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TE·AKA·MATUA·O·TE·TURE

Report 83

Improving the Arbitration
Act 1996

February 2003
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

The Honourable Justice J Bruce Robertson – President
Judge Patrick Keane
Professor Ngatata Love QSO JP
Vivienne Ullrich QC

The Executive Manager of the Law Commission is Bala Benjamin
The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

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21 February 2003

Dear Minister

I am pleased to present to you Report 83 of the Law Commission *Improving the Arbitration Act 1996*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

J Bruce Robertson
President

The Hon Lianne Dalziel
Minister Responsible for the
Law Commission
Parliament Buildings
Wellington

Preface

THE ARBITRATION ACT 1996 (The Act) was enacted by Parliament following the introduction of a Private Member's Bill by Mr Peter Hilt MP. The Bill was based on a statute recommended by the Law Commission in its report *Arbitration*.¹

The Act repealed and replaced the Arbitration Act 1908. The 1908 Act had been modelled on English arbitration procedures. The 1996 Act is based on an international model developed by the United Nations Commission on International Trade Law (UNCITRAL).²

Coincidentally, in 1996, the Westminster Parliament enacted a new arbitration law which was also based on the UNCITRAL Model Law. There are, however, important differences in approach between the two Acts which have informed our deliberations on some of the issues in this report.

As we observed in our preliminary paper the Act appears to be working well.³ Relatively few flaws or ambiguities have been identified in decided cases. The courts appear to be applying the Act in accordance with underlying themes, viz:

¹ New Zealand Law Commission *Arbitration* (NZLC R20, Wellington, 1991). The draft statute recommended by the Commission is set out in para 13 of that report at pages 6–57 (inclusive). See also the discussion paper which preceded the Commission's report: New Zealand Law Commission *Arbitration* (NZLC PP7, Wellington, 1988).

² Model Law on International Commercial Arbitration; the Model Law can be accessed at <<http://www.uncitral.org>> under the heading *Adopted Texts*. Section 3 of the Act makes it clear that the material to which an arbitral tribunal or a court may refer in interpreting the Act includes the documents relating to the Model Law and originating from UNCITRAL or the Working Group of UNCITRAL which prepared the Model Law. These materials are referred to as *travaux préparatoires*. The *travaux préparatoires* for the Model Law can be found at <<http://www.uncitral.org>> under the heading *Travaux Préparatoires*.

³ New Zealand Law Commission *Improving the Arbitration Act 1996* (NZLC PP46, Wellington, 2001) para 2.

- party autonomy;
- reduced judicial involvement in the arbitral process;
- consistency with laws in other jurisdictions;
- increased powers for the arbitral tribunal.

Preliminary Paper 46 raised some specific (and important) problems identified in the operation of the Act. In paragraph 3 of the discussion paper we said:

Finding solutions to these problems will improve significantly the way in which the Act works. That should, in consequence, add to the viability of arbitration as a means of resolving disputes privately in New Zealand. It should also encourage offshore entities to agree to arbitration in New Zealand under the New Zealand Act.⁴

We have had the advantage of a number of submissions addressing the issues raised in our preliminary paper. A list of submitters appears as appendix C. We gratefully acknowledge the assistance that submitters have provided to us.

In particular, we wish to thank the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) and the New Zealand Law Society (NZLS) for their assistance in ensuring that a wide audience was consulted. The authors of the AMINZ submission included Mr David Williams QC and Mr Fred Thorp, Barrister, who presented, in September 2001, a travelling seminar for NZLS entitled *Arbitration for the 21st Century – A Practical Guide*.⁵ The penultimate draft of our preliminary paper was included in the materials circulated for that seminar. This enabled the presenters to obtain responses from seminar participants on the issues raised. We have found the assistance gained through that collaboration to be of great benefit.

We follow the same order in this report as in our preliminary paper. We repeat, where necessary, background information from our preliminary paper to assist readers in understanding the issues. We provide a more detailed analysis of the problems and suggest solutions. In part 6 we deal briefly with some additional issues raised by submitters.

The drafting of a Bill, to reflect the recommendations that we have made in this report, is underway. The Commission is currently liaising with the Parliamentary Counsel Office and interested parties

⁴ New Zealand Law Commission, above n 3, para 3.

⁵ David Williams QC and Fred Thorp *Arbitration for the 21st Century – A Practical Guide* (New Zealand Law Society Seminar, 2001).

on issues relating to the Bill. In this regard we would like to express our thanks to Chief Parliamentary Counsel, Mr George Tanner, and to Mr Renato Guzman, Parliamentary Counsel, for their assistance to date. Ultimately, we decided we publish the report prior to the Bill being finalised. One reason for this was that AMINZ intend to have a session on the report at its February 2003 conference. When the draft Bill is completed, the Commission may issue a supplementary report to accompany it.

On 29 January 2003, the Privy Council delivered its decision in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich*. The case dealt (in part) with the issue of the implied duty of confidentiality, which is one of the main topics dealt with in this report. The publication process was already too well advanced to allow us to refer to the Privy Council's advice. We will, however, (obviously) have regard to the decision when finalising the draft legislation.

The Commissioner responsible for preparation of this report was Paul Heath QC. Research and some of the writing was undertaken by Michael Josling, to whom the Commission expresses its appreciation.

Part 1
Confidentiality

1

The issues

INTRODUCTION

- 1 **A**RBITRATION IS A CONSENSUAL METHOD of dispute resolution. It enables parties to identify parameters and determine the rules that they wish to apply to the resolution of their dispute. Fundamental to the process is agreement to appoint a private judge to adjudicate and make a binding decision.
- 2 One of the expressed purposes of the Arbitration Act 1996 (the Act) is to encourage the use of arbitration as an agreed method of resolving commercial and other disputes.⁶ The object of this encouragement is twofold. First, it reinforces the desirability of disputing parties resolving their differences by methods chosen by them. Second, by having the disputes resolved privately, the burden on courts provided by the State and funded by taxpayers to resolve civil disputes is lessened.⁷
- 3 In Preliminary Paper 46 we identified two specific issues touching on the question of confidentiality in the context of arbitral proceedings. Both issues need to be considered in the context of section 14 of the Arbitration Act 1996 and the circumstances in which that particular section was passed.⁸ For the purpose of this report we express the issues as follows:

⁶ Arbitration Act 1996, s 5(a).

⁷ Lord Cooke of Thorndon put the point in this way:

The new-found emphasis on party autonomy represents a far cry from the days when Scrutton LJ recoiled from the thought that an English arbitration could be conducted without the possibility of the court being entitled to exercise its statutory power to require the arbitrators to state a special case. In his famous analogy of *Alsatia* the Lord Justice in effect likened an area of arbitration immune from that power as a haunt of thieves. Since then the pressures of judicial workloads have led the courts to entertain towards arbitrators a sense of gratitude rather than rivalry, of respect rather than content.

Lord Cooke of Thorndon “Party Autonomy” (1999) 30 VUWLR 257, 258–259.

⁸ Section 14 of the Act is set out in para 11 of Preliminary Paper 46 and is reproduced in para 9 below.

- Does section 14 of the Act deal adequately with issues of confidentiality? If not, how should the Act be amended to deal adequately with this issue? (We refer to this issue as the “default rule” issue.)
 - When it is necessary for parties to an arbitral proceeding to have recourse to courts of general jurisdiction, should the (otherwise) confidential nature of the arbitral process yield to principles of open justice applicable in courts of general jurisdiction? (We refer to this issue as the “open justice” issue.)
- 4 The background to the default rule issue is set out in paragraphs 7–12 of our preliminary paper. We summarise. In *Dolling-Baker v Merrett*⁹ the English Court of Appeal had held that a duty of confidentiality between the parties to an arbitration was to be implied as a matter of law. Subsequently, but before the enactment of the 1996 Act, the High Court of Australia, in *Esso Australian Resources Ltd v Plowman*¹⁰ declined to follow the *Dolling-Baker* decision, on the basis that confidentiality was not an essential attribute of arbitration. As a consequence of *Esso*, the Select Committee, in considering the Bill that led to the 1996 New Zealand Act, recommended the insertion of the present section 14, which implies a term as to confidentiality, with limited exceptions, into arbitration agreements.
- 5 Section 14, however, arguably contains flaws: First, the exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary. In England, for example, cases have recognised exceptions to their common law rule, which may not be permitted under section 14.¹¹ Second, it is arguable that no statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.¹² The issue is, therefore: should section 14 be amended to deal with these potential problems, and if so, how? Alternately, should it simply be repealed?
- 6 The open justice issue is wider in its scope. There are occasions when the High Court will need to determine whether an arbitral award should be enforced,¹³ or, whether an arbitral tribunal has erred on a question of law.¹⁴ The question is how the presupposition

⁹ *Dolling-Baker v Merrett* [1991] 2 All ER 890, 899 (CA).

¹⁰ *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391 (HCA).

¹¹ See *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136 (CA).

¹² Lord Saville “The Arbitration Act 1996” [1997] LMCLQ 503, 507.

¹³ Arbitration Act 1996, first sch, arts 34–36.

¹⁴ Arbitration Act 1996, second sch, cl 5.

of confidentiality in arbitration should be balanced against the desirability of a court conducting its business openly. That is, pre-eminently, a question of policy to be addressed by reference to the principle of open justice discussed in cases such as *Scott v Scott*,¹⁵ *McPherson v McPherson*¹⁶ and *Lewis v Wilson & Horton Ltd*.¹⁷ We shall refer also to the recent discussion of this issue in the context of family law cases in England and Wales: *Allan v Clibbery*.¹⁸

- 7 The open justice issue arose recently for consideration in an arbitral context: *Television New Zealand Ltd v Langley Productions Ltd*.¹⁹ In that case Robertson J took the view that the confidentiality which the parties had adopted and embraced for their arbitration could not automatically extend to the processes for enforcement or challenge in the High Court.²⁰ The judge also expressed the view that a clear and unambiguous determination of Parliament was necessary for the cloak of confidentiality attaching to the arbitral process to apply to subsequent proceedings in the High Court.²¹
- 8 We address the default rule and open justice issues in the chapters which follow and then set out our recommendations for reform.

¹⁵ *Scott v Scott* [1913] AC 417 (HL).

¹⁶ *McPherson v McPherson* [1936] AC 177 (PC).

¹⁷ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

¹⁸ *Allan v Clibbery* [2002] 1 All ER 865 (CA).

¹⁹ *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250 (CA).

²⁰ *Television New Zealand Ltd v Langley Productions Ltd*, above n 19, 255, para 38.

²¹ *Television New Zealand Ltd v Langley Productions Ltd*, above n 19, 255, para 39.

2

The default rule issue

BACKGROUND

- 9 SECTION 14 OF THE ARBITRATION ACT 1996 PROVIDES:
- 14 Disclosure of information relating to arbitral proceedings and awards prohibited
- (1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.
 - (2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection—
 - (a) If the publication, disclosure, or communication is contemplated by this Act; or
 - (b) To a professional or other adviser of any of the parties.
- 10 The drafting technique used to prohibit disclosure is, subject to the two exceptions, to deem that the parties have agreed not to publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. Thus, if there is a breach of the rule it is actionable, as between the parties, on the basis of breach of contract. If a party has prior knowledge of an intended breach of such a term an injunction could be sought (usually from the court²²) to restrain the intended breach. For damages to be recovered, loss would need to be proved. If no loss was proved only nominal

²² Occasionally, it may be that the arbitral tribunal could issue an injunction exercising powers under s 12(1)(a) of the Act.

damages could be awarded.²³ This contrasts with the situation which prevails when a confidentiality order is made by a court as, in that situation, breach of the order may also amount to a contempt of court and be actionable accordingly.²⁴

- 11 With only two stated exceptions, section 14 of the Act contains an absolute prohibition on disclosure of information relating to arbitral proceedings and awards. The first exception is where the parties otherwise agree.²⁵ That exception is premised on the party autonomy principle. The second exception permits disclosure of such information to a professional or other advisor of any party or, otherwise, if the publication, disclosure or communication is contemplated by the Act.²⁶ The second exception is based on both pragmatic (disclosure to advisors) and public interest (if contemplated by the Act) considerations.
- 12 The most significant exception is under section 14(2)(a) which applies “*if the publication, disclosure, or communication is contemplated by this Act*”. This exception, however, appears narrow. It does not permit:
- disclosures to interested parties (for example, insurers, lenders, or regulatory bodies);
 - disclosures required by law, but not contemplated by the Act; and

²³ As an example of the above, in *M v Bank of New Zealand* (25 May 1998) Court of Appeal CA 48/98, the Bank of New Zealand had been held to be in breach of a confidentiality settlement agreement by providing details of it to a firm of accountants that it had contracted to monitor the settlement. The proceeding was then remitted to the High Court to consider the appropriate remedy. The plaintiffs sought repayment of all settlement repayments it had made, rather than damages. Chambers J rejected this argument (which was based on the particular wording of the clause), but went on to say that even if damages had been sought, they would not have been awarded because the plaintiffs had failed to prove any harm; in particular, Chambers J noted that the firm of accountants instructed had themselves entered into a confidentiality agreement with the Bank of New Zealand, and that there was no evidence that the accountants had used the information contrary to the plaintiffs’ interests. (See *M v Bank of New Zealand* (17 March 2000) High Court Auckland CP 572/96 Chambers J).

