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Some Comparisons with Arbitration

Authors: Robert Regan, Jessica Rippon and Shyla Sharma, Corrs Chambers Westgarth

1 Introduction

The purpose of this paper is to highlight some commonalities and differences between a Dispute Board (DB) and an arbitration for the purposes of stimulating panel discussion.

2 Globalisation and the Rise of Arbitration and DBs

International Arbitration and DBs are becoming increasingly common methods of dispute resolution.

The authors speculate that the momentum of International Arbitration and DBs will continue, supported by the rapid expansion of international trade and the rising volume of infrastructure internationally.

When reflecting on the demand for infrastructure, it is interesting to reflect on the predictions that by the year 2030:

- (a) air passenger traffic could double;
- (b) air freight could triple; and
- (c) port handling of maritime containers world wide could quadruple.¹

It is estimated that USD\$53 trillion of investment (equivalent to an annual 2.5% of global GDP) will be needed to meet demand over the coming decades.² More than USD\$11 trillion of that will be required for ports, airports and key rail routes alone.³

The World Bank has just released a report, which recognises that services are already the fastest growing component of international trade.⁴ Construction and engineering services form part of that growth.

While the trend toward globalisation is not new, the global financial crisis has accelerated that trend. These days, projects look to international sources of funding and technical support, while construction engineering firms look abroad for new markets for growth. In

¹ OECD, *Strategic Transport Infrastructure Needs to 2030 Report* (2011) OECD International Futures Program, 6.

² *Ibid*, 10.

³ *Ibid*, 11.

⁴ The World Bank, *China 2030: Building a Modern, Harmonious, and Creative High-Income Society* (2012) International Bank for Reconstruction and Development /International Development Association or The World Bank, 7.

the construction industry, for example, a project might be performed in Thailand with Hong Kong investors, the engineering, procurement and construction company might be headquartered in Australia, the engineering design might be performed in India, and the materials might be fabricated in China.

Parties to a contract are generally reluctant to submit to the jurisdiction of another party's legal system. In the context of the macro economic trend toward increased trade-flows and cross-border transactions, the unwillingness of parties to surrender to another party's legal system has, and no doubt will, continue to support the growth of DBs⁵ and International Arbitration.⁶

Parties should consider and weigh up the respective strengths of using International Arbitration or DBs, either alone or in combination.

3 Arbitration as an Effective Dispute Resolution Mechanism

Unlike local court systems, no arbitration panel exists unless two parties contractually undertake to create one,⁷ the result being that the arbitration agreement becomes the primary source of the rights, powers and duties of the arbitral tribunal.⁸

Most of the specificities of an International Arbitration result from its principal feature: party autonomy.⁹ Parties to an arbitration retain considerable freedom over the place of arbitration, the applicable law, the language of the arbitration, the composition of the bench, and the confidentiality of proceedings.¹⁰ Furthermore, an arbitral award is legally binding and the grounds of appeal are limited. Arbitration affords finality to the proceedings.

Although arbitration was introduced to avoid the delays and problems associated with litigation, at times it has had a reputation for being highly procedural and expensive.¹¹ However, there have been considerable strides made in the efficiency of arbitration over the past few years, including in Australia.

⁵ Paula Gerber and Brennan Ong, '21 today! Dispute review board in Australia: Past, present and future' (2011) 22 *Australian Dispute Resolution Journal* 180, 180. According to this recent article, the use of DBs is projected to grow at a rate of more than 15% a year.

⁶ Albert Monichino, 'International Arbitration in Australia – 2010/2011 in review' (2011) 22 *Australian Dispute Resolution Journal* 215, 215.

⁷ Richard Garnett, 'International Arbitration law: progress towards harmonisation' (2002) 3(2) *Melbourne Journal of International Law* 400, 402.

⁸ *Ibid.*

⁹ Peter Sherwin et al, *Chapter 19: The decision to arbitrate* (2011) Proskauer Rose LLP at <<http://www.proskauerguide.com/arbitration/19/l/>> at 22 March 2012.

¹⁰ Garnett, above n7, 403.

