PRACTICAL EXAMPLES OF RESOLVING INTERNATIONAL DISPUTES

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SUMMARY

• Methods of resolving disputes – mediation, arbitration, litigation
• Factors to consider when choosing method to resolve dispute
• Recent developments which will affect resolution methods
• What to do when the dispute arises – how to respond to dispute notices, early case management, appointment of counsel
• Fee arrangements in international disputes
• Case study
HOW COMPANIES DEAL WITH CROSS BORDER RISK

• Transfer the risk to another party via limitations of liability, warranties, rights of termination, payment after delivery, advance payment, insurance bonds, bank guarantees and irrevocable letters of credit

• Corporate structure

• Price the increased risk

• Take the legal risk without compensation
METHODS FOR RESOLVING INTERNATIONAL DISPUTES

Chart 1: What is your preferred method of resolving cross-border disputes?

- International arbitration: 56%
- International arbitration together with (other) ADR: 34%
- Mediation: 5%
- Cross-border litigation together with ADR: 2%
- Cross-border litigation: 2%
DIFFERENT FORMS OF DISPUTE RESOLUTION

MEDIATION:

• when should mediation be considered?
• does it mean the same thing everywhere?
• advantages and disadvantages
• mediation costs and fees
• legal representation
• outcomes
• appropriateness for international disputes
• new developments with ICC Rules?
UNCITRAL ENFORCEMENT OF CONCILIATED SETTLEMENT AGREEMENTS (CSA)

- No new convention for uniform approach to enforcement
- UNCITRAL Working Group II currently working on a harmonised approach to enforcement
- Aims to be mediation equivalent of NY Convention – CSA same footing as arbitration awards
- Article 1(3) of Model Law as starting point
- Suggested minimum requirements to be enforceable – settlement agreement reached in mediation should be in writing and signed by parties
- Possible defences to enforcement
MED-ARB

• A happy compromise or the worst of both worlds?
• Med-Arb...is the process of the same person acting as (i) a mediator in seeking to facilitate a settlement between the parties, and (ii) an arbitrator to determine the issues in dispute and issue a final and binding award.
• In an arbitration, the arbitrator is neutral and has no additional knowledge of the parties' positions beyond the facts presented in the case.
• By contrast, a mediation process requires the parties to disclose additional information, that would otherwise be private and confidential.
ARBITRATION

• What is arbitration?

• The 1958 Convention on the Recognition of Foreign Arbitral awards (the New York convention)

• The UNCITRAL Model Law on international commercial arbitration (1985) (or Model Law)
METHODS RESOLVING INTERNATIONAL DISPUTES (CONTINUED)

Reasons for choosing institutional arbitration

- High level of administration (including proactiveness, facilities, quality of staff)
- Neutrality/internationalism
- Global presence/ability to administrate arbitrations worldwide
- Free choice of arbitrators (i.e. no exclusive institutional list)
- Early procedural conference
- Scrutiny of award by institution
- Regional presence/knowledge
- Expertise in certain in types of case
- Overall cost of service
- Transparency of arbitrator challenge decisions
- Method of remunerating arbitrators (ad valorem)
- Other
- Method of remunerating arbitrators (per hour)
- Payment to institution required upfront
- Payment to institution required at the end of arbitration
METHODS RESOLVING INTERNATIONAL DISPUTES (CONTINUED)

Preferred arbitration institutions

- ICC: 68%
- LCIA: 37%
- HKIAC: 28%
- SIAC: 21%
- SCC: 13%
- ICSID: 11%
- ICDR/AAA: 10%

Percentage of respondents who included the institution in their answer
FAST TRACK ARBITRATION PLATFORMS

CIArb Business Arbitration Scheme

- simple, cost-effective, and timely resolution of disputes of low to medium monetary value (£ 5,000 -£ 100,000)
- legally binding decision on their dispute in less than 90 days
- fixed fee of £ 1,250 + VAT is payable by each party
- The Arbitration Act 1996 (The Act) and any amendments to the Act shall apply
## Considerations in Favour of Choosing International Arbitration vs Litigation