²⁴ For a discussion of this topic see the judgment of Dame Elizabeth Butler-Sloss P in *Allan v Clibbery*, above n 18, paras 51–66 (CA); compare with the judgment of Thorpe LJ. These issues are discussed further in chapter 3 below.

²⁵ Arbitration Act 1996, s 14(1).

²⁶ Arbitration Act 1996, s 14(2).

- disclosures for other legitimate reasons (for example, those needed to defend a court action).

In addition, the exception is unduly vague. In our view, it fails to convey, in any precise sense, the circumstances in which disclosure is permitted. The inability for someone reading section 14(2)(a) to identify readily the publications, disclosures or communications contemplated is undesirable.

- 13 An additional problem arising from section 14 concerns the extent of the persons who may be bound by the confidentiality requirements. The term “arbitration agreement” is defined by the Act as:

An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship.²⁷

- 14 We propose to address the problems raised by the default rule issue in the following sequence:

- First, we consider who should be bound by any confidentiality imposed on the parties to an arbitration agreement.
- Second, we consider whether express recognition ought to be given, in the Act, to whether the hearing should be held in private.
- Third, we consider whether, and if so to what extent, information and documents relating to an arbitration ought to remain confidential to the parties; in addressing this issue we consider developments in the law since our Act was enacted in 1996 and also analyse, in some detail, the *Esso* case.
- Fourth, we outline the policy considerations which we believe should guide our deliberations on this issue and make recommendations for reform.

We address the submissions made to us on these problems in the context of our discussion of particular issues.

WHO SHOULD BE BOUND BY ANY PROVISION AS TO CONFIDENTIALITY?

- 15 Although the definition of the term “arbitration agreement” seems, on its face, to be confined to the parties in dispute it is likely that a New Zealand court would also regard the arbitrator (or members of the arbitral tribunal, if more than one) as parties to the

²⁷ Arbitration Act 1996, s 2(1).

arbitration agreement. In *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd*, Sir Nicolas Browne-Wilkinson VC analysed the contractual relationship as follows:

The arbitration agreement is a bi-lateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a tri-lateral contract: see *Cie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301. Under that tri-lateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi judicial adjudicator, together with all the duties and disabilities inherent in that status. Amongst those disabilities is an inability to deal unilaterally with only one of the parties to the arbitration, let alone to bargain with one party alone for a personal benefit.²⁸

The *Norjarl* case concerned claims by arbitrators for a commitment fee which had not been negotiated prior to their appointment.

- 16 We believe it is undesirable that any statutory exposition of the nature and extent of confidentiality obligations in an arbitration should omit express mention of the arbitral tribunal as a contractual party owing such obligations. What is currently implicit could easily be made explicit. Accordingly, we recommend that if either section 14 is retained in its current form or is replaced by a provision which is more specific in nature, it should expressly provide that the obligations of confidentiality are owed also by the arbitral tribunal.

SHOULD EXPRESS RECOGNITION BE GIVEN TO PRIVATE HEARINGS?

- 17 The issue of confidentiality raises two different questions. The first is whether the hearing of an arbitration should take place in private. The second is whether, and if so to what extent, information and documents disclosed in the course of the arbitral process should be capable of further disclosure beyond the parties to the dispute and the arbitral tribunal. We discuss the first of those questions in this part of the chapter.
- 18 We are unable to discern any serious challenge, as a matter of law or policy, to the proposition that parties to an arbitration agreement are entitled and, indeed, should expect (unless they agree

²⁸ *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211, 228 (CA).

otherwise) to have their private disputes heard in private by an arbitral tribunal.

19 We are of the view that the position on this particular point is best summarised in the judgment of Mason CJ in *Esso Australia Resources Ltd v Plowman*.²⁹ We set out below a summary of the propositions which emerge from Mason CJ's judgment:

- In the absence of some manifestation of a contrary intention, parties, when submitting disputes to an arbitral tribunal, confer upon the tribunal a discretion as to the procedures to be adopted in reaching its decision.³⁰
- In the exercise of its power with regard to procedural matters, an arbitral tribunal can decide who is entitled to be present at the hearing of the arbitration.³¹ But, that power must be exercised having regard to the provisions of the relevant contract.
- Unless the parties manifest a contrary intention, the arbitration will usually be held in private, in the sense that it is not open to the public. Those who are allowed, by the arbitral tribunal, to attend the hearing must have some connection with it, or the parties should agree that attendance is appropriate. For example, persons whose presence is necessary for the proper conduct of the arbitration (such as a stenographer, witnesses and advisors) should be entitled to attend.

Those observations are consistent with traditional practice in New Zealand.³² Indeed, it was because of that traditional practice that this Commission, in 1991, declined to recommend enactment of a provision within Article 24 of the First Schedule to the Act, requiring hearings to be *in camera*.³³

²⁹ *Esso v Plowman* above n 10, 398–399 (HCA).

³⁰ See also Arbitration Act 1996, first sch, art 19.

³¹ See also, Arbitration Act 1996, first sch, art 24 which contemplates disputes being determined on the papers or by oral hearing.

³² New Zealand Law Commission *Arbitration*, above n 1, para 358.

³³ New Zealand Law Commission *Arbitration*, above n 1. The Commission said:

The legislation adopting the Model Law in British Columbia and in California includes a provision to the effect that, subject to the agreement of the parties, arbitral proceedings are to be held *in camera*. On the basis that this is the traditional practice in arbitration proceedings in New Zealand, is often an explicit term of an arbitration agreement, and in some situations may be an implied term of an arbitration agreement, we do not recommend any substantive alteration or addition to article 24.

- 20 Views expressed by Mason CJ on the issue of private hearings were endorsed by other members of the High Court of Australia in *Esso*.³⁴
- 21 The observations made by members of the High Court of Australia accord with English practice. In *Hassneh Insurance Co of Israel v Mew*, Colman J had said:

If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and [is], I believe, undisputed. It is a practice which represents an important advantage of arbitration over the courts as a means of dispute resolution. The informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration.³⁵

- 22 Internationally, the expectation of confidentiality as an essential characteristic of an arbitration may not be so high.³⁶ For example, it was reported to a meeting of Committee D of the International Bar Association at Cancun, Mexico in October 2001 that, internationally, privacy and confidentiality were not regarded as being of great importance.³⁷ However, this difference in approach does not alter our view, because there are significant differences between international and domestic arbitrations. In particular:
- In international commercial arbitration the parties will often adopt rules of an international body.³⁸ In some cases those

³⁴ *Esso v Plowman*, above n 10, 404 (Brennan J), 409 (Dawson J), 409–11 (Toohey J) and 416 (McHugh J) (HCA).

³⁵ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243, 246–247.

³⁶ For example, see Yves Derains and Eric A Schwartz, *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International, The Hague, London, Boston, 1998) 12. When the International Chamber of Commerce Rules were revised the option of including a general provision requiring the parties to respect the confidentiality of the arbitration was expressly rejected.

³⁷ We express our gratitude to David Williams QC, Pierre Bienvenue of Ogilvy Renaud, and Audley Sheppard of Clifford Chance, London for supplying this information to us.

³⁸ For example, the International Court of Arbitration in Paris, the London Court of International Arbitration or the International Centre for Dispute Resolution.

international bodies contain rules relating to confidentiality while others do not.³⁹

- Often in international arbitration, the parties will not know, at the time of the arbitration, the country in which the award will be enforced; thus, applicable law on enforcement may be different from the *lex arbitri* (the law of the place of arbitration).
- In international arbitration it can be expected that specific confidentiality provisions will be adopted if the parties require confidentiality and if the applicable law allows absolute confidentiality.

23 These considerations do not apply with equal weight in a domestic arbitration. We say that for these reasons:

- There are no institutions in New Zealand which offer the type of service for arbitrations which are offered by the international bodies to which we refer. Thus, while there is a protocol in existence which has been formulated by the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) and which, in practice, we are aware assists advisors in drafting arbitration agreements, there are no standard form rules to apply.⁴⁰
- No questions of conflict of laws arise in a New Zealand domestic arbitration.
- Many parties in New Zealand do not have access to advice that is sufficiently expert on the nature of the terms to be adopted. Many parties use the default rules set out in the First and Second Schedules to the Act. Alternatively, difficulties may arise in agreeing confidentiality terms after an arbitration has commenced. This is because, in many cases, the arbitration agreement is a simple statement that any disputes will be resolved by arbitration. Once the arbitration commences there can be

³⁹ For example, art 34 of the International Arbitration Rules of the International Centre for Dispute Resolution which provides: "Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award." A useful summary of the various positions on confidentiality adopted by international bodies is set out in David AR Williams QC and Amy Buchanan "The Confidentiality of Arbitral Proceedings: Where to Next?" (AMINZ Annual Conference, Hamilton, 27–29 July 2001).

⁴⁰ The protocol can be obtained from AMINZ.

disputes as to whether confidentiality should or should not exist and, if so, to what extent. Parties are often driven by tactical considerations.

To meet these differences it is our view that a default rule is required for domestic arbitrations. This rule should not apply to international arbitrations unless the parties expressly adopt it.

- 24 No submissions have been made to us which suggest that the traditional practice of private arbitral hearings in New Zealand should be changed. However, consistent with the principle of party autonomy, it seems entirely appropriate for the parties to an arbitration to decide for themselves that the hearing (in part or in whole) will be open to the public. Accordingly, our recommendation is that a revised version of section 14 of the Act should expressly state that the hearing of an arbitration shall be in private unless the parties agree otherwise.⁴¹

TO WHAT EXTENT SHOULD INFORMATION RELATING TO ARBITRATIONS REMAIN CONFIDENTIAL

Introduction

- 25 In this part of the chapter we:
- consider the *Esso* decision;
 - consider subsequent developments, including criticism of the *Esso* decision;
 - outline the submissions made on this issue.

The *Esso* decision

- 26 As set out above, in *Dolling-Baker v Merrett*⁴² the English Court of Appeal held that a duty of confidentiality between the parties to an arbitration was to be implied as a matter of law. In *Esso*, that

⁴¹ This is also consistent with the philosophy underpinning arts 19 and 24 of the first sch to the Act which deal, respectively, with the procedure to be followed in conducting the proceedings and whether the hearings are held orally or on the papers. In each case, the arbitrating parties are free to choose their own procedure: only if they have failed to mandate a particular procedure will the arbitral tribunal have a discretion to conduct the proceedings as it thinks fit.

⁴² *Dolling-Baker v Merrett*, above n 9.

issue was considered by the High Court of Australia; Mason CJ put it as follows:

This appeal raises the important question whether an arbitrating party is under an obligation of confidence in relation to documents and information disclosed in, and for the purposes of, a private arbitration.⁴³

27 The issue arose in the context of two arbitrations to which enterprises owned and operated on behalf of the Victorian Government were party. One of the issues of concern was the extent to which the Gas and Fuel Corporation of Victoria could make disclosure of information arising out of the arbitration to its responsible minister.

28 Mason CJ took the view that duties of confidentiality were not imposed upon the parties as an implied term of the arbitration agreement. His Honour said:

... the case for an implied term must be rejected for the very reasons I have given for rejecting the view that confidentiality is an essential characteristic of a private arbitration. In the context of such an arbitration, once it is accepted that confidentiality is not such a characteristic, there can be no basis for implication as a matter of necessity.⁴⁴

29 As a basis for his view that confidentiality was not an “essential characteristic” of a private arbitration, Mason CJ placed weight on the following factors:

- Before *Dolling-Baker* no decision had suggested that an arbitration hearing was confidential as distinct from private. In addition, in neither Australia nor the United States could any support be found in decided cases for the existence of an obligation of confidence.⁴⁵ Mason CJ noted that if such an obligation had formed part of the law one would have expected it to be recognised and enforced by judicial decision long before *Dolling-Baker*.⁴⁶

⁴³ *Esso v Plowman*, above n 10, 392.

