



ReSolution in Brief

Belize, Malawi and Iraq accede to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The “New York Convention”)

On 15 March 2021, Belize acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also commonly known as the New York Convention). Belize becomes the 168th State Party to the Convention. The Convention will enter into force for Belize on 13 June 2021.

A week earlier, on 4 March 2021, Malawi became the 167th State Party to the Convention. The Convention will enter into force for Malawi on 2 June 2021.

Also on 4 March 2021, the Iraqi Parliament ratified the country’s anticipated accession to the Convention. This is a step towards Iraq’s plans for economic recovery. With this ratification, Iraq is set to become the 169th state party to the New York Convention, leaving Libya and Yemen as the only remaining countries in the Middle East/North African region not to accede to the Convention.

The New York Convention is an important instrument for settling international commercial disputes. It aims to not discriminate against foreign and non-domestic arbitral awards and obliges parties to ensure such awards are recognised and

can be enforced in their jurisdiction in the same way as domestic awards. The courts of contracting States are required to deny the parties’ access to the court if there is an arbitration agreement between them.

Further information about the New York Convention is available on the UNCITRAL website: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

Jurisdictional Inconsistency in the Financial Dispute Resolution Scheme Rules

The Ministry of Business, Innovation and Employment sought public input to address jurisdictional inconsistencies between approved dispute resolution scheme rules. These rules govern what complaints and redress the schemes can consider and award. Currently there are four schemes and all financial service providers with retail clients are required to belong to a scheme. The schemes can resolve disputes between consumers and financial service providers with a faster and less formal process. Consumers may access the schemes free of charge and are not bound by the decisions if they disagree.

The current inconsistency in the scheme rules impacts overall accessibility and fairness of the schemes in three key areas. First, there are dif-

ferent financial caps for bringing a complaint under the different schemes. This can limit access to redress for those with a dispute valued over the cap amount but who cannot afford court proceedings. Second, the difference in timing of membership leaves a gap, where a scheme may be difficult to enforce if a financial service provider moves from one scheme to another. Third, the differences in timeframes for bringing a claim between the schemes can impact when and how a scheme can hear a complaint. Some schemes have a tighter timeframe than others, which could result in unfairness to the consumers and encourage providers to switch to a scheme with a timeframe that is more favourable to them.

The proposed changes will align all the schemes' jurisdictional rules, and therefore improve consumer access to redress and fairness.

The importance of identifying the correct respondent in an arbitration - AB v CD [2021] HKCFI 327

An arbitral award was set aside in the Hong Kong Court of First Instance on the grounds it was made against the wrong entity, which was not a party to the arbitration agreement. Additionally, because

of this confusion, the purported respondent was not given proper notice of the arbitration proceedings nor the appointment of an arbitrator. This decision is significant as the Hong Kong courts rarely intervene with arbitral awards.

The plaintiff, AB Engineering, was a subsidiary entity of AB Bureau until a restructuring in 2016. An agreement between AB Bureau and CD was entered into in 2013. CD initiated an arbitration process in 2019 naming the respondent as AB Bureau, but later submitted an Amended Notice of Arbitration to "correct" the respondent's name from AB Bureau to AB Engineering.

CD mistakenly believed that AB Bureau and AB Engineering were the same entity, based on a short description on AB Engineering's website.

The court found that the two entities were legally separate entities and AB Engineering was never involved in the performance of the contract. CD's belief that the two entities were inherently the same was unfounded.

Changing the respondent's name in the middle of the arbitration process meant that AB Engineering was never notified of the arbitration proceedings or the appointment of an arbitrator.

The combined effect was that the arbitration process was flawed and therefore the award should be set aside.



Trusts Disputes
A smarter way to resolve trust disputes is here

NZDRC

LEARN MORE

Witness Memory in International Arbitration – An ICC Report

In November 2020, the International Chamber of Commerce published a report on the Accuracy of Fact Witness Memory in International Arbitration. The report notes that witness memory is imperfect and is subject to distorting influences.

The international arbitration community spends a significant amount of time and resources in preparing witness statements and oral evidence. Is this effort wasted if witness evidence lacks accuracy?

The report considers the science behind memory and provides some recommendations to protect witnesses' memories, including:

- counsel should avoid setting a party line and keep contemporaneous notes of issues being discussed;
- witness interviews should be conducted at the earliest opportunity;

- party submissions should not be used in the interview because they could distort the witness' memory;

- witnesses should be reminded that it is permissible to say *I don't recall*; and

- the tribunal should allow the collection and preparation process to be included in the witness statement.

The report also points out that the probative value of such evidence should be examined on a case-by-case basis. The parties and tribunals should always keep in mind that human memory is not perfect.

While the report does not suggest fundamental changes to the way witness evidence is collected and presented, it shows an increased awareness of the imperfection of human memory. Taking steps to mitigate this risk may well lead to more accurate factual witness evidence in international arbitration.

