

## **TOPIC 8 – DISPUTE RESOLUTION**

### **(1) Levels of Dispute Resolution**

- (i) State to State – WTO, FTA, BIT, bilateral/plurilateral agreements
- (ii) State to Investor – ISDS (Investor-State Dispute Resolution)
  - Arises under e.g. BITs, FTAs, and investment contracts
  - Is limited to covering expropriation only – covers some investment disputes
  - But, is subject to what is in the relevant treaty (e.g. CHAFTA)
  - Usually done through arbitration (e.g. under ICSID rules, or ad hoc)
  - E.g. Aus and BIT Arbitration
    - Several claims against Aus – e.g. *Philip Morris Asia Ltd v Australia* and *Zeph v Australia*
    - At least 14 claims have been brought by Aus investors against India, Indonesia, Pakistan, Thailand, Mongolia, Egypt, Georgia, Poland, PNG – all in relation to mining
- (iii) Party to Party – contractual, informal, legal
- (iv) Unrelated Party Disputes – civil/administrative, criminal

### **(2) Dispute Resolution Agreements**

- \*\*Look for: **contractual provisions** – might include:
  - Expert determination of factual or technical issues
  - Provision for negotiation of disputed issues
  - Provision for mediation/conciliation in event of failure of negotiation
  - Deadlock provisions
  - Arbitration clauses
  - Submission to jurisdiction clauses – exclusive vs non-exclusive

### **(3) Methods of Dispute Resolution**

- (i) Non-binding / voluntary
  - Discussion
  - Negotiation
  - Contractually determined methods
- (ii) Voluntary, but involving a third party
  - Mediation
  - Conciliation
- (iii) Non-voluntary
  - Contractually determined methods
  - Arbitration
  - Litigation

### \*Notes on Methods

- Decide on method in advance if possible
- Consider all aspects and implement carefully in contract – e.g.:
  - Location of assets/issues of enforcement
  - Quality of available courts
  - Quality of available arbitral institutions (vs ad hoc arbitration)
  - Cost, convenience, speed, confidentiality, etc.
  - Limitation of matters to be referred to alternative dispute resolution (e.g. legal questions, jurisdictional issues, etc.)
  - Arbitration rules and procedures
  - Submission to jurisdiction of appropriate court

#### (a) Mediation/Conciliation – Voluntary

- Mediation/Conciliation = informal process, third party trained and registered mediator/conciliator facilitates discussion, rather than forcing a resolution
- International developments:
  - 2002 UNCITRAL Model Law on International Commercial Conciliation and 2018 Singapore Convention on Mediation
  - Aims to facilitate enforcement of mediation agreements internationally
  - Aims not to overlap with other Conventions which allow for enforcement of such agreements (e.g. New York Convention accepts arbitral award as enforceable)
  - Limited grounds for refusing enforcement
  - Ratifications happening slowly – Aus has not yet ratified

| <u>Advantages of Mediation</u>                                                              | <u>Disadvantages of Mediation</u>                                                                                 |
|---------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| ▪ Fewer formalities, quicker, less documentation and less expensive                         | ▪ Enforceability – may have to rely on contractual enforcement                                                    |
| ▪ Assist in maintaining business relationship (i.e. if aim is ongoing business arrangement) | ▪ Some domestic provisions for enforcement of settlement agreements, particularly where done under court auspices |
| ▪ Flexible solutions                                                                        | ▪ Limited scope of Singapore Convention                                                                           |
| ▪ Confidential                                                                              | ▪ Mediator – if they do not have experience or knowledge of cultural differences                                  |
|                                                                                             | ▪ Possible power imbalances + legal and jurisdictional differences                                                |

#### (b) Litigation

- Compulsory method of dispute resolution, either by agreement or due to domestic jurisdictional rules
- Consider whether there is an exclusive or non-exclusive jurisdiction clause