⁴⁴ *Esso v Plowman*, above n 10, 401–402.

⁴⁵ For example, *Industrotech Constructors Inc v Duke University* (1984) 314 SE 2d 272, 274; *Giacobazzi Grandi Vini SpA v Renfield Corp* [1987] US Dist Lexis 1783; *USA v Panhandle Eastern Corp* (1988) 118 FRD 346 and *Alliance Petroleum Australia NL v Australian Gaslight Co* (1983) 34 SASR 215, 229–232.

⁴⁶ *Esso v Plowman*, above n 10, 400.

- Members of the profession with experience in arbitration had expressed different views on the question of confidentiality before the court.⁴⁷
- There were too many exceptions to the rule to be able to regard complete confidentiality of arbitral proceedings as an essential characteristic. Problems identified by Mason CJ were:
 - No obligation of confidence attaches to witnesses who, therefore, are at liberty to disclose to third parties what they know of the proceedings.⁴⁸
 - There are varied circumstances in which an award made in an arbitration, or the proceedings in an arbitration, could come before a court which would involve disclosure of information to the court and, in some cases, wider publication.
 - Other circumstances exist in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award: for example, a party may be bound under a policy of insurance to disclose relevant information, it may be necessary to refer to the proceeding if any contingency arose which would need to be noted in accounts of an arbitrating party, or it would be necessary to disclose information to comply with statutory or other regulatory requirements (for example, stock exchange requirements for listed companies).

⁴⁷ Several briefs of evidence from expert witnesses, relied upon in the course of the litigation, are set out in full in (1995) 11 *Arbitration International* 265–298.

⁴⁸ In fact, there is English authority holding that expert witnesses and arbitrators do owe duties of confidentiality to the parties to an arbitration. (See *London v Leeds Estates* [1995] 2 EG 134, 137 (HC)). This decision was premised on the fact that they were taken to have impliedly agreed to such duties. However, it is not necessary for there to be agreement. Persons who receive information, knowing it to be confidential, also have a duty of confidence imposed upon them, whether or not they agreed to respect the confidence. Thus, in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 281 (HL) Lord Goff stated:

... a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he be precluded from disclosing the information to others ... The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

30 Having regard to those considerations, Mason CJ said:

Despite the view taken in *Dolling-Baker* and subsequently by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.⁴⁹

31 Later in his judgment, Mason CJ referred to a submission based on an implied undertaking not to disclose documents made available in an arbitration in a manner akin to the implied undertaking which arises in respect of discovered documents in court proceedings.⁵⁰ Mason CJ agreed that where parties are compelled to discover documents in an arbitration, then the opposing party must accord them the same confidentiality that they would if they were litigating the dispute in court; but he did not consider that this principle dictated that all information disclosed during an arbitration should remain confidential:

... consistently with the principle as it applies in court proceedings, the obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authority. The existence of this obligation does not provide a basis for the wide ranging obligation of confidentiality which the appellants seek to apply to all documents and information provided in and for the purposes of an arbitration ...⁵¹

32 Both Dawson and McHugh JJ agreed with Mason CJ on these points.

33 Brennan J was prepared to imply a term of confidentiality “as a matter of business efficacy” but qualified it in a similar manner to the obligation of confidentiality imposed upon a banker.⁵² The qualifications were:

- Where disclosure is under compulsion of law.
- Where there is a duty, albeit not a legal duty, to the public to disclose.

⁴⁹ *Esso v Plowman*, above n 10, 401.

⁵⁰ For example, see *Home Office v Harman* [1983] 1 AC 280 (HL).

⁵¹ *Esso v Plowman*, above n 10, 403–404.

⁵² *Esso v Plowman*, above n 10, 406; as to the banker's duty see *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, 473 Bankes LJ (CA).

- Where disclosure is fairly required for the protection of the party's legitimate interests.
- Where disclosure is made by the express or implied consent of the party producing the material.

34 The fifth judge, Toohey J, took the view that if there was to be no restraint on a party to an arbitration making public what was said or done at an arbitration, including the contents of documents tended to the arbitrator, there was little point in excluding strangers from the arbitration.⁵³ His Honour noted:

While clearly it is not possible to say that every aspect of an arbitration is confidential in every circumstance, no sharp distinction can be drawn between privacy and confidentiality in this context. They are, to a considerable extent, two sides of the same coin. The privacy of an arbitration hearing is not an end in itself; surely it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.⁵⁴

Developments and comment following *Esso*

35 Section 14 of the Act was inserted following Select Committee hearings in an express endeavour to circumvent the effect of the decision in *Esso*. In reporting back to Parliament on the Bill the Government Administration Committee said, linking the concepts of privacy of hearings and confidentiality of information, that:

...the privacy of the proceedings in an arbitration is a key advantage compared with litigation that is conducted in public. In selecting arbitration as their way of resolving disputes, parties would not contemplate that one of them might publicise or pass on information given in the course of the arbitration because such conduct would negate some of the advantages derived from arbitrating.⁵⁵

⁵³ *Esso v Plowman*, above n 10, 411.

⁵⁴ *Esso v Plowman*, above n 10, 411.

⁵⁵ Arbitration Bill 1996, no 117-2 (the Government Administration Committee Report) vi. On the second and third readings of the Bill, Peter Hilt, the Member of Parliament who introduced the Bill, referred specifically to the clause that became the present s 14 stating:

There is now also a clause in the Bill providing that, unless the parties otherwise agree, an arbitration agreement is to be taken to include a term that the parties will keep confidential any information disclosed in the course of the arbitration proceedings and any award arising out of the arbitration. This clause is meant to confirm that privacy is one of the essential attributes of arbitration. It should negate the effects of the finding in a recent Australian case that confidentiality is not an assured characteristic of arbitration. (See Peter Hilt, (21 August 1996) 557 NZPD 14247).

36 In their seminar booklet, *Arbitration for the 21st Century – A Practical Guide*,⁵⁶ David Williams QC and Fred Thorp said:

Confidentiality is often said to be one of the main attractions of arbitration. Until recently, it had generally been regarded as self-evident that an arbitrating party was under an obligation of confidence in relation to documents and information disclosed in, and for the purposes of, the arbitration. However recent cases, most notably in Australia – *Esso Australia v Plowman* (1995) 128 ALR 391, Sweden – *Bulbank v A.I.T.* Mealey’s International Arbitration Report (2000) Volume 15, Issue 12, Partnership Agreement-1, and the United States – *United States v Panhandle Eastern Corp. et al* (1988) 118 FRD 346, have demonstrated that, in the absence of express agreement, confidentiality cannot be taken for granted in all places and in all circumstances. In short, these cases hold that the parties do not necessarily have an absolute obligation to respect the confidentiality of the arbitration.

37 In the United Kingdom, when its Arbitration Act 1996 was passed, a deliberate decision was made not to insert a provision dealing with confidentiality having regard to the implied duty of confidentiality not to disclose or use for any other purpose any material generated in the course of an arbitration⁵⁷ established in *Dolling-Baker v Merrett*.⁵⁸ That decision proved to be justified when, in *Ali Shipping Corp v Shipyard Togr*,⁵⁹ the English Court of Appeal agreed that the duty arose as an essential corollary to the privacy of arbitral proceedings. Nevertheless, the Court of Appeal also recognised a number of exceptions to this duty: including cases where disclosure of documents received in the arbitration is made under compulsion of law, or where disclosure of an arbitral award and its reasons are necessary to safeguard the legitimate interests of one of the parties.⁶⁰

38 A good deal of support can be found in the literature for the English approach; particularly in its endeavour to embrace the principle established in *Dolling-Baker* rather than the *Esso* decision. Lord Neill QC put the point particularly strongly:

⁵⁶ Williams and Thorp, above n 5, 20.

⁵⁷ Lord Saville, above n 12. Lord Saville was the Chairman of the Departmental Advisory Committee which prepared the Bill on which the United Kingdom Arbitration Act 1996 was based.

⁵⁸ *Dolling-Baker v Merrett*, above n 9. See para 7 of Preliminary Paper 46 (New Zealand Law Commission), above n 3.

⁵⁹ *Ali Shipping Corp v Shipyard Togr*, above n 11.

⁶⁰ *Ali Shipping Corp v Shipyard Togr*, above n 11, 146–154.

If some Machiavelli were to ask me to advise on the best method of driving international arbitration away from England I think that I would say that the best way would be to reintroduce ... all the court interference that was swept away ... The second best method but the two boats are only separated by a canvas would be for the House of Lords to overthrow *Dolling-Baker* and to embrace the majority judgment of the High Court of Australia in *Esso/BHP*. This would be to announce that English law no longer regarded the privacy and confidentiality of arbitration proceedings (using that term in the broadest sense) as a fundamental characteristic of the agreement to arbitrate. Lawyers and businessmen in France, Germany, Switzerland and in the countries of the Commonwealth and elsewhere would take note and there would be a flight of arbitrations from this country to more hospitable climes.⁶¹

39 Despite the strongly expressed concerns (with regard to the English market) of Lord Neill QC, no legislative amendments have been made in Australia to overturn the effect of the *Esso* decision. But, the view has been expressed that Australia may be regarded as a less favourable venue for international commercial arbitration as a result of the *Esso* decision. Hon Andrew Rogers QC and Duncan Miller wrote:

It must be questioned whether the recent Australian decisions will now result in Australia being less favoured as a venue for international commercial arbitration. Surely it is at least arguable that parties may in future be less likely to specify Australia as the forum for the resolution of their disputes when the Superior Courts in Australia have left it open to a party to disclose information obtained during the resolution of the dispute simply if they can assert that do to so was in some way in the public's interest.⁶²

Submissions on this issue

40 Submitters agreed generally with the observations made in paragraph 12 of our preliminary paper.⁶³ The effect of that general agreement is as follows:

⁶¹ Lord Neil QC “Confidentiality in Arbitration” (1996) 12 *Arbitration International* 287, 316.

⁶² Hon Andrew Rogers QC and Duncan Miller “Non-Confidential Arbitration Proceedings” (1996) 12 *Arbitration International* 319, 344.

⁶³ New Zealand Law Commission, above n 3.

- Section 14 is regarded, in its present form, as creating undesirable difficulties because the exceptions to the general rule of confidentiality are insufficiently wide.
- Nevertheless, it is also agreed that it would be difficult, if not impossible, to draft an implied term which would deal exhaustively with all situations likely to arise.

41 All submitters agreed that section 14 of the Act should not remain unamended. Only one submitter suggested complete repeal. Other submitters preferred an approach which would amend section 14 to make it more workable.

42 In its submission, AMINZ proposed repeal of the existing section 14 and enactment of a replacement provision which would enable publication disclosure or communication of information relating to arbitral proceedings, or to an award made in those proceedings in the following circumstances:

- (a) If made to a professional or other advisor of any of the parties.
- (b) If publication disclosure or communication was necessarily involved in the filing and prosecution of any application to the District Court or the High Court under the Act, provided that such publication disclosure or communication is no more than what is reasonably required for those purposes.
- (c) If publication disclosure or communication is required or authorised by law or required by a competent regulatory body (for example, the New Zealand Stock Exchange) provided that disclosure provides no more than what is legally required or authorised and provided disclosure is made to the other party to the arbitration and the arbitral tribunal of what has been disclosed and the reasons for disclosure.
- (d) Where, on application to the High Court, publication, disclosure or communication is authorised in the public interest: AMINZ propose that the test for the High Court be whether the public interest in preserving the confidentiality of arbitral proceedings is outweighed, in the particular case, by other public interest factors. It is suggested that the court permit no greater degree of publication, disclosure or communication than is necessary to serve the identified public interest.

43 We will address the basic policy matters raised in the submissions in the next section, dealing with policy issues and our recommendations.

