The Dichotomy of Good Faith in the context of the CISG -
Has Good Faith become an Interpretative Doctrine?

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Abstract

Cast, by the drafters of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), as an *interpretative aid*, the doctrine of good faith, we will argue, has been transformed, by those applying the provisions of the Convention into an *interpretative doctrine*. Originally devised as a reference point in the interpretation of the CISG, this doctrine appears to have evolved into a touch-stone thanks to the work of those using the CISG to resolve disputes, shaping the substantive relationship between the contracting parties both during the negotiation stage and then throughout the contractual lifecycle and in turn their respective duties and rights. Generating an expectation that the parties will adhere to this doctrine both pre- and post-inception of the contract.

Key words

CISG, good faith, comparative law, private international law

Title: A new approach to contracts breached by COVID19.

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Abstract

Non-performance of commercial contracts is always an important issue, but it is one that has become particularly important in the light of the COVID 19 pandemic. In response to this several countries, including the UK, China, Italy and the United States, have imposed restrictions on local and international travel and commercial activities.[1] Consequently, businesses have been unable to perform their contractual obligations, and many will have breached contracts. Not all contract terms carry the same weight and consequently the remedies available for breach vary but under English law the innocent party can either complete its contractual obligations and claim damages or repudiate the contract and also obtain damages.[2] The breaching party will wish to avoid paying damages and might claim that an intervening event occurred, beyond its control and say that it should therefore be absolved of responsibility because the contract had been frustrated. The Common Law does indeed provide such a remedy.[3] When frustration is established, future contractual obligations will be automatically discharged. However, there is a high threshold to establish frustration.

Consequently, in practice, parties to international sale contracts usually include 'force majeure' clauses which state mutual rights and duties if certain events, beyond the parties' control, occur whether or not such events would have amounted to frustration.[4] Force majeure is a creature of the Civil Law and does not exist as a Common Law concept and has been very strictly interpreted by our courts usually requiring the exact intervening event to have been precisely identified in such clauses. It is highly possible that the commercial parties will not have specifically drafted a clause which deals precisely with COVID 19 and its effects since it is a new occurrence. This novelty may lead arbitrators and courts to refuse to accept that particular clauses provide a remedy. Consequently, the focus of this article is not on force majeure but rather on the doctrine of frustration. It argues that although English Law is very strict with reference to the circumstances where a contract can be frustrated, it is possible that COVID 19 would nonetheless be considered a frustrating event. We suggest that activity elsewhere in the Common law world point in this direction and, although it is early days, it is possible that England and Wales may follow in the footsteps of some of other jurisdictions such as Singapore, which seem to have taken a more relaxed approach about COVID 19 as a frustrating event. Also, the article discusses possible clauses that the contractual parties should implement in contracts drafted post COVID19 to prevent having to rely on remedies such as frustration.

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[1] Debevoise & Plimpton, 'COVID-19 and its Impact on English Law Contracts' (Law Firm newsletter March 18, 2020) <file:///C:/Users/Kingdel/Downloads/20200318%20COVID19%20and%20its%20Impact%20on%20English%20Law%20(3).pdf> accessed 22 September 2020

[2] Failure to repudiate will mean that the innocent party will still be bound to perform their obligations under the contract as explained in *SC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2016] EWCA Civ 789

[3] Ewan MacIntyre, *Business Law* (11th edn, Pearson, London 2016)

[4] Ibid.

Automation in Smart Contract Arbitration: Moving Towards New Conceptions of Procedural Fairness?

Dr Sara Hourani

Blockchain technology was first introduced at the end of the 2000s when an anonymous person using the name of Satoshi Nakomoto released their whitepaper on the Bitcoin cryptocurrency. The specificity of this technology is that it functions on a decentralised basis as there is no use of a trusted intermediary or central authority. Blockchain technology is used in smart contracts to automate transactions. Smart contracts are software codes that include the terms and conditions of a contract and that run on a network leading to a partial or full automated self-execution and self-enforcement of the contract. In essence, a smart contract is a software programme that is stored on the blockchain. Smart contracts can be used in supply chain management, trade finance and insurance for example.

In the context of these different transactions, it would be relevant to include a dispute resolution clause in the smart contract to prompt the parties to resolve their differences with regards to the performance of the contract. This type of dispute resolution has received widespread attention for the resolution of specific low-value claims, especially in the context of cryptocurrency and commercial smart contract-related disputes.