- \*Questions to consider:
  - What court has jurisdiction / will the court take jurisdiction?
  - Does the def have assets in the jurisdiction subject to the court's enforcement powers?
  - Is the chosen legal system advantageous to the plaintiff?
  - Is the judgment enforceable in the jurisdiction where def's assets are located?
- Enforcing foreign judgments in Aus
  - Enforceable by registration under *Foreign Judgments Act 1991* (Cth) for countries on the list – mainly British Cth, Japan, Korea, Germany, Poland, etc. (notably not US or China)
    - Onus on def to show why the court should not register the judgment
    - Grounds of defence: basis of jurisdiction, submission to foreign court, fraud, lack of due process, binding agreement to submit dispute to arbitration or foreign court
  - Where a country is not listed, foreign judgments are enforceable under common law
    - Onus is on plaintiff to prove there was a foreign judgment by a court which: (i) had jurisdiction, (ii) was final and conclusive, (iii) was between the same parties, and (iv) was for a certain sum
    - Same grounds of defence as above
  - Few multilateral agreements relate to enforcement of judgments

#### Choice of Court – what to consider

- (1) Applicable Law
  - Costs and complexity of proving foreign law
  - Applicable law does not always need to match with the choice of Court – e.g. Hong Kong courts can apply English law
- (2) Local Courts
  - Are they convenient? Efficient? Reliable? Inexpensive? Biased (local preference / issues of corruption)?
  - What language are the proceedings held in?
  - Will the court take jurisdiction even if there is an exclusive jurisdiction and arbitration agreement nominating another jurisdiction?
- (3) Foreign Courts
  - Similar issues to local courts
  - Are their judgments enforceable in the jurisdiction where the local party is located / where the local party's assets are located?
  - Does the court have specialist expertise?
  - Would a local court override the jurisdiction clause?
- (4) Exclusive vs non-exclusive jurisdiction clauses
  - Exclusive = only 1 choice; no subsequent change except by agreement; not flexible; judgments made despite this clause may be unenforceable in other courts

- Non-exclusive = more flexible; provides a forum but not only forum; allows choice if better jurisdiction available later
- \*Exclusive clauses are not always enforced by other courts
- (5) International considerations (conventions)
  - Intra-EU; Aus/NZ TTPA (about enforcement of exclusive jurisdiction provisions); HK/China Agreement; etc.
- (6) What if parties choose the wrong court? – example: Baha Mar (Bahamas) Project
  - Project: construction of a beach resort in Bahamas
  - Parties: investors (based in US – Delaware company + Bahamas project entities); construction company (US subsidiary of Chinese Parent); financiers (China Exim Bank)
  - Stakeholders: govt of Bahamas; employees; local residents and businesses
  - Contracts: loan finance (Eng law and courts), construction contract (NY law and courts), ancillary agreements (law of Eng, British Columbia, Texas and New York), grant of security (law of Bahamas)
  - Litigation:
    - In US Bankruptcy Court Delaware: application to wind up company + Bahamas subsidiaries
    - In Courts of Bahamas: application to wind up Bahamas project companies
    - In Eng High Court: action on the debt
    - In NY court: dispute over construction contract

### Governing Law

- Forum applies its own choice of law rules – parties may generally select the governing law in a commercial contract, but the court will not always accept the choice by the parties
- Applies generally for contracts and torts arising from contracts
- Relevant aspects in choosing applicable law:
  - Forum – is the law that of the selected forum? Is it generally understood in the forum?
  - Types – Eng common law, US common law, Napoleonic, Roman-Germanic, mixed common/civil law
  - E.g. England/NY is popular for international commercial finance
- Choice of law factors and relevant considerations:
  - Predictability
  - Commerciality
  - Enforcement of judgments abroad
  - Freedom of contract
  - Stability, rule of law, and risk