POLICY CONSIDERATIONS AND RECOMMENDATIONS FOR REFORM

Policy considerations

- 44 It is clear from an analysis of the judgments in *Esso* that the judges were influenced, in reaching their respective views, not only by considerations strictly relevant to the application of the law (for example, whether it could be said that the alleged implied term met the criteria for implication of a term) but also by wider policy considerations. The fact that different choices have been made in other countries (notably in the United Kingdom) indicates that, pre-eminently, the question is one of policy.
- 45 It is unproductive for us to consider whether the policy choice made by the High Court of Australia to meet the needs of Australian society is right or wrong. It is equally unproductive for us to consider whether the choice made in the United Kingdom, in the circumstances facing that country, is right or wrong. We propose to start afresh. In what follows we identify policy considerations which we believe should weigh with our Parliament in determining how to address the problem to best meet the needs of New Zealanders.
- 46 We have considered, by reference to the English and Australian decisions and domestic concerns reflected in previous Commission papers and Parliamentary material, the policy goals relevant for New Zealand in the context of this issue. We are of the view that the following considerations should guide our deliberations on this issue:
- If the parties decide expressly how to deal with questions of confidentiality of information and documentation arising out of an arbitration that agreement should, generally, prevail. The principle of party autonomy plainly supports that view. However, the considerations which we set out below are relevant to the question of how the issue should be addressed if either of the parties fail to turn their minds to the question,⁶⁴ or a countervailing public interest exists.
 - The Act, when passed, was intended to encourage the use of arbitration as an agreed method of resolving commercial and other disputes.⁶⁵

⁶⁴ For example, because they are parties to an arbitration agreement contained in a substantive contract and cannot, after the dispute has arisen, agree on the way in which confidentiality is to be addressed.

⁶⁵ Arbitration Act 1996, s 5(a).

- It was acknowledged by this Commission when recommending the Act that the hearing of arbitral proceedings in private was traditional in New Zealand.⁶⁶
- Parliament acted swiftly to insert section 14 of the Act when the possibility of a challenge to the confidentiality principle (based on *Esso*) was identified.⁶⁷
- Confidentiality has been seen, by business, to be a major attraction of arbitration.⁶⁸ In addition, where issues involving

⁶⁶ New Zealand Law Commission, above n 1, para 358.

⁶⁷ As set out in footnote 55, Peter Hilt, on the second and third readings of the Bill, stated that a major purpose of s 14 was to “negate the effects of the finding in a recent Australian case that confidentiality is not an assured characteristic of arbitration”. He went on to refer to the speed with which the Bill was (finally) brought before Parliament: “I also want to thank the parliamentary counsel Jenny Walden for the immense amount of work that she has done under incredible pressure over the past few weeks to get this Bill back into the House in time for its passage before the House rises.” (See Hilt, above n 55.)

⁶⁸ See paras 36 and 35 above. As a way of assessing the importance of confidentiality in arbitrations to potential parties, rather than arbitrators or lawyers, we thought it would be useful to carry out a review of non-legal magazines and journals that have discussed arbitration from the stand-point of participants. To do so we searched a commercial database of approximately 3000 full text magazines and journals (typically of a business, trade or general interest nature) for articles that contained a general discussion on arbitration. Of the 27 that fit this criteria, all expressly mentioned confidentiality and/or privacy as a key advantage of arbitration. (The other advantages mentioned were speed and cost.) See Timothy S Bland “What’s the Verdict on Arbitration” (January 2002) *Security Management* 85; David Rubenstein “Steering Clear of the Courtroom: Alternative Dispute Resolution Gaining Ground” (January 2002) *Corporate Legal Times International* 14; Mark Bourrie “The Verdict is In” (19 February 2001) *Canadian Business Canada* 60; Carolyn Hong “Getting Arbitration Back on Track” *New Straits Times-Management Times Malaysia*; Stuart Markus “Better than Court” (2 February 2002) *Long Island Business News New York* 1A; Louis Lavelle “Happy Endings Not Guaranteed” (20 November 2000) *Business Week* 69; James A Calderwood “Alternative Dispute Resolution” (October 1999) *Transportation and Distribution* 140; Erik K Blatt and Larry Wollert II “Resolving Disputes” (September/October 1999) *Journal of Property Management* 46; Gerald M Levy “Resolving Real Estate Disputes” (Autumn 1999) *Real Estate Issues* 1; Maxine Lans Retsky “Dispute does not a lawsuit have to make” (24 May 1999) *Marketing News* 5; Paul D Winston “ADR Should be Considered to Settle Claims” (1 March 1999) *Business Insurance* 29; Susan Pemberton “See You Out of Court?” (24 December 1998) *People Management* 20; Andrew Wood “Legal Costs Too High?” (4 November 1998) *Chemical Week* 33; Paul Geoghan “Stay Out of Court” (September 1998) *Journal of Accountancy United States* 77; David L Coleman “I’ll See You Out of Court” (February 1998) *Physician’s Management* 54; Alison Staniforth “Building and Engineering Disputes: Changing Resolutions: Part 1” (1997)

Māori are concerned, problems can arise over matters as important as disclosure of one's whakapapa. Confidential arbitration may be an attractive option to deal with such matters.

- There are circumstances in which disclosure of information derived from arbitral proceedings will be justified. Generally speaking, justification will arise if there are statutory or contractual requirements for disclosure or if disclosure is in the public interest. But, for reasons similar to those given by Mason CJ in *Esso*⁶⁹ we are of the view that it is almost impossible to formulate an implied term of the arbitration agreement which could encapsulate all intended exceptions without being too vague in nature. The policy goal of predictability in legislation is important in this context.
- Public policy concerns about transparency (achieved through disclosure of information) with regard to business enterprises operated in both the public and private sector must be recognised in formulating any recommendations which we make. For example, we suggest that it would be wrong for state-owned enterprises not to be required to make available relevant information arising out of an arbitration if that arbitration raised issues of public concern. Similarly, we believe that information derived from an arbitration which is relevant to the regulatory functions of the New Zealand Stock Exchange should also be disclosed. Those examples are not intended to be exhaustive.
- It is necessary to ensure that administration of justice considerations are not undermined by making the obligation of confidence too rigid. Where information, which has emerged

⁶⁸ *continued*

Credit Control 4; James A Calderwood "Arbitrate Rail Disputes" (December 1997) *Transportation and Distribution* United States 99; Robert Y Knowlton "When is Arbitration the Right Choice for Your Business?" (October 1997) *South Carolina Business Journal* 12; Heber Simmons II "Alternative Dispute Resolution: A Growing and Attractive Option" (31 March 1997) *Mississippi Business Journal* 12; Louis B Kushner "Lawsuit Alternatives" (December 1996) *Executive Report* 52; Katharine F Braid "Arbitrate or Litigate: A Canadian Corporate Perspective" (1991) *Canada-United States Law Journal* 465; Richard M Reilly "Litigation is Going Out of Style ... Here are the Alternatives" (February 1994) *Directorship* United States 3; Theresa Donahue Egler "The Benefits and Burdens of Arbitration" (July 1995) *HR Magazine* 27; James F Henry "Alternative Dispute Resolution for Executive Lawsuits" (January/February 1996) *Corporate Board* United States 15; "Charles E Davis and Richard D Faulkner "Avoid the Courts" (April 1996) *Florist* United States 62; Robert V Kuenzel "Alternative Dispute Resolution: Why All the Fuss?" (July/August 1996) *Compensation and Benefits Review* United States 43; Jan Sheehan "Having Your Day Out of Court" (August 1996) *Colorado Business* 80.

⁶⁹ See in particular, para 29 above.

from an arbitration, is required to enable justice to be done between other parties, confidentiality must yield in favour of the public interest concerning the administration of justice.⁷⁰

Analysis

- 47 We commence by saying that we do not believe that section 14 of the Act should just be repealed, and the matter left to the courts, as initially raised in our preliminary paper.⁷¹ While this would give courts the flexibility to deal with confidentiality issues not dealt with in any statutory provision, difficulties could arise. The problem is that a court might misconstrue simple repeal of section 14 as evidence of a legislative intent to remove confidentiality rather than to circumscribe more precisely when confidentiality attaches to documents and information used in arbitral proceedings. In addition, persons considering referring a dispute to arbitration, particularly those from other countries, may well regard any repeal as an indication that New Zealand does not favour confidential dispute resolution. Finally, a New Zealand court may well follow *Esso*, which for reasons set out below we consider would be undesirable.
- 48 We believe that there should be a default provision providing that information and documentation relating to the arbitral process should be confidential. We say this because we consider that, firstly, such a provision would be beneficial for arbitrations (which as we pointed out, should be encouraged), and secondly because we believe that a position of confidentiality is more likely to reflect what the parties would choose had they put their minds to it. We are of the view that there should be exceptions to this general rule, which we deal with in the next paragraph.
- 49 With regard to exceptions, we consider that parties should obviously be permitted to disclose information to professional advisors, and if required to do so by court order. With regard to other exceptions, we do not think that it would be desirable or practical to attempt

⁷⁰ For example, see *Re Dickinson* [1992] 2 NZLR 43 (CA) and *Wattie v Commissioner of Inland Revenue* (1997) 18 NZTC 13,297, 13,299 (CA). In *Wattie* the Court of Appeal declined to uphold a confidentiality order made at first instance ((1996) 17 NZTC 12,712) on the grounds that it was contrary to the public interest for information bearing upon rent fixing processes to be concealed from the public. Although *Wattie v Commissioner of Inland Revenue* was ultimately determined by the Privy Council [1999] 1 NZLR 529, the Privy Council expressed no views on the confidentiality issue.

⁷¹ New Zealand Law Commission, above n 3, para 12.

to set out a detailed code. Rather, we favour a general exception whereby the parties would apply to the arbitral tribunal for permission to disclose any information which the parties *need* to disclose because of any contractual, statutory, or regulatory requirement. The intention is that the arbitral tribunal will only grant permission where the information sought to be disclosed would have had to be disclosed even if the dispute had never arisen or if it had been mediated or resolved in any other private way.

- 50 Because of potential difficulties if an order was declined,⁷² we also recommend an automatic right of appeal to the High Court. In cases where the arbitral tribunal's mandate has terminated, for any reason, we recommend that permission be sought directly from the High Court. In cases where an application is required to be made to the High Court we recommend no further right of appeal. We take this view because we believe it is appropriate for the High Court to be the final arbiter if a party is prevented from supplying information to another as a result of the confidentiality provision.
- 51 While this process could be seen to be time consuming, and possibly costly, we would expect that in plain cases the parties will be able to sort out these matters without the need for any application.
- 52 By basing the threshold test on the question whether the information would have been disclosable if the dispute had been resolved by other private means it is unnecessary to require the arbitral tribunal to inquire into wider public interest issues in determining whether such an order should be made. Wider public interest issues can be addressed by the exception based on disclosure under compulsion of law.

Summary of recommendations

- 53 To summarise the above, we recommend that section 14 of the Arbitration Act 1996 be repealed and replaced with a section which requires, subject to any agreement of the arbitrating parties to the contrary, that:
- (a) The hearing take place in private.
 - (b) Subject to (c) to (f) below, the arbitral tribunal and the parties to the arbitration agreement not to disclose pleadings, evidence, discovered documents or the award arising from the arbitration.

⁷² For example, if a regulatory authority was seeking information.

- (c) The requirement is subject to disclosure when compelled by court order⁷³ or subpoena,⁷⁴ or to a professional or other adviser of any of the parties.
- (d) The arbitrating parties may apply to the arbitral tribunal for an order that they be permitted to disclose information otherwise protected by the implied term. Such an order:
- (i) should only be made after the arbitral tribunal has heard from the arbitrating parties; and
 - (ii) if the arbitral tribunal is satisfied that:
 - such an order is necessary to enable the party applying for disclosure to comply with any statutory, contractual or regulatory requirement; and
 - disclosure of the information would have been required if no dispute had arisen or the dispute had been resolved by private⁷⁵ means (for example, negotiation or mediation) other than arbitration.

⁷³ Courts are given a discretion to compel witnesses to reveal information provided in confidence in certain prescribed circumstances. See, in particular, s 35 of the Evidence Amendment Act (No 2) 1980. In deciding whether to compel a witness to give information or to produce a document which would be a breach of confidence the court is required to have regard: (a) to the special relationship existing between that person and the person from whom he or she obtained the information or document; (b) the likely significance of the evidence to the resolution of the issues to be decided in the proceedings; (c) the nature of the confidence and of the special relationship between the confidante and the witness; and (d) the likely effect of the disclosure on the confidante or any other person: see s 35(1) and (2) Evidence Amendment Act (No 2) 1980. Proposals for reform of this area of the law were made by the Law Commission in its report *New Zealand Law Commission Evidence – Reform of the Law* (NZLC R55 – vol 1, Wellington, 1999) paras 260–274 and draft s 67 of the Evidence Code (set out in *New Zealand Law Commission Evidence: Evidence Code and Commentary* (NZLC R55 – vol 2, Wellington, 1999) 174. Section 67 reverses the effect of the discretion by enabling a judge to order that the information not be disclosed in a proceeding if satisfied that the public interest in the communication or information being disclosed is outweighed by the public interest in preventing harm to a person or in preventing harm to the particular relationship in the course of which the information was obtained or relationships of a similar kind or maintaining activities which contribute to or rely upon the free flow of information.

