Russell McVeagh | Arbitration Year in Review 2024

Arbitration is an established means of binding dispute resolution for civil, particularly commercial, disputes in New Zealand. In this Year in Review, we consider recent important court decisions in the arbitration context and note important changes to arbitral legislation, rules and guidelines.

Appeals of arbitral awards in 2024

The Arbitration Act 1996 does not permit appeals of arbitral awards on questions of fact. It does permit appeals on questions of law (in most cases subject to parties first obtaining leave of the court), so long as this right is either not expressly excluded by the parties (for domestic arbitrations) or if the parties expressly agree (for international arbitrations).

Historically, appeals have been uncommon and rarely successful. The courts have a general reluctance to interfere with arbitral awards. This reflects the overarching objective of finality, which is embedded in the Act, and promoted as one of arbitration's key attributes.

Most appeals fail at the application for leave to appeal stage of the appeals process. In deciding an application for leave to appeal, the courts apply a statutory "substantial affecting of rights" threshold (clause 5(2), Schedule 2 of the Act), and the related factors developed by the Court of Appeal in the leading case *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318.

In 2024, the number of applications for leave to appeal, as well as the proportion of successful applications for leave, continued to be low. Only two out of five applications for leave to appeal decided during 2024 were granted.

December 2023: the Court's jurisdiction to grant interim relief

Article 9(2) of Schedule 1 of the Arbitration Act 1996 provides that the Court "has the same powers as an arbitral tribunal to grant an interim measure [defined in Article 17] under article 17A for the purposes of proceedings before that court".

In *Foundation Village Limited v Growing Spaces Limited* [2023] NZHC 2638, the Court declined an application for an interim injunction on the basis that the Court had no jurisdiction to grant the orders requested.

The plaintiffs submitted that the permanent nature of the relief sought by the interim injunction meant that it was not governed by Schedule 1, so the Court had jurisdiction to determine it. This reasoning was not accepted by the Court. Instead, the Court followed *Worldwide Holidays Ltd v Liu* [2018] NZHC 3443 and *Clark Road Developments Ltd v Grande Meadow Developments Ltd* [2017] NZHC 2589 in determining that, because the granting of an interim injunction is regulated by Schedule 1, the Court does not have any general or residual powers to grant injunctive relief beyond what is listed in Schedule 1.

This case reflects the general principle that the Court's inherent jurisdiction cannot be used to ride roughshod over the Act, the arbitration agreement (i.e. party autonomy) or the jurisdiction of the arbitral tribunal.

May 2024: Arbitrator conflicts – updates to the IBA Guidelines

In May 2024, the International Bar Association released updated Guidelines on Conflicts of Interest in International Arbitration.

The Guidelines provide detailed guidance for arbitrators and counsel for the purpose of identifying and managing conflicts of interest in international arbitration. They have been widely used in international arbitrations since their first introduction in 2004.

The updates are focused on modernising and refining the 2014 edition of the Guidelines to reflect modern arbitral practice (including the employment of arbitrators in law firms, and the rise of third-party funding). They do not change the overall structure, substance or spirit of the Guidelines.

The IBA has helpfully published a side by side document showing the updates implemented in the 2024 edition. The key changes include:

- an expansion of the duty to disclose, requiring parties and arbitrators to make "reasonable enquiries" to identify potential conflicts of interest;
- an expansion of the list of potential conflicts that require disclosure by arbitrators; and
- a requirement that arbitrators decline or resign an appointment if they determine that a disclosure would violate secrecy or confidentiality rules.

May 2024: Privacy of arbitrations

Section 14F(1) of the Arbitration Act 1996 provides that court proceedings under the Act must be conducted in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

In *Bathurst Resources Ltd v LMCBH Ltd* [2024] NZHC 1058, an application was made for an order under section 14H that those court proceedings (arising out of an underlying arbitration) be conducted in private. The parties had expressly agreed (in the terms of appointment of the arbitrator) that any court proceedings arising out of the underlying arbitration should be conducted in private. Notwithstanding that, the Court declined the application on the basis that: the parties' agreement did not bind the Court; LMCBH had subsequently resiled from the agreement and no longer wanted privacy; the dispute between the parties had been the subject of public judgments of the senior courts of New Zealand already; there was a public interest in the resolution of the dispute given its commercial significance to New Zealand's mining industry; there had been public statements about the fact of the arbitration and its outcome; and the evidence before the Court was not commercially sensitive enough to justify an order. The Court did, however, make an order that there would be no search of the court file without leave of a judge.

While this case is highly fact-specific, it is a helpful reminder that there are limits to privacy in the context of arbitration and the parties' ability to safeguard such privacy.

July 2024: Interim measures

Article 17B(1) of Schedule 1 of the Arbitration Act 1996 provides that if a party requests an interim measure, that party must satisfy the arbitral tribunal that:

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted;

(b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and

(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

In *Methanex New Zealand Ltd v Nova Energy Ltd* [2024] NZHC 1604, the Court considered whether harm to third parties could be taken into account when determining whether to grant an application for interim measures under Article 17A. The underlying dispute related to non-supply of gas by Nova to Methanex under a gas supply agreement. Methanex disputed Nova's ability to choose not to supply Methanex gas, and to allocate the gas to other Nova customers. Methanex therefore sought interim orders requiring Nova to supply the contracted gas. Nova raised the potential impacts on its third-party priority customers, who would be deprived of their contracted gas in the event the orders were granted.

The Court confirmed that, while Article 17B(1)(b) refers only to the harm to the respondent, this does not prevent the Court from considering harm to third parties.