¹¹ Jeremy Coggins, 'Dispute Resolution in the Australian construction industry – is there hope for arbitration?' (2011) *Building and Construction Law* 292,292.

3.1 Adoption of 2006 UNCITRAL Model Law Amendments

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) has, to date, been enacted in 66 countries worldwide.¹²

In 1989, Australia was one of the first countries to adopt the 1985 Model Law. In 2010, Australia amended the *International Arbitration Act 1974* (Cth) (IAA) to implement the amendments made to the Model Law in 2006, and is one of 12 jurisdictions to have adopted these amendments.

The 2006 Model Law has also been incorporated in the domestic arbitration legislation of New South Wales, Northern Territory, South Australia, Tasmania and Victoria.¹³ While based on the Model Law, the state legislation is supplemented by additional provisions to make it appropriate to domestic commercial arbitration. The state legislation is also uniform and consistent with the IAA. Both the Commonwealth and state-wide amendments aim to further facilitate international trade by encouraging the use of arbitration for dispute resolution in Australia.

Some key features of the 2010 legislative reform to the IAA include:

- (a) *Restricting the scope of judicial intervention* – there is now an exhaustive list of specific circumstances (consistent with the Model Law) allowing recourse to the courts. It is now clear that the Court does not retain residual discretion to refuse to enforce a foreign arbitral award;¹⁴
- (b) *Clarity on application of the Act* – the IAA is now the exclusive law governing international commercial arbitrations in Australia. Previously, it was unclear as to which Act applied to international disputes, however, the operation of state Commercial Arbitration Acts has now been excluded;¹⁵
- (c) *Challenging the identity of the arbitrator* – the IAA now provides that the identity of an arbitrator may only be challenged where there are “justifiable doubts” as to his/her impartiality or independence,¹⁶ or if he/she does not possess the required qualifications;¹⁷
- (d) *Opt-In provisions* – under the IAA, the parties can “opt-in” to provisions,¹⁸ including a confidentiality regime restricting the disclosure of confidential information except in

¹² UNCITRAL, *Status 1985 – UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006* (2012) UNCITRAL
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> at 22 March 2012 (provides full list of countries).

¹³ Ibid.

¹⁴ *International Arbitration Act 1974* (Cth) s 8.

¹⁵ Ibid, s 21.

¹⁶ Ibid, ss 16 and 18A.

¹⁷ Ibid, s 18A.

¹⁸ Ibid, ss 22(3) and 22(5).

certain circumstances¹⁹ and also to powers in respect of the consolidation of arbitration proceedings;²⁰

- (e) *Opt-Out provisions* – under the IAA, the parties can “opt-out” of provisions²¹ including an arbitrator’s power to order security for costs,²² a right to apply to the court for subpoena,²³ and the power to require inspection of documents and other evidence.²⁴

As a result of these amendments, arbitration can be more efficient and parties to an arbitration have greater certainty in resolving international commercial disputes and enforcing foreign arbitral awards in Australia.

3.2 Greater Harmonisation of Arbitration Procedure

There is growing harmonisation of the arbitration process. This is aimed at creating stability and certainty in international trade and commerce by enabling parties to predict in advance the rules that are likely to apply to them.²⁵

A significant early example of the movement away from national regulation is the *New York Convention*²⁶ (the Convention) which has been adopted by 146 countries.²⁷ The Convention focuses on the enforcement of arbitration agreements and awards.²⁸ Its provisions compel parties to go to arbitration pursuant to their agreement and lays down the rules for enforcing arbitral awards.²⁹ The general enforcement of agreements and awards without the intervention of national laws was central in the minds of its drafters and signatories.

While individual national courts have adopted different interpretations of its provisions, its widespread membership has created an effective uniform law in enforcing arbitral agreements and awards, thereby making the *New York Convention* a pillar in the harmonisation of arbitration law.³⁰ The ability to enforce awards in Convention Countries through this international framework is also a strength.

Further evidence of this trend towards harmonisation is in the growth of institutions engaged in administering and supervising International Arbitrations, for example, the American Arbitration Association (AAA), Australian Centre for International Commercial Arbitration (ACICA), the International Chamber of Commerce (ICC) and the London Court

¹⁹ Ibid, ss 22(3)(a) and 23C.

