John G Walton
Commercial Barrister and Mediator

ARBITRATION ACT 1996

A further opportunity for refinement

This paper was published in the October 2017 edition of the New Zealand Bar Association's magazine At the Bar.

Introduction

In early April 2017, Paul Foster-Bell MP's private members' bill amending the Arbitration Act 1996 was drawn from the ballot, and on 12 April 2017, the Arbitration Amendment Bill 2017 received its first reading. It is now with the Electoral and Justice Select Committee for consideration.[1]

The Act was just amended in 2016; it is unusual for such highly regarded and effective legislation to receive such attention. This article considers the background to the amendments, and why the 2017 Bill is important.

The 1996 Act

In 1991, the Law Commission recommended adopting the 1985 UNCITRAL Model Law on International Commercial Arbitration for both domestic and international arbitrations. It was not until Peter Hilt, an MP and AMINZ member, managed to have his private Member's bill drawn from the ballot that the Arbitration Bill was introduced into the House. That bill was eventually passed into law as the Arbitration Act 1996.

In addition to providing a long overdue reform to the 1908 legislation, largely inherited from the UK, the new Act brought our legislation into line with the Model Law, save in a number of critical respects:

- related court proceedings to be held in public, save in exceptional circumstances;[2]
- summary judgment where "*there is not in fact any dispute between the parties*";[3]
- *quick draw* procedure for appointment of the arbitral tribunal;[4] and
- appeals on questions of law.[5]

1 Submissions to the Select Committee closed on 22 June 2017.
2 Section 14F.
3 Article 8(1) of the Frist Schedule.
4 Clause 1 of the Second Schedule.
5 Clause 5 of the Second Schedule.

BANKSIDE CHAMBERS
Level 22, 88 Shortland Street, Auckland 1010, New Zealand
phone +64 9 308 0514 | fax +64 21 696 161 | mobile +64 21 473 656 | email john@johnwalton.co.nz | www.johnwalton.co.nz

The Act has been seen to work very well, and for their part, the courts in NZ have been supportive of Act, and arbitration, more generally. There have, however, been a number of exceptions.

In the heavily criticised[6] case of *Casata Ltd v General Distributors Ltd*,[7] the Supreme Court held that arbitrators have a duty to make an award of costs, notwithstanding that neither party had claimed or made submissions on the point; a case hard to reconcile with the express wording of clause 6(1)(b) of the Second Schedule.[8]

The case of *Zurich Australian Insurance Ltd v Cognition Education,*[9] concerning the application of the summary judgment wording at the end of article 8(1), produced a result at odds with the express wording of the Act and with the UK case law on a similar provision. This provision was lifted from a previous version of the UK's Arbitration Act and inserted into our 1996, ironically, a year in which the UK repealed the provision. The case law in the UK had held that the provision was the *reverse side of the coin* from the normal summary judgment test of there being no tenable defence to the claim.

That said, the decision of the Supreme Court, given by Arnold J, was exemplary in its support for arbitration, the finding that:

> "*The added words act so as to filter out cases where the defendant is obviously simply playing for time — the bald assertion of a dispute is not enough to justify the granting of a stay where it is immediately demonstrable that there is, in reality, no dispute."*[10]

Finally, in *Carr v Gallaway Cook Allan*,[11] the Supreme Court engaged in an extensive and technical consideration of severability and effect of the invalidity of the agreement to arbitrate, with the majority coming to the view that the arbitral award had to be set aside. In the context where the parties agreed (on advice from their respective lawyers) to refer their dispute to arbitration and actively participated in it, and where enforcement was resisted on grounds only raised on appeal, the Supreme Court's technical decision on the agreement to arbitrate has also caused a number of difficulties.

While these decisions could be said to be supportive of arbitration, it would be a stretch to say that two of them further the purposes of arbitration generally, focusing as they do, very narrowly on technical arguments in isolation of the overall purpose of limiting judicial review and facilitating recognition and enforcement.

