Suriname and Timor-Leste accede to the New York Convention

Suriname and Timor-Leste have acceded to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention).

The Convention is the cornerstone of the international arbitration system, by which ratifying states agree to give effect to arbitration agreements between parties to a dispute and to recognise and enforce arbitration awards made in other states.

Suriname acceded on 10 November 2022, and the Convention entered into force there on 8 February 2023, making it the 171st state party. Timor Leste became the 172nd, when it acceded on 17 January 2023. It will take effect there on 17 April 2023.

Further information about the New York Convention is available on the UNCITRAL website.

Changes to unfair contract terms regime in Australia

On 9 November 2022, Australia's new Treasury Laws Amendment (More Competition, Better Prices) Act 2022 received Royal Assent. This introduces various reforms to the unfair contract terms regime under the Australian Consumer Law to increase protections for consumers and small businesses. Notable among the changes is the introduction of penalties for using unfair contract terms in *standard form contracts* with *small businesses*.

The current definition of a 'small business contract' has been significantly widened to include contracts where at least one party is a business employing less than 100 persons and/or with annual turnover of less than $10 million.

Broadly speaking, a contract will be considered 'standard form' if it has not been subject to effective negotiation between the parties, such as standard terms and conditions. A contract term may 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 would cause detriment to a party.

The changes will come into effect in November this year. You can find further information about the changes on the Australian Competition and Consumer Commission website.

Western Australia's Supreme Court infers implied consent by victor to appeal of arbitral award

Under section 34A of the Commercial Arbitration Act 2012 (WA), leave to appeal an arbitral award may only be granted if the parties agree to appeal proceedings, and the court itself considers that leave should be granted.

Such agreement between the parties usually occurs only where the terms of the arbitration agreement allow for appeal to the courts. It is difficult to imagine a successful party otherwise voluntarily agreeing to an appeal after an award; however, this was the issue in the recent case of *Golden Mile Milling Pty Ltd v Novus Capital Ltd* [2022] WASC 364.

The parties (**Golden Mile** and **Novus**) referred their dispute to arbitration, and Novus was successful in receiving an award for damages and costs. Novus became aware that Golden Mile was in the process of selling its business assets, and commenced enforcement proceedings in the WA Supreme Court.

Early on in the enforcement proceedings the parties agreed consent orders, under which Golden Mile would pay the full award amount into the Court as security. As well as payment of the security, the consent orders set down a timetable, which included a reference to a hearing on leave to appeal the award.

After the consent orders were made, Golden Mile applied to the Court for leave to appeal the award, on the basis that the arbitrator had erred on a question of law. Golden Mile claimed that by agreeing to the timetable in the consent orders, Novus had impliedly consented to an application for appeal. Novus denied this, claiming that as the victor in the arbitration, it would not have agreed to the prospect of an appeal.

The Court noted the general *commercial unlikelihood* of a victor agreeing to an appeal, but in the circumstances it agreed that by agreeing to the timetable, Novus had impliedly consented to an appeal. The Court considered that Novus had purposely not objected to the timetable in the orders so as to ensure it would get the benefit of payment of the security.

Luckily for Novus, in the end the Court refused leave to appeal, on the basis that Golden Mile had failed to show that the arbitrator had made an obvious error in law. But the Court's finding on the issue of consent by conduct serves as a warning for those bringing enforcement proceedings to be vigilant and ensure they do not inadvertently open the door to an appeal.

Western Australia Supreme Court clarifies 'real danger of bias' test for challenging an arbitrator's impartiality or independence

Under section 12 of the Commercial Arbitration Act 2012 (WA) (CAA), challenging an arbitrator requires that the existing circumstances give rise to *justifiable doubts* as to their independence and impartiality, and provides that 'justifiable doubts' means a *real danger of bias*.

Last year, the New South Wales Supreme Court clarified the test for determining 'real danger of bias', in *Hancock v Hancock Prospecting Pty Ltd* [2022] NSWSC 724. It found that the 'real danger' standard in Australian commercial arbitration legislation is intentionally stricter than the common law test of 'reasonable apprehension', the policy reason for the change being to discourage tactical challenges and promote Australia as an arbitration seat. It held that 'real danger' requires that, based on the known facts, there is an *objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to all of the questions to be determined*.

The NSW Supreme Court's test above was recently

affirmed and applied by Western Australia's Supreme Court, in *Grieve v Gould* [2022] WASC 413. The alleged bias in this case concerned the arbitrator having previously provided an expert report to a party's legal representatives, in an unrelated case.

In dismissing the challenge, the WA Supreme Court affirmed the real bias test in *Hancock*, but with two qualifications. Firstly, it held that the real danger need not only be of *actual* bias – a challenge may be based on *apparent or ostensible* bias. Second, the WA Court held that real danger of bias may be shown by evidence of an arbitrator's *subjectively declared attitude or manifested propensity*, such as potential prejudgment on an issue.

"Arbitration List" introduced by County Court of Victoria

As part of its Commercial Division Omnibus Practice Note, the County Court of Victoria, Australia, has created what it is calling the "Arbitration List". The purpose of the List is to serve two purposes. It is designed as the appropriate list for disputes which are alleged to be subject to a pre-existing agreement. This means that where parties have agreed previously that arising disputes should be resolved through arbitration, not litigation, the Court will support that arrangement. This will allow the arbitrator to hear the dispute.

