ReSolution in Brief

Kazakhstan ratifies Singapore Convention on Mediation

Kazakhstan has become the 10th country to ratify the United Nations Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**), and it will enter into force there on 23 November 2022.

Kazakhstan was one of the Singapore Convention's original signatories when it opened for signature in August 2019. It now joins Georgia, Belarus, Turkey, Qatar, Saudi Arabia, Ecuador, Honduras, Fiji, and Singapore as the latest state party.

The Singapore Convention is one of the most successful multilateral treaties prepared by the United Nations Commission on International Trade Law (UNCITRAL), with a current total of 55 signatory countries. The world's three largest economies – the United States, China and India, have signed up but not yet implemented domestic legislation to ratify the treaty.

The Singapore Convention aims to promote mediation as a tool for resolution in international disputes by providing easier recognition and enforcement of mediated settlements between its state parties, much like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) does for arbitral awards.

Australia signed in September 2021 but is yet to ratify. Earlier this year, the UK government conducted a consultation on whether it should also sign - the results of this consultation are expected in the upcoming months. If the UK does decide to sign, this may encourage further uptake among jurisdictions such as Canada, New Zealand, and the European Union.

You can find more information about the Singapore Convention and the New York Convention on the UNCITRAL website.

New ICSID rules for investment dispute arbitrations enter into effect

In our May 2022 issue of ReSolution we outlined recent amendments to the International Centre for Settlement of Investment Disputes (**ICSID**) arbitration rules. The rules govern procedures in investment dispute arbitrations between businesses and nations under the ICSID Convention.

You can find the revised rules at https://icsid.worldbank.org/. The amendments aim to increase transparency, modernise and simplify proceedings, and embrace technology to make the arbitration process more time and cost-effective.

The new rules came into effect on 1 July 2022

and ICSID has now also published guidance notes to the rules on its website. The guidance notes include useful explanations, visual aids and instructions for practitioners both on the overall procedure as well as the new rules specifically, such as electronic filing, time limits, expedited procedure, bifurcation, consolidation, public access and consent to publication, CMCs and security for costs.

ICSID has also recently published its latest caseload statistics report for the 2022 financial year which analyses overall trends, types of new cases, geographic, distributions, economic sectors, case outcomes and arbitrator gender.

English High Court clarifies interplay between court-ordered arbitration and ability of a non-participant to contest jurisdiction

In *National Investment Bank Ltd v Eland International (Thailand) Co Ltd and Eland International Ghana Limited* [2022] EWHC 1168 (Comm) the High Court of England and Wales considered the interplay between section 18 and section 72 of the Arbitration Act 1996 (the **Act**).

Eland International Thailand Ltd commenced court proceedings against National Investment Bank Ltd (**NIB**) in Ghana. After initially involving itself in the Ghana court proceedings, Eland Ghana Limited (**EG**) later sought to commence arbitration in the UK instead. NIB did not agree to arbitration.

EG successfully asked the English High Court to appoint an arbitrator under section 18 of the Act. Section 18 allows a party to a dispute to ask the court to appoint an arbitrator, where the other party does not agree to arbitration. Such court-ordered appointment has effect as if made by agreement of the parties.

NIB, in turn, applied to the High Court for a declaration under section 72 of the Act that the (court-appointed) arbitrator did not have jurisdiction. Section 72 allows a person alleged to be a party to arbitral proceedings, but *who takes no part in the proceedings*, to question matters such as the jurisdiction of the arbitral tribunal.

EG tried to argue that the effect of the section 18 appointment was that the parties were deemed to have appointed the arbitrator themselves, and therefore NIB no longer met the section 72 requirement of being a person 'who takes no part in the proceedings'.