### (c) Arbitration

- Arbitration exists within context of local arbitration law – decisions are binding (limited right to appeal/annul)
- Elements = (i) arbitration agreement, (ii) in writing (for purposes of enforcement), (iii) matter capable of arbitration, and (iv) commercial agreement
- Arbitration award is enforceable in most jurisdictions under New York Convention
- If arbitration agreed to, jurisdiction of courts is generally excluded
  - Depends on court and relevant laws relating to arbitration
- Consent of parties (either at time of signing contract or subsequently) is required for an arbitral body to have jurisdiction
- Issues with arbitration clauses:
  - Considered a ‘separate contract’ – survives contract termination or invalidity
  - If ‘dropped into’ contract without adequate thought, can cause issues later
  - Different issues may require different arbitrators (e.g. technical vs legal issues)
  - Clause should specify issues covered and any limitation periods
- Types of Arbitration
  - Ad hoc arbitrations
    - Parties set up own arbitration without support from formal institution
    - Can draft and choose their own rules
  - Arbitration centres
    - Have their own rules, but may allow use of e.g. UNCITRAL Rules
  - Established systems of arbitration rules
    - E.g. UNCITRAL Rules, ICC Rules, etc.
- Arbitration Rules
  - Application: parties nominate Rules in writing in agreement
  - Procedure: (i) notice of arbitration by claimant, (ii) composition of tribunal, (iii) right to representation, (iv) challenges to arbitrators
    - Additional procedures re Statement of Claim, Defence, other written statements, Hearings, etc.
  - Awards: majority, type, ability of tribunal to decide *ex aequo et bono* (if parties agree)
  - Costs: fixed by tribunal
- Arbitration Venues
  - International Chamber of Commerce (e.g. Paris, Geneva, Zurich)
  - London Court of International Arbitration
  - American Arbitration Association
  - Arbitration Institute of Stockholm Chamber of Commerce
  - Hong Kong International Arbitration Centre
  - Singapore Arbitration Centre
  - \*Australian Centre for International Commercial Arbitration (ACICA)  
[growing use]

### Arbitration vs litigation

- Costs – is arbitration actually cheaper?
- Speed
- Choice of venue
- Confidentiality vs public hearings
- Procedure: simplicity vs clarity
- Finality/no appeal – is this always a positive?
- Standard of arbitrators vs standard of judges – quality of judgments vs awards
- Enforcement
- Mandatory arbitration provisions?
- What will be the determining factor for a decision on this?

### Arbitration Rules

| <u>Rules/Law</u>               | <u>Description</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| UNCITRAL Model Arbitration Law | <ul style="list-style-type: none"><li>○ Art. 1: applies to international commercial arbitrations</li><li>○ Art. 5: no court to intervene except where provided by law</li><li>○ Must be an <u>arbitration agreement</u> – in writing, agreement to submit all or certain disputes in respect of a ‘defined legal relationship’</li><li>○ Art. 8: court must refer any matter subject to an arbitration agreement to arbitration, unless the agreement is ‘null and void, inoperative, or incapable of being performed’</li><li>○ Art. 10: parties free to choose number of arbitrators (if no choice, number will be 3)</li><li>○ Art. 11: provisions for selection of arbitrators</li><li>○ Art. 12: provides for challenge to arbitrators – circumstances that ‘give rise to justifiable doubts as to his impartiality or independence’ or failure to possess agreed qualifications</li><li>○ Chapter V: Procedure<ul style="list-style-type: none"><li>○ Parties to be treated with equality and given chance to present case</li><li>○ Parties can agree on procedures, place of arbitration, and language</li><li>○ Right of tribunal to determine hearings, appointment of experts, request courts to provide assistance in taking evidence</li></ul></li><li>○ Chapter VI: Making Award and Termination of proceedings<ul style="list-style-type: none"><li>○ Apply rules of law chosen by parties or law determined by conflict of laws rules it considers applicable</li><li>○ May decide <i>ex aequo et bono</i> or <i>as amiable compositeur</i>, only if agreed by parties</li><li>○ Must take into account usages of trade</li><li>○ May record settlement of proceedings on agreed terms</li><li>○ Majority decision unless otherwise agreed</li><li>○ Award to be in writing</li></ul></li><li>○ Setting aside awards (grounds as per New York Convention):</li></ul> |