The second purpose is that matters within the Arbitration List may be referred to arbitration where agreed upon. This occurs in situations where no arbitration clause had existed, but the parties would prefer that option rather than being seen in the Court. The List also states that when the Court believes that the dispute needs to be resolved quickly, or that it views the amount being claimed as too small, the Court "may encourage" the litigants to use arbitration.

In conjunction with the Arbitration List, the County Court has also produced an information sheet on its website. This expands upon its own criteria for when arbitration may be recommended. For example, the Court may also find the dispute to be appropriate for arbitration if it feels that confidentiality could be a concern.

UK and French courts reach different conclusions in choice of law arbitration dispute

In issue 32 of ReSolution we looked at a choice of law decision by the UK Supreme Court in our article: *The importance of certainty in international arbitration agreements*.

A dispute arose under a franchise agreement and Kabab-Ji took KFG to arbitration in Paris. The original agreement between Kabab-Ji and a subsidiary of KFG stipulated that the governing law was to be English law with an ICC arbitration clause with a Paris seat. The agreement was silent as to the law governing the arbitration clause.

KFG's position was that they were not a party to the original franchise agreement and thus were not bound by the agreement's arbitration clause. The Tribunal sided with Kabab-Ji, and KFG sought to have the award set aside by the French Courts. Kabab-Ji meanwhile sought to have the award recognised and enforced by the English Courts. This led to the UK Supreme Court's decision in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 in which it sided with Kabab-Ji, holding that *where the law applicable to an arbitration agreement is not specified, a choice of governing law for the contract will generally apply*.

The French Courts, however, consistently held that in the absence of an agreement between the parties, when looking at jurisdiction the seat is more appropriate. It was noted previously that KFG were appealing the decision to the highest court in France. That decision was issued in September 2022, in which the Court of Cassation upheld the decision of the Paris Court of Appeal.

Ultimately there is no common approach to determining which law applies to the interpretation of an arbitration agreement, therefore it is important to make sure that any agreement is not silent as to the law governing the arbitration clause, especially where the governing

law of the underlying contract and the arbitral seat are in different jurisdictions.

English Court of Appeal creates obstacles for jurisdictional challenges

A recent decision in the English Court of Appeal has emphasised the restraint the courts should take in accepting jurisdictional challenges. In doing so, the Court has highlighted, and perhaps reinforced, the utility of section 42 of the Arbitration Act 1996 (the **Act**) for parties in having awards enforced.

The case, *S3D Interactive, Inc v Oovee Limited* [2022] EWCA Civ 1665, concerned an appeal over the Commercial Court's enforcement of an order that had been made by an arbitral tribunal. The original dispute was over payment, with the tribunal making two orders in favour of Oovee. During the process however, Oovee released documents concerning the arbitration to the public. The act of doing so prompted S3D to argue that a repudiatory breach of the arbitration agreement had been committed. If the agreement had been repudiated, then there was no agreement. This would eliminate the necessary requirement of arbitration: that the parties agree to it.

The potential breach of the arbitration agreement provided the grounds for S3D's appeal. S3D relied on a caveat within section 42(2) that stated for an application for enforcement to be made, there must be consent from the tribunal. Due to the purported lack of agreement between the parties, the tribunal could not be seen as such as it did not have jurisdiction.

The Court of Appeal rejected S3D's argument. It found that the acceptance of S3D's argument would disturb general principles of arbitration law. It would be an intervention that violates the autonomy of arbitration. The Court was able to arrive at this conclusion by holding that both within the Act, and through its natural use, the word *tribunal* holds regardless of a purported jurisdictional challenge.

English Law Commission finishes review of Arbitration Act

The English Law Commission has published its review of the Arbitration Act 1996. The Act, which provides a framework for arbitration in England and Wales, and Northern Ireland, saw the completion of 25 years in 2021. As a tie in, the Commission was asked by the UK Government to conduct a formal review to assess its suitability. The Commission ultimately is favourable to the Act, and makes that assessment after having conducted a large consultation process. However, there are several areas in which it believes change to be necessary. The areas of recommendations fit into the categories below.

- Confidentiality
- Independence of arbitrators and disclosure
- Discrimination
- Immunity of arbitrators
- Summary disposal of issues which lack merit
- Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act)
- Jurisdictional challenges against arbitral awards (section 67)
- Appeals on a point of law (section 69)

The full review of the Act contains the Commission's comprehensive evaluation of how these areas could be better suited to the present day.

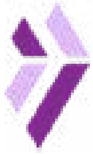
Canadian courts told not to interfere in arbitral awards

There is now additional reason to believe that the Canadian courts should be hesitant to set aside arbitral awards. The Ontario Court of Appeal has made an effort in the recent *Tall Ships Development Inc. v. Brockville(City)*, 2022 ONCA 861 to stress the position the Supreme Court of Canada has made in recent years. That is, when using their appellate powers under section 45 of the Arbitration Act, 1991, judges should hesitate to extract questions of law from the arbitrator's interpretation process. In *Tall Ships*, the challenged decision of the tribunal may have been flawed, but the errors

had avoided fitting into categories in which they could be described as extricable errors of law, or breaches of procedural fairness.

The decision also considered the approach of the arbitrator in considering interest payments. The arbitrator had made the assessment that the contract made no mention of interest. For this reason, and that parties had ceased in contemplating interest, Tall Ships would be prevented from claiming it. The Court of Appeal held that this was not an extricable error of law and so it could not be subject to appeal. In the Court's view, the arbitrator had clearly considered the contract as a whole.

The Court also usefully commented on the purpose of arbitration, stating that challenges against arbitral awards could result in the *very inefficiencies, delays and added expenses that using an arbitral process seeks to avoid*.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