Chapter 3
The Importance of Arbitration to the Resources Sector

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Abstract In the resources sector, arbitration has retained its position as a permanent feature of dispute resolution. Disputes in the resources sector involve various types of agreements, technical subject matters, and are often trans-national in nature—all of which are features that make arbitration an attractive dispute resolution method. To set the context for addressing the benefits provided by arbitration to the resources sector, this chapter will examine these features in detail and outline the arbitration framework in Australia. The chapter also discusses features of the arbitration process itself that make it well suited to the resolution of disputes in the resources sector.

3.1 Introduction

The importance of arbitration to the resources sector is revealed when contractual disputes occur in the resources sector. Dispute resolution is certainly not at the very centre of the resources industry because most of the projects and contracts in the resources sector proceed to conclusion without any dispute. Nevertheless, it is important to provide a relief valve in the event that commercial disagreements emerge between parties during the resources process. It is in this context that the contribution of arbitration to the resolution of commercial disputes must be examined.

As a process that might appear to be in constant competition with litigation, which is often perceived as the more traditional method of dispute resolution, arbitration has proven itself to be an effective and reliable means of solving commercial disagreements. This has been the case even more so in the context of disputes within a few particular and technical subject matter areas, namely the

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technology, construction, and resources sectors, where arbitration has retained its position alongside litigation as a permanent feature of dispute resolution.

Litigation in the resources sector when presided over by a judge who is unfamiliar with the subject matter is likely to be costly and quite slow. Critics of arbitration have sometimes contended that it may, in a worst case scenario, imitate court processes and exhibit similar symptoms of inefficiency. Such critics also suggest that arbitration may cost even more than its litigation counterpart, adding the costs of the hearing (such as venue hire and the arbitrators' fees) to the final bill.

There are nevertheless various features of the arbitration process, both in the domestic and international contexts that give it an advantage over its litigation counterpart in resolving disputes in the resources sector. Beginning with a discussion on the nature of the disputes that arise in the resources sector, this chapter will examine the arbitration framework in Australia as setting a context for the Australian contribution to the resolution of disputes. It will then address the benefits that arbitration provides to the resolution of differences of opinion in the resources sector and the implications for the future of dispute resolution in the resources industry.

3.2 The Nature of Resource Disputes

To put a context around the types of disputes that can emerge between commercial parties in the resources industry, it is necessary to first understand the nature of resource contracts. There is a wide ambit of disputes that may arise in the resources sector, and there are many characteristics of resource disputes that make arbitration an attractive option for resolving commercial differences.

3.2.1 Types of Agreements in the Resources Sector

One of the difficulties with addressing the issue of disputes within the resources sector is the wide ambit of disputes that arise in the industry—from relatively simple disputes between two parties, to complex, multi-party disputes involving extremely valuable projects that can potentially take years to finally determine. Often, these disputes involve complex questions of law and fact, including issues around national boundaries, environmental claims, insurance and reinsurance, sanctions, bribery and anti-corruption.

The types of agreements which parties involved in resource projects enter into are certainly diverse, ranging from development agreements before any ground is broken or well drilled, to feasibility studies which will predict the economic viability or otherwise of projects, through to initial and then detailed design of the resource projects themselves. There are also agreements that relate to the protection, exploitation, process design and other issues of intellectual property.

Once the commitment has been made to conduct the resource development, parties need to deal with the construction of on and offshore infrastructure, involving its own unique range of agreements. Then, the exploitation of the resource itself, which is at the heart of the resources industry, involves commodity sales agreements, many of which are long-term and in respect of a variety of potential resource products. There are also commercial agreements regarding the transportation of resource commodities both on land and, in the case of island countries such as Australia, on sea. The inter-relationship between the transportation of resource products, shipping, and other transportation issues involved in the sale of resource products, is a whole area of commercial endeavour in itself.

There are also agreements relating to the insurance at all the different stages of a resource project, from design, construction, sale, and through to the performance of the product. In addition, long-term gas and oil pricing agreements, which can be intended to last for a very long time, are commercial arrangements which often need relief valves when the commercial assumptions underlying the initial agreements turn out to be different to what was originally envisaged.

Finally, many parties in the resources sector are involved in changes in shareholding, which can be broadly described as merger and acquisition or M&A activity.

3.2.2 Resource Disputes and Arbitration

These various agreements represent a vast array of contract structures, providing fertile grounds for commercial differences of opinion to emerge in many ways. The contracts which are entered into are often high-value, high-risk and long-term, and consequently the structuring of relief valves in these contracts to deal with commercial differences of opinion is absolutely critical. As a result, a wide range of dispute resolution measures have been implemented over the years, with varying measures of success. Other than arbitration and litigation, such measures include various forms of mediation and conciliation. There are, however, some features of resource disputes that make arbitration a particularly suitable method for resource disputes.