The application in *Methanex* was dismissed on the basis that the harm to Methanex if the interim measures were not granted did not substantially outweigh the harm to other parties (including non-parties to the arbitration) if the interim measures were granted.

August 2024: Review of arbitral costs awards

In *StockCo Ltd v Big Basin Ltd* [2024] NZHC 2438, the Court declined StockCo's application under clause 6(3) of Schedule 2 to the Arbitration Act 1996 for an order varying an arbitral costs award. StockCo had been successful in an arbitration and awarded costs, but argued that the amount was unreasonable, covering only 51% of its total costs (as fixed by the arbitrator).

Under clause 6(3), the Court may vary an arbitral costs award "if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances". The Court confirmed that clause 6(3) imposes a high threshold: an unreasonable allocation of costs is an irrational allocation that no reasonable arbitral tribunal could have made.

The Court said that this high threshold is appropriate given that an application to vary an arbitrator's costs award is effectively an appeal against the exercise of the arbitrator's discretion, the arbitrator is the best-placed person to decide costs in an arbitration, and it is desirable to minimise recourse to the Court in an arbitration process.

December 2024: Clifford Chance Unilateral Option Clauses Survey

We were pleased to contribute to the 2024 edition of the Clifford Chance Unilateral Option Clauses Survey.

Unilateral option clauses (also known as one-sided, non-mutual, asymmetrical or sole option clauses) are a common form of dispute resolution clause in commercial agreements. These clauses grant one party or a group of parties the exclusive right to decide between arbitration or litigation as the forum to resolve a dispute. There are two broad types of unilateral option clauses:

- clauses providing that both parties can refer a dispute to arbitration, but giving one party the exclusive right to elect to refer a dispute to litigation before the courts; and
- clauses providing that the courts of a particular country have exclusive jurisdiction but giving one party the right to elect to bring court proceedings in another country, and/or refer the dispute to arbitration instead.

The treatment of unilateral option clauses varies significantly between jurisdictions, giving rise to potential pitfalls around validity and enforceability. The survey helpfully indicates the treatment of unilateral options clauses across 120 different jurisdictions.

We recommend that before including any type of unilateral option clause parties should obtain local law advice on how the proposed clause would be viewed in countries likely to have jurisdiction over a dispute and in countries where any judgment or award may need to be enforced.

December 2024: New SIAC Rules

The Singapore International Arbitration Centre is a leading global arbitration institution, reflecting Singapore's status as one of the most preferred seats for international commercial arbitrations.

In December 2024, SIAC published the seventh edition of its Arbitration Rules. The new SIAC Rules took effect on 1 January 2025 (that is, they will apply by default to any SIAC arbitration commenced from January onwards, unless otherwise agreed by the parties). The SIAC Rules were last updated in 2016.

The new SIAC Rules contain a number of significant updates aimed at improving the procedural efficiency of SIAC arbitrations, including:

- a new Streamlined Procedure, and an expanded Expedited Procedure, for low value disputes;
- new provision for coordinated arbitrations, allowing tribunals to coordinate arbitrations where a common question of law of fact arises out of or in connection with those arbitrations;
- codification of the tribunal's power to make final and binding preliminary decisions on key legal or factual issues;
- changes to the Emergency Arbitration Procedure, allowing:
  - a party to apply for emergency interim relief prior to filing the Notice of Arbitration, provided that the Notice is filed within seven days of any application (whereas the 2016 SIAC Rules allows a party to apply alongside or after filing the Notice); and
  - Emergency Arbitrators to issue protective preliminary orders pending the Emergency Arbitrator's final decision on the need for emergency relief. The Emergency Arbitrator must determine such a request within 24 hours of their appointment;
- new rules encouraging the parties to use mediation at different stages of the arbitration; and
- new rules requiring the parties to disclose the existence of any third-party funding agreement and the details of the third-party funder.

On the horizon for 2025

Proposed changes to the English Arbitration Act 1996

While there are differences, the New Zealand Arbitration Act 1996 and the English Arbitration Act 1996 share the same broad structure, and their interpretation and application have often produced similar outcomes. The result is that English case law regarding the English Arbitration Act 1996 is often referenced by the New Zealand courts for the purpose of construing and applying the New Zealand Arbitration Act 1996.

Following the UK General Election in July 2024, the new Labour government reintroduced the Arbitration Bill 2024. The Bill was previously introduced under the previous Conservative government but had not passed through Parliament by the time of the election.

The Bill is intended to give effect to recommendations issued by the Law Commission in its September 2023 report on the English Arbitration Act 1996.

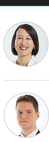
The Bill contains several changes to the English Arbitration Act 1996, including:

- a new power of summary disposal, which will broadly mirror the English courts' power to award (and approach to awarding) summary judgment in English court proceedings;
- a new rule on the governing law of an arbitration agreement: where the parties do not specify the governing law of the arbitration agreement, it should be the law of the seat; and
- clarification that the courts can make orders in support of arbitration that include orders against third parties.

The new UK Arbitration Act is expected to receive Royal Assent and come into effect towards the end of this year.

These legislative reforms do not affect the New Zealand Arbitration Act 1996. However, the reforms will be relevant to any comparative analysis of English law and practice concerning the issues impacted by these reforms. Additionally, the reforms could potentially inform the New Zealand Law Commission's approach to any future review of the New Zealand Arbitration Act 1996 (the last major review by the New Zealand Law Commission closed in 2003, with changes proposed being reflected in the Arbitration Amendment Act 2007).

Any questions? Talk to one of our experts



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