⁷⁴ In the context of the analogous obligation arising out of a banker/customer relationship it has been held, by the Privy Council, that there is no absolute duty on a bank to inform the customer of the existence of the subpoena; the obligation imposed on a bank is to do no more than to use its best endeavours to inform its customer of the subpoena. See *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824, 829–831 (PC).

⁷⁵ We use the term “private” deliberately to exclude litigation in the courts so that the open justice principle is not relevant to this inquiry.

It is intended that this jurisdiction be conferred on the arbitral tribunal by statute rather than as an implied term of the arbitration agreement.

- (e) If the mandate of the arbitral tribunal has expired, the application referred to in paragraph 53(d) would be made to the High Court (which would apply the same criteria as the arbitral tribunal).
 - (f) If the application is declined by an arbitral tribunal, then there would be an automatic right of appeal to the High Court. There is no appeal where the application is made at first instance to the High Court.
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3

Open justice issue

BACKGROUND

54 **T**HE ISSUE WE CONSIDER HERE is as follows: When it is necessary for parties to an arbitral proceeding to have recourse to courts of general jurisdiction, should the (otherwise) confidential nature of the arbitral process yield to principles of open justice applicable in courts of general jurisdiction?

55 The open justice issue was considered, but expressly left open, in the Commission's 1991 report. After referring to provisions set out in legislation passed in Hong Kong the Commission said:

We are sympathetic to the underlying argument that parties may in part choose to arbitrate rather than litigate because of the confidentiality it affords. We are also mindful of the traditional reasons for open courts and public decisions; and we are of the view that this issue is one which extends to much commercial litigation. We have concluded that the issue should be resolved in that wider context and, accordingly, have not recommended provisions similar to ss 2D and 2E of the Hong Kong Ordinance. We recommend that examination of the wider question take place at an early date.⁷⁶

56 The provisions of sections 2D and 2E of the Hong Kong legislation are also reflected in sections 22 and 23 of the International Arbitration Act of Singapore. Both sets of provisions are set out in appendices A and B. But, in general terms the scheme of the legislation is:

- To allow the court, on the application of any party to the proceedings, to have the proceedings heard other than in open court.
- To enable the court to give directions as to whether, and if so to what extent, information relating to the proceedings may be published. The presumption is that such information will remain private unless the court orders otherwise.

⁷⁶ New Zealand Law Commission, above n 1, para 360.

- To permit reporting of judgments of courts in such a manner as to preserve the intended confidentiality resulting from an order that the proceedings be heard *in camera*.

57 Different approaches to this issue can be discerned in judgments given in various parts of the common law world. Illustrations taken from three jurisdictions are set out below by way of example.

58 First, as noted in paragraph 7, the open justice issue was considered, in New Zealand, in an arbitral context in *Television New Zealand v Langley Productions Ltd.*⁷⁷ The case was remarkable because, when a full arbitration agreement was negotiated (after the dispute arose) one party desired confidentiality while the other did not. By the time an award had been made and an application for leave to appeal to the High Court filed, the parties had reversed their positions. The successful party in the High Court (who had wanted the procedure to be open throughout) now sought confidentiality while the losing party (which had pressed for confidentiality) wanted the appeal to be aired publicly. Robertson J held that the open justice principle prevailed and details of the award were made publicly available.⁷⁸

59 In Canada, in *887574 Ontario Inc v Pizza Pizza Ltd.*,⁷⁹ Farley J, in the Ontario Court of Justice (General Division), declined to make an order for confidentiality in respect of documents arising out of an arbitral process because of the open justice principle. Farley J said:

Section 137(2) of the *Courts of Justice Act*, RSO 1990 c C43 (CJA) provides:

⁷⁷ *Television New Zealand Ltd v Langley Productions Ltd*, above n 19. There are other New Zealand and English authorities where information disclosed at arbitrations was required to be produced at subsequent court hearings; none of these decisions, however, expressly considered the issue in the context of balancing confidentiality against open justice; see *Rawstone v Preston Corp* (1885) 30 Ch D 116 (shorthand notes taken by a party's agent at an arbitration were required to be produced at a court hearing); *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418; *Attorney-General for Manitoba v Kelly* [1922] 1 AC 268 (PC) and *Perriam v Neumans Tours Ltd* [1991] 2 NZLR 663 (CA) (all holding that an arbitrator can be required to give evidence at a subsequent hearing as to the subject matter of the arbitration); *Shearson Lehman v Maclaine Watson & Co* [1989] 1 All ER 1056 (HC) and *Dolling-Baker v Merrett*, above n 9, 899 (holding that documents produced in an arbitration could be ordered to be produced at a subsequent court hearing).

⁷⁸ See also, para 7 above. It is of interest to note that once this ruling had been given the appeal was abandoned.

⁷⁹ *887574 Ontario Inc v Pizza Pizza Ltd* (1994) BLR(2d) 239.

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record. However when a matter comes to court the philosophy of the court system is openness: see *MDS Health Group Ltd v Canada (Attorney-General)* (1993) 15 OR (3d) 630 (Gen Div) at 633. The present sealing application would not fit within any of the exceptions to the general rule of *public* justice as discussed in *AJ v Canada Life Assurance Co* (1989) 70 OR (2d) 27 (HC) at 34:

... Actions involving infants, or mentally disturbed people and actions involving matters of secrecy ... Secret processes, inventions, documents or the like ... The broader principle of confidentiality possibly being “warranted where confidentiality is precisely what is at stake” was also discussed at the same page but would not appear applicable.⁸⁰

60 In the United States, in order to preserve the confidentiality of the arbitral process, courts in some States will seal court files relating to arbitral proceedings.⁸¹ In one New York case, a judge, in upholding an application to seal, said:

... Litigants ought not be required to wash their dirty linen in public and subjected to public revelation of embarrassing material *where no substantial public interest is shown* ...⁸² [our emphasis]

61 An analogous issue, that has been the subject of litigation in the United States, concerns the situation when confidential settlement agreements, arising out of mediations or other private dispute resolution processes, are filed in courts. The issue has been whether they should properly be sealed. In an article on the issue, the author summarised over 70 cases from State and Federal appellate courts, commenting:

If a settlement agreement were submitted to the court for either approval or enforcement, then the agreement would likely be considered a ‘court record’ subject to disclosure.⁸³

Cases where the court granted the application to seal involved situations where the applicant’s privacy interest outweighed any public interest in disclosure; and situations where the court

⁸⁰ See also s 137(2) of the Courts of Justice Act RSO 1990 cC-43 (Ontario).

⁸¹ See James Veach “The Law and Practices on the Confidentiality of Reinsurance Arbitration Awards – How Courts View Applications to Seal” [2000] Insurance Advocate 22. Usually, the court will be dealing with applications to stay or to enforce an award as, in many jurisdictions, the courts do not exercise appellate jurisdiction over arbitral awards.

⁸² *Feffer v Goodkind* (1991) NY Misc LEXIS 737.

⁸³ Ashley Gauthier “Secret Justice: Alternative Dispute Resolution” (2001) 25 News Media and the Law 1.

considered that the desirability in encouraging parties to settle disputes out of court indicated that sealing should be permitted.

62 Robertson J observed, in *Television New Zealand Ltd v Langley Productions Ltd* that a clear and unambiguous determination of Parliament should be required for the cloak of confidentiality attaching to the arbitral process to apply to subsequent proceedings in the High Court.⁸⁴ We agree. The question for our consideration is whether Parliament should act or whether the status quo should remain.

63 In order to address this issue we:

- First, examine the origins and development of the open justice principle.
- Second, consider exceptions to the open justice principle which are to be found in contemporary New Zealand legislation.
- Third, consider public policy issues which might militate against full operation of the open justice principle in the context of arbitral proceedings.
- Fourth, set out our recommendations for reform.

ORIGINS AND DEVELOPMENT OF THE OPEN JUSTICE PRINCIPLE

Basic principle and *Scott v Scott*

64 In very broad terms, the open justice principle can be summarised as follows: courts should conduct their processes openly unless to do so would frustrate the administration of justice.⁸⁵ The open justice principle reflects an underlying philosophy that justice should be done in open. It is therefore better to refer to the desirability of open justice as a principle rather than a rule.

65 The principle manifests itself in a variety of different forms. For example, at civil trials it typically takes the form of a judge-made rule of procedure; in criminal cases the principle is given effect by section 138(1) of the Criminal Justice Act 1985. It is also a factor relied upon by courts in determining how to exercise statutory discretions.⁸⁶

⁸⁴ *Television New Zealand Ltd v Langley Productions Ltd*, above n 19, para 39 (HC).

⁸⁵ We deal later with a change in emphasis which seems to have been adopted in New Zealand from frustration of ‘the administration of justice’ to taking account of the (more broader) ‘interests of justice’. See para 86 below. See also Morag McDowell “The Principle of Open Justice in a Civil Context” [1995] NZ Law Rev 214 and Claire Baylis “Justice Done and Justice Seen to be Done – The Public Administration of Justice” (1991) 21 VUWLR 177.

⁸⁶ See for example *R v Mahanga* [2001] 1 NZLR 641 (CA).

- 66 In Canada and the United States the principle has been held to have constitutional status under their respective freedom of expression provisions.⁸⁷ Similarly in New Zealand, section 14 of the New Zealand Bill of Rights Act 1990 has been held to have affirmed the principle.⁸⁸ Section 25(a) of the New Zealand Bill of Rights Act 1990 also states that criminal defendants are entitled to a public trial. However, we note that this is a right of the accused, which is somewhat different from the open justice principle, which is essentially a right of the public to open justice, not a right of the parties.
- 67 Most authorities which address the open justice issue use as their starting point the seminal opinions delivered in the House of Lords in *Scott v Scott*.⁸⁹ The leading judgment of the Privy Council, *McPherson v McPherson*⁹⁰ is to much the same effect. The case initially involved a petition by a wife (Mrs Scott) against her husband for a declaration that their marriage was void due to his impotence. On Mrs Scott's application an order was made that the petition be heard in private. Subsequently, Mrs Scott sent copies of the shorthand notes of the proceedings to her father in law, her sister in law and a third party. Mr Scott then moved to commit Mrs Scott for contempt of court for breaching the privacy order for hearing in camera.
- 68 The relevant issue for the House of Lords to determine was whether there was jurisdiction for the Divorce Court (which was part of the High Court of Judicature) to hear nullity proceedings in camera and, if so, whether that jurisdiction empowered the judge to make an order which not only excluded the public from the hearing but also restrained the parties from afterwards making public the details of what took place.

⁸⁷ Based on the rationale that a right to express opinions carries with it a right to obtain information upon which to form opinions. *Edmonton Journal v Attorney-General for Alberta* (1989) 64 DLR (4th) 577 (SCC); *Richmond Newspapers v Virginia* (1980) 448 US 555. The principle has been accepted virtually worldwide, and by differing cultures. For example, in *Repeta v The Japanese Government* (8 March 1989) Supreme Court of Japan (O)-436 of 1988, the Supreme Court of Japan stated: "Paragraph 1, Article 82 of the Constitution provides that hearings and confrontations in the trials shall be open to the public. The gist of the matter is to guarantee the conducting of hearings open to the general public in a fair manner as an established system, thus in turn securing the confidence of the people in regard to the trials."

⁸⁸ *Lewis v Wilson & Horton*, above n 17.

⁸⁹ *Scott v Scott*, above n 15. Plainly, however, the principle predates *Scott v Scott*. In *Richmond Newspapers v Virginia*, above n 87, 565–571 Burger CJ traces its history back to before the Norman Conquest.

⁹⁰ *McPherson v McPherson*, above n 16.

69 It is of some importance to recognise that the five Law Lords who heard *Scott v Scott* gave different reasons for allowing the appeal.⁹¹ But, all of their Lordships were influenced by the terms of section 46 of the Divorce Act by which, subject to such rules and regulations as might be established, witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross examination on such affidavits in open court, if the opposite party so desired. It was explicitly on that basis that, for example, Viscount Haldane LC held that the old procedure used by the Ecclesiastical Courts in dealing with nullity cases had been brought to an end. Lord Haldane LC said:

...The new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that section 46 lays down this principle generally, and that section 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceedings save in so far as ordinary courts of justice might have power to make it.⁹²

70 The Lord Chancellor admitted of exceptions to the open justice principle: in particular, the case of wards of Court and lunatics who were the subject of an administrative/paternal jurisdiction, and cases, such as trade secrets, where disclosure of information would undermine the very purpose for which proceedings were brought: that is to protect the secret formula.⁹³ The exceptions to which the Lord Chancellor referred were based on what His Lordship described as “a yet more fundamental principle”. Viscount Haldane LC said:

While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject

⁹¹ An excellent summary of the views of the Law Lords is to be found at paras 32–41 (inclusive) of the judgment of Dame Elizabeth Butler-Sloss P in *Allan v Clibbery*, above n 18. Additional historical information which puts the judgment in *Scott v Scott* in context is to be found in paras 87–88 of Thorpe J’s judgment in the same case.