3.2.2.1 Technicality of Resource Disputes

The technical nature of the disputes that arise in the resources sector often requires a degree of expertise and technical skill that is not guaranteed when a judge is appointed through court processes. With its ability to be customised for any particular dispute and still produce binding results, arbitration has outshone many of the other dispute resolution processes. As resource disputes often involve complex factual situations requiring voluminous document discovery, the flexibility available to arbitral tribunals in tailoring the arbitral process can streamline the dispute

resolution process. To provide some examples, the process might be tailored to include limited time procedures and limited document discovery to provide for a more expeditious procedure.

3.2.2.2 International Nature of Resource Disputes

Many resource projects, if not all, are transnational in nature, that is, the contracting parties are from different countries and the contract is performed, as the product moves, the design is fulfilled, or the construction occurs, in different jurisdictions. The international nature of the operations of multinational oil and gas companies and cross-border oil and gas fields result in a number of issues that make arbitration an appealing alternative to litigation. In particular, enforcing arbitral awards in different jurisdictions, as explained in further detail at Sect. 3.4.1, is generally much easier than attempting to enforce a court judgement in another jurisdiction.

3.2.2.3 Overlapping Commercial Interests in Resource Disputes

In resource projects, the players involved in the various forms of contract fulfil a variety of roles, such as service provision, provision of capital, provision of debt, and the like. These overlapping commercial interests and long term contractual relationships between oil and gas companies militate against litigation, which is often expensive, time consuming, adversarial and destructive of good working relationships.

The proliferation of sophisticated contracts in the resources sector means that disputes are anticipated, and that well planned dispute resolution procedures are able to be put into place much ahead of time. By foreseeing the potential for disputes, and implementing appropriate processes and procedures for their resolution ahead of time, uncertainty and risk can be minimised, even once a dispute has arisen. This is of vital importance to parties in the resources sector given the inherently high levels of uncertainty and risk already associated with their ventures. When dealing with these sophisticated contracts with overlapping commercial interests, arbitration is an appropriate mechanism for dispute resolution.

That is not to say, however, that arbitration is the only means of resolution of commercial differences and disputes in the resources sector. It is very important to remember that there are a variety of tools in the dispute resolution tool kit. Of course, in the context of binding dispute resolution, of which arbitration is one such option, courts in the various States where work is performed or goods are delivered also provide very effective commercial dispute resolution services. As an example in Western Australian, the centre of natural resources activity, oil and gas industries in Australia, the Supreme Court has the capacity to provide very effective commercial dispute resolution services to those who wish to bring their disputes to it.

In addition to court dispute resolution processes, there are binding determinations by experts, dispute boards, and other means of issue resolution which are

available to be considered as options in the process of the resolution of commercial differences of opinion in the resources sector. It is a matter of appropriately choosing a combination of these tools in the dispute resolution tool kit that is the challenge for those engaged in this wide variety of commercial activities.

Having set the scene of the variety of needs which the resources sector has for issue resolution, the next section will deal with the context of arbitration in Australia and the important characteristics to keep in mind when considering arbitration as an option for dispute resolution for the resources industry.

3.3 The Australian Arbitration Framework

There are two types of arbitration that need to be considered in the Australian context—domestic and international. Although their legal characteristics are identical, their capacity to contribute to dispute resolution can be quite different.

Over the last few years, Australia's domestic arbitration regime has undergone significant reform in order to bring it into line with international standards.[1] Similarly, Australia's international arbitration regime has been brought into line with international best practice under the *International Arbitration Act 1974* ("**IAA**"). As discussed below, both of these developments have significant implications for the resources sector.

3.3.1 Domestic Arbitration

Prior to 2010, Australia's arbitration system distinguished between a federally regulated international regime based on the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), and the domestic regimes governed by the States and Territories that had been implemented in the mid-1980s. In the domestic context, arbitration has been an option for many years. Indeed, arbitration as a method of dispute resolution goes back thousands of years where parties in civilised societies have almost always had an alternative to established court structures which business people in particular have used.

In recent times, however, there has been adopted for domestic arbitration in Australia a wholly new legal framework that is now uniform between the States. It is "uniform" in the sense that the constitutional responsibility for legislation in relation to domestic arbitration lies with the States, and the States have enacted

[1]With the exception of the ACT, all States and Territories in Australia have now adopted domestic arbitration legislation based on the Model Law as amended in 2006. See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2012* (WA).

uniform legislation completely different to that which previously existed. It is in all respects, except for some areas of detail, identical to the legislative structure for international arbitration in Australia, which previously had a completely different legal structure.

Turning now to how the legal framework operates in practice, the term 'domestic arbitration' refers to disputes between parties who are purely Australian,[2] that is, two Australian companies who have a difference of opinion and who have the capacity to choose what form of binding dispute resolution will be adopted by them in the event of differences of commercial opinion.