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|-------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                 | <ul style="list-style-type: none"> <li>○ Parties under an incapacity or agreement not valid</li> <li>○ No proper notice to party or party unable to present case</li> <li>○ Award outside agreement</li> <li>○ Tribunal not properly constituted or procedure not in accordance with agreement or law of seat</li> <li>○ Award not binding or set aside</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <i>International Arbitration Act 1974 (Cth)</i> | <ul style="list-style-type: none"> <li>○ Adopts UNCITRAL Model Arbitration Law – provides legislative backing for international arbitrations inside Aus</li> <li>○ Provides for stay of court proceedings where parties have agreed to international arbitration</li> <li>○ 2010 amendments incorporate many of the provisions of the 2006 amendment to the Model Law</li> <li>○ s 20: Enforcement provisions of Part II (under New York Convention) prevail over enforcement provisions of model law</li> <li>○ Art. 17: in interpreting model law, reference may be made to documents of UNCITRAL and working group for preparation of Model Law</li> <li>○ Supreme Courts of States / Territories are ‘competent courts’</li> <li>○ Parties may agree to settlement of disputes by means other than the Model Law</li> <li>○ Art. 24: allows for application to arbitral tribunal for order consolidating arbitration proceedings when: <ul style="list-style-type: none"> <li>○ Common question of law/fact arises in all proceedings</li> <li>○ Rights to relief claimed in proceedings arise out of same transaction/s</li> <li>○ Otherwise desirable that an order be made</li> </ul> </li> <li>○ Provision for consultation by tribunals re consolidation where more than one tribunal involved</li> <li>○ Allows for: orders for interest, orders for costs, no action against arbitrators for negligence (but action may lie for fraud), right of representation by legal counsel in oral hearings, interim orders, etc.</li> </ul> |

### Enforcement after Arbitration

- Compulsory grant of stay of litigation if parties have agreed to international arbitration
- Enforcement under New York Convention:
  - Art. 1: award made in territory of another State or award not considered domestic
  - Art. 2: must have agreement in writing, defined legal relationship, concerning subject-matter capable of settlement by arbitration
  - Art. 3: award to be enforced in accordance with rules of procedure of place of enforcement
  - Art. 4: formalities – original award or certified copy, original arbitration agreement or copy
  - Art. 5: grounds for refusal (see ‘setting aside awards’ above)

- Reasons for refusal of enforcement
  - Award not yet binding or set aside
  - Subject matter not capable of settlement by arbitration
  - Recognition or enforcement contrary to public policy
  - Enforceable in Aus in IIA (grounds for non-enforcement very limited)
  - Investor-state – enforced through ICSID Convention of NY Convention (many issues)
- Practical issues with enforcement of arbitral awards
  - Estimate that 90% of international arbitral awards have been given effect by a domestic court have been challenged – resistance of national courts
  - Claims of sovereign immunity, public policy, dispute not arbitrable, procedural issues, corruption and fraud allegations, etc.
- Advantages
  - Expert judges (including one or more foreign judges in most cases)
  - Legal expertise
  - Relaxed rules of evidence in some cases (e.g. proof of foreign law)
  - Superior electronic case management (e.g. in Middle East), expediting hearings and judgments
- Disadvantages
  - Lack of standard enforcement regime (dependent on domestic courts)
  - Costs?
  - Sometimes there is publication of judgments
  - Enforcement
  - E.g. China – no choice of judges
  - E.g. Dubai and Abu Dhabi Courts – need for either some connection with jurisdiction or the consent of the parties
- Examples of sample provisions
  - Parties must explicitly opt for the jurisdiction of the court
  - English speaking courts
  - Substantial influence of English courts
  - E.g. Netherlands, Dutch Courts but speaking English
  - E.g. Brussels, international trade specialty, no appeal – to use UNCITRAL Arbitration Rules
  - E.g. Singapore, right of appeal