<table>
<thead>
<tr>
<th>Considerations in Favour of Choosing International Arbitration</th>
<th>Yes/No</th>
</tr>
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<tbody>
<tr>
<td><strong>Neutrality:</strong> Does a party wish to avoid the home courts of the other?</td>
<td></td>
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<tr>
<td><strong>Enforcement:</strong> Is it likely there will be a need to enforce a right of payment against assets of a party located outside the country where the court decision would be rendered?</td>
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<td><strong>Efficiency:</strong> Is the time from the start of the litigation to obtaining an enforceable judgment in the available court likely to be excessive when compared with international arbitration?</td>
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<td><strong>Cost:</strong> Will the cost of litigating in the courts significantly exceed the cost of international arbitration?</td>
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<td><strong>Flexibility:</strong> Is it important for the parties to be able to design their own bespoke dispute resolution process for this contract?</td>
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<td><strong>Competence:</strong> Is it likely that complex or technical issues will be involved that may challenge the capabilities of the court?</td>
<td></td>
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<tr>
<td><strong>Convenience:</strong> Is the dispute likely to require witnesses and documents located in different countries and involve languages that are not the same as that or those of the available court?</td>
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<td><strong>Confidentiality:</strong> Is it important for the parties to keep their disputes out of the public eye?</td>
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<td><strong>Moderation:</strong> Is it desirable to avoid the risk of potentially extreme or unusual decisions by a court?</td>
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LITIGATION

- When should litigation be considered?
- Costs of litigation?
- Appropriateness for international disputes
HAGUE CONVENTION – CHOICE OF COURT

• Hague Convention of Choice of Court Agreements, entered into force 1 October 2015
• Aims to be the equivalent for litigation of the New York Convention on Arbitral Awards.
• Deals only with exclusive choice of court agreements in international civil or commercial matters. Does not apply to certain matters e.g. consumer and employment.
• Recognition and enforceability of judgments between member states. Enforceability subject to exceptions (Articles 5, 6, 9, 11).
• Number of signatories not at the level of New York Convention…yet, but includes major trading partners Singapore and US.
SINGAPORE INTERNATIONAL COMMERCIAL COURT

- SICC launched in early 2015
- SICC as a new forum for international disputes following ratification of Hague Convention in early 2016.
- Implications for Australian parties entering international commercial transactions.
- 3 decisions published so far (links to Australia in two – one matter involved an Australian mining company and another dealt with a dispute arising out of an energy project in Queensland)
- An international network of ICCs, Australia next?
## Preliminaries Once Arbitration or Litigation is Probable

<table>
<thead>
<tr>
<th>Issue</th>
<th>Suggested Action</th>
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</thead>
<tbody>
<tr>
<td>Contractual pre-arbitration procedures</td>
<td>Check whether contract dispute clause (or other provision) requires steps to be taken by either side, and consider consequences of compliance and non-compliance</td>
</tr>
<tr>
<td>‘Letters before action’</td>
<td>Determine appropriateness of sending one to opposing party if ‘natural claimant’</td>
</tr>
<tr>
<td>Communications internally and externally (especially with opponent) concerning issues in dispute</td>
<td>Advise employees of existence of dispute (if not informed) and any restrictions on internal or external communications</td>
</tr>
<tr>
<td>Key employees and witnesses</td>
<td>Identify who may need to be available before and during arbitration, possibly inform supervising managers and human resources</td>
</tr>
<tr>
<td>Document retention</td>
<td>Determine whether a document retention notice should be sent to employees to ensure that relevant documents are retained</td>
</tr>
<tr>
<td>Insurance</td>
<td>Consider whether coverage may exist and provide notice to insurers under relevant policies</td>
</tr>
<tr>
<td>Media</td>
<td>Assess whether media coverage or press inquiries are likely and, if so, prepare appropriate statement</td>
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<tr>
<td>Management briefings</td>
<td>See Early Case Assessment (ECA), addressed below in section III</td>
</tr>
<tr>
<td>Informal resolution options</td>
<td>Explore any options for informal resolution (negotiations, mediation) before incurring significant expense and before positions become further polarised and solidified</td>
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HOW TO RESPOND TO A DISPUTES NOTICE