---

6 See *Williams and Kawharu* LexisNexis 2011 (First Edition) at para 16.5.

7 [2005] NZSC 43

8 Clause 6(1)(b) provides that in the absence of an award as to costs, then costs are to lie where they fall.

9 [2014] NZSC 188.

10 See para [39] of the judgment.

11 [2014] NZSC 75

2016 Amendments

The Arbitration Amendment Act 2016 brought in two substantial amendments:

(1) Removal of the High Court as the default appointing body in terms of article 11 of the First Schedule; AMINZ was nominated as the appointing body by the Associate Minister of Justice, Hon Mark Mitchell, on 2 March 2017.

(2) Recognition of emergency arbitrators, appointed for the provision of interim measures and preliminary orders and the recognition of the emergency arbitrator's awards.

The first amendment acknowledged that arbitral institutions are best placed to make appointments where the parties cannot agree. To that end, AMINZ has adopted an appointment process whereby the President or Executive Director is to consult with a panel of experienced and expert practitioners on the most appropriate appointments. This procedure has a number of benefits – it ensures that appointments are robust and made on an informed basis; appointments are made at appropriate levels, thereby bringing on new practitioners, rather than favouring a select few; and the process gives effect to the Institute's diversity policies.

Substituting AMINZ for the High Court has, however, had a number of unintended consequences.

The first is that the new article 11(7) retains the ability to apply to the High Court for appointment where (a) AMINZ has not made the appointment within 30 days of receiving a request, or (b) "*a dispute arises in respect of the appointment process*". While AMINZ has no difficulty making an appointment within 30 days, the second circumstance does little but provide an opportunity for further challenge and delay.[12]

The second difficulty arises in respect default appointments under article 11 of the First Schedule and clause 1 of the Second Schedule.

Article 11(3) – (6) sets out a default procedure fort appointment. In general terms, if the parties fail to act as required in their agreement or if they are unable to agree, then the appointment is to be made by AMINZ having due regard to the qualifications required and any other consideration "*likely to secure and independent and impartial arbitrator.*" As it stands, when read with the AMINZ appointments policy, no further legislative provision would be required.

The Second Schedule,[13] however, includes a further procedure in clause 1, to which the parties are deemed to have agreed. Unlike article 11, clause 1(4) provides that where there is *default* under the appointments procedure, or *the parties are unable to agree*, a party may issue a notice specifying "*the details of that person's default*" and proposing a person to fill the vacant arbitrator's position "*if that default is not remedied*" within a period of not less than 7 days. In

[12] This issue, and the retention of the "quick draw" procedure in clause 1, have been the subject a recent article in *LawTalk* by Jack Wass, barrister at Stout Street Chambers in Wellington. Mr Wass has made submissions to the Select Committee on the point, supported by AMINZ.

[13] For domestic arbitrations, the Second Schedule contains default provisions which are subject to agreement – they are "opt-out" provisions; for international arbitrations, the provisions are "opt-in".

practical terms, this has provided a *quick draw* procedure under which a party alleges a failure to agree, and forces their appointment on the other party through a default notice.

The interaction of article 11 and clause 1 was considered by Hansen J in the case of *Hitex Plastering Ltd v Santa Barbara Homes Ltd*[14]; at paragraph [29], his Honour noted:

> *A party or an arbitrator will not be able to invoke subcl (4)(b) unless there has been a genuine attempt to reach agreement. Anyone who peremptorily issues a notice of default without making a reasonable attempt to resolve differences will risk a successful challenge to any appointment which ensues.*

More recently, this issue was considered in the case of *Body Corporate 200012 v Naylor Love Construction Limited.*[15] In his minute recording the agreement of the parties, Muir J commented that he was not satisfied that there was "default" in terms of clause 1(4) which would enable a notice to be issued, notwithstanding that the parties had failed to reach agreement.

It may be an appropriate answer to the unhappy drafting of clause 1(4), to do away with clause 1 altogether.[16]

Senior Courts (High Court Commercial Panel) Order 2017

With effect from 1 September 2017, the Chief High Court Judge has established a specialist judicial commercial panel of the High Court, to deal with commercial disputes and applications under the Arbitration Act 1996 where the sums at issue are not less than $2 million.[17]

This is a welcome development.

