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CROSSBORDER DISPUTES & INTERNATIONAL ARBITRATION

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Alternative dispute resolution is an integral part of global business. There is a growing need for contracts to adequately reflect an international position for any dispute resolution process that will be used.

A well considered dispute resolution clause can go a long way to preserving the business relationship between the contracting parties if a dispute does arise. The drafting process should start with a risk analysis of the contract and some scenario planning about what might go wrong. It is easier to agree about a fair and efficient process for dealing with any later disputes during the negotiation of the contract, when the relationship between the parties is unaffected by the dispute.

Depending on the nature of the contract, there are a range of possibilities about how a dispute can be managed, and arbitration should be viewed as a useful tool in a broader dispute resolution process. It can be a particularly important instrument for dealing with disputes with foreign counterparties.

By including arbitration clauses into contracts, parties can opt to have disputes decided by private tribunals rather than litigating them in Court.

THINGS TO CONSIDER

There are a number of things To keep in mind when considering An arbitration process:

1. GOVERNING LAW

   Contracts will often contain a “governing law” clause, ie the parties have agreed the law of a specified country will apply. However, that doesn’t mean that any judgment you obtain in that country will necessarily be enforceable against the counterparty in its home country.

   For example, even if it is agreed that the law of Australia will govern the contract and you obtain a judgment from an Australian Court, you need to register that judgment in the country in which the counterparty has assets, so that you can enforce it.

   The ability to register an Australian judgment overseas is highly variable. For instance, China does not have a process available to register and enforce foreign judgments. In the absence of an international arbitration clause in the contract, the only remedy is to sue in the Chinese Courts. However, with an arbitration clause, you could agree to arbitrate in Hong Kong, as an arbitral award from Hong Kong is readily enforceable in China.

2. ENFORCEABILITY

   A good arbitration and dispute resolution clause in the contract will include a protocol for enforcing any arbitral award.

   Generally, the enforcement of an arbitral award is dealt with under the New York Convention on the Recognition & Enforcement of Foreign Arbitral Awards (“New York Convention”). There are 145 signatories to that Convention, but it is important

to ensure that the home country of the counterparty is a signatory.

3. FLEXIBILITY

Parties have great flexibility in their contract to design the procedure for the arbitration that best suits them. This includes determining which countries' laws will apply, who will arbitrate the dispute (ie a person who is an expert in a particular field), the process to be followed, what language will be used (which is particularly important with non English speaking counterparties), and how the arbitral award will be enforced.

4. FINAL DETERMINATION

An arbitral award is final between the parties and cannot be appealed. This can be contrasted to mediation which usually has no binding effect; and also contrasted to a Court decision, which may be subject to lengthy appeal procedures and subsequent disputes about the assessment of any costs that are awarded.

5. SPEED

Arbitral proceedings can be concluded quickly, if the parties agree at the outset to a speedy process. It will not be subjected to the same delays that commonly occur in litigation as a result of complying with court rules and protocols, and waiting for judge time to be available to hear the matter.

6. NEUTRALITY

The parties can agree to a neutral arbitrator to resolve the dispute. This can be important to the parties, as the nationality of the decision maker can give a perception that he or she will favour the party of the same nationality. The parties can agree that the arbitrator will be an expert from a neutral country, so that neither party feels they are at a disadvantage.

7. CONFIDENTIALITY

Court proceedings are usually a matter of public record and members of the press can report about the evidence given at the hearing. An advantage of arbitration is that the parties can agree from the outset that the process and the decision will be kept confidential.

This could be important, particularly where the subject matter of the dispute is commercially sensitive..

CHOOSING A COUNTRY

The choice of the place for the arbitration to occur (ie the "seat") can be important. The parties will need to consider what laws are in place in the seat and whether or not the country is a party to the New York Convention.

There are a number of different approaches around the world, but for an Australian based company, the growing significance of Asia in both the economic and legal sphere cannot be disputed. Australia has adopted the New York Convention and our Courts will readily enforce arbitral awards. The Australian Centre for International Commercial Arbitration in Sydney has its own arbitration guidelines which are neutral and separate to any Asian or European procedures.

Our geographical isolation is often seen by the Asian tribunals and arbitrators as an indicator of neutrality, largely due to the fact that Australia and Australian lawyers are not "influenced" by their location nor do they lean towards a certain type of arbitratory procedure.

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