⁹² *Scott v Scott*, above n 15.

⁹³ *Scott v Scott*, above n 15, 437.

to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done ... as the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.⁹⁴

71 It is of interest that both Viscount Haldane LC and the Earl of Halsbury refer to an exception whereby a judge could exclude the public if he sat as an arbitrator rather than as a judge.⁹⁵ The Lord Chancellor said:

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course.⁹⁶

The Earl of Halsbury said:

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires to be stated, forms part of the public administration of justice at all.

Again, the acceptance of the aid of a judge as arbitrator to deal with that private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (in the matter of *Lord Portsmouth*⁹⁷) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the

⁹⁴ *Scott v Scott*, above n 15, 437–438.

⁹⁵ *Scott v Scott*, above n 15, 436 (Viscount Haldane LC) and 442 (Earl of Halsbury).

⁹⁶ *Scott v Scott*, above n 15, 436.

⁹⁷ *G. Coop. Cas in Ch* 106.

Sherborne School case, *Malan v Young*⁹⁸ it was clearly recognised that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.⁹⁹

- 72 Research into the cases to which the Earl of Halsbury refers throws no light on the process apparently used to enable a judge to sit as an arbitrator rather than as a judge.¹⁰⁰ But, leaving that to one side, it is of some importance that both Viscount Haldane LC and the Earl of Halsbury acknowledged, notwithstanding other strong statements in their judgments about the open justice principle, that parties resolving private rights before a judge sitting as an arbitrator could properly exclude the operation of the open justice principle.
- 73 In many respects it might be easier to justify non application of the open justice principle in the context of an arbitration over which a private citizen presides; it seems unacceptable in principle that a judge could remove application of the open justice principle, and therefore scrutiny of his or her actions as a judge, simply by deciding to sit as an arbitrator rather than a judge.
- 74 Viscount Haldane LC put in strong terms the need for issues militating against operation of the open justice principle being considered by Parliament rather than the courts. His Lordship said:¹⁰¹

A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I

⁹⁸ 6 Times LR 38.

⁹⁹ *Scott v Scott*, above n 15, 441–442.

¹⁰⁰ Neither of the authorities cited seem to support the proposition. The first, in the matter of *Lord Portsmouth* (1815) G Coop 106; 35 ER 495 held that it had always been Chancery practice to hear family disputes in private if both parties consented. But the report of the case does not refer to the Lord Chancellor sitting as an arbitrator. The second case, *Malan v Young* (1889) 6 Times LR 38, appears to have involved an arbitrator but was not a family dispute. The action concerned a claim against the headmaster of Sherborne School in libel, brought by an assistant master. By consent, counsel requested that the hearing be in private. It appears, from the report, that Denman J was referred to some case law but was unsure whether he should properly make the direction and so left court to consult with other judges. On his return he directed that the trial be held in private. The report indicates that a barrister present in court objected to this course of action but was ordered to leave by the judge. The report then states that the hearing proceeded *in camera*. Nothing is said in the report about the judge sitting as an arbitrator. It does appear, however, that one of the counsel appearing before Their Lordships in *Scott v Scott* was familiar with the Sherborne School case: Sir R Finlay KC is reported in argument as having said that the case was heard in private before the judge as arbitrator: *Scott v Scott*, above n 15, 423.

¹⁰¹ *Scott v Scott*, above n 15, 439.

repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature.

- 75 Other members of the House of Lords gave opinions which reinforced those of Viscount Haldane LC and the Earl of Halsbury. However, in one respect, Lord Shaw of Dunfermline went further by stating that the order to hear the nullity suit *in camera* and thereafter to suppress reports of what happened at the trial appeared:

... to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.¹⁰²

Accountability, transparency and comprehensibility

- 76 In *Scott v Scott* Lord Shaw of Dunfermline referred to a passage by Jeremy Bentham as explaining the reason for the rule:¹⁰³

Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.¹⁰⁴

- 77 Thus, this rationale can be seen, in modern terms, as promoting the public policy goals of accountability and transparency. This formulation was approved by Lord Diplock in *Home Office v Harman*¹⁰⁵ and has also been approved in two recent judgments of the Court of Appeal in England: *Lilly Icos Ltd v Pfizer Ltd*¹⁰⁶ and *Allan v Clibbery*.¹⁰⁷

- 78 In *Lilly Icos Ltd v Pfizer Ltd*¹⁰⁸ the Court of Appeal was required to consider the confidentiality of material disclosed by a patent holder during the course of revocation proceedings which had been treated

¹⁰² *Scott v Scott*, above n 15, 476.

¹⁰³ *Scott v Scott*, above n 15, 477.

¹⁰⁴ Jeremy Bentham *Benthamiana or Select Extracts from the Works of Jeremy Bentham* (1843) 115.

¹⁰⁵ *Home Office v Harman* [1983] AC 280, 303C (HL).

¹⁰⁶ *Lilly Icos Ltd v Pfizer Ltd* [2002] 1 All ER 842, para 25(i) (CA).

¹⁰⁷ *Allan v Clibbery*, above n 18, para 16 (Dame Elizabeth Butler-Sloss P).

¹⁰⁸ *Lilly Icos v Pfizer*, above n 106.

as confidential in the hands of the opponent during the course of the proceedings and which the patent holder wished to remain confidential even after those proceedings had been terminated. The legal framework against which the Court of Appeal considered the issue is set out in CPR 31.22 and CPR 39.2 of the new English Civil Procedure Rules 1998 (the CPR).

79 Under CPR 31.22 a party to whom a document has been disclosed is entitled to use the document only for the purpose of the proceedings in which it is disclosed except where:

- The document has been read to or by the court or referred to at a hearing which has been held in public.¹⁰⁹
- The court gives permission.
- The party who discloses the document and the person to whom the document belongs agree.

80 Under CPR 39.2, a hearing in court is required, as a general rule, to be in public; a hearing, or any part of it, may be in private if:

- (a) Publicity would defeat the object of the hearing.
- (b) It involves matters relating to national security.
- (c) It involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.
- (d) A private hearing is necessary to protect the interests of any child or patient.
- (e) It is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing.
- (f) It involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate.
- (g) The court considers a private hearing to be necessary, in the interests of justice.

81 In *Lilly Icos Ltd* Buxton LJ, delivering the judgment of the Court of Appeal, said:¹¹⁰

The central theme of these rules is the importance of the principle that justice is to be done in public, *and within that principle the importance of those attending a public court understanding the case. They cannot do that if the contents of documents used in that process are concealed*

¹⁰⁹ Effectively reversing *Home Office v Harman*, above n 105, on that particular point.

¹¹⁰ *Lilly Icos v Pfizer*, above n 106, para 9.

from them: hence the release of confidence once the document has been read or used in court. [our emphasis]

- 82 Those observations demonstrate an additional ground for the open justice principle. Not only is the open justice principle designed to ensure that judges carry out their functions in a transparent way but also, on the rationale articulated by Buxton LJ, openness is required to enable those attending a public court to understand the case.
- 83 In *Allan v Clibbery* Dame Elizabeth Butler-Sloss P identified three categories of case which ought to be considered separately: viz¹¹¹
- (a) Those heard in open court.
 - (b) Those heard in private where information disclosed in court is not required to remain confidential.
 - (c) Those heard in secret where the information disclosed to the court and the proceedings remain confidential.
- 84 Her Ladyship then proceeded to analyse separately the ramifications, with regard to the open justice principle, of civil proceedings held in private¹¹² with particular regard to procedures used in family proceedings.¹¹³
- 85 Interestingly, the Court of Appeal in New Zealand has taken a slightly different view of the need to disclose documents used in court in the context of interpreting the Criminal Proceedings (Search of Court Records) Rules 1974.¹¹⁴ In *R v Mahanga*,¹¹⁵ McGrath J, delivering the judgment of the Court, held that open justice did not require that a television broadcaster be permitted to obtain and replay a videotape of a police interview, which had already been played in open court. The Court of Appeal took particular account of the privacy interest of the interviewee. As a matter of policy the approach of the Court of Appeal in *R v Mahanga* should be contrasted with the terms of CPR 31.22 and the observations made in *Lilly Icos Ltd v Pfizer Ltd*.
- 86 In reaching its decision in *R v Mahanga* the Court of Appeal balanced three considerations: open justice and freedom of

¹¹¹ *Allan v Clibbery*, above n 18, para 20 (CA).

¹¹² *Allan v Clibbery*, above n 18, paras 21–28

¹¹³ *Allan v Clibbery*, above n 18, paras 29–42 (discussion of *Scott v Scott*) and 43–49 (procedures used in family proceedings).

¹¹⁴ Rule 2(5).

¹¹⁵ *R v Mahanga*, above n 86.

expression,¹¹⁶ privacy¹¹⁷ and administration of justice.¹¹⁸ The use of notions of privacy as an appropriate balance is something which may be said to go beyond the question of administration of justice: it recognises that New Zealand courts consider factors relevant to the interests of justice generally. See also *Director of Proceedings v Nursing Council of New Zealand* where Baragwanath J said:

The court will normally sit in public ... But the high importance of the complainant's privacy interest is not ... to be imperiled by an implication that Parliament has over-ridden the courts inherent power to conduct its business in such a manner as the interests of justice may require.¹¹⁹

EXCEPTIONS FOUND IN CONTEMPORARY NEW ZEALAND LEGISLATION

Introduction

87 There are now many areas involving family law and mental health matters, questions of public morality, the reputation of a victim of an alleged sexual offence, or an offence of extortion, or where the security or defence of the nation may be in jeopardy, where private hearings can take place. As Cooke J said in *Broadcasting Corp of New Zealand v Attorney-General*:

Ironically the two most famous cases decided in England on the fundamental importance of public hearings, *Scott v Scott* and *McPherson v McPherson* are examples of the very type of case for which the legislature, reflecting contemporary opinion, now enjoins privacy.¹²⁰

88 Even in the area of access to court documents, the law has some inconsistencies. Documents will not, generally, be available for search until a proceeding has been determined by the court.¹²¹ And, where access to pending proceedings is concerned or where there is an endeavour to restrict access to determined proceedings the court, or in some circumstances a registrar, has a discretion to allow or to restrict disclosure.

¹¹⁶ *R v Mahanga*, above n 86, 652–653 paras 38–40.

¹¹⁷ *R v Mahanga*, above n 86, 653 paras 41–43.

¹¹⁸ *R v Mahanga*, above n 86, 653 para 44.

¹¹⁹ *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360, 381 (HC). See also *P v Wellington Newspapers Ltd* [2002] NZAR 337 (HC) Ellis J.

¹²⁰ *Broadcasting Corp of New Zealand v Attorney-General* [1982] 1 NZLR 120, 131–132 (CA) Cooke J.

¹²¹ See High Court Rules, r 66 and District Courts Rules 1992, r 69.

89 In those circumstances, it is impracticable for us, in the context of a review of the open justice principle in so far as it refers to arbitration, to expand any rule which might address all similar concerns which arise from time to time. Accordingly, what we propose to do is to review the circumstances in which Parliament, by statute, has modified the open justice principle and then to determine, as a policy and law reform question, whether it is appropriate to retain privacy and confidentiality in respect of court proceedings arising out of an arbitration.

Particular statutes

90 There are numerous statutes in force in New Zealand which modify the open justice principle. The position is set out in *The Laws of New Zealand*,¹²² which we summarise below:

- Proceedings before a Disputes Tribunal are heard in private,¹²³ as are applications under the Alcoholism and Drug Addiction Act 1966.¹²⁴ No application in respect of an adoption may be heard in open court.¹²⁵ There are restrictions as to the persons who may be present during the hearing of applications for compulsory treatment orders under the Mental Health (Compulsory Assessment and Treatment) Act 1992,¹²⁶ and of many civil proceedings concerning domestic and family matters.¹²⁷ Similar restrictions apply to certain proceedings in a Family Court or a Youth Court relating to a child or young person.¹²⁸
- While the complainant in a criminal case of a sexual nature is giving oral evidence only a limited number of persons are permitted to remain in court.¹²⁹
- The proceedings of the Courts Martial Appeal Court are not open to the public when the court is dealing with matters of procedure or is deliberating.¹³⁰

¹²² *The Laws of New Zealand* (Butterworths, Wellington, 1992) Courts, para 31.