Arbitration Amendment Bill 2017

The new bill proposes four further amendments:

(1) recognise the arbitration of trust disputes;

(2) provide for a rebuttable presumption of confidentiality of court proceedings related to arbitration;

(3) rectify the technical issues raised in *Carr v Gallaway*; and

(4) remove the opportunity to resist enforcement of arbitral awards on jurisdictional grounds, raised in the Singapore case of *PT First Media v Astro*.

Trust arbitration

---

[14] [2002] 3 NZLR 695

[15] CIV-2017-404-247, Auckland High Court, 26 April 2017, Muir J

[16] A position supported by AMINZ in its submissions on the bill – see fn 12 above.

[17] Coincidentally, $2 million is also the threshold for *expedited arbitration* under the AMINZ Arbitration Rules.

The arbitration of trust disputes (typically between settlors, beneficiaries and trustees) is problematic, primarily due to the conflict between enforcement and the protection of the rights of under-aged or unascertained beneficiaries. Yet there is strong demand for reform in this area internationally,[18] and it is logical that NZ, with the popularity of family trusts, should follow suit.

The proposed amendment validates arbitration clauses in trust deeds.[19] In doing so it recognises the legitimate reasons why settlors include them, for example party autonomy in the selection of specialist arbitrators and in setting the arbitral procedure; privacy for what are often sensitive family disputes; and efficiency.[20] 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

Any discussion of confidentiality in relation to arbitration can be a sensitive issue; it was certainly a touchpaper issue in relation to discussions over investor-state-dispute-settlement under the TPPA.

This is an issue where the Act is out of step with other Model Law jurisdictions. When the 2007 amendments were introduced, the Law Commission was firm in its view that following the Model Law approach would deprive the courts and, more widely, the legal community of important case law in relation to arbitration. Those submissions resulted in section 14F, providing for related court proceedings to be in public, while retaining the privacy of arbitral proceedings in sections 14A and 14B.

The difficulty with much of the discussion of confidentiality of arbitral proceedings is that it is often subverted by suggestions that something underhand is going on, there is *private justice* and the perception that the public has an interest in the private affairs of others.[21] Such disputes (particularly in relation to trusts) often arise at a time of emotional vulnerability when close family members or trusted friends have fallen out when they also are coping with the loss of a loved one. 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.

---

[18] See S. Strong and T. Molloy *Arbitration of Trust Disputes: Issues in National and International Law* (Oxford University Press, Oxford 2016); and T. Wusterman "*Consent and Trust Arbitration*", chapter 6 in E. Geisinger and E. Tribaldo-de Mestral *Sports Arbitration: A Coach for Other Players* ASA Special Series No. 412, 2015.

[19] Subsequent submissions have suggested that the clause should extend to *ad hoc* arbitrations, ie situations where the agreement to arbitrate is made subsequent to the trust being settled, and after a dispute has arisen. AMINZ has supported this amendment.

[20] It would also answer some of the criticism levelled by Dr Molloy QC at the courts over their decisions in trust disputes in his new book – see fn 18 above.

[21] See the discussion of the first reading of the bill https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20170412_20170412_42

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 NZ Act into line with similar provisions in Singapore and Hong Kong; jurisdictions also offering arbitral services in the region.

Carr v Gallaway Cook Allan[22] *and PT First Media (Lippo) v Astro*[23]

Both these cases relate to challenges to the enforcement of arbitral awards which, on their face, appeared to be beyond reproach.

In the first, *Carr v Gallaway Cook Allan*, the parties had agreed to a right to appeal not only on questions of law, but also on questions of fact; something which is expressly prohibited in clause 5(10) of the Second Schedule. While there are good grounds for accepting that, as a matter of contract, the parties specifically agreed to appeals on fact and it was arguably core to their agreement, the fault was with the agreement to arbitrate, rather than the arbitration itself or the result (though the unsuccessful party would probably agree to differ).

