ALTERNATIVE DISPUTE RESOLUTION

Appointing your arbitrator

BY **JOHN WALTON**

> It is generally not a good idea to annoy the mind you're trying to persuade.
> — Anon

Dinosaurs were not quite roaming the earth when I first turned my mind to arbitration as a young lawyer (though my daughter would demur). It's not that long ago that arbitration was primarily the preserve of lease and construction disputes. Since that time, we have had the almost universal adoption of the UNCITRAL Model Law and what Schultz and Kovacs have described as "The Rise of a Third Generation of Arbitrators" (*Arbitration International* (2012) Volume 2B, Issue 2 at 161). The first wave was the "grand old men" who had risen to the top of their professions, typically legal, and who had no particular expertise in arbitration. Their credibility could be said to have rested in their grey hair.

The second wave was what Dezalay and Garth referred to in 1996 as the "technocrats" (Yves Dezalay and Brant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press 1996)); technical experts who gained their credentials through international arbitration. Schultz and Kovacs' third generation are arbitration specialists, with managerial skills at the forefront. While the delegation of legal analysis, running hearings and writing awards proposed by Schultz and Kovacs would, on any measure, be a step too far, there is something to be said for the recognition of arbitrators as specialists in their own right.

For any arbitration, the selection of the arbitrator is probably the most important decision of the entire process; yet regrettably it is generally not done as well in New Zealand as it might be. Approaches range from using the last arbitrator to be charmed by counsel's powers of persuasion or to favour a client's position; appointing the most recent retirement from the High Court bench, based on how they were perceived from prior cases; to simply surrendering the entire process to an appointing body. Sadly, few counsel fully explore the options available to them; particularly in what arbitration might offer. This is something that could be done better.

Drafting the agreement

The first opportunity to insert some rigour into the selection process is in drafting the agreement to arbitrate. The minimal, and to be honest quite satisfactory, approach is for the agreement to simply provide for arbitration under the Arbitration Act 1996. The difficulty with this approach is that, if the parties fail to agree, then the appointment is made for them by AMINZ under article 11 of Schedule 1 to the Act. No timeframe for agreement is provided in article 11, and the appointment is made on the application of either party. AMINZ then makes the appointment in accordance with its Appointments Policy from its panel of arbitrators, in consultation with its Appointments Panel.

While the AMINZ appointments process is as transparent as it can be, providing for consultation with experienced practitioners engaged in arbitration, more could be done by counsel. More complex arrangements for appointment are used – for example, the UNCITRAL process under which the parties propose not more than three candidates, the appointing body then collates a list of five, from which the parties may object to two and must rank the remaining three in order of preference (see article 30.3 of the AMINZ Arbitration Rules). This may be more than a little cumbersome for all but the most complex and high value claims, but it is thorough. Time will tell if this process gains favour.

At times, it would appear that contract drafters have relied on supposition, or faulty memories, to provide for appointment by inappropriate organisations or some that simply don't exist. In the recent case of *Tumatatoro Ltd v HJS AG Ltd* [2019] NZHC 1047, the parties provided for an independent registered farm management consultant, appointed by Federated Farmers, to resolve a rural leasehold dispute. Regrettably, Federated Farmers do not, and would not, make such an appointment. In the High Court, Justice Duffy held that the agreed procedure had been defeated; in an exchange of emails the parties had agreed to arbitration; and, having failed to agree on an arbitrator, the appointment made by AMINZ as the default appointing body under the Act, was valid. That the arbitrator appointed was not a registered farm management consultant, as provided in the original agreement, was not an issue as this requirement was not carried through to the imputed agreement to arbitrate. While the article 11 procedure worked well in that case, with AMINZ making the

appointment, it is perhaps less than what the parties had intended.

Coincidentally, the New Zealand Law Society advised in July that the Institute of Architects (NZIA) will not appoint experts in dispute resolution clauses either:

> "The NZIA says this has been done without its knowledge or consent and places it in an untenable position. It notes that the NZIA, its President, and its architect members generally, are not authorised nor have the expertise (and insurance) to provide these services."

Rejection a matter of practice

While lawyers will frequently exchange correspondence proposing and objecting to candidates for appointment, all too often this is taken as an opportunity to game the process; or counsel is blinded by suspicion that their opposite number is pulling a fast one. Rejecting the first name on a proposed list of candidates has become a matter of practice, on the assumption that this is the person most favoured by the proposing party. This has led to some listing their preference at number two or three on their proposed list.

It is hard to see this behaviour as being in the best interests of the clients.

Arbitration is not court litigation, and it provides significant procedural advantages; the ability to select your arbitrator; to select your procedure; the availability of interim measures; disposal of costly and time consuming discovery, in favour of disclosure; tailoring submissions and the use of experts to suit the dispute; privacy; disposing of rights of appeal; and the ability to agree on costs, including indemnity costs, if that is what clients would prefer – most would, if asked.

Properly used, there can be no doubt that arbitration can get to the determination of the substance of the dispute more quickly and more cost effectively than traditional litigation. All too often, that will depend on how the arbitrator proposes to use his or her powers under article 19 of Schedule 1.

Familiarity with the skills and preferences of potential arbitrators is the key, and having a sensible discussion between counsel over who best to select in the expectation of reaching agreement. For many litigators, arbitration is a field visited infrequently. Perusing the AMINZ or the New Zealand Dispute Resolution Centre website, to identify potential arbitrators, can be helpful, but it is, at best, only a starting point.

One solution, all too frequently overlooked, is to interview the prospective arbitrator(s) and ascertain their suitability for the dispute. Armed with a clearer picture of the available talent, counsel should then meet, face-to-face, and discuss their preferences and try to reach agreement. Exchanging emails and firing off letters is a poor excuse for a frank discussion, and is usually only useful as evidence of a failure to agree, with a resulting loss of the critical power to settle on an arbitrator which both counsel accept.

Useful guidance

The London-based Chartered Institute of Arbitrators (CIArb) has published a useful practice guideline on interviewing prospective arbitrators. *Interviews for Prospective Arbitrators* CIArb, 2016 sets out six general principles:

1. arbitrators may agree to be interviewed by a party prior to appointment;
2. when approached, the candidate arbitrator should enquire whether pre-appointment communication is prohibited either under the arbitration agreement or the applicable law;
3. the prospective arbitrator should be provided with a copy of the arbitration agreement and details of the parties and the matter in dispute to ascertain whether or not they have a conflict of interest and the qualifications and expertise to determine the dispute;
4. the prospective arbitrator should then agree the basis upon with the interview is to be conducted, including the questions to be asked and issues canvassed;
5. no remuneration or hospitality should be offered for agreeing to be interviewed; and
6. contemporaneous notes should be taken of the interview (which will be discoverable, if the appointment becomes an issue).

It goes without saying that the substance of the dispute should not be canvassed during the interview, including specific facts, positions of the parties and the merits of the case. Conversely, the arbitrator's background, published speeches and articles, appearances as expert witness and positions taken, prior appearances as arbitrator (within the constraints of confidentiality) and anything else which may go to the arbitrator's competence, availability or independence are all fair game for discussion.

While this may seem to be overkill, selection of your arbitrator is one of the most important decisions you will make in the arbitration process, and it should not be taken lightly; nor should it lightly be surrendered to an appointing body, unless it genuinely cannot be agreed. That is not to say that appointing bodies do not provide a valuable service; clearly they do. However, most counsel experienced in arbitration are capable of recognising an appropriate arbitrator, and recommending them to their clients.

While New Zealand may not be the epicentre of international arbitration, like Hong Kong, Singapore or London, that is the context of Schultz and Kovacs' *Third Generation*, we have a growing cadre of expert arbitrators and legal practitioners with the experience and skills to maximise the benefits of arbitration. The starting point is to recognise that arbitrators are not judges, and the process – while legal – is not litigation. ■

John Walton ✉ *john@johnwalton.co.nz* is an arbitrator, construction adjudicator and commercial mediator practising out of Bankside Chambers in Auckland.