¹²³ Disputes Tribunals Act 1988, s 39(1).

¹²⁴ Alcoholism and Drug Addiction Act 1966, s 35(1).

¹²⁵ Adoption Act 1955, s 22.

¹²⁶ Mental Health (Compulsory Assessment and Treatment) Act 1992, s 24.

¹²⁷ Domestic Violence Act 1995, s 83, Family Proceedings Act 1980, s 159(2), Guardianship Act 1968, s 27, and Property (Relationships) Act 1976, s 35.

¹²⁸ Children, Young Persons, and Their Families Act 1989, ss 166 and 329.

¹²⁹ Crimes Act 1961, s 375A and Summary Proceedings Act 1957, s 185C(s).

¹³⁰ Courts Martial Appeals Act 1953, s 17.

- The right or obligation of a judge to sit privately in Chambers;¹³¹
- The discretion of a court in the exercise of its inherent jurisdiction or of a particular statutory power to exclude the public from the courtroom and to sit in camera. The inherent jurisdiction is exercisable where it is reasonably clear that justice cannot be done unless the hearing is conducted in private; but it is to be exercised with great care, and only where and to the extent that strict necessity requires it.¹³² It is not exercisable in any proceedings in respect of an offence, for here the position is governed by statute.¹³³
- Statutory authority to sit in camera is given to any court dealing with any proceedings in respect of an offence where the court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand, so require. The informant, any member of the Police, the defendant, any counsel engaged in the proceedings, and any officer of the court are entitled to remain. Accredited news media reporters may be excluded only where the interests of security or defence so require. Where an order excluding persons from the court is made, the announcement of the verdict or decision, and the passing of sentence, must take place in public. If there are exceptional circumstances the court may decline to state in public the matters it has taken into account.¹³⁴
- A coroner is entitled to exclude persons from an inquest if satisfied that it is in the interests of justice, decency, or public order to do so.¹³⁵
- On an appeal from a decision of the Commerce Commission the High Court may order that the proceedings be heard, wholly

¹³¹ See *The Laws of New Zealand*, above n 122, para 30.

¹³² *Broadcasting Corp v Attorney-General*, above n 120, and *Scott v Scott*, above n 15.

¹³³ Criminal Justice Act 1985, s 138(5). The judgments in *Broadcasting Corp v Attorney-General*, above n 120, must be read subject to this provision.

¹³⁴ Criminal Justice Act 1985, s 138(2), (3) and (6). These provisions do not apply to preliminary hearings in a Youth Court: Children, Young Persons, and Their Families Act 1989, s 274(2)(b).

¹³⁵ Coroners Act 1988 s 25(2).

or in part, in private.¹³⁶ There is a similar power on the hearing of appeals from decisions of the Animal Remedies Board.¹³⁷

- Under its inherent power to control its own procedure, a court sitting in public is entitled in exceptional circumstances to receive certain evidence or other material in confidence. For example, witnesses may be permitted to write down their name and address and to be referred to by a letter only.¹³⁸ Similarly, confidential memoranda may be submitted to the judge on sentencing.¹³⁹ There is a statutory prohibition against disclosure, without the leave of the court, of the name and address or other particulars likely to lead to the disclosure of the name and address of a witness who was an undercover police officer in an investigation relevant to the proceedings.¹⁴⁰ Witness anonymity orders may be granted which contain prohibitions on the disclosure of certain details of witnesses.¹⁴¹

91 As can be seen, exceptions are most prevalent in hearings involving family law issues, or mental health. As noted above, even in *Scott v Scott*, their Lordships recognised that a court's jurisdiction over wardship matters, and lunatics, was to be exercised in private. Apart from the court's general discretion, there are relatively few specific exceptions applicable to civil hearings. In practical terms, the most important is the practice of the court to hear chambers matters privately. We note also that a number of statutes place restrictions upon the ability for the press to report proceedings in a court.¹⁴²

¹³⁶ Commerce Act 1986, s 96(1).

¹³⁷ Agricultural Compounds and Veterinary Medicines Act 1997, s 96. Despite the repeal of the Animal Remedies Act 1967 by s 86(1) and sch 3 of the 1997 Act, the Animal Remedies Board continues to exist under s 96 of the 1997 Act for three years after the date of commencement of that Act or until such earlier date as the Governor-General may fix by Order in Council.

¹³⁸ *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA); *R v Hughes* [1986] 2 NZLR 129, 134 (CA) Cooke P.

¹³⁹ *Broadcasting Corp v Attorney-General*, above n 120.

¹⁴⁰ Evidence Act 1908, s 13A. This section replaces the procedure evolved in *R v Hughes*, above n 138.

¹⁴¹ Evidence Act 1908, ss 13B–13J, as inserted by s 3 of the Evidence (Witness Anonymity) Amendment Act 1997.

¹⁴² See the summary of such restrictions set out in *The Laws of New Zealand*, above n 122, para 32.

92 In our view, a sharp distinction must be drawn between the ability of a court to sit in private (which might include the ability to exclude members of the media) and the ability of a court to sit in public, with members of the media having the ability to be in attendance, but with restrictions upon what might properly be reported.¹⁴³

93 In considering section 375 of the Crimes Act 1961, the Court of Appeal, in *Broadcasting Corp of New Zealand v Attorney-General*¹⁴⁴ emphasised the desirability of hearing all submissions orally while recognising that in exceptional cases it may be appropriate for the judge to receive private information. The concern which arose from directions made by the sentencing judge in that particular case were expressed pithily by Woodhouse P in *Broadcasting Corp of New Zealand v Attorney-General* as follows:

The case has provoked public discussion of the powers of a judge to sit in camera in a criminal case or otherwise; and there has been criticism of the breadth of the order made by Moller J which effectively has withdrawn from public scrutiny every aspect of what took place.¹⁴⁵

The issue of public scrutiny mentioned by Woodhouse P is linked to concepts of accountability and transparency.

Appeals from courts sitting in private

94 In the specific context of arbitration it is also necessary to consider what contemporary legislation is in place to deal with appeals from courts and tribunals which are empowered or enjoined to sit in private. In this regard we note that most statutes that allow private hearings in fact also provide for private appeals. We have listed the provisions, and relevant case law, in appendix C.

95 The issue of whether appellate bodies should follow the same rules as to privacy as do the bodies appealed from, was considered by the Law Commission of England and Wales under the chairmanship of Lord Scarman.¹⁴⁶ It recommended that a discretion be given to

¹⁴³ See s 375 of the Crimes Act 1961 and the decision of the Court of Appeal in *Broadcasting Corp v Attorney-General*, above n 120. Section 375 of the Crimes Act was repealed in 1985 and substituted by s 138 of the Criminal Justice Act 1985. These provisions apply only to criminal proceedings.

¹⁴⁴ *Broadcasting Corp v Attorney-General*, above n 120.

¹⁴⁵ *Broadcasting Corp v Attorney-General*, above n 120, 122.

¹⁴⁶ Report on the Powers of Appeal Courts to Sit in Private and the Restrictions Upon Publicity in Domestic Proceedings (1966) Cmnd 3149.

appellate courts to sit in private, when hearing appeals from bodies which had the power to sit in private. In making this recommendation it reasoned that what was important was the subject matter of the hearing, not the type of court:

It is the nature of the proceedings, not the elevation of the court, which should be decisive.¹⁴⁷

- 96 We do note that the statutes referred to above, and the Law Commission report, are not directly analogous to appeals from arbitrations; with regard to the statutes listed, Parliament has already decided that the subject matter of the hearing makes it appropriate that the matter be heard privately; by contrast, arbitrations are held in private because of a decision by the parties.

POLICY CONSIDERATIONS

- 97 There is a direct conflict between the public policy goal of confidentiality in arbitration (on the one hand) and the public policy goal of openness in court proceedings (on the other). One must yield to the other. The extent to which one goal should yield to the other must be determined after an appropriate balancing of relevant considerations.
- 98 Looking purely at the open justice principle in the context of arbitral proceedings, the following public policy factors should, we believe guide us in framing an appropriate rule to meet the competing needs for privacy (in arbitrations) and openness (in the court system):
- In passing the Arbitration Act 1996, Parliament expressly decided to encourage arbitration as an agreed method of resolving commercial and other disputes.¹⁴⁸ It is this statutory encouragement of a forum for dispute resolution which embraces the principle of confidentiality that can properly distinguish arbitral proceedings from other civil proceedings heard in the courts.
 - In enacting section 14 of the Act in its current form Parliament responded swiftly to a perceived need to protect the confidentiality of arbitral proceedings which had been put in issue as a result of the decision of the High Court of Australia in *Esso*.¹⁴⁹

¹⁴⁷ Report on the Powers of Appeal Courts to Sit in Private and the Restrictions Upon Publicity in Domestic Proceedings, above n 146, 14.

¹⁴⁸ Arbitration Act 1996, s 5(a).

¹⁴⁹ See para 35 above.

- Public policy goals of accountability and transparency favour openness within the court system.
- While the principle of party autonomy allows parties to an arbitration agreement to delete clause 5 of the Second Schedule to the Arbitration Act 1996 and remove the possibility of an appeal, they cannot, by private agreement, remove or modify the powers of the High Court to set aside an award under Article 34 of the First Schedule to the Act. Thus, party autonomy has a limited role in modifying the effect of the open justice principle.

99 In paragraph 15 of our preliminary paper we noted that a factor which might weigh in favour of open justice is the consideration that the volume of New Zealand litigation is not large, and much of New Zealand law is unique to this country. A difficulty arises if a good deal of case law, that is, the case law determined by arbitral tribunals, is not published for the use of the profession. On balance, however, we prefer the view expressed by Lord Cooke of Thorndon:

Far from undermining public policy, the parties to a commercial dispute could be seen to be further in the public interest by selecting and meeting the cost of their own dispute resolution machinery, rather than resorting to facilities provided and subsidised by the State. Certainly the arbitration might well not provide a publicly accessible contribution to jurisprudence; but there was no reason why parties freely contracting should be obliged by public policy to make a compulsory contribution to the worthy cause of the coherent evolution of commercial law.¹⁵⁰

RECOMMENDATIONS FOR REFORM

100 We are of the view that the presumption, in court proceedings, should be one of open process. When a party has resort to the coercive powers of the public justice system, the need and desirability for transparency of process and accountability of judges must prevail over private interests. The one exception to that rule, which we believe to be justified, is where a judge concludes that the private interests of the parties outweigh the interests in disclosure in a particular case. Accordingly, we take the view that the starting point is a presumption of application of the open justice principle; that presumption being able to be rebutted if an applicant can demonstrate to the court that, in the particular case, the public interest in confidentiality of arbitral proceedings outweighs other public interest factors which would favour disclosure.

¹⁵⁰ Lord Cooke of Thorndon, above n 7, 264.

101 We are of the view that the competing public policy goals can best be met by enacting a provision within the Act which will provide as follows:

- (a) That all proceedings brought before the courts of general jurisdiction from arbitrations shall be heard in open court.

As Elias CJ said, delivering the judgment of the Court of Appeal in *Lewis v Wilson & Horton Ltd*:

The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice ... The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.¹⁵¹

- (b) No proceedings filed in the courts of general jurisdiction in respect of arbitral proceedings shall be capable of being searched or copied, whether before or after determination of the application before the court, in the absence of an order from a judge of that court. We envisage that this rule would also apply to all applications lodged in the High Court to enforce arbitral awards.¹⁵²

In our view, the balance between the competing policy objectives is so acute as to require this decision to be made by a judge. An appropriate test is whether the public interest in confidentiality of arbitral proceedings outweighs other public interest factors favouring disclosure: the criteria mentioned in paragraph (c) are likely to inform a judge when undertaking this balancing exercise.

- (c) If the default position as to confidentiality (recommended in paragraph 53 above) applied before the arbitral tribunal, or if an express confidentiality agreement had been reached between the parties, that position should continue for a period of 14 days from the date on which the relevant application is served so that, within that 14 day period, either party can apply to the court for an order seeking to retain confidentiality. If an application is made then the proceeding is to remain confidential until the application is determined. The party seeking an order for a private hearing or confidentiality with

¹⁵¹ *Lewis v Wilson & Horton Ltd*, above n 16, 566, para 79 (CA).

¹⁵² Under r 880 of the High Court Rules it is necessary to file in the High Court as an exhibit to an affidavit in support of an application to enforce an award a copy of the award. Thus, unless the rule made it clear that it also referred to enforcement proceedings the purpose of the rule could be undermined.

regard to documents should be required to set out specifically, in the application, the extent of and reasons for the order sought. In determining the application, the court should take into account:

- the open justice principle;
- the desirability of confidentiality in arbitral proceedings; and
- the terms of any agreement as to confidentiality set out in the arbitration agreement.

