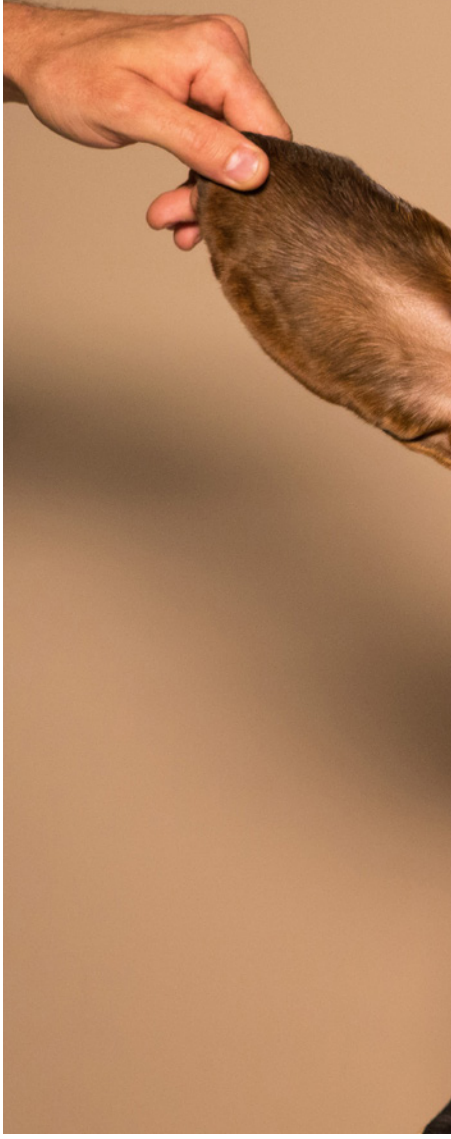
UPDATE
ARBITRATION LAW

The Arbitration Amendment Act 2019

Further refinement

BY **JOHN WALTON**



Since the UNCITRAL Model Law was adopted in New Zealand in the Arbitration Act 1996, few amendments have been necessary. We have a unified Act, which applies to both domestic and international arbitrations, and it has performed well, free of the complications in Australia, with its potentially competing state legislation (for domestic arbitrations) and a Federal Act (for international arbitration), or more baffling in Fiji, left with its 1908 based Act for domestic disputes and new, Model Law based, legislation for international arbitration.

In 2007, we were the first to adopt the 2006 amendments to the Model Law (primarily to deal with consumer arbitration agreements, privacy and interim measures and preliminary orders); in 2016, the definition of *arbitral tribunal* was amended to include emergency arbitrators (removing any argument that an emergency arbitrator's award of interim measures was not an enforceable *award* as defined in the Act) and a new section 6A was inserted replacing the High Court with "a suitably qualified body" to deal with default appointments under article 11 of Schedule 1 (AMINZ was nominated to this role in March 2017).

While this may all look like plain sailing, the reality is more prosaic. A number of issues have arisen over the years as a result of the development of case law and there was a sense that New Zealand needs to be cognisant of developments in other regional centres, notably Singapore and Hong Kong.

A number of amendments were put to the government by AMINZ in 2014 to deal with these issues. Initially, the core changes were included in the omnibus courts legislation. When that legislation was broken up into the subsidiary bills, the majority of the amendments proposed by AMINZ had evaporated during the select committee process. As with most legislation, the Institute was not given any real opportunity to comment on the trimmed down amendment bill. The first we saw of the revisions to the bill was when it was returned to the House.

Not to be daunted, AMINZ promoted a private member's bill to pick up on the omitted amendments and to deal with the arbitration of trust disputes. That bill, first sponsored by Paul Foster-Bell MP and subsequently picked up by Andrew Bayly MP following Mr Foster-Bell's retirement, was drawn from the ballot and introduced into Parliament on 9 March 2017. With cross-bench support from both the National government and the Labour opposition, we were optimistic that the Bill would pass reasonably unmolested. It had its first reading on 9 May 2017 and was referred to the Justice and Electoral select committee the next day.

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Despite extensive and largely supportive submissions on the bill, the initial draft report recommended the rejection of the bill in its entirety on grounds which were difficult to fathom. After considerable lobbying and independent advice, the select committee reconsidered that recommendation, and proposed three amendments to the Act:

- clarification of jurisdictional challenges;
- clarification of the setting aside and enforcement provisions in

article 34 of Schedule 1; and
- removal of the quick draw provision for the appointment of the arbitral tribunal.

Two proposals were lost in this process. The first that New Zealand should follow the approach in Singapore and Hong Kong that court proceedings related to arbitration should, by default, be held in private (thereby reversing the existing presumption); and the second in relation to the validation of arbitration clauses in trust deeds.

On the issue of confidentiality, a number of permutations were considered, but ultimately the committee favoured the preservation of the status quo in the name of open justice. This is a matter of policy on which there were diverse views. The end result of this round of amendments is that if the parties are concerned about confidentiality, the first step would be either to exclude rights of appeal on questions of law, or to provide for them to be determined by the AMINZ Arbitral Appeals Tribunal. This leaves issues of setting aside or recognition to be determined, by default, in open court. As these touch on matters of policy, it is hard to disagree with this approach.

