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New States Party to New York Convention

On 10 June 1958, a diplomatic conference convened by the United Nations in New York concluded the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The 'New York Convention', as it is known, established an effective international regime to uphold and enforce arbitration agreements and to facilitate the international enforcement of arbitration awards. It is widely recognised as one of the most successful international treaties of the 20th century in the area of commercial law, currently adhered to by 157 States, including the major trading nations and the eleven parties to the recently signed CPTPP.

Cabo Verde has become the 158th State party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention, having deposited its instrument of accession on 22 March 2018. The New York Convention will enter into force for Cabo Verde on 20 June 2018.

Sudan has become the 159th State party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention, having deposited its instrument of accession on 26 March 2018. The New York Convention will enter into force for Sudan on 24 June 2018. The Sudanese economy has been negatively affected by civil war and decades of international sanctions. Sanctions have been relaxed in recent years, however, and accession to the Convention is no doubt intended as a sign of a renewed commitment to attract foreign investment. Sudan is the 38th African State to become party to the Convention.

This year marks the 60th anniversary of the Convention, an event that UNCITRAL will celebrate on the occasion of its 51st session, on 28 June 2018, at UN Headquarters in New York.

New legal framework for the enforcement of settlement agreements resulting from international mediation

On February 9, 2018, the United Nations Commission on International Trade Law's (UNCITRAL) Working Group II (Dispute Settlement – formerly Arbitration and Conciliation) concluded negotiations and approved a draft convention and a draft amended model law on the enforcement of settlement agreements reached through international commercial conciliation or mediation. The Working Group elected Ms Natalie Yu-Lin Morris-Sharma from Singapore as Chairperson and Mr Khory McCormick from Australia as Rapporteur.

The aim of the initiative is to implement an international regime for the enforcement of mediated settlements broadly akin to the New York Convention regime for the enforcement of arbitral awards – and thereby increase the attraction of mediation for international litigants, with all its well-known cost efficiencies and other potential benefits.

Although the instruments still need to be finalised by UNCITRAL and then ratified by States, the completion of the drafting stage marks an important development in international commercial dispute resolution.

Ethics at centre of the use and development of artificial intelligence in UK

AI continues to develop in the UK, due to the growth of available data, computer processing power and improved techniques such as deep learning.

The House of Lords Select Committee on Artificial Intelligence has recently published a report that puts ethics at the centre of the use and development of Artificial Intelligence within the UK. The House of Lords appointed the Committee "*to consider the economic, ethical and social implications of advances in artificial intelligence*" on 29 June 2017.

The committee observed that the debate around exactly what is, and is not, artificial intelligence, would merit a study of its own. For practical purposes its says it adopted the definition used by the Government in its Industrial Strategy White Paper, which defined AI as *Technologies with the ability to perform tasks that would otherwise require human intelligence, such as visual perception, speech recognition, and language translation.*

The committee reports that from the outset of the inquiry, it has asked its members and its witnesses, five key questions:

- How does AI affect people in their everyday lives, and how is this likely to change?

- What are the potential opportunities presented by artificial intelligence for the United Kingdom? How can these be realised?

- What are the possible risks and implications of artificial intelligence? How can these be avoided?

- How should the public be engaged with in a responsible manner about AI?

- What are the ethical issues presented by the development and use of artificial intelligence?

The committee concluded that, while the UK should realise and harness the potential benefits of AI, it may have many social and political impacts which extend well beyond people's lives as workers and consumers and its potential threats and risks need to be minimised. In order to achieve this balance, the committee suggested an AI code to provide ethical guidance for the development and application of AI. The five main overarching principles of the code are as follows:

1. Artificial intelligence should be developed for the common good and benefit of humanity.

2. Artificial intelligence should operate on principles of intelligibility and fairness.

3. Artificial intelligence should not be used to diminish the data rights or privacy of individuals, families or communities.

4. All citizens have the right to be educated to enable them to flourish mentally, emotionally and economically alongside artificial intelligence.

5. The autonomous power to hurt, destroy or deceive human beings should never be vested in artificial intelligence.

The report also recommends that the Law Commission investigate whether existing liability law will be sufficient when AI systems malfunction or cause harm to users.

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The Commercial Court recently considered a peculiar challenge to two partial final awards under section 67 of the Arbitration Act 1996 based on evidence that neither the Applicant nor the Respondent were in fact the same entities that had entered into the arbitration agreement, which was, of course, the foundation of the arbitrator's jurisdiction.

English court sets aside tribunal's award finding procedural rules do not permit single arbitration of disputes under multiple contracts

In A v B [2017] EWHC 3417 (Comm), the English Commercial Court considered whether a single request for arbitration under the London Court of International Arbitration (**LCIA**) Rules 2014, was valid to refer disputes under two distinct contracts to arbitration, and if not, whether the respondent had lost the right to object to the tribunal's jurisdiction.

The court set aside the tribunal's award upholding its own jurisdiction, on the grounds that the LCIA Rules 2014 do not permit a party to commence a single arbitration in respect of disputes under multiple contracts. As a result, the claimant's Request for Arbitration was invalid. The Court also held (contrary to the tribunal's award) that the respondent had not lost its right to object to the tribunal's jurisdiction by failing to raise its jurisdictional challenge until shortly before filing its Statement of Defence.

The case provides a salutary lesson: where a dispute involves multiple contracts, claimants will need to be careful to ensure that any procedural rules governing the arbitration of those disputes permit disputes arising under multiple contracts to be referred to a single arbitration.

