International Commercial Litigation: The Dangers For Business, And The Solutions To Mitigate Risk

By Alex Milne

The business of international commerce is indeed a potentially risky business. One of the greatest fears of a party to an international commercial contract is the prospect of being dragged through an overseas forum where they have little understanding of how the law operates. In addition parties may have a fear, whether justified or not, that the courts of the foreign jurisdiction will unfairly bias their decision in favour of the party which hails from that jurisdiction.

It is also possible for parties to an international contract to engage in 'forum shopping.' In this situation a party will choose between a number of potential forums, decide which country's laws and/or legal system most advantages them, and then seek to have proceedings instituted in that forum.

In this globalised and rapidly developing world, trade and cross-border investment is occurring between countries and regions that previously had very little contact. Businesses now may encounter jurisdictions with completely alien legal systems, and completely different judicial and societal norms. Parties may also encounter legal systems which are not yet fully developed and fully equipped to deal with disputes in a complex commercial transaction.

Difficulties in Effectively and Efficiently Litigating an International Dispute:

Litigation based on a contract with international elements can be extremely convoluted. Rather than a straightforward decision on the merits of the case, a company may become embroiled in a lengthy stoush even before they can get the substantive matters of the dispute heard.

For example if one party to an international agreement instituted proceedings in Australia, another party could potentially challenge the Australian court's jurisdiction to hear the matter.

A possible way to do this would be to rely on the doctrine of *forum non conveniens*. A party will essentially be arguing that Australia is not the appropriate forum for the hearing of the dispute. A range of issues will potentially be called in to try and establish whether Australia is an inappropriate forum for the hearing. We will be looking at connecting factors like the domicile of the parties, the location of the project to which the agreement relates, and the location where the conduct leading to the dispute has occurred.

Particularly where we see complex international agreements and joint-ventures between numerous different international parties, we could be forced

to assess connecting factors to numerous different jurisdictions.

This doctrine in Australia is limited in the sense that an Australian court will only refuse to hear a dispute if it finds that it is actually a clearly inappropriate forum for the dispute to be heard, regardless of whether there may be another more appropriate forum.[1] However in other jurisdictions, for example the UK[2] and Singapore[3], it may be the case that a court will find it does not have jurisdiction to hear the matter on the grounds that there is simply a more appropriate forum elsewhere.

Another tactic could be to initiate an 'anti-suit' proceeding in their country of domicile, with a view to obtaining a pre-emptive injunction to the effect that any decision by the Australian court will not be recognised in that country. This can mean that a party must simultaneously fight two legal proceedings, the first addressing the substantive elements of the dispute, and the second opposing the anti-suit injunction.

Even once a court has found that it has jurisdiction to hear the dispute, it may be that there is dispute over which country's laws should be relied upon as governing the dispute. Potentially a court will have to break up the dispute into its constituent parts and apply the laws of different jurisdictions to each component of the dispute based on the specific factors connecting that component of the dispute to a certain jurisdiction. Involving a court in considering the laws of another jurisdiction is generally complex, uncertain and expensive.

Problems of Enforceability of Foreign Judgements:

A court typically only has the jurisdiction to enforce its judgement within the realm of its own borders. A company seeking satisfaction of a hard-one court judgment still needs to actually access the assets of the other party. A judgment is of little consolation without the cold, hard cash going into the coffers.

If the other party refuses to pay up, it may be that a company is forced to have the Australian court's judgment recognised by the foreign country in which the party is domiciled. As noted above, if the other party has already obtained an anti-suit injunction then one is largely snookered.

Even if this has not occurred, the rules for recognition of foreign judgments are not universally harmonised. Recognition of foreign judgments is essentially governed by the laws of the state in which a party seeks to have a judgment enforced. It may be that even upon obtaining a successful judgment in one jurisdiction, a company is forced to have recourse to the courts in which the other party holds its assets.

The Upshot of these Difficulties for a Commercial Party:

Companies do business to make money, not to gratuitously fund the lawyers of the world. From a company's perspective the potential for time consuming and costly litigation across several different legal systems, and with minimal certainty is a toxic combination.

All of these potential pitfalls can leave a company uncertain of their legal rights, and their ability to enforce these rights. Uncertainty is the ultimate undesirable when it comes to contracting. They are further discouraged by the cost and length of time which may be involved in attempting to enforce these rights. Uncertainty will necessarily lead a prudent company to make a range of commercial compromises. Essentially it is likely that a company will make a pragmatic decision to settle for less than they believe they are entitled to.

Mitigating the Risk through Choice of Forum and Choice of Law:

International commercial contract disputes can lead to complicated and time consuming onslaughts of litigation. It is a well-known and obvious point that litigation can be expensive. One must try to imagine the possibility of having separate litigations held in different forums regarding the same dispute. Then more than likely there will be litigation over the issue of which is the appropriate forum for the litigation.

Even after jurisdiction is established there may be room to litigate over which country's laws should be applied to resolve the dispute. Perhaps there will even be a cocktail formed, taking elements of the law from several different jurisdictions for application to different parts of the dispute. Even after all of this if one does end up with a court judgement in their favour, they may have to proceed in the courts of another jurisdiction to try and have that judgement recognised and enforced by local authorities.

This kind of protracted dispute can not only be costly, but will more than likely dissolve any goodwill between the parties, and eliminate any chance of a future relationship.

For this reason it is wise for parties to turn their minds to these potential pitfalls at an early stage and invest the time at the front-end to ensure that they enter a contract which minimises the chance of an international litigation debacle.

One potential front-end solution is to insert a 'jurisdiction clause' into the contract. A jurisdiction clause will allow parties to nominate a forum which the parties are required to revert to in the event of litigation. Within the auspice of drafting a jurisdiction clause parties will need to consider whether they wish one country's jurisdiction to be exclusive or non-exclusive. A potential jurisdiction clause might read as follows:

All disputes relating to this contract shall be exclusively determined by the courts of the State of Victoria, Australia.

Another potential solution would be to create a separate and distinct agreement known as a 'jurisdiction agreement' which will refer to the original contract and nominate a forum for litigation of disputes arising from that contract. This kind of agreement could theoretically be tacked on at a later stage if parties have formed the original contract hastily, and mutually desire the certainty of having a designated forum.

Jurisdiction clauses or jurisdiction agreements are obviously contractual in nature, and so can themselves be subject to dispute, but where they are properly drafted courts in most cases will give effect to the evidenced intention of the parties. Generally these type of clauses do significantly mitigate the risk of a potential dispute about jurisdiction. A court of a foreign jurisdiction is unlikely to hear a case where there is an exclusive jurisdiction clause nominating another forum. However this is of course at a court's discretion. A court may decide not to stay the proceeding even when a clause nominates another forum exclusively.

A prominent US decision in *The Eleftheria* notes this discretion, and creates a rebuttable presumption that a stay should be granted where another forum is nominated. This presumption can be rebutted by strong evidence showing that it will be extremely inconvenient or prejudicial to one of the parties to stay the local proceeding and hold the proceeding in the contract's nominated forum. This decision has been followed with approval in Australia.

Another front-end tactic to increase certainty is to use a 'choice of law clause', which may nominate that the contract is to be governed by the laws of a certain jurisdiction, and disputes must be resolved in accordance with the laws of that jurisdiction. These clauses are generally given effect by a court hearing a dispute, and so allow both parties to more accurately predict their rights under the contract, and the enforceability of these rights.

Alternative Dispute Resolution - Arbitration Clauses:

Arbitration clauses are a popular and effective way to enshrine a straightforward dispute resolution mechanism in an international contract. It is recognised that arbitration can often better preserve the relationship between the parties in a commercial disagreement, and therefore disputes can be resolved without leading to a total dissolution of the arrangement between the parties.

Arbitration these days can be well organised and is increasingly flexible to accommodate the needs of commercial parties. For example numerous arbitration bodies worldwide provide a right to urgent arbitration where a party requires an injunction in the nature of a 'Mareva Order'preventing a contracting party dealing with its assets in the interim before a determination is made.

International harmonisation with the goal of increasing certainty of arbitration decisions has been attempted with relative success. For example the 'New York Convention' adopted by the United Nations Conference of International Commercial Arbitration in 1958 was an attempt to increase international enforceability of arbitration awards across borders. This convention has now been adopted by a majority of states.

Conclusions - Preparing to Swim before Entering the Ocean:

By intelligently considering what will happen in the event of a dispute at the early stages of contracting, parties to an international contract can have

increased certainty, and are better placed to avoid fragmented and costly litigation at a later date.

There are tactics which can be used to increase certainty, and these tactics not only benefit each party individually, but benefit the transaction as a whole. Where rights and obligations are clear, a relationship is much less likely to break down in a flurry of disagreement. An international commercial contract is inevitably formed with certain goals in mind, and these goals are much more likely to come to fruition if the contract is drafted well, and accounts for the complexities a global legal landscape.