The second issue, the validation of arbitration provisions in trust deeds, was left to be dealt with in the Trusts Bill also under consideration by that committee. That bill has yet to be referred back to the House. The Arbitration Amendment Bill was considered and passed by the Committee of the Whole House on 3 April and will have passed into law by the time this article is published.

Jurisdictional challenges

The jurisdictional issues have arisen in two cases where arbitral awards were successfully challenged on jurisdictional grounds during enforcement. The first, *Carr v Gallaway Cook Allen* [2016] NZSC 75, turned on the validity of the agreement to arbitrate (on the grounds that it provided for appeals on *questions of fact*); and the second, the Singaporean case of *Astro v Lippo* (*PT First Media TBK v Astro Nusantara & Ors* [2013] SGCA 57).

Article 16(2) of Schedule 1 provides that a jurisdictional challenge must be raised before the arbitrator not later than the submission of the statement of defence, and article 16(3) that a challenge to the tribunal's ruling on jurisdiction may be made within 30 days of that ruling to the High Court.

In *Carr v Gallaway* the challenge was not to the arbitrator's jurisdiction, but to the entire arbitral proceedings on the basis of the invalidity of the agreement to arbitrate, and in *Astro v Lippo* the issue was one of how and on what basis the challenge was made. In the former case, the Supreme Court considered severance of the offending right of appeal, and came to the conclusion that the agreement to arbitrate was fatally flawed and beyond any jurisdictional challenge.

In the latter case, the Singapore Court of Appeal came to an unusual distinction between a passive position (ie, reserving jurisdictional issues during the arbitration), and an active position in resisting enforcement, the latter position not being caught by the time limits on jurisdictional challenges in the Model Law. Needless to say, the case has suffered widespread criticism within the arbitration community.

A new article 16(4) is to be inserted into the Act to the effect that a failure to *pursue* a challenge to jurisdiction in the High Court "in a timely manner" would act as a waiver. This rather leaves three issues open to question:

1. what happens if no challenge to jurisdiction is made to the tribunal (as in *Carr v Gallaway*);
2. if there is a ruling by the tribunal on jurisdiction, but no referral to the High Court (the *Astro v Lippo* scenario); and
3. where the ruling is challenged in

the High Court on time, but not pursued with any vigour, the applicant reserving its position during the arbitral proceedings.

While the measure of "timely manner" will be open to interpretation, there can be little doubt that scenarios 1, 2 and 3 above will be caught by articles 16(2), (3) & (4), and the opportunity to challenge the jurisdiction of the arbitral tribunal will be lost if a ruling on jurisdiction is not sought before the defence is submitted and a challenge to that ruling is not lodged in the High Court on time and actively pursued (though it need not be done so enthusiastically).

It is fair to say, therefore, that a party cannot remain silent on jurisdictional issues pending the outcome of the arbitration, nor can it reserve its position in relation to jurisdictional issues without actively pursuing them. In both cases, any such challenge will be deemed to be waived.

Setting aside and enforcement

A more complex issue arises in relation to setting aside awards (article 34).

The grounds for setting aside and refusing enforcement are largely the same, and include incapacity of a party, invalidity of the agreement to arbitrate, a failure in the composition of the tribunal or of the tribunal to follow procedure, or, more generally, on public policy grounds.

Article 34(1)(a)(iv) provides that an award may be set aside if:

> "The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, **unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate**, or, failing such agreement, was not in accordance with this Schedule …"

The saving, where there is a failure to comply with the agreement as to the composition of the tribunal or the arbitral procedure, applies where the agreement was "in conflict with a provision of **this Schedule** from which the parties cannot derogate". In other words, the agreement contained a procedure which was in breach of the requirements of Schedule 1 and the tribunal did not follow that agreed procedure, complying instead with the obligatory requirements of Schedule 1.

As originally promulgated, the saving in the Model Law referred to "a provision of **this Law** from which the parties cannot derogate". It was logical, therefore, when the Model Law was incorporated into Schedule 1 of the Act, that "this Law" would be amended to "this Schedule". In his minority judgment in *Carr v Gallaway*, Justice Arnold sought to apply the saving to the invalidity of the agreement to arbitrate (covered in clause 5(b)(10) of Schedule 2, rather than in Schedule 1, to which the saving applied); the point being that there was nothing wrong with the arbitration as such, the only issue being providing for appeals on questions of fact which are prohibited in Schedule 2.

While sensible and logical, the difficulty with Justice Arnold's reasoning was twofold. The first was that the prohibition against appeals on *questions of fact* is contained in clause 5(b)(10) of Schedule 2, and not Schedule 1 as article 34(2)(a)(iv) required; and second, there was nothing wrong with either the composition of the tribunal or the procedure followed. The problem was with the validity of the agreement to arbitrate itself, which is covered explicitly in article 34(2)(a)(i), to which the saving did not apply. Any attempt to appeal on a question of fact would be addressed by the High Court, and not by the arbitral tribunal.