²⁰ Ibid, ss 22(5) and 24.

²¹ Ibid, ss 22(2) and 22(4).

²² Ibid, ss 22(2)(e) and 23K.

²³ Ibid, ss 22(2)(a) and 23.

²⁴ Ibid, ss 22(2)(d) and 23J.

²⁵ Ibid.

²⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959).

²⁷ UNCITRAL, *Status 1985 – UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2012) UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> at 22 March 2012.

²⁸ Garnett, above n7, 404.

²⁹ Ibid, 403.

³⁰ Ibid, 405.

of International Arbitration (LCIA). While each institution has its own set of rules, when compared, their provisions are becoming remarkably similar in content.³¹

While arbitration is fundamentally a process for resolving disputes between parties, the goal of party autonomy has proven to be consistent with harmonisation. Most national laws have adopted party autonomy as a “harmonised principle”³² and a single law of international commercial arbitration is foreseeable in the near future.³³

3.3 Expedited Arbitration Rules

In 2008, ACICA introduced the Expedited Arbitration Rules (EAR) whose overriding objective is to ensure that arbitration remains quick, cost-effective and fair, considering the amounts in dispute and complexity of issues or facts involved in the case.³⁴

The EAR reduce the time limits for most procedural steps, place restrictions on extensions of time and have limited provision for document production. This provides parties with greater confidence that the arbitrator will hear the case quickly and fairly and that the award will not be open to challenge due to a failure to accord procedural fairness.³⁵ For instance, there are general duties on the Arbitrator to avoid unnecessary delay and expense, so as to provide an expeditious, cost effective and fair means of determining the matters in dispute.³⁶ Parties also have an obligation to comply with any direction by the Arbitrator without causing delay.³⁷

4 Some Differentiators of Dispute Boards

Like arbitration, the source of a DB’s rights, powers and duties arises from agreement between the parties. Unlike arbitration however a DB is unsupported by a legislative framework, or the support of international law, including as to enforcement.

Although arbitration offers an effective method to determine disputes and enforce awards, DBs have clear and attractive strengths.

4.1 Dispute Avoidance

Most conventional alternative dispute resolution methods are reactive processes which are only triggered once a dispute has crystallised. These processes focus on minimising expense but do little or nothing to assist with the management of dispute avoidance.³⁸

³¹ Ibid, 410.

³² Ibid, 413.

³³ Ibid.

³⁴ ACICA Expedited Arbitration Rules, Rule 3.

³⁵ Peter McQueen, ‘Developments in Maritime Arbitration in Australia’, (Paper presented at the ICMA XVII, Hamburg, October 2009) 9.

³⁶ *Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* Rule 10.

³⁷ Ibid, Rule 11.

³⁸ Graeme Peck and Peer Dalland, ‘The Benefits of Dispute Resolution Boards for Issue Management of Medium to Large Construction Projects’ (2007) 26 (1) *The Arbitrator and Mediator* 13,15; Robert Hunt, *Dispute Resolution Boards* (2005) Robert Hunt Barrister < <http://roberthuntbarrister.com/Dispute.pdf>> 3.-

In contrast, a DB places emphasis on maintaining project relationships while resolving disputes in an efficient and equitable manner.³⁹ From the project outset, DBs focus on avoiding disputes, not merely resolving them at a lower cost.⁴⁰

4.2 Trust

It is a conventional approach that a DB's decision will only bind parties if they so agree at the time when the decision is delivered. In such cases, building confidence and establishing authority as a board of neutral experts with integrity and experience is critical to a party's willingness to accept the DB's decision.

A DB has social power vested in it by reason of its collective experience in the type of work occurring, longevity in the industry, reputation among contractual parties, as well as in the manner in which they personally conduct themselves during meetings and hearings.⁴¹

To the extent that DBs enable a consensual resolution of disputes, this has the strength of maintaining project relationships and potentially enhancing commercial relationships.

