawyers Conference, National Museum of Australia, Canberra, 2–3 March 2007) www.claytonutz.com.
4. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596; 87 ALJR 410; [2013] HCA 5; BC201301035 at [10] [TCL case]; The Hon PA Keane, Justice of the High Court, (2013) 79 *Arbitration* 195–207; PWC and Queen Mary, University of London,

School of International Arbitration *2013 International Arbitration Survey: Corporate choices in International Arbitration - Industry perspectives*. Available at www.arbitrationonline.org and past years' surveys.

5. John K Arthur, above n 3, at 41.
6. Rt Hon Sir Michael Kerr "Concord and conflict in international arbitration" (1997) 13 *Arbitration International* 122 at 125–26.
7. Sir John Donaldson in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175 at 189 cited in Doug Jones, above n 3, at 2.
8. International Arbitration Amendment Act 2010 (Cth) and the new Commercial Arbitration Acts in the states which substantially enact the Model Law domestically; see, R Kovacs "Putting Australia on the arbitration map" (2012) 86 *LIJ* 36.
9. For example, Arbitration List G of the Supreme Court of Victoria, and see "Arbitration law reform and the Arbitration List G of the Supreme Court of Victoria", by Hon Justice Croft, available on Supreme Court of Victoria website; in NSW, Commercial Arbitration List and see Practice Note No SC Eq 9; in the Federal Court, see Practice Note ARB 1 — Proceedings under the International Arbitration Act 1974, and see "The Federal Court of Australia's International Arbitration List" by Hon Justice Rares available on Federal Court website; The AIDC, established in 2010 with the assistance of the federal and NSW governments, houses leading ADR providers including the Australian Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators (Australia) Limited, the Australian Maritime and Transport Arbitration Commission and the Australian Commercial Disputes Centre. See www.disputescentre.com.au. The MCAMC is a joint initiative of the Department of Justice, Court Services Victoria, the Victorian Bar and the Law Institute of Victoria. See www.mcamh.com.au.
10. Perth Centre for Energy and Resources Arbitration http://pcera.org/;
11. TCL case, above n 4.
12. TCL case, above n 4, at [11], [12], [17], [29], [45], [81], [101].
13. *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91; 287 ALR 315; [2012] WASCA 50; BC201201101 at [165]–[166].
14. Above n 13.
15. International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA), China International Economic and Trade Arbitration Commission (CIETAC), Australian Centre for International Commercial Arbitration (ACICA), Australian Disputes Centre (ADC). Arbitration clauses which are inexpertly drawn may be flawed and inefficacious — so called "pathological" clauses.
16. For example, ACICA now has a set of mediation rules and clauses to assist parties to invoke this form of ADR, often as part of med-arb or arb-med. Section 27D of the uniform Commercial Arbitration Acts provides for the power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary.
17. International Arbitration Act 1974 (Cth), s 7(2)(b).
18. Redfern and Hunter, above n 3, at [2.111], [2.114].
19. Phillip Capper, above n 3, p 11ff. Five systems of law may apply to international commercial arbitration: Redfern & Hunter, above n 3, p 165, cited in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666; [2013] WASCA 66; BC201301614 at [36].
20. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958 known as the New York Convention; Redfern & Hunter at p. 72; the 148 countries which have acceded to the NYC are the vast majority of countries in the world. On 16 April 2013 Myanmar also acceded to the NYC: New York Arbitration Convention, *Contracting states,* www.newyorkconvention.org; NYC, Arts II and IV.
21. The 1985 Model Law was revised in 2006, available at www.uncitral.org.
22. First, the enforcement of foreign arbitration agreements; and second, the recognition, and enforcement, of foreign awards by s 8 and 9 of the IAA.
23. For example, freezing orders: Art 17(2)(c). Under the IAA local courts provide assistance to the arbitration process in a variety of ways, including a request to refer a matter to arbitration (s 8). As to enforcement of interim measures in courts, see Art 17H. See also the ACICA Rule 28.
24. Phillip Capper, above n 3, pp 113–117; sections on interest see IAA, ss 25 and 26.
25. Redfern & Hunter, above n 3, p 553ff; Phillip Capper, above n 3, p 118. Eg Model Law, Art 31.
26. Redfern & Hunter, above n 3, at [9.114]; Phillip Capper, above n 3, p 117ff.
27. See, John K Arthur, above n 3; See, generally in relation to the new uniform domestic arbitration legislation Doug Jones *Commercial Arbitration in Australia* (2nd ed) Thomson Reuters, Australia 2012.
28. Doug Jones, above n 27, pp 9, 18–19.
29. Doug Jones, see above n 27 and 28; and see the Hon PA Keane, above n 4.