The NZIAC and NZDRC 2018 Arbitration Rules (the **Rules**) allow the initiation of a single arbitration in respect of disputes or differences arising out of or in connection with more than one contract, provided that:

(a) the parties to each contract are the same;

(b) the Arbitration Agreements are compatible; and

(c) the Parties agree to a single Arbitration under these Rules.

In every other case, a claimant will need to initiate multiple arbitrations and then apply to consolidate them, which the Standard Rules allow (not the expedited Rules) where:

(a) the contracts are between the same parties and all the parties have agreed to consolidation; or

(b) all of the claims are made under the same arbitration agreement; or

(c) the claims in the arbitrations are made under more than one arbitration agreement and the arbitrations are between the same parties, the disputes arise out of the same legal relationship or the same transaction or series of transactions, and the Arbitration Agreements are compatible.

Can defective arbitration clauses be cured?

In *SEA2011 Inc v ICT Ltd* [2018] EWHC 520 (Comm) the TCC was asked to consider a challenge to two partial final awards under section 67 of the Arbitration Act 1996 based on evidence that neither the claimant nor the defendant were in fact the same entities that had entered into the arbitration agreement, which was, of course, the foundation of the arbitrator's jurisdiction.

The claimant submitted that the defendant was not a party to that agreement, because, at the relevant date, its registered name had been different and had only changed to its current name 12 months after the agreement had been entered, such that the arbitrator's jurisdiction, as defined by the notice of arbitration, had not extended to determining the disputes that the defendant had raised.

A Sales Agency Agreement dated 28 January 2011 was entered into by SEA Inc as the principal and ICT Ltd as agent. The agreement contained an arbitration clause. At that date there was no company registered in England as ICT Ltd, but in January 2012 IN Ltd, which was in existence at the time, changed its name to ICT Ltd. In December 2011 SEA2011 was incorporated, and took over the business of SEA Inc. In 2014 disputes arose between the parties in relation to commission levels. ICT Ltd served notice of arbitration on SEA2011 Inc on 20 April 2016. The notice provided that in or around March 2012 the business of SEA Inc had been transferred to SEA2011 Inc, and that the dispute was between ICT Ltd and SEA2011 Inc. In the arbitration, ICT Ltd abandoned the argument that there had been an assignment to SEA2011 and instead argued that there was an implied contract between ICT and SEA2011 Inc. SEA2011 Inc contested the jurisdiction of the arbitrator. Its challenges were dismissed in partial awards and SEA2011 Inc appealed against the awards.

The court accepted the evidence that the corporate entities involved in the arbitration were not the same entities that had entered into the arbitration agreement, however, the court overcame this defect finding that there had been a clear mistake in the description of parties in the contract which could be readily corrected as a matter of construction. Applying the principles set out by *Lord Hoffmann in Chartbrook v Persimmon Homes* [2009] UKHL 38, the Judge held that there was an implied arbitration agreement between the correct entities based on the meaning which the Sales Agency Agreement would convey to a reasonable person having all the background knowledge as to the formation of the contract and how the mistake had arisen to include the incorrect corporate entities in the agreement.

Time for appeal under s69 of the UK Arbitration Act runs from the date of the award or the date of a material correction only

In Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Endurance Ltd [2018] EWHC 538 (Comm) dated 16 March 2018, Bryan J dismissed the application for permission to appeal under s69 of the English Arbitration Act 1996 by Daewoo Shipbuilding & Marine Engineering Company Limited (**DSME**) on the ground that the application was not made within the statutory time period provided by s70(3) of the Act and there was no reason to grant an extension to that period.

The key issue was whether the 28 day statutory period for appeal commenced on the date of the original award or the date of the correction of the award (to remedy clerical errors pursuant to s57(3) of the Act). The Court held the 28 day period commences on the date of the original award unless the correction was material to the challenge to the Award. This exception did not apply here so DSME's application was out of time.

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New videos and quick guides to help businesses avoid unfair contract terms

The Commerce Commission has launched a new series of videos and quick guides targeted at businesses to help them avoid unfair contract terms in their standard form consumer contracts.

The Fair Trading Act prohibits contract terms in standard form consumer contracts which create a significant imbalance in the rights and obligations between companies and consumers, cause detriment to consumers, and are not reasonably necessary to protect the legitimate interest of the business.

Commissioner Anna Rawlings said consumers enter into a number of contracts every day without necessarily realising it.

"Every time you hire a car, book a flight, join a gym, or get a mobile phone, that's a legal contract. The unfair contract term provisions are designed to make sure that these one size fits all, take it or leave it agreements strike the right balance between the rights and obligations of companies and consumers."

The guides provide tips to businesses on terms that may be unfair such as unilateral variation and cancellation clauses, subscriptions and automatic renewals, and clauses that specify where responsibility lies if things go wrong.

"These quick guides are targeted particularly at small businesses, from your local plumbing or sports club to beauty therapist. They are designed to draw their attention to the unfair contract term provisions and their need to get legal advice to ensure their contracts are fair."

The material has been adapted for New Zealand law by the Commerce Commission using material first developed by the United Kingdom's Competition & Markets Authority (**CMA**) in relation to the UK's unfair contract terms legislation. It is being made widely available to a range of government, legal, business, and consumer advocacy groups.

Under the unfair contract term provisions, only the Commerce Commission can ask a court to make a declaration as to whether a term is unfair. If a court decides a term is unfair, a business cannot enforce it. If a business continues to use a term that has been declared unfair by a court, it is liable for prosecution by the Commission.

The videos and quick guides can be found here.