For there to be arbitration between two such domestic entities, there needs to be an agreement to arbitrate. The usual way in which an agreement to arbitrate is established is via a clause in the main contract dealing with the particular commercial activity in question to the effect that, in the event of differences of opinion arising between the parties to that agreement, the parties agree that they will refer those differences of opinion to arbitration. It is of course possible after a dispute has arisen, in the absence of such a clause in a contract, for parties to agree to refer a ripe dispute that then exists to arbitration. However, it is often difficult for parties in dispute to reach agreement on anything, and as a result agreements to refer existing disputes to arbitration in the absence of a prior agreement to arbitrate are relatively rare compared to the pre-written arbitration clauses contained in contracts.

When two domestic parties decide to arbitrate, they have decided, for better or for worse, to oust the jurisdiction of the court. However, courts do present, in Australia and in Western Australia in particular as an important centre for the resources sector, a very real option for the resolution of commercial disputes. As previously mentioned, the Western Australian Supreme Court has now established a very effective commercial dispute resolution process that provides expeditious, flexible and expert determination of commercial disputes. Domestic arbitration is different from international arbitration in this respect because there are fewer alternative choices available in the international context.

The parties who choose the court option, who are domestic Australian parties, also choose the publicity which comes with court proceedings. It is very rare indeed for court proceedings to be other than public, whereas arbitration is almost always private and confidential. Leaving aside some other characteristics of domestic arbitration, the privacy and confidentiality attributed to arbitration can be a major influence in parties' choice of process.

With the new reformed legislative structure, arbitration is now a truly different and alternative method of dispute resolution to the courts. That is, not just in providing confidentiality and privacy, but also in providing procedures tailored to the particular dispute and designed to get the dispute done and dusted quickly. We have yet to fully realise the potential of that in Australia, with domestic arbitration having in the recent past failed to provide a true effective commercial alternative to dispute resolution to the courts. The author is hopeful, however, that legislative

[2]As provided in section 1(3) of the uniform Commercial Arbitration Acts.

change will present a real opportunity for commercial parties in the domestic context and provide a real choice between domestic court proceedings and arbitration.

3.3.2 International Arbitration

In the Australian context, an arbitration proceeding is international if the parties to the dispute and the agreement from which the dispute arose are from different countries.[3] Under the IAA, an arbitration will also be international if it involves two Australian parties performing a contract outside Australia, or two Australian parties choosing to have their commercial relationship governed by a law other than the law of one of the Australian States.[4] From these definitions, it is seen that there is a concept of international arbitration in Australia, as is the case under the UNCITRAL Model Law, that is broader than one which involves parties from different countries.

With respect to the legislative framework of international arbitration, the UNCITRAL Model Law, which was initially drafted in 1985, has formed part of the IAA since 1989, in an effort to support the practice of international arbitration in Australia. This commitment to international arbitration has been maintained over successive governments, with a number of steps taken over the years to continually improve Australia's international arbitration infrastructure.

In July 2010, the IAA underwent significant reform with the enactment of the federal *International Arbitration Amendment Act 2010*. The most important modifications made by this amending act were the incorporation of the 2006 UNCITRAL amendments to the Model Law and the repeal of provisions that allowed parties to opt out of the Model Law. These amendments, among others, ensured that the IAA remained in line with international best practice. This has had a positive effect in further advancing Australia as a centre for international arbitration, encouraging parties to seriously consider it as a potential arbitration venue. These legislative changes also sought to increase the quality of international arbitration in Australia by creating consistency and certainty in the application of Australian international arbitration law.

It is not just legislation which makes arbitration relevant as a dispute resolution technique. There must also be the appropriate infrastructure available, both in terms of professional services and other things, to make arbitration work in any place. In Australia, there has been in recent years a significant growth in the expertise of Australian lawyers and those who service the dispute resolution industry in international arbitration. Together with the government's commitment to international arbitration, there has been the involvement of various professionals and industry

[3] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3)(a).

[4] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3)(b)(ii).

bodies such as the Australian Centre for International Commercial Arbitration (ACICA), the Australian Commercial Dispute Centre (ACDC), the Institute of Arbitrators and Mediators Australia (IAMA), the Chartered Institute of Arbitrators (Australia) (CIArb Australia) and the National Alternative Dispute Resolution Advisory Council (NADRAC), which have all contributed to the development of the international arbitration industry in Australia.

Australian lawyers are also in demand around the world and many of them practise in North America and in Europe. Many of these Australian lawyers eventually return, contributing to the enrichment of international arbitration expertise in the Australian legal community. It can thus be said, with confidence, that in Australia there are practitioners able to provide commercial parties with highly sophisticated international arbitration services.