We make it clear that we do not see the terms of the confidentiality agreement as being decisive; only a factor to be taken into account in the balance exercise.

- (d) The decision as to confidentiality made by the court should be capable of being revisited from time to time on application to the court.
- (e) Judgments of the courts which relate to arbitral proceedings should be reported in a manner that, so far as is possible, will preserve the intended confidentiality attaching to the arbitral proceedings. We envisage, in this context, the use of initials to identify parties but, where it is necessary to refer to an event to understand the decision, reference must be made to it.¹⁵³

¹⁵³ An example of a case reported in this way was *O v SM* [2000] 3 NZLR 114 (HC).

Part 2
Issues arising out of appeals
from arbitral awards

4 Introduction

- 102 **W**E RAISED TWO ISSUES in this area for consideration in our preliminary paper. First, we questioned whether it was necessary for the Act to set out the grounds on which the High Court could grant leave to appeal against an arbitral award. We also inquired as to what those grounds should be.¹⁵⁴
- 103 With regard to the guidelines for leave to appeal, our questions were posed against the backdrop of the Court of Appeal's decision in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*.¹⁵⁵ Prior to that decision there had been conflicting authority as to the test that a court should apply in determining whether to grant leave, and this led to uncertainty. The court attempted to overcome this uncertainty by setting out eight guidelines.
- 104 The second question raised a discrete issue. Generally, leave to appeal against an award of an arbitral tribunal will only be granted on questions of law.¹⁵⁶ Findings of fact made by an arbitral tribunal are usually regarded as conclusive. But, it is uncertain whether an allegation that there was no, or insufficient, evidence to support a particular finding of fact should be regarded as a question of law for the purposes of clause 5(1)(c) of the Second Schedule to the Act. We sought submissions on whether the statute should define when, if ever, a perverse finding of fact should be regarded as an error of law for the purposes of the Act.¹⁵⁷
- 105 In chapter 5 we address the question of whether it is necessary for the Act to specify grounds on which the court might grant leave to appeal. In chapter 6 we address the question whether a perverse finding of fact can, or should, amount to an error of law.

¹⁵⁴ New Zealand Law Commission, above n 3, paras 18–26.

¹⁵⁵ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA).

¹⁵⁶ Arbitration Act 1996 second sch, cl 5(1)(c).

¹⁵⁷ New Zealand Law Commission, above n 3, para 27.

5

Grounds on which the court grants leave to appeal

BACKGROUND

106 **T**HE ISSUES THAT WE CONSIDER in this chapter are whether the grounds for seeking leave to appeal should be set out in the Act, and if so, what should they be? We consider this issue having particular regard to the decision of the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*,¹⁵⁸ where the court itself set out eight clear guidelines. By way of elaboration on the background, we reproduce a modified form of paragraphs 20–25 (inclusive) of Preliminary Paper 46 below:

In relation to the granting of leave to appeal to the High Court, clause 5 of the Second Schedule to the New Zealand Act:

- may be expressly excluded by the parties as a result of section 6(2)(b) of the Act, which allows parties to a domestic arbitration to contract out of the default rules set out in the Second Schedule;
- specifies no criteria against which the High Court will judge whether, in a particular case, leave should or should not be granted; and
- states that leave to appeal should not be granted unless determination of the question of law could substantially affect the outcome.

Although the default rules set out in the Act do not expressly permit an appeal to the High Court against a finding of fact made by an arbitral tribunal, it is not clear whether the absence of evidence on which to base a finding of fact is to be regarded as a question of law on which leave to appeal may be granted.

Following a number of conflicting High Court decisions (essentially concerned with whether the restrictive *Nema*¹⁵⁹ guidelines should apply), the Court of Appeal in *Gold and Resource Developments (NZ)*

¹⁵⁸ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155.

¹⁵⁹ *Pioneer Shipping Co v BTP Tioxide* [1982] AC 724 (HL).

Ltd v Doug Hood Ltd,¹⁶⁰ with a view to filling the gap left by the legislature's failure to give adequate direction, set out the approach that New Zealand courts are to take in exercising their discretion. After a survey of cases and legislation from Australia and the United Kingdom, the Court concluded that Parliament had intended that the parties should normally have to accept the arbitrator's decision and accordingly the discretion should be construed narrowly. It then set out eight guidelines for the exercise of the discretion, although it emphasised that other factors might be relevant.¹⁶¹ These guidelines were:

- the strength of the challenge and/or the nature of the point of law;
- how the question arose before the arbitrators;
- the qualifications of the arbitrators;
- the importance of the dispute to the parties;
- the amount of money involved;
- the amount of delay involved in going through the courts;
- whether the contract provides for the arbitral award to be final and binding; and
- whether the dispute before the arbitrators is international or domestic.

The first guideline, which the Court said was the most important, effectively followed the guidelines in *The Nema* but with a change in terminology. The Court said that if the point on appeal was only a "one-off point" then usually a very strong indication of error was needed. In other cases, a strongly arguable case will normally be required.

In contrast to the New Zealand legislation, section 69 of the Arbitration Act 1996 (UK) states that leave to appeal shall be given only if the court is satisfied:

- (a) that the determination of the question will substantially affect the rights of one or more of the parties;
- (b) that the question is one which the arbitral tribunal is asked to determine;
- (c) that, on the basis of the findings of fact in the award –
 - (i) the decision of the arbitral tribunal on the question is obviously wrong; or
 - (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

¹⁶⁰ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155.

¹⁶¹ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155, 333–335, para 54.

- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

In addition to section 69(3) of the Arbitration Act 1996 (UK), section 69(4) requires an application for leave to appeal to identify the question of law to be determined and to state the grounds on which it is alleged that leave to appeal should be granted.

Apart from the requirement in section 69(3)(a) of the UK legislation, that the determination of the question will substantially affect the rights of one or more of the parties, the remaining matters relevant to the grant of leave are not expressly stated in the New Zealand legislation. That it is necessary to establish that the point of law *could* substantially affect the rights of one or more parties is clear from clause 5(2) of the Second Schedule to the Act.

SUBMISSIONS

107 Only three of the submissions, which we received, addressed this particular issue. The general effect of the submissions we received was:

- There seems to be general agreement that the grounds of appeal identified in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* were working in practice.
- Because circumstances relating to an appeal could vary so much, and it would be impossible for legislation to ascribe the weight to be given to any particular factor in the context of a specific case, legislative intervention was not favoured.
- While the guidelines identified in *Gold and Resource Developments (NZ) v Doug Hood Ltd* could translate into legislative provisions it was appropriate that the Court of Appeal determine applications on the basis of all relevant factors in the particular case.

108 Two submissions addressed a particular sub-issue: whether the fact that a contract provides that the award shall be “final and binding” is a proper factor for the court to consider. We will address that issue separately at the conclusion of the chapter.

RECOMMENDATIONS

109 The basic argument against codifying the guidelines articulated by the Court of Appeal, is that if they were enshrined in legislation, without a “catch all” provision such as “such other factors as may, in the particular circumstances, be relevant”, then the ability for the court to do justice in individual cases may be undermined. And,

the insertion of such factors with a “catch all” provision would not change the status quo; though, arguably, accessibility to the criteria would be enhanced.

- 110 On balance, we are of the view that it is unnecessary to legislate given that the criteria developed by the Court of Appeal to meet New Zealand circumstances appear to be working well. We believe that the criteria are sufficiently well known to those practising in the arbitration field to negate the need for legislative intervention to ensure greater accessibility. Accordingly, we do not recommend any change.

RELEVANCE OF CLAUSE THAT AWARD IS “FINAL AND BINDING”

Submissions

- 111 One particular issue arising out of the *Doug Hood* guidelines was the subject of a difference between two submitters. The relevant guideline involves the question where the arbitration agreement provides for the award to be “final and binding”. In *Doug Hood* the Court of Appeal had said of this guideline:

(7) Whether the contract provides for the arbitral award to be final and binding

Where there is such a clause, it will not be determinative, but it will be an important consideration. It will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award. The High Court should lean towards giving effect to the stated preference of the parties for finality.¹⁶²

- 112 One view was that a contractual term providing that an award is “final and binding” is not directed to the question of whether the parties intended the award to be subject to appeal for error of law. Rather, the intention of such a clause is to confirm the parties’ agreement that the award is immediately operative and binding on the parties and that no further steps are required to give effect to it. Both article 36(1)(a)(v) of the First Schedule to the Act and article V(i)(e) of the New York Convention¹⁶³ provide that enforcement of an award can be refused by a Court of Appeal if the award has not become binding on the parties. Accordingly, on this view, the agreement that the award is “final and binding” is relevant

¹⁶² *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155, 334, para 54.

¹⁶³ The New York Convention is incorporated into the Act as the Third Schedule.

only to enforcement, and should not be a relevant factor in deciding whether to grant leave to appeal.

- 113 The alternative view advanced is that the guideline is appropriate and relevant to the question of appeal rights. This view, which seeks to derive support from *CBI NZ Ltd v Badger Chiyoda*,¹⁶⁴ acknowledges that something more than an agreement between the parties, that an award is “final and binding”, is required to exclude any right to apply for leave to appeal from an arbitral award; but a “final and binding” provision is still relevant. We note that, however, *CBI NZ Ltd v Badger Chiyoda* was a case in which the parties had expressly agreed that there should be no appeal¹⁶⁵ and the issue, as framed by counsel and adopted by Cooke P was:

[Whether the rule as to inability to oust the jurisdiction of the court] should not apply to international commercial arbitrations in one-off contracts where the parties have freely chosen to exclude the anomalous inherent jurisdiction relating to error of law on face of the award.¹⁶⁶

That issue arose, of course, in the context of the Arbitration Act 1908 and the inherent jurisdiction of the court to review an award for error of law on the face of the award. That jurisdiction has subsequently been overtaken by the appeal provisions contained in clause 5 of the Second Schedule to the Act.

Recommendation

- 114 We do not think it is necessary to address the opposing views on this issue. Ultimately, the issue is one of contractual intent; that is, did the parties intend that any appeal rights should be excluded, or is the clause directed only to enforcement. This is properly a question for the courts to determine; we do not think that it would be appropriate for legislation to dictate that the words should have a fixed meaning.

¹⁶⁴ *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA).

¹⁶⁵ See also Derek S Firth “A Clever Curved Ball” [2000] NZLJ 370, 373.

¹⁶⁶ *CBI NZ Ltd v Badger Chiyoda*, above n 164, 675.

6

Perverse findings of fact and errors of law

BACKGROUND

- 115 **T**HE ISSUE WE CONSIDER in this chapter is whether a perverse finding of fact should be regarded as a question of law for the purposes of clause 5(1)(c) of the Second Schedule to the Arbitration Act 1996, and whether any amendment to the Act is desirable in this respect.¹⁶⁷
- 116 In paragraph 27 of our preliminary paper we noted that the question was expressly left open by the Court of Appeal in *Doug Hood*. Nevertheless, the Court of Appeal did see some force in the argument that a perverse finding of fact should not amount to an error of law. Blanchard J, delivering the judgment, said:¹⁶⁸

In *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29 Viscount Simonds said that findings of fact made by a tribunal could be set

¹⁶⁷ This chapter is not directly concerned with appeals on questions of mixed fact and law; that is, where it is alleged that the facts found by the arbitral tribunal cannot support the legal description given to them. Such appeals do not challenge the tribunal's findings of fact; rather its application of the law to these facts. Not every appeal involving an allegedly erroneous legal conclusion will involve an error of law. This is because it is possible (and not uncommon) for judges and arbitrators to come to different legal conclusions on the same facts, without making any error of law. Whether there will be an error of law depends on the reasonableness of the legal conclusion. As to the test to be applied see *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 (HL) Lord Radcliffe: there would be an error of law if "the true and only reasonable conclusion contradicts the determination"; *Australian Gas Light Co v Valuer-General* (1940) 40 SR(NSW) 126, 138 Jordan CJ: "If the facts inferred ... from the evidence ... are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law". See also *Williams v Bill Williams Pty Ltd* [1971] 1 NSWLR 547, 557 Mason JA (NSW CA); *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 450–451 (HCA); *Housen v Nikolaisen* (28 March 2002) Supreme Court of Canada No 27826.

¹⁶⁸ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155, 335 (CA).

aside by a court if it appeared that the tribunal had acted without evidence, or upon a view of the facts which could not reasonably be entertained. The authors of *Mustill and Boyd, Commercial Arbitