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Arbitration Update – New Zealand
Further refinement

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Since the UNCITRAL Model Law was adopted in New Zealand in the Arbitration Act 1996, few amendments have been necessary. New Zealand has a unified Act, which applies to both domestic and international arbitrations, and it has performed well, free of the complications found in other jurisdictions, with potentially competing domestic legislation and a separate Model Law based Act for international arbitration.

In 2007, New Zealand was the first State to adopt the 2006 amendments to the Model Law (primarily to deal with consumer arbitration agreements, privacy and interim measures and preliminary orders); and 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 (the Arbitrators' & Mediators' Institute of NZ (*AMINZ*) was nominated to this role in March 2017).

While this may all look like plain sailing, the reality is more prosaic. Before the proposed amendments to the Act, a number of issues arose over the years as a result of the development of case law and there was a sense that New Zealand needed 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 to the Act were included in the omnibus courts legislation, then before the House. When that legislation was broken up into the subsidiary bills, the majority of the amendments proposed by AMINZ evaporated. AMINZ was not given a genuine opportunity to comment on the narrowed amendment bill. The first the public saw of the revised bill was when it was returned to the House for its second reading.

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. 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 by the Select Committee recommended the rejection of the bill in its entirety on grounds which were difficult to reconcile. 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;
- removal of the quick draw provision for the appointment of the arbitral tribunal from Schedule 2.

Two proposals were lost in this process. The first that New Zealand should follow the approach adopted 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 dealt with in the Trusts Act 2019 which will come into force in early 2021. The Arbitration Amendment Act 2019 passed into law in early May this year.

Jurisdictional challenges

The jurisdictional issues have arisen in two cases where arbitral awards were 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), where jurisdiction was challenged before the arbitrator but only pursued with any vigour in opposition to enforcement proceedings.

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

Both cases raised an unease that a party might participate in arbitral proceedings, while "keeping its powder dry" on jurisdictional challenges, preferring to wait for the outcome of the arbitration.

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. It is likely that in future any such challenge, as raised in either case, 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 …*

As set out above, a failure to comply with the agreement as to the composition of the tribunal or the arbitral procedure may be permissible where the agreement was "in conflict with a provision of this Schedule from which the parties cannot derogate". In other words, where the agreement contains a procedure which is in breach of the requirements of Schedule 1, and the tribunal does not follow that agreed procedure, it may be saved by 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". The prohibition against appeals on questions of fact, which caused the issue in *Carr v Gallaway*, was included in Schedule 2 of the Act, as part of the 2007 amendments. In his minority judgment in *Carr v Gallaway*, Justice Arnold sought to apply the saving to the invalidity of the agreement to arbitrate; 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 would have been dealt with by the Court.

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 issues specifically covered by article 34(2)(a)(iv). The problem was with the validity of the agreement to arbitrate itself, covered by article 34(2)(a)(i), which the majority of the Supreme Court held went to the heart of the agreement.

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 drafting issue raised in 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, which went to the core of the agreement to arbitrate.

As a result, we are left in the peculiar 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, and any such issues will be dealt with by the arbitral tribunal under article 16.

Trusts arbitration

The Trusts Act 2019 sets out an extensive reform of the laws of express trusts, including provision for mediation and arbitration in sections 142 to 148.

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 – an approach adopted by the Court of Appeal of New South Wales in the *Rinehart* decision), two difficulties arise:

(1) if the arbitration provisions are included in a trust deed, arbitration is imposed on the trustees and/or beneficiaries by the settlor, rather than being an *agreement* between the disputing parties (the *conditional gift* approach adopted by the ICC in its 2008 trust arbitration clauses), and

(2) 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 (something not addressed in either the revised 2018 ICC trust arbitration clauses or the Australian decisions).

On the first issue, while the New South Wales Court of Appeal and the High Court of Australia in the *Rinehart* decisions have accepted that trust disputes may be arbitrated, New Zealand has opted to validate such arbitration provisions as *agreements to arbitrate* in the new Act.

On the second issue, the Bill provides for the appointment by the High Court of counsel for the class of beneficiaries which are, by definition, unable to participate. This addresses the failings in both the ICC draft clauses and in the Australian decisions. A point which may discourage litigants is that the arbitrator's award is only enforceable against the unascertained beneficiaries at the option of their court appointed counsel.

The Act will come into effect in February 2021.

Appointing the arbitral tribunal

When the Arbitration Act was passed in 1996, two curious amendments from other jurisdictions 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 at the time our Act was passed.

The issue with article 8 was that, even though there was an agreement to arbitrate which would normally support a stay, 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. This unhappy arrangement was abandoned by the UK when it enacted its version of the Model Law in its Arbitration Act 1996.

In New Zealand, the issue was 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 not been 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 those default provisions which the parties may opt out of, in the case of domestic arbitrations, and may opt into, in the case of international arbitrations) 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 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) have been repealed, doing away with the quick draw procedure entirely.

As with any legislative amendment, 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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Schedule

Trusts Act 2019 2019 No 38 > Pt 7 > s 142

Alternative dispute resolution

142 Definitions for purposes of sections 143 to 148

In sections 143 to 148,—

ADR process means an alternative dispute resolution process (for example, mediation or arbitration) designed to facilitate the resolution of a matter

ADR settlement, in relation to a matter,—

(a) means an enforceable agreement reached through an ADR process that resolves the matter; but

(b) does not include an arbitral award

arbitral award, in relation to a matter that has been referred to arbitration, has the same meaning as award in section 2(1) of the Arbitration Act 1996

arbitration agreement, in relation to a matter that has been referred to arbitration, has the same meaning as in section 2(1) of the Arbitration Act 1996

external matter means a matter to which the parties are a trustee and 1 or more third parties

internal matter means a matter to which the parties are a trustee and 1 or more beneficiaries, or a trustee and 1 or more other trustees, of the trust

matter—

(a) means—

(i) a legal proceeding brought by or against a trustee in relation to the trust; or

(ii) a dispute in relation to the trust between a trustee and a beneficiary, or between a trustee and a third party, or between 2 or more trustees, that may give rise to a legal proceeding; but

(b) does not include a legal proceeding or a dispute about the validity of all or part of a trust.

Compare: 1991 No 69 s 268(4)

143 Power of trustee to refer matter to alternative dispute resolution process

(1) This section applies if there is no provision in the terms of a trust that requires or empowers a trustee to refer a matter to an ADR process.

(2) A trustee may, with the agreement of each party to the matter, refer the matter to an ADR process.

(3) For the purposes of this section, a beneficiary is not a party to an external matter.

144 ADR process for internal matter if trust has beneficiaries who are unascertained or lack capacity

(1) If a trust has any beneficiaries who are unascertained or lack capacity, then, for a matter relating to that trust that is subject to an ADR process,—

(a) the court must appoint representatives for those beneficiaries; and

(b) those representatives may agree to an ADR settlement, or agree to be bound by an arbitration agreement and any arbitral award under that agreement, on behalf of the beneficiaries who are unascertained or lack capacity; and

(c) any ADR settlement must be approved by the court.

(2) If representatives have been appointed under subsection (1) for beneficiaries who are unascertained or lack capacity,—

(a) the representatives must act in the best interests of the beneficiaries on whose behalf they have been appointed; and

(b) the court may order that a representative's costs be paid out of the trust property; and

(c) the court may make any order that it thinks fit regarding the terms of a representative's appointment.

(3) This section applies only to internal matters.

145 Power of court to order ADR process for internal matter

(1) The court may, at the request of a trustee or a beneficiary or on its own motion,—

(a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or

(b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).

(2) In exercising the power, the court may make any of the following orders:

(a) an order requiring each party to the matter, or specified parties, to participate in the ADR process in person or by a representative:

(b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property:

(c) an order appointing a particular person to act as a mediator, an arbitrator, or any other facilitator of the ADR process.

(3) This section applies in relation to internal matters only.

146 Trustee may give undertakings for purposes of ADR settlement or arbitration agreement and any arbitral award

Despite section 33 (duty not to bind or commit trustees to future exercise of discretion), a trustee may, for the purposes of an ADR settlement or arbitration agreement and any arbitral award under that agreement, give binding undertakings in relation to the trustee's future actions as trustee.

147 Trustee's liability in relation to ADR settlement or arbitration agreement and any arbitral award limited

(1) This section applies to a proceeding brought by or on behalf of a beneficiary and arising from or relating to an ADR settlement or arbitration agreement and any arbitral award under that agreement.

(2) An ADR settlement or arbitration agreement and any arbitral award under that agreement is valid and a trustee is not liable in the proceeding unless, in relation to the settlement, agreement, or award, the trustee failed to comply with—

  (a) the trustee's mandatory duty under section 25; or

  (b) any duty specified in the terms of the trust for the purposes of establishing liability under this section.

(3) Despite subsection (2)(a), a trustee is not liable in the proceeding by reason only that the settlement, agreement, or award was not consistent with the terms of the trust.

148 Application of Arbitration Act 1996

If arbitration is the ADR process to which a matter is referred under this Act or under the terms of the trust, the Arbitration Act 1996 applies to the arbitration.