• Should a party take the initiative and commence arbitration or litigation first?
• Whereabouts of assets
• Availability of interim relief
• Use of non binding dispute resolution mechanisms
• Just don’t respond?
• Amending the disputes clause
USING EARLY EVALUATION TO QUANTIFY THE RISK

• Some companies have a policy to prepare an early case assessment (ECA)
• ECA is an informed estimate of likely outcome, costs, legal or factual issues
• Balancing best, worst and most likely outcomes for liability (or recovery) and costs
• Be wary of ECA’s that are based on only one side’s documents or witness accounts
• An ECA will inform a party of necessary documents and witnesses early in the process (be aware of restrictions on interviewing or document collection)
• Be aware of witness bias—both favourable and unfavourable
FEE ARRANGEMENTS IN INTERNATIONAL DISPUTES

Fee arrangements can include:

• Hourly rates
• Contingency fee based on success in the proceeding
• A fixed one-off or annual retainer plus a contingency fee, which is a common arrangement in litigation in jurisdictions such as France
• An agreement that the lawyer receives a bonus based on a positive outcome, to write off a portion of the fees if the outcome is negative, or both together
• Fixed price arrangements under which the lawyer or firm agrees to conduct the arbitration for a set amount for the entire proceeding, or for each stage
• A fee cap, where the lawyer applies an hourly or other rate and where the total will not exceed a given amount
• Blended rate fees, where instead of a firm's different lawyers billing at different rates, they all bill at the same rate
• Simple discounts on the lawyers' hourly rates, which may increase with the volume of work done
• A combination of any of the above
### Contingency Fees and Litigation Funding in Australia and Asia

<table>
<thead>
<tr>
<th>Country</th>
<th>Third party funding</th>
<th>Contingency fee agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Permitted</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Singapore</td>
<td>Prohibited</td>
<td>Prohibited</td>
</tr>
<tr>
<td>China</td>
<td>Permitted</td>
<td>Permitted</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Prohibited</td>
<td>Permitted in arbitration only</td>
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</table>
A CASE STUDY

• Bob had a company
• Peter liked the company so much he wanted to buy it (and Bob)
• Bob liked Peter (or so it seemed) and was happy to sell the company and keep working
• Bob also liked Yan (a lot and in a creepy way)
• They started doing evil things
• Yan left the company
• They did eviler things
• Peter found out...
A FRACUTRED FAIRYTALE

Arbitration

Determination of disputes by arbitration

14.1 In the event of there being any dispute between the parties, before or after completion, relating to or arising out of this Agreement, including its construction, effect, the rights and obligations of the parties, the performance, breach, rescission or termination of this Agreement, the entitlement of either party to damages or compensation and the amount of that entitlement (called "dispute"), the dispute shall be determined by arbitration.

Notice of dispute

14.2 Either party may give notice to the other party of the existence of a dispute and unless the dispute is settled between the parties within twenty-one (21) Business days after the other party received notice of the dispute, the dispute shall be referred to arbitration.

Appointment of arbitrator

14.3 The arbitrator shall be the nominee of the President of the New South Wales Bar Association.

Conduct of arbitration

14.4 The arbitration shall be conducted in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators Australia and, subject to those Rules, in accordance with the provisions of the Commercial Arbitration Act.
ONCE UPON A TIME

• And then there was a very bad arbitrator....
ONCE UPON A TIME

- And a very worse solicitor....
ONCE UPON A TIME

• And to make it worse a smug barrister (as if there was another kind)....
WE WERE MODEL ARBITRANTS

- We drafted a submission agreement
- They said no
- We asked for an undertaking that they not deal with the shares
- They said no
- We applied for interim measures in the arbitration
- They and then the arbitrator said no
WE STOPPED BEING MODEL ARBITRANTS

- We commenced AAA proceedings
- They applied for interim relief (in court this time)
- Another (lengthy) boring hearing
- Settlement meeting
- A new form of mediation
- Settlement
- Rapprochement
Thank You

Any questions?