As a result, international parties contemplating the use of international arbitration in Australia can be confident that there is both a legal framework which is state-of-the-art and practitioners who can service the needs of commercial parties looking to use international arbitration at a standard second to none. Given the large amount of foreign investment in the resources sector, it is indeed essential that international parties feel confident in Australia's dispute resolution framework.

3.4 Benefits of Arbitration in Resource Disputes

As has been mentioned, arbitration has retained its position of prominence in the resources sector even amongst the various methods of dispute resolution which have been implemented in the industry over the years. There are a variety of reasons why this is the case. In addition to the aforementioned characteristics of resources sector disputes that are likely to render them more easily resolved by arbitration, there are a number of features of the arbitration process itself that make it well suited to resource disputes.

3.4.1 Enforceability

The most important benefit of arbitration is in relation to enforceability. Unlike domestic arbitration where parties may pursue dispute resolution through either arbitration or the courts, there is no such choice in the international context. This is because there is a fundamental difference between domestic and international arbitration when it comes to enforceability. Once an arbitration proceedings is concluded and the tribunal renders an award, that award is available for enforcement within Australia as if it is a court judgment. Where assets are contained within companies existing in Australia, there is no problem of enforcement of the award.

However, many of the transactions involved in the resources sector, in the wide variety of agreements identified above, are with parties who are offshore, who have

no assets in Australia, and therefore decisions made by arbitrators in the awards need to be enforced against assets outside the jurisdiction. Though it is not impossible, it is very difficult to take a judgment, for example, from the Western Australian Supreme Court and have it enforced in China against assets in China. However, an international arbitral award, as a consequence of a very successful international convention, namely the New York Convention,[5] is enforceable in China even if delivered in Australia. It will be treated as if it is a judgment of the Chinese courts.

Over one hundred and fifty countries are parties to the New York Convention, and consequently international arbitral awards can be taken around the world and enforced in ways in which domestic court decisions cannot. In contrast, international conventions on the recognition and enforcement of foreign judgments have had very limited success. Whether a foreign judgment will be recognised in another country will depend on the laws in that country and, in extreme cases, it may be necessary to start the proceedings from scratch.

When one considers the enforceability of the outcome, international arbitration has a virtual monopoly on international commercial dispute resolution. It would only be for very particular reasons that well-informed and advised parties would choose in an international transnational contract to adopt court proceedings in a local court.

3.4.2 Other Advantages

There are other advantages of international arbitration in the resources sector, such as neutrality. Choosing a court usually involves choosing a home town advantage for one of the parties. Arbitration in contrast has, as its very essence, the ability to allow for the determination of a dispute in a neutral geographic environment, by neutral parties. This is a beneficial feature of arbitration for those who trade transnationally, as neither party gets a perceived or real home town advantage.

Then there is, as previously mentioned, the advantage of confidentiality and privacy. The opportunity to keep confidential any disputes arising from resources projects can be of critical strategic importance to parties.

There is also the advantage of flexibility that an arbitral process can and should be designed to suit the particular dispute and be just as short and efficient as it needs to be to satisfy the parties' necessary requirement for a fair process. Through the flexibility that arbitration can provide, disputes can be resolved by a process that is tailored to the circumstances and conducted in a streamlined manner so as to allow the project or venture to continue smoothly.

On a final note, in many of the sectors in which resource contracts are entered into, such as development agreements, construction contracts, pricing arrangements,

[5] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958.

and shipping and insurance, there is a long tradition of arbitration as a means of resolving those disputes. For this reason, the resources sector may pick up, in relation to those contracts, the more traditional approach to dispute resolution which arbitration represents. However, it is worth taking a more holistic view of dispute resolution in the context of the resources sector by conceptualising arbitration in its many forms as a means for effective dispute resolution.

In the context of Australia, we now have the legal and actual expertise structures which enable international arbitrations to be successfully conducted, providing in Australia an effective means of resolving the disputes that emerge in the resources sector. In appropriate circumstances, Australia is a place where arbitration should be considered as the preferred method of dispute resolution, particularly in the international context.

3.5 The Future of Resource Disputes

To conclude, arbitration is already widely used in the resources sector, and the whole panoply of commercial transactions is likely to continue to use arbitration. It will continue growing as the preferred method of international dispute resolution, as the nature of disputes in the resources sector become ever more technically complicated. It has been and is able to deliver the flexibility required in the long-term agreements which many resources contracts involve. Further, arbitration is and should remain more streamlined and more flexible than domestic court processes.

The sustained commitment by arbitrators, practitioners and parties to ensure that arbitral processes do not mimic court procedures has assisted in providing for such increased efficiency. Regular communication between the service providers and the purchasers of services in the resources sector, are of enormous value, and all interested parties are encouraged to continue the dialogue regarding the effectiveness of international arbitration and how it can best provide dispute resolution services in the resources sector.