## Ensuring payment when working overseas

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Australians are increasingly venturing into international trade and investment. In particular, in the Resources Industry, Australians are called upon for their expertise throughout the developing world. Whether the Australian is to work as an individual consultant or as a complex contracting company or some other small to medium enterprise (SME), it will be essential to ensure that the terms of the contract ensure that the Australian identity will be paid for the work performed.

International involvement in economic relations entails both increased risks and benefits. One important element of such additional risks is non-payment of debts: the debtor may feel himself to be safely out of the creditor's reach when he is across a border.

A dispute may be with a foreign state as in the case of mining and oil companies and foreign direct investors, or a foreign commercial entity. In international legal terms, a dispute with a foreign state is an International Investment Dispute; and a dispute with a foreign commercial entity is an International Commercial Dispute. For the purposes of this paper, the debtor and creditor will be private persons or corporations separated by national borders. Therefore, should a dispute arise, it will be classified as an International Commercial Dispute.

Should such a situation arise, whereby an Australian SME experiences such difficulties, what can be done? What mechanisms are available? Are they effective?

A contract is only as strong as the law governing any dispute that may arise; therefore, when embarking on a foreign venture, the SME will need to consider the mechanisms available, and choose the mechanism desirable to meet its needs. These needs are typically the expectation of a fair hearing, in a timely manner, enforceable and economically conducted. To be heard in our native tongue would also be desirable, but not always negotiable.

If no provision is made through the dispute resolution clause in the contract; then it is probable that litigation will ensue, and the dispute will be heard in the national courts of the host state. This may be acceptable in a state with a fully developed legal system. However, the contrary may be true in a developing state. A delocalised and independent forum of dispute resolution, for the parties irrespective of their nations of origin, should be the choice.

An example in the experience of the Author was that of a potential dispute in the State of Bangladesh. It was established that the laws of Bangladesh are currently in an undeveloped, un-evolved and chaotic state. The resulting conclusion was that important matters of contractual interpretation, dependent on the sensible and reliable evolution and legal

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jurisprudence of the legal system was not achievable. In addition, as an average, in the civil courts of Bangladesh, it takes approximately twenty years for the court to decide an action at first instance and thereafter, approximately 100 years to exhaust the appellate jurisdiction;[2] however, litigation *will* be the dispute resolution mechanism used if no provision is made for an alternative dispute resolution in the contract, or it is an express choice of the parties.

So, what is available? There is a hierarchy of dispute resolution mechanisms, whether commercial or investment. Collectively, they are known as Alternative Dispute Resolution (ADR). Potential disputes can be avoided, or if necessary, settled privately, honourably, timely and economically through ADR.

ADR includes: Negotiation, Mediation, Expert Determination

**Negotiation**

It is always desirable to negotiate our way out of a dispute. An effective negotiation strategy is entirely dependent upon a detailed understanding, analysis and evaluation of the merits of a dispute. It is stressed however, that the negotiating team should be in possession of all relevant materials to enable them to quantify their ambitions.

**Expert Determination**

Expert determination is where a third party neutral makes a decision as to the outcome of the matters in dispute referred to him or her.

Each party submits their case to a mutually agreed expert who makes his decision as to the outcome of the dispute and such decision becomes a binding contract as between the parties.

For a dispute of substantial size, value and complexity, the Author is not persuaded that Expert Determination is the preferred option.

**Mediation**

Mediation is assisted negotiation. It is where a neutral third party facilitates the parties to a dispute to identify common ground in order to obtain settlement. Mediation is not adjudication. The mediator does not decide the issue. It is the parties' dispute and it is the parties who settle their dispute.

As any mediated settlement agreement only has the status of an ordinary private contract, there are potential difficulties of enforcing such an agreement worldwide. The Author suggests that should a mediated settlement agreement be entered into, it would be advised that thereafter an arbitral tribunal be convened to recognize the mediated settlement agreement in the form of an arbitral award. This would then allow enforcement of the mediated settlement agreement by way of an award on a worldwide basis and pursuant to the New York Convention.

[2] http://www.rghr.net/mainfile.php/0503/455/?print=yes

Approximately 80 percent of disputes that are referred to International Commercial Mediation are successful and result in a mutually agreeable mediated settlement agreement.[3]

**International Commercial Arbitration**

Arbitration is an additional dispute resolution mechanism available to disputing parties on both a domestic and international level. It is in many respects similar to court proceedings. However, significant differences are that the parties to the dispute choose the arbitrators (in national courts the State appoints the judge), the venue, the applicable law, the language, and the procedural rules under which it will be conducted.

A quoted definition of international arbitration is below:

> "International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures and structures and substantive legal or non-legal standards chosen directly or indirectly by the parties."

Section 1 of the English Arbitration Act 1996 provides

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

What is clear is that arbitration is an alternative to the national courts, which is selected and controlled by the parties.

**Advantages of arbitration over national courts**

No party has to submit to the national court of the other party. This is an obvious advantage where there may be a perceived or real national prejudice;

Unless otherwise agree by the parties, confidentiality is maintained throughout the proceedings. The existence, of the arbitration, the agreement, the subject matter, the evidence, the documentation, the entitlements, the obligations of the parties and the award are kept private and cannot be divulged to third parties. In addition, confidentiality increases the chances for peaceful settlement;

The arbitral tribunal is tailor-made as mentioned above; the parties choose the arbitrators, the venue, the applicable law, the language, and the procedural rules under which it will be conducted. National courts by contrast have very rigid and inflexible procedures. National court judges are drawn from the local system and do not necessarily have the knowledge of international business or even disputes between parties from different countries.

Enforceability of an award of a domestic arbitration will be enforced in the normal way through the national courts. However, in an international arbitration, the award will be enforced by international treaty. The relevant international treaty is the *New York*

[3] CEDR United Kingdom, ICC Paris

*Convention on Recognition and Enforcement of Arbitral Awards 1958*. The New York Convention sets the standard requirements for a successful international arbitration process. The success of the Convention is well illustrated by three factors.

**First**, over 150 countries are party to the Convention. There are few private law conventions that have achieved such a wide international acceptance.

**Second**, for the purposes of interpreting and applying the New York Convention, it is now common for the courts of one country to look to the decisions of other foreign national courts to see how specific provisions have been interpreted and applied. Whilst these national court decisions are not automatically binding, such applications of the common rules of the New York Convention have had a direct influence on the development of international practice and law, which is increasingly of significant influence on parties, arbitrators, and national courts, regardless of nationality.

**Third**, and this follows from the above two points, it is now generally accepted that agreements to arbitrate and arbitration awards will be enforced by the courts of all countries which are a party to the New York Convention. Upholding arbitration agreements and awards is an absolute prerequisite if international arbitration is to succeed and the New York Convention has provided the framework for this success.

According to the UNCITRAL Model Law of 1985 (the arbitration law from which Australia models its arbitration law) the term "commercial" is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.

There are three ways to establish the international character of a commercial arbitration: its subject matter or procedure or its organization is international; or the parties involved are connected with different jurisdictions; or there is a combination of both.

The significance of the terms "Commercial" and "International" are that it gives the disputing party the protection of international treaties governing the procedural and enforcement rights of the disputing parties.

**Conclusion**

Before embarking on any international transaction, one must ensure the following:

- Your client can afford you; i.e. the debtor must have the funds or assets to pay the debt; therefore, due diligence must be performed;
- One must specify international commercial arbitration as the chosen dispute resolution mechanism in the original contract. If not, then litigation will be the only option, thus leading to enforcement difficulties;
- One must seek advice from the necessary experts with knowledge of international law and trans-boundary transactions.

Finally: before initiating any legal proceedings, I ask myself three questions:

1. How much will the dispute cost? Is it more than the disputed amount?
2. Will I win? And
3. If I do win, will I get paid?

If *all* of the questions cannot be answered in the positive, seek other dispute resolution methods or don't go ahead. One should only initiate legal proceedings for economic reasons, not for a principle.

To quote *Lord Phillips, Former Lord Chief Justice of England and Wales*

*"Civil litigation is still something any sensible person should look at with horror at the possibility of being involved in."*