The Court held that as ingenious as EG's argument was, the language of section 18 did not suggest that it was intended to have this effect, nor was there any evidence of such legislative intent. It held that section 18 deems the *outcome or effect* of the appointment but does not deem the non-participating party's participation in the appointment process for any other purpose. It held that section 72 provides *vital protection* to those who do not accept the jurisdiction of the arbitral tribunal and take no part in the arbitral process and that protection is not eroded or lost where a party obtains a section 18 order.

The importance of being purposive when seeking a subpoena in arbitration

In *Mountain View Productions LLC v Keri Lee Charters Pty Ltd* [2022] FCA 161 the Australian Federal Court provided some useful guidance for successfully applying for a subpoena in support of arbitration.

It concerned an international arbitration seated in Queensland between the Australian owners of a super yacht (Kerri Lee), who were claiming $12.85m for alleged damage to their vessel by the Californian respondent who had chartered it (**Mountain View**).

Mountain View sought permission from the arbitrator to apply to the Court for a subpoena compelling two Australian non-parties to provide documents about the yacht's repair and damage history under section 23(3) of the International Arbitration Act 1974 (the **Act**). The arbitrator was satisfied that the documents were sufficiently relevant to the determination of the dispute and granted permission.

The Court stated that it was not its place to second guess the arbitrator's view as to relevance, but that Mountain View's request for 'all documents' without any time limits was too wide-ranging and therefore unreasonable. It considered that the absence of a specific time period would require the non-parties to produce documents stretching back more than a decade prior, without any legitimate forensic purpose. The Court granted the subpoena but narrowed its scope to only documents created in the two years before the charter.

The decision provides a useful summary of the requirements for a successful application for subpoena under the Act, the respective roles of the arbitral tribunal and the court in the process and underlines the importance of ensuring that subpoenas are sufficiently purposive and do not go beyond what is necessary to determine the issues in dispute.

Alberta Court of Appeal reinforces judicial non-intervention in arbitral matters

In Esfahani v Samimi, 2022 ABCA 178 the Alberta Court of Appeal clarified the procedure to be undertaken when a party wishes to appeal an arbitral award under section 44(2) of Alberta's Arbitration Act, RSA 2000, c-A-43 (the **Act**).

The case concerned a family law arbitration regarding child support. However, the decision will apply equally to any arbitration falling within the scope of the Act and is a reminder of the Alberta courts' non-interventionist approach to arbitration.

The parties had signed a standard form arbitration agreement but had omitted to incorporate any terms regarding rights of appeal. Under the Act, where an arbitral agreement is silent as to appeal, a party must request the court's permission to appeal; and appeals are restricted only to issues of law (and excluding any issues of law that were expressly referred to arbitration).

Samimi wished to appeal the arbitral award. A hearing was set to deal with both the permission to appeal and the merits of the appeal contemporaneously. The Court of Appeal rejected this combined hearing on the basis that it undermined the legislative intent of the Act – that of minimum judicial involvement in arbitration.

In its decision, the Court pointed out that the statutory permission requirement was intended as a gatekeeping function to restrict judicial involvement in arbitration and preserve the finality of arbitral awards (unless parties have elected to include rights of appeal as part of their arbitration agreement). Hearing the application for permission to appeal together with the merits of the appeal conflicts with this intention.

The Court stressed that *resort to the courts detrimentally affects the well-recognized benefits of arbitration: speed, efficiency and cost*. It held that the mandated legislative procedure is a bifurcated process - permission to appeal must be sought before and separately to any hearing of the substantive merits.

Onerous clauses 'buried away' inside detailed T&Cs not properly incorporated into contract

A recent decision of the English High Court has reinforced that where a contract contains onerous or unusual terms, they must be fairly and reasonably drawn to the signing party's attention.

Blu-Sky Solutions Limited v Be Caring Limited [2021] EWHC 2619 (Comm) concerned a £23,000 contract between a telecommunications company (**Blu-Sky**) and a social care provider for the connection of 800 mobile phones. Blu-Sky's order form referred to its standard terms and conditions on its website. Among those detailed T&Cs was a clause imposing a £225 administration charge per mobile phone for cancellation before connection.

