



LEX ARBITRI

After examining mechanisms for alternative dispute resolution in previous issues, Colin Roberts now turns his attention to an additional dispute resolution mechanism available to disputing parties on both a domestic and international level – International Commercial Arbitration. This 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.

Cross-country resolutions

A quoted definition of international arbitration is: "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, 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 agreed 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 lan-

guage, and the procedural rules under which it will be conducted.

National courts by contrast have very rigid and inflexible procedures. 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 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 130 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.

For the Foreign Direct Investor, it is important to establish whether a dispute is to be commercial – Legal Person vs Legal Person – or an investment transaction – Legal Person vs Sovereign State.

As this article is about "international commercial arbitration" we will concentrate on commercial disputes for the time being.

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 organisation 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.

TRIPLE BOTTOM LINE

With BHP Billiton Ltd operating in a number of Commonwealth countries, the international mining giant has offered support to 10 Commonwealth countries as part of a sponsorship programme announced by the 2006 Melbourne Commonwealth Games organising committee.

In Australia alone, BHP Billiton has operations and offices in all states and the Northern Territory. Its global headquarters are in Melbourne – which will host the Games next month (March) – 10 of its operations are in Western Australia; two are in South Australia; there are coal operations in New South Wales and Queensland; and there are base metals in Tasmania and in Queensland.

There are also operations in Canada (Ekati diamonds), South Africa, Pakistan, India, and Singapore.

The company has also invited a number

Games support from BHPB

of national Commonwealth Games Associations to nominate a new or ongoing development project in a sport of its choice to be considered for specific support under the sponsorship.

The company will provide Partner level support to the 2006 Melbourne Games organisation and, as part of a Federal Government support programme, will facilitate travel and associated costs for athletes and officials from nominated Commonwealth countries.

BHP Billiton will also provide the silver for the Commonwealth Games' silver medals.

Chief executive Chip Goodyear said the sponsorship programme was an opportunity to assist a number of Commonwealth coun-

tries in a practical way that would leave lasting benefits.

"Many of the Commonwealth countries require assistance to fully participate in major global sporting events, such as the Games, and we are glad to be able to provide some support," Goodyear said.

"This is a logical and tangible way to implement our Charter values by interacting with and supporting some of the communities in which we operate. We are pleased to be working with the Commonwealth Games Federation on the international sponsorships and look forward to hosting representatives of these communities during the Games in Melbourne."