Russell McVeagh

Arbitration in Aotearoa
Year in Review 2023

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, comment briefly on the role of arbitration in resolving tikanga disputes, and note some important legislative reforms. The established principles of party autonomy, fairness and limited judicial intervention continue to guide developments.

Appeals of arbitral awards in 2023

The Arbitration Act 1996 provides that, for domestic arbitrations, appeals of arbitral awards on questions of fact are precluded. There is a right of appeal on a question of law (in most cases subject to leave, ie permission), so long as this right is not expressly excluded by the parties. The same right of appeal applies to an international arbitration only if the parties expressly agree.

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 restrictively 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 2023, the number of successful applications for leave to appeal continued to be low. On our assessment, only c.20% of applications for leave to appeal decided during the past 12 months were granted.

December 2022

High Court decisions on the boundaries of arbitration

Any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration. While there is limited case law concerning the scope of arbitrability under New Zealand law, the courts' general approach has mirrored the trend in other jurisdictions to expand the scope of arbitrable subject matters.

Cutting somewhat across that trend are the following recent High Court decisions:

- In *Wade v Wade* [2022] NZHC 3254, Cooke J held that matters of guardianship are non-arbitrable. The decision found that the Care of Children Act 2004 is a comprehensive and mandatory regime for determining disputes in relation to care of children matters (including guardianship); it gives exclusive jurisdiction to the Family Court or the High Court to determine disputes in relation to such matters.
- In *HWD NZ Investment Co Ltd v Body Corporate 392418* [2022] NZHC 3472, Brittain AJ held that the parties were not obliged to go to arbitration because the alleged agreement to arbitrate was non-consensual; valid arbitration agreements require "an element of consent" under the Arbitration Act 1996. The arbitration agreement was contained in a scheme of arrangement under the Unit Titles Act 2010.

We consider that these cases are fact-specific, involving particular statutory frameworks, and therefore do not represent a shift in the courts' general preference to expand the boundaries of arbitrable disputes.

March 2023

High Court decision on evidence in arbitrations

In *Prestige Building Removals Ltd v Vogel* [2023] NZHC 359, the High Court refused leave to appeal an arbitral award on the grounds of material error of law. One of these grounds was a submission that the arbitrator erred in admitting evidence from two witnesses which the applicant said was inadmissible hearsay evidence under the Evidence Act 2006.

Justice Andrew rejected the submission on the basis that the Evidence Act 2006 does not apply to arbitrations: the rules of evidence in an arbitration are a matter for specific agreement between the parties (including whether the principles and provisions of the Evidence Act 2006 should be applied). His Honour re-stated the principle that, in the absence of an agreement between the parties on procedural matters, arbitral tribunals have a broad discretion to conduct proceedings as they consider appropriate, subject only to the mandatory provisions in the Arbitration Act 1996 as to procedural fairness and equality (contained at Article 19 of the Model Law (Schedule 1 of the Arbitration Act 1996)). The arbitrator was therefore entitled to accept hearsay documents in evidence and determine what weight he should place upon them. This was an issue of fact not an issue of law.

The case is a helpful reminder that arbitration is not High Court litigation; parties should give careful thought to this difference when deciding whether to incorporate specific procedural provisions in any arbitration agreement.

April 2023

High Court grants rare anti-suit injunction to protect New Zealand arbitral proceedings

In *Maritime Mutual Insurance Association NZ Ltd v Silica Sandport Inc* [2023] NZHC 793, the High Court granted an injunction restraining a party from continuing court proceedings in Guyana, on the basis that there was an arbitration clause that provided for arbitration in New Zealand. The dispute concerned a barge that capsized in international waters north of Trinidad. A New Zealand P&I club (an association that provides marine insurance to its members) obtained an injunction restraining two of the members of the P&I club (the owners and operators of the vessel) from suing them in the Guyanese Courts.

The rules of the P&I club provided that any relevant difference or dispute between a member and the P&I club was to be referred to and adjudicated by the directors. If the member did not accept the decision, then the dispute was to be referred to arbitration. The seat of arbitration was to be either Auckland or London, at the discretion of the directors, and accordingly subject to either the New Zealand or English Arbitration Act 1996.

The High Court affirmed the settled legal principles for the granting of an anti-suit injunction by the New Zealand courts, which are largely derived from leading English authority. As recapped in the High Court:

- The New Zealand court must have jurisdiction over the defendant. The New Zealand court must be satisfied that it has a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court that an anti-suit injunction entails.
- The New Zealand court must also be satisfied that starting or continuing the foreign proceedings, or the way the respondent is conducting those proceedings, is vexatious, oppressive or otherwise unconscionable.
- Finally, the New Zealand court must be satisfied that the interests of justice require the injunction to be granted.

August 2023

AMINZ conference

The theme of the Arbitrators' and Mediators' Institute of New Zealand's annual conference was Access to Justice. Russell McVeagh lawyers contributed to the debate at the conference with:

- Senior Solicitor Tyson Hullena delivering a presentation Exploring Issues in the Arbitrability of Tikanga Māori Disputes; and
- Former Russell McVeagh Partner Polly Pope leading a discussion on Pro Bono for Arbitrators and Mediators.

September 2023

He Poutama and the potential for arbitration to resolve tikanga disputes

Te Aka Matua o te Ture / Law Commission released its eagerly awaited study paper *He Poutama* (NZLC SP24) in September 2023. The paper had two goals:

- to provide an account of what tikanga is; and
- to address how tikanga and state law might best engage in a way that maintains their individual coherence and integrity (tikanga being a coherent, integrated system of norms that operates in Māori life in jural ways).

The paper includes discussion regarding the use of arbitration to resolve tikanga disputes, and notes the following forward-looking options:

- it might be appropriate to introduce new, tailored default rules in the Arbitration Act 1996 for tikanga disputes; and
- it might be appropriate to direct/require appeals on points of tikanga to a specialist tribunal or to the Māori Land Court or Māori Appellate Court.

The paper noted that there is *already* extensive flexibility for parties to customise their dispute resolution process and make it tikanga-consistent. For example, parties can agree to use tikanga as the governing law; they can conduct the arbitration in te reo Māori; they can use particular locations, eg a marae; they can specify appropriate rules of evidence and procedure consistent with tikanga; and they can appoint an arbitrator with expertise in tikanga.

October 2023

New Incorporated Societies Act 2022 comes into force

Unlike the old Act, the new Incorporated Societies Act 2022 requires every incorporated society's constitution to include a clause for resolution of disputes. The new Act also makes it clear that any arbitration clause under the constitution will be treated as an arbitration agreement under the Arbitration Act 1996.

November 2023

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.

In September, the English Law Commission released a report following its review of the English Arbitration Act 1996. The report did not recommend fundamental changes to the Act, but it did propose several major initiatives, including (but not limited to):

- 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.

In November, the UK Government introduced a bill to Parliament, which broadly accepted all of the Law Commission's recommendations. The new UK Arbitration Act is expected to receive Royal Assent and come into effect by the middle of 2024.

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).

On the horizon for the new year...

2024

Coming up: New Zealand Arbitration Survey

2022 saw the publication of the inaugural New Zealand Arbitration Survey Report, the first collection of statistical data on the use of arbitration in New Zealand. The second report is expected to be published in the coming months.

Any questions? Talk to one of our experts

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