Be Caring signed the online order form but cancelled two weeks later. Blu-Sky claimed the cancellation administration charge for each mobile phone, totaling £180,000, and sued for payment.

The Court found that Blu-Sky had incorporated its website terms and conditions into the contract by referring to them on the order form. However, it agreed that the cancellation clause itself had not been properly incorporated because it was an unduly onerous term that Blu-Sky had failed to highlight and fairly and reasonably draw to Be Caring's attention.

The Court found that the case came very close to misrepresentation because the onerous clauses were hidden within terms and conditions which were so detailed that it was *difficult to tell the important from the unimportant* and…*the offending clause itself…was cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate…*

The decision serves as a double reminder to businesses to carefully check all the T&Cs before signing an order and to also ensure that any onerous terms in their own standard T&Cs are clearly highlighted and brought to the other party's attention.

New Zealand's new rules on unfair contract terms and unconscionable conduct in trade now in force

In August 2021 the New Zealand Parliament passed the Fair Trading Amendment Act 2021, which amends the Fair Trading Act 1986 (the **Act**). The new rules came into force on 16 August 2022.

The new sections 7 and 8 introduce a general prohibition against unconscionable conduct in all trade (both in consumer and business-to-business relationships). The amendments also extend the existing protection against unfair contract terms in standard form consumer contracts to standard form 'small trade contracts' between businesses (trade relationships under $250,000 annual value).

Broadly speaking, a contract will be presumed to be 'standard form' if it has not been subject to effective negotiation between the parties, such as a business's standard terms and conditions. A contract term may be found by a court to be 'unfair' if it would cause a significant imbalance between the parties, is not reasonably necessary to protect the legitimate interests of the benefitting party and if it would cause detriment to a party. The court will take into account the context of the term within the contract as a whole and the extent to which the term is transparent.

The Commerce Commission has published guidance for businesses on unfair contract terms and unconscionable conduct on the amendments here. Businesses are encouraged to review their practices and their standard terms and conditions and identify any terms or practices that could be considered unfair or unconscionable under the Act. There is a list of example unfair contract terms at section 46M.

First UK Covid rent arrears scheme arbitration award published

The Commercial Rent (Coronavirus) Act 2022 (the **Act**) came into force in England and Wales in March, introducing a six-month arbitration scheme for resolving rent arrears disputes. Commercial landlords and tenants who cannot agree over rent arrears attributable to periods of mandatory business closures during the pandemic can refer their dispute to the scheme for determination by an arbitrator empowered to award relief from payment.

The first such arbitral award to be published came as bad news for office tenants seeking relief from rent arrears under the scheme.

The tenant in this case was Signet Trading Limited (the **Tenant**) – a jewellery retailer with hundreds of retail stores. All 300 of its shops were forced to shut under the Government's mandatory closure of business premises carrying on the sale or rental of goods. However, the rent arrears dispute in question was not for one of its shops but its registered office. The office had been open but empty during the lockdown, with just a mailroom clerk and a security guard.

The Tenant's case failed at a preliminary hearing on jurisdiction. The arbitrator found that the rent arrears were not a 'protected rent' for the purposes of the Act and therefore, the dispute did not fall within the scope for referral to the arbitration scheme.

The arbitrator applied a strict interpretation of the wording of the Act and the business closure mandate and found that the lockdown rules did not force the Tenant to close its registered office, only its retail stores. The arbitrator rejected the Tenant's argument that the office was ancillary to its retail business, reasoning that to find otherwise would impose a two-tier system for tenants of offices connected to retail and those unconnected to retail. The statutory arbitration scheme will close on 23 September 2022.

About the author

Kate is a research clerk in NZDRC's Knowledge Management team. She has recently joined us after working in trust law and succession planning. Previously, she has practised as a solicitor in the UK with an international commercial firm.