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Making litigation attractive internationally

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Changing the contours of international dispute settlement

Making litigation attractive internationally

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A recent international treaty has gone some way towards making litigation a more attractive option, vis-à-vis arbitration, in international dispute resolution, while leaving other forms of ADR somewhat in the cold.

Since 1958 the New York Convention has made provision for the reciprocal enforcement of arbitral awards in the domestic courts of member States. Australia is a signatory to the treaty and has enacted legislation to give it effect, both at the Commonwealth and State levels.

Thus an arbitral award made in treaty-State A can be enforced in treaty-State B without having to deal with issues of proof or conflict of laws questions.

Mediation, as a contractually-based system of ADR, has not enjoyed the same advantage. International parties to a mediated settlement would have to plead and prove its terms in a court of competent jurisdiction and would be subject to the general defences of duress, undue influence, and so on. This subjects mediation to a double disadvantage vis-à-vis arbitration as a dispute resolution option in international matters.

Litigation outcomes have, somewhat surprisingly, also been immune from automatic enforcement in jurisdictions other than those in which they were rendered. This will change if a new treaty is ratified over the following years

The Hague Conference of Private International Law at its 20th session in mid-2005 has attempted to promote judicial cooperation in the recognition and enforcement of foreign judgments through the Convention on Choice of Court Agreements.

There is inevitably a long list of exclusions from the operation of the Convention, notwithstanding the fact that the parties have an international agreement: for example, in relation to insolvency, wills, competition matters, personal injury claims and disputes over rights *in rem* in immovable property. This, however, still leaves extensive scope for matters of trade, commerce and general business to come within the reciprocal recognition and enforcement terms of the Convention.

Part of the Convention deals with standard conflict of laws arrangements in relation to choice of forum, reinforcing the enforceability of 'exclusive choice of court agreements' whereby parties, for the purpose of determining disputes which have arisen in connection with a legal relationship, can designate the courts of a contracting State as having exclusive jurisdiction over the disputes. The designated court is not able to decline to exercise jurisdiction on the grounds that the dispute should be decided in the courts of another State, though it can decline to exercise its powers if the original agreement would be null and void under the laws of its own jurisdiction. Conversely the courts of other contracting States are required to dismiss proceedings to which an exclusive choice of court agreement applies unless, *inter alia*, the agreement is null and void under the law of the State of the chosen court or the chosen court has decided not to hear the case.

Chapter III of the Convention contains the crucial recognition and enforcement provisions. These provide as follows:

Art 8.1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States ...



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Recognition and enforcement may only be refused on the grounds specified in this Convention.

Art 8.2 Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

Art 8.3 A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Art 8.4 Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

As regards the grounds referred to in Art 8.1, the Convention refers to several predictable situations in which recognition and enforcement will not automatically operate, such as where the original judgment was obtained by fraud in connection with a matter of procedure. An interesting exception relates to the question of damages in respect of which, in recognition of the vast differences among jurisdictions in approaches to this question, it is provided that recognition of damages awards may be refused to the extent that they include exemplary or punitive damages that do not compensate a party for actual loss or harm suffered. However some of the other exceptions are not as predictable and could over time create some complexities in the interpretation and operation of the treaty.

Despite the contrariness of some of the exceptions, however, the general framework of the Convention provides for the efficient and effective reciprocal recognition and enforcement of court judgments among the signatory States. It provides some of the advantages of the New York Convention in relation to the litigation option, while leaving mediated international settlements subject to the vagaries of the current enforcement regime.

Interestingly, provision is made in Art 12 for the recognition and enforcement of judicial settlements (*transactions judiciaires*):

Judicial settlements... which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

While this provision is inspired by the civil law systems in which judges have a recognised dispute settlement function, it is broad enough to include court-connected ADR processes in common law jurisdictions which result in mediated settlements being turned into consent orders of court. Thus mediation, and other ADR processes such as case appraisal, will be able to ride on the coat tails of the new system, provided the various pre-requisites are satisfied. This will provide an incentive for parties in court-referred mediations to seek consent judgments of their settlements, and might even make pre-filing ADR, under the auspices of court systems, more attractive than purely private processes. It might also in time avail those court systems which provide judges with a direct settlement or mediatory function. It will not, however, provide any benefits for purely private mediated settlements.

Australia, together with 64 other countries, is a signatory to the new Convention. It now requires ratification, acceptance or approval by the signatory States and is also open for accession by all other States. While the treaty ratification process can be protracted it could be that over time Australian disputants will be beneficiaries of easier and more effective methods of having court judgments recognised and enforced in the courts of many other States. This will provide a challenge to the attractiveness of non-arbitral ADR processes in the trans-jurisdictional domain. ●

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