UPDATE
ARBITRATION

# The Arbitration Amendment Bill 2017

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In early April, Paul Foster-Bell's private member's bill, further amending the Arbitration Act 1996, was drawn from the ballot. On the first reading, the bill received near universal support, with only New Zealand First demurring.

The bill introduces four amendments to the Act; the validation of arbitration clauses in trust deeds; reversing the current position on confidentiality of related court proceedings to one of a rebuttable presumption of privacy; and clarifying the position in relation to jurisdictional challenges following the Supreme Court decision of *Carr v Gallaway Cook Allan* [2014] NZSC 75 and the Singapore Court of Appeal decision of *PT First Media TBK (Lippo) v Astro* [2013] SGCA 57.

While Mr Foster-Bell's bill being drawn from the ballot was fortuitous, and these amendments largely technical, the bill provides an important opportunity to affirm Government support for arbitration in New Zealand.

The bill amends the Act to validate arbitration clauses in trust deeds. In doing so it recognises the legitimate reasons why settlors include them. They could want privacy for what are often sensitive family disputes. The efficiency of arbitration, and ability to select trust specialists as arbitrators, may also appeal. There is also the pragmatic realisation that there are deeds that have these clauses and it is better if uncertainty is removed.

What it does not do is undermine the rights of unborn/minor beneficiaries. The bill provides for arbitrators to appoint counsel to represent their interests in proceedings and only if appointed will the arbitral award be binding on them.

Confidentiality is a sensitive issue, with many assuming that something underhand is going on. Similarly, there can be a prurient interest in the affairs of the rich. In legal circles, many bemoan the fact that some of the more interesting commercial disputes, rife with interesting legal issues, are shielded by the privacy of arbitration, reinforced by sections 14A-14I, introduced in the 2007 amendments. That situation is hardly new; arbitration has been a procedure adopted by agreement, conducted in private and supported by the courts through enforcement for centuries.

The difficulty with the privacy of arbitral proceedings is that it is perceived that the public has an interest in the private affairs of others. Taking the example of trust disputes, canvassed above, these disputes arise at a time of emotional vulnerability when the parties are frequently grieving over the loss of a loved one or in a situation where family members have fallen out, often bitterly, over the wishes of a lost relative or friend. To enable those disputes to be dealt with in private is understandable; to have legal issues arising from that private process dealt with in public is less so.

The amendments proposed in the bill tread a fine line between the conflicting interests of the parties' expectation of privacy and the public interest in seeing the legal reasoning applied by judges. By establishing a rebuttable presumption of confidentiality, the proposed amendments give the judge the discretion to publish the judgment, with private details, including the names of the parties, redacted. This amendment also brings the New Zealand Act into line with similar provisions in Singapore and Hong Kong; similar jurisdictions offering arbitral services in the region.

The final amendments deal with challenges to jurisdiction. The first responds to *Carr*, the second to *Lippo*.

In *Carr*, putting aside the lengthy discussions of severability and the core importance to the parties of appeals on questions of fact, the parties enthusiastically participated in a lengthy and complex arbitration before one of New Zealand's leading retired judges. The issue of the validity of the agreement to arbitrate did not bother the parties until it came time for the lawyers to consider the available grounds for resisting enforcement of the award.

Similarly, in *Lippo*, Chief Justice Menon was persuaded that challenging jurisdiction on enforcement was something different to challenging jurisdiction during the arbitral proceedings, as the Act requires.

Neither case has been without its critics; in each, there was no criticism of the arbitration itself. The jurisdiction was only challenged after the arbitral proceedings were completed, and each party had put their cases, as they had agreed to do. In the case of *Lippo*, we now have the curious situation where enforcement was refused in Singapore, but allowed in Hong Kong.

The proposed amendments, in relation to both *Carr* and *Lippo* remove any doubt that, in New Zealand, if parties agree to engage in arbitration, then that agreement will be enforced, regardless of any technical irregularities, and if there are any concerns over jurisdiction, they must be raised before the arbitrator at a time they can be dealt with. Allowing either argument to be raised as a ground to resist enforcement of adverse arbitral award does no favours to arbitration in New Zealand; and puts us out of step with other Model Law countries.

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