Different projects have integrated automation in the blockchain-based dispute resolution procedure. To illustrate, the Kleros blockchain-based dispute resolution procedure has adopted automation at every stage of the procedure. Another example is the CodeLegit blockchain-based arbitration procedure that clarifies at what stages of the procedure automation can be used. Both of these platforms include the possible feature of having an automated enforcement of the arbitral award, without having recourse to a State court.

Research Question:

This paper's research question therefore queries the extent to which automation is incorporated in the design of current blockchain-based/smart contract dispute resolution systems, and how automation can be embraced in these procedures to comply with fairness and equity standards that are currently found in traditional private dispute resolution procedures, such as arbitration. The paper tries to explore whether the international business community is moving towards embracing a new conception of procedural fairness.

Plan Outline:

Part one of the paper focuses on a comparative analysis of the use of automation and new procedural characteristics in the blockchain dispute resolution platforms chosen for this study. Part two carries out an analysis of the compatibility of such automation and characteristics with the law on arbitration in different legal systems, and assesses the extent to which such systems are embracing a novel approach towards procedural fairness.

PICKING UP THE TAB: MONETISING ARBITRAL CLAIMS AND AWARDS

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The recent financial crises and the need for maintaining liquidity have witnessed claimants in investor-state arbitration monetising their claims. A perusal of previous monetisations of arbitral claims indicates that the scope of monetization was solely limited to debt restructuring or simply limited to financing the arbitration/enforcement proceedings. However, recent trends suggest that an arbitral award can be monetized in ways more varied than the abovementioned traditional methods. This article focuses on one such aspect, i.e., assignment of investor-state arbitration claims and awards and the enforcement issues emanating therefrom. With the commodification of arbitral claims/awards gaining traction, scholars have debated, inter alia, the role of the assignor/funder in the entire process. When assigning the arbitral claim, the bone of contention lies in two jurisdictional aspects – ratione personae (whether the assignor is competent as a 'party' to bring the claim) and ratione temporis (whether the timing of the assignment affects the tribunal's jurisdiction). The primary considerations are often public policy-oriented – dependent on the civil or common law jurisdiction. Depending upon the substantive law of the enforcement country the assignment can be challenged along the lines of champerty, maintenance, good faith, abuse of process and the commercial interests of the stakeholders involved. The practice also strikes a discussion on the legal and commercial consequences of investors potentially 'forum shopping' through the assignment of said claim/award. The modus operandi for the present article is as follows: Part I will attempt to distinguish the assignment of claims/awards from other prevalent forms of monetization and elaborate on the practice of assignment in the context of investment arbitration. This exercise will delineate the scope of the article. Part II of the article will refer to a few known instances of assignment of arbitral claims/awards to cull out a standard threshold for the approach adopted by courts and tribunals, especially when the assignment of claims has been disclosed. In a general sense, the article will examine whether the increased presence of the assignor in arbitration/enforcement proceedings threatens to diminish

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stakeholders' reliance on the ISDS framework. Part III will focus on the enforcement-related issues arising courtesy the assignment of claims/awards, especially public policy concerns that may occur due to the substantive law of the country where the award is sought to be enforced being pivotal to the determination of the legitimacy of the assignment in the first place.

Keywords: investor-state arbitration, enforcement, assignment, arbitral claims

The Future of Unfair Terms Regulation in Commercial Contracts

Abstract

This paper considers the appropriate scope of regulation of unfair terms in standard form commercial contracts. Presently, the scope of regulation of unfair terms in standard form commercial contracts varies among jurisdictions. The EU Directive on unfair terms sets a minimum harmonisation standard of consumer contracts. In some member-states, regulation of unfair terms in standard form commercial contracts applies only to consumer contracts. In the UK, this is mostly the case, with some additional scope from the earlier Unfair Contract Terms Act 1977. Under the Australian Consumer Law, the scope of regulation is larger, including standard form contracts with small-businesses, who are seen as similarly situated as consumers. In other jurisdictions, the scope in theory covers all commercial contracts. Examples include Germany and the Netherlands which chose to go beyond the minimum scope of the EU Directive. Another example is the United States, through its doctrine of unconscionability rooted in state-legislation implementing Uniform Commercial Code §2-302.