As highlighted in a report by the Hildebrandt Institute and Citi Private Bank, there has been an explosion of interest in global markets exhibited by the legal industry, which is evidenced by the recent number of cross-border mergers and integration of law firms.⁴² This activity is largely due to the demand growth in key emerging markets such as Brazil, Russia, India and China which have continued to generate legal work despite the economic downturns experienced by the developed countries.⁴³

Relevantly, this trend reflects the shift in world economic activity from the west and north to the east and south.⁴⁴ The report predicts that this shift will continue to occur over the next 40 years.⁴⁵ One might speculate that this change in the composition of global economic activity will stimulate an enhanced focus on the cultural and legal traditions of Asian and emerging economies.⁴⁶ In any event, there will be an increased diversity of perspectives, with emerging economies having a stronger voice.

With a focus on relationships, DBs are well placed to help accommodate cultural differences, which if not addressed and acknowledged, may result in cultural bias and stereotyping, and cause miscommunication and suboptimal project outcomes.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Kathleen. Harmon, 'Dispute Review Boards: Elements of a Convincing Recommendation' (2004) 130(4)*Journal of Professional Issues in Engineering Education and Practice* 289, 290.

⁴² The Hildebrandt Institute and Citi Private Bank, *2012 Client Advisory* (2012) at <https://peermonitor.thomsonreuters.com/ThomsonPeer/docs/2012_Client_Advisory.pdf>, 18

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid, 19

⁴⁶ In the Australian context, the shift of economic and strategic weight to Asia is recognised by the Australian Government's commissioning of a White Paper on "Australia in the Asian Century"

The area of cultural difference is an area in which it has been questioned whether International Arbitration has been doing enough.⁴⁷

The enhanced ability of a DB to deal with “non legal” cultural factors through confidence and relationship building, and for parties to feel that they have been heard and understood in a manner consistent with their cultural context is a potential comparative advantage of a DB.

This is particularly important in light of the changing patterns of economic activity discussed above. For example, it is sometimes said that Chinese societies have traditionally resorted to more consensual dispute resolution processes such as negotiation and conciliation.⁴⁸ In this regard, DBs are more attuned to a culture of avoiding direct confrontation⁴⁹ by creating an environment where parties are more likely to adopt a DB recommendation and thereby avoid further conflict.⁵⁰

4.3 Success of DBs

It is hypothesised that a perception of fairness, and trust in the DB process and the experts, are key reasons for the success of DBs.⁵¹

While there is a degree of uncertainty around the statistics used to quantify the actual success rate, according to a 2011 article by Paula Gerber and Brennan Ong,⁵² DBs have been used in over 2000 construction projects around the world through to the end of 2006.⁵³ Only 3% of the disputes referred to DBs⁵⁴ were referred on to arbitration or litigation, where most of the initial DB determinations were upheld anyway.⁵⁵

Of the 21 projects, the subject of DBs in Australia, only 3 disputes were referred to a DB for a formal hearing and on all 3 occasions, the DB’s recommendations were accepted by the parties.⁵⁶

5 Convergence of Dispute Resolution Mechanisms

The increased flexibility of arbitration has led to a narrowing of the differences between arbitration and other less formal forms of dispute resolution.

⁴⁷ Khawar Qureshi QC, ‘Cultural Sensitivity and International Arbitration’ (2008) *McNair Chambers* <www.mcnairchambers.com> at 22 March 2012, 1.

⁴⁸ Leonard L. Riskin, James E. Westbrook, Chris Guthrie, *Dispute Resolution and Lawyers* (4th ed, 2009), 277.

⁴⁹ *Ibid.*

⁵⁰ Peter H.J. Chapman, ‘*Dispute Boards on Major Infrastructure Projects*’ (June, 2011), 7.

⁵¹ Kathleen Harmon, above, n43.

⁵² Gerber and Ong, above n5, 182.

⁵³ *Ibid.*

⁵⁴ Peck and Dalland, above n34, 23-24.

⁵⁵ *Ibid.*

⁵⁶ Gerber and Ong, above n5, 182.

5.1 Arbitration and Expert Determination

The effect of the *Arbitration Act 1996* (NZ) (the NZ Act) with respect to differentiating between arbitration and expert determination was, for example, examined by the High Court of New Zealand.⁵⁷

There, the issue was whether the parties' appointment of an umpire to assess land value pursuant to a dispute resolution clause in a licence agreement, specifying that in undertaking the assessment the umpire would be deemed to be acting as an expert and not as an arbitrator, nevertheless constituted an agreement to arbitrate under the NZ Act.

It was contended that the dispute clause constituted an arbitration agreement on the basis that the umpire would need to conduct a formal hearing at which witnesses would give evidence and be cross-examined.

The Court held that the clause did not constitute an agreement to arbitrate. In the course of his judgment however, the Court noted that:

“Like arbitration, expert determination provides for the final resolution of disputes by a private tribunal to whom issues are referred for a binding decision. Traditionally the distinction between the two has been drawn on the basis that at arbitration the tribunal must act judicially whereas an expert decides according to his own expertise. ... With the increasingly informal nature of arbitration and the use of experts in the arbitration context this distinction is being increasingly blurred.”

This appears to be a trend, at least in Australian and New Zealand jurisdictions (and possibly more broadly).

5.2 Arbitration and DBs

Arbitration does not have a role to play in dispute avoidance. Both DBs and arbitration however can play a role in dispute resolution.

The similarity of a DB hearing process with an arbitral process is apparent when one compares the DB hearing process to a modern arbitration. This is a particularly pertinent issue given the flexibility afforded by expedited arbitration.⁵⁸ It is appropriate for practitioners to keep questioning *“why is this process different?”*.

When designing a DB hearing process the outcome of which is not automatically binding, one must be careful not to over-engineer the process in terms of formality with the consequent time and expense. A line needs to be drawn between building a robust process which engenders sufficient confidence for the parties to accept the decision and the risk of over investment in a non binding process which contains a level of formality consistent with arbitration. If a DB becomes an expensive gate to be passed through before rights are determined through some other mechanism, then it is likely to decline in popularity.⁵⁹

⁵⁷ *Forestry Corporation of New Zealand Ltd (In Receivership) v Attorney-General* [2003] 3 NZLR 328.

⁵⁸ Institute of Arbitrators and Mediators Australia, *Clauses Recommended for use in Agreements* (2012) IAMA <http://www.iama.org.au/clauses.htm> at 22 March 2012.

⁵⁹ This has been a perception issue affecting other processes such as mediation, and has led to concerns that non binding processes can be used as a “fishing expedition” rather than a genuine attempt to resolve disputes.

DB agreements typically include a provision which expressly states that the DB will be deemed not to be acting as arbitrators and that the process does not constitute an arbitration. However, at what point does a dispute resolution process become an arbitration?

This type of issue has arisen in the context of expert determination. In Australia, while the stated intention of the parties is relevant, when a court is considering whether the process is, in law, an arbitration, the stated intention is not determinative of the issue.⁶⁰ In Canada, a court will look at the substance of the arrangement.⁶¹ Although a DB involves a process which is intended to be a distinct and separate dispute resolution process to arbitration, and may be set up as such, the parties should ensure that in the implementation of the agreement they do not behave in a way which crosses the line. An agreement reached during the course of a project to treat DB decisions on specific issues as automatically final and binding would, for example, increase the risk of this. This is particularly the case if a DB contains features of a judicial enquiry.⁶²

Much depends upon the jurisdiction within whose laws the matter is being considered. The answer may differ from jurisdiction to jurisdiction.

If it is the case that, in a particular jurisdiction, a process is in fact an arbitration, then it attracts the relevant legislative provisions and consequences, including for example making the process potentially subject to a level of supervision by the courts.⁶³ In such cases the local law of arbitration may indeed be helpful in providing certainty to the parties as to the jurisprudence surrounding the conduct of the process and other ancillary matters.

6 The best of both worlds?

It is common to combine a DB process with an arbitration provision.⁶⁴

A good example of the interaction between a DB and arbitration is found in the ICC Dispute Board Rules. The ICC Rules provide, for example, that:

- (a) if a party fails to comply with a “Recommendation” which has become binding, the other party may refer that failure to arbitration.⁶⁵ If this progresses to an arbitral award in support of the “Recommendation” then the benefits of the international framework for enforcement of an arbitral award can be engaged;

⁶⁰ See, for example, *Age Old Builders Pty Ltd v Swintons Limited* [2003] VSC 307, and *Ajzner v Cartonlux Pty Ltd* [1972] VR 919.