This raises an interesting issue beyond the consideration of the majority. The structure of our Act is such that the Model Law provisions are largely encapsulated in the First Schedule, and provisions of domestic application (*opt-in* for international arbitration) are in the Second Schedule. The prohibition against appeals on questions of law was included as a new paragraph (10) to clause 5 of the Second Schedule in the 2007 amendments. There was logic in adding the paragraph to the Second Schedule as appeals on questions of law are a New Zealand departure from the Model Law. While clause (10) prohibits appeals on questions of fact, it is not a provision which is open to agreement to the contrary; rather it is a condition for allowing any appeals at all, which the parties cannot contract out of.

Article 34 of the Model Law, on which article 34 of the First Schedule to our Act is based, provides in article 34(2)(a)(i) that an award may be set aside if the agreement to arbitrate was not valid under the applicable law. In this case, the agreement to allow appeals on questions of fact was fatal to the enforceability of the award, not because it could not be severed, but because it was central to the agreement.

There is, however, a potential saving in article 34(1)(a)(iv) which provides that the award would not be set aside where the arbitral procedure departed from the agreement to arbitrate where "*such agreement was in conflict with a provision of this Law from which the parties cannot derogate*." In other words, the provision excluding a right of appeals on questions of fact was one which the parties could not derogate from and therefore that provision in the agreement would not invalidate the award provided the tribunal did not comply with that part of the agreement. This is the point taken by Arnold J in his dissenting judgment.

The problem with this argument is that, while the Model Law refers to derogating from "*this Law*", when the provision was carried over into article 34(1)(a)(iv) of our legislation, this Law

22 Ibid fn 11.
23 [2013] SGCA 57

became "*this Schedule*". As the prohibition in clause 5(10) is in the Second Schedule, strictly speaking the saving didn't apply.

The amendments proposed in the Bill include two very simple, but subtle changes to article 34 – the first providing that the parties' "*agreement to refer their dispute to arbitration*" must suffer from invalidity (rather than the defined term *agreement to arbitrate*) and changing the reference to "*this Schedule*" in article 34(1)(a)(iv) to "*this Act*" thereby capturing failures to comply with the obligatory provisions of the Act itself, including the First and Second Schedules.

The second case, *Lippo v Astro* similarly concerned a complex arbitration which was challenged only on enforcement, rather than during the course of the arbitration itself. In a decision which makes for difficult reading, Chief Justice Menon came to the conclusion that failure to challenge jurisdiction before the arbitrator was a passive position, whereas challenging enforcement was an active position, which the respondent was entitled to do, notwithstanding the fact that the argument had not been raised before the arbitrator.

Needless to say the decision has received considerable criticism, and has not been followed in other jurisdictions; notably Hong Kong where Astro was able to have the award enforced against Lippo. The amendments proposed in the Bill reinforce the requirement for all challenges to be raised during the arbitral proceedings.

Conclusion

In adopting the Model Law, it has to be acknowledged that Parliament gave primacy to the purposes of the Act – to facilitate and promote arbitration and the recognition and enforcement of awards.

The amendments proposed are consistent with those purposes and they recognise that when the parties agree to have their disputes settled in arbitration, they are doing to with limited intervention from the courts. Over the last few years, AMINZ has developed an appointments process; it has promulgated an emergency arbitrator protocol; it has generated arbitration rules, for use in both domestic and international arbitration; it has adopted rules and guidelines for awarding costs in arbitration; and it has established the AMINZ Arbitration Appeals Tribunal. Parliament has also recognised AMINZ central role in arbitration by transferring the default appointment role to it from the High Court, and establishing the new specialist commercial list.

It is important also not to forget that the primary appeal of arbitration is party autonomy; this includes having disputes determined in private with minimal court intervention. Increasingly, parties have embraced this approach by removing the right to appeal and providing for indemnity costs, by default.

Hopefully the 2017 Bill will pass, regardless of the outcome on 23 September!

Edit – Since this article was submitted for publication, the Bill has been taken up by Andrew Bayly MP for Hunua.