The simple solution, adopted by the select committee, has been to substitute "this Act" for "this Schedule" in article 34. At first blush, this addresses the reservations over Justice Arnold's minority decision in *Carr v Gallaway*, however it does not, strictly, address the second difficulty – the failing was not with the arbitrator's appointment or the procedure, which is what the saving in article 34(1)(a)(iv) specifically addresses, but with the possibility of appealing questions of fact.

So, we are left in the hopefully rare position where there is a defect in the agreement to arbitrate which cannot be severed, the parties proceed with the arbitration without making any challenge as to jurisdiction, and the award is set aside. Fortunately, and perhaps hopefully, the scenario in *Carr v Gallaway* is unlikely to be repeated.

But having proposed, promoted and lobbied for the amendments, it is gratifying to have the critical changes finally adopted. These changes keep New Zealand up to date with the shifting landscape of arbitration

Trusts arbitration

The Trusts Bill, as currently drafted, sets out an extensive reform of the law of trusts, including provision for mediation and arbitration in the proposed clauses 138 to 142.

While there is no reason that a dispute involving a trust cannot be referred to arbitration (like any dispute, in terms of section 10 of the Arbitration Act), two difficulties arise:

4. if the arbitration provisions are

included in the trust deed, arbitration is therefore imposed on the trustees and/or beneficiaries by the settlor, rather than being an agreement between the disputing parties; and

5. where the award affects the rights of unborn or unascertained beneficiaries, or those simply lacking legal capacity, then it will not be enforceable as regards those beneficiaries.

The solution to the first issue is to validate the arbitration provisions, and the second is to provide for the appointment of counsel for the class of beneficiaries which are, by definition, unable to participate.

While the drafting of the bill is, in places, difficult, the court may, either on application of a party or of its own volition enforce an ADR provision in a trust deed or refer a dispute to an ADR process (in terms of clause 140); and in relation to the second point, the court is to appoint a representative for those beneficiaries who cannot participate themselves (see clause 139).

In relation to mediation, any ADR settlement must be approved by the court.

Appointing the arbitral tribunal

When the Arbitration Act was passed in 1996, two rather curious amendments from overseas were included in the legislation. The first, from the UK, was a qualification to the stay provisions in article 8(1) where *there is not in fact any dispute between the parties*; and the second, from the NSW Commercial Arbitration Act 1984, providing the *quick draw* procedure for the appointment of the arbitral tribunal where there was a *default* in the power of appointment. Curiously, in both cases the provisions were dropped from the UK and NSW legislation in the year our Act was passed (in the case of the UK) and shortly thereafter (in the case of the NSW legislation).

The issue with article 8 was that, even though there was an agreement to arbitrate which would normally support a stay in terms of article 8, a resisting party could argue before a court that there was, in fact, no dispute. The UK case law suggested that this was the *flipside of the coin* from arguable defence in summary judgment proceedings. It is fair to say that this was an unhappy arrangement, and the UK abandoned the saving when it enacted its version of the Model Law in its Arbitration Act 1996.

In New Zealand, the issue was effectively put to bed in the judgment of the Supreme Court in *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, in which Justice Arnold significantly read down article 8 in the following terms:

> "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**."

Bearing in mind how limited the application of the offending words in article 8 have become following the Supreme Court's decision, no further amendment was considered necessary.

Concerns about the "quick draw" procedure in clause 1 of Schedule 2 have been not so easily put to bed.

In the ordinary course, where the parties are unable to agree on an arbitral tribunal, the appointment would be made by AMINZ in terms of article 11 of Schedule 1. That provision, however, is subject to agreement. Schedule 2 (which sets out the implied provisions) includes in clause 1 deemed agreement to a default appointment procedure.

Clause 1(4) provides that where there is a failure or default in the appointment procedure "a party may specify the default" and propose that if the default is not remedied "a person named in the communication shall be appointed" to the tribunal.

Aside from the unhappy way that this provision sits with article 11, there are two core difficulties with it. First, the procedure has been used in effect as a unilateral means of appointing arbitrators (often with conflicting notices crossing in the post); and second, "default" does not sit well in the context of agreement, or at least failing to agree; and such default is hardly capable of rectification short of simply rolling over and accepting the nominated arbitrator.

The case law on the point has been as mixed as the drafting is muddled (see for example *Hitex Plastering Ltd v Santa Barbara Homes Ltd* [2002] 3 NZLR 695 and the minute of Muir J in *Body Corporate 200012 v Naylor Love Construction Ltd* CIV-2017-404-247, Auckland High Court, 26 April 2017). It is with some relief that clauses 1(4) & (5) are to be repealed, doing away with the quick draw procedure entirely.

As with any legislative change, procuring amendment to the Act has proven to be long and, at times frustrating. But having proposed, promoted and lobbied for the amendments, it is gratifying to have the critical changes finally adopted. These changes keep New Zealand up to date with the shifting landscape of arbitration, and they also maintain New Zealand as a good place to arbitrate. ■

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