These differences in scope correspond to distinct rationales for regulating unfair terms in standard form commercial contracts. Regulations focused on consumer contracts are often justified based on notions of inequality of bargaining power, and asymmetry of information. Regulation which apply more broadly to all standard form commercial contracts are based on a theory of a market failure for standard form terms. The paper critically examines and compares these rationales, asking how persuasive they are and to what extent each serves the interests of market-participants. It is further suggested that trade would be furthered by greater harmonisation of the scope of regulation of unfair terms in standard form commercial contracts.

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Investment Arbitration and the Rule of Law: Is It Not Time to Bridge the Ethical Gap?

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-interested in submitting a paper for the edited collection

Recently, the debate about preserving the rule of law has taken centre stage in the EU and beyond. Many authors concur that one of the mechanisms to promote the rule of law is financial sanctions. Unsurprisingly, on an EU level, there is an initiative aimed at tying rule of law decay to the freezing of EU funds. Yet, an EU autocracy may not just feed on EU funds but on Foreign Direct Investment (FDI) broadly conceived.

In this light, scholars have explored the relationship between FDI and the rule of law. Some agree that countries which respect the rule of law tend to attract more investment. However, the establishment of institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), seems to have provided international investors with the comfort that they can find a remedy even if the country in which they have invested is not governed by the rule of law, so long as there is a relevant treaty they can step upon. A priori, this comfort deters investors from making ethical choices by refusing to invest in countries which disrespect the rule of law and violate human rights.

Even worse, if one examines ICSID's website, one sees that in many cases, the awards or the excerpts of the awards are missing. Sometimes, even if the excerpts have been published, they are censored to such extent that one may be lost in capturing how the dispute unravelled. If one digs deeper into ICSID's procedural rules, one sees that these seem be settlements which ICSID has helped mask by not overtly referring to Rule 43 (settlement and discontinuance) or Rule 44 (discontinuance at a party's request), which are the only ways to discontinue proceedings. This allows the State, which carried out the violation, to save its face and even lie in press releases about how a dispute unravelled, going as far as misleading the public that it won the case. Even when such overt misrepresentations take place, ICSID remains silent.

This paper suggests that a better balance between protecting the legitimate interests of international investors and defending the rule of law is needed and that it is time to bridge the ethical gap between the two. It makes a broader call for transparency in ICSID arbitration by examining in detail several cases which had profound repercussions for the countries, including EU members, which they involved. In all cases, one may identify behaviour by the host State falling short of basic standards of the rule of law, which did not just affect the foreign investor in question, but also the local citizens. However, in all cases, willingly or not, ICSID helped the violating State mask the fact that it settled, thus facilitating it to claim that it won the case in public. In this way, not only the violating State was not encouraged to change unlawful behaviour in the future, but local citizens were deprived of remedies by virtue of alleged persuasive precedent which was not even published.

The underlying values of German and English contact law

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Abstract

Values are often described as the defining feature of a particular legal system and the extent to which values are shared is the determining factor in whether different legal systems can (or cannot) cooperate.[1] Individual judges are seen as either market individualist or consumer welfarist depending on the values they hold,[2] but the collective values of the legal system are shaped not only by judgments but also by social, political and cultural events. Yet exactly what these values are, how they operate, and to what extent they are balanced against each other is less often examined and can only be identified through comparative analysis.

The aim of this paper is twofold. It will first set out a new theoretical framework for understanding the way values operate within a legal system. It will show that neither should culture be considered equivalent to law nor should the positivist conception of excluding culture be considered a valid comparative methodology. These values are neither an embodiment of culture nor are they a-cultural, instead they are influenced by historical events which also shape cultural ideologies. Second, it will identify relevant values in relation to change of circumstances in German and English contract law. This will provide evidence that the new framework is based on functionally equivalent and mostly identical values. However, the weight given to each of the values differ to in some cases reveal divergences in outcomes. This insight is crucial to a more nuanced understanding of the way that values operate in practice.

[1] See for example the manifesto exploring a harmonised European contract law: G. Brueggemeier et al, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 European Law Journal

[2] See for example J. N. Adams and R. Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, distinguishing between market individualist and consumer welfarist judges.

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- **Contractual claims versus treaty claims in investor-state disputes**
    - To the extent treaty claims can be brought (and the various requirements for the application of an investment treaty are met), this topic would focus on how parties may wish to consider bringing claims under one or more applicable investment treaties (if applicable), rather than seeking contractual remedies, which are often capped or more limited than international law remedies. Although this choice is often left to the last minute (and in any event to the moment when a dispute arises), parties should take into account the advantages of either option earlier on, ideally when a project is being structured. In a way, this topic is also relevant to contract negotiation.