⁶¹ *Sport Maska Inc. v. Zittreer* [1988] 1 SCR 564.

⁶² See for example *Strofolino v Helmstadter* (2001) 55 OR (3d) 138 per Nordheimer J at [26]-[27], *Age Old Builders Pty Limited v Swintons Pty Ltd* (2003) 20 VSC 200.

⁶³ See for example *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57.

⁶⁴ Standard-form contracts used in International projects, such as those provided by FIDIC, World Bank and the AAA, require a DB process as a precursor to litigation or arbitral proceedings.

⁶⁵ See article 5(4) of the ICC Dispute Board Rules.

- (b) if a party disagrees with a “Recommendation”, and has given written notice of its dissatisfaction with the “Recommendation” within a specified timeframe, the dispute in question may be referred to arbitration;⁶⁶
- (c) unless otherwise agreed by the parties any “Determination” is admissible in arbitral proceedings.⁶⁷

The inclusion of a DB as part of a multi-tiered dispute mechanism raises its own set of legal issues. For example, does the local arbitration law confer power on a court to extend a specified time frame within which written notice of dissatisfaction with a recommendation must be given?⁶⁸

7 Future Direction

As a creature of contract and without the statutory support enjoyed by arbitration, it is important that a DB maintain the trust and cooperation of the parties. There is also a need for the parties to continue to cooperate in a way which engenders the success of the process.

Some of the most interesting legal questions emerge if a party does not accept the decision of the DB or a party ceases to cooperate, perhaps because circumstances have changed, or because of the emergence of an overriding commercial imperative. In those cases, a range of legal issues begin to arise, including the limits of a DB’s contractual authority, whether rights can be enforced and the duties of the DB.

As the use of DBs increases this area will be increasingly tested, and these difficult issues will need to be tackled. What is the scope for developing the jurisprudence surrounding DBs including other than at a local level? What direction could this take? Is the absence of a developed jurisprudence a comparative disadvantage for DBs, and does it make it a less attractive dispute resolution mechanism for international participants? These issues will, no doubt, be pursued during panel discussion.

8 Concluding Remarks

This paper is not intended to be an exhaustive comparison between DBs and arbitration.

For the purposes of stimulating panel discussion, the authors make the following concluding remarks:

- (a) The use of both International Arbitration and DBs should increase as a consequence of macro economic trends.
- (b) A key differentiator of a DB is the opportunity it creates to build trust in order avoid disputes, or alternatively to achieve a consensual outcome.

⁶⁶ See article 5(6) of the ICC Dispute Board Rules.

⁶⁷ See article 25 of the ICC Dispute Board Rules.

⁶⁸ See for example the reasoning in *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 at 310-311.

- (c) With developing countries, particularly in Asia, accounting for an increasing share of the world GDP⁶⁹, there will likely be an increased need to acknowledge and respect cultural differences of parties. The flexibility and trust-building nature of DBs is well suited to accommodate this.
- (d) If parties place a high value on the determination of rights leading to an enforceable award, then parties should consider modern arbitration, with its improved flexibility and efficiency, in combination with a DB.
- (e) When drafting a DB hearing process, parties ought keep firmly in mind the differences between DBs and arbitration, and build on the strengths of a DB as a fundamentally consensual process based on trust in the competence and expertise of the DB.
- (f) With the increased use of DBs it is likely that there will also be an increase in the number of disputes referred to DBs which are also referred on to arbitration or litigation. While this will no doubt create challenges, it also creates an opportunity for the development of the jurisprudence surrounding DBs.

In the end, the challenge for lawyers is to respond to the rapidly changing world and to continue to focus on appropriate, cost-effective and efficient methods of dispute resolution which support both domestic and international trade and commerce.

⁶⁹ The Hildebrandt Institute and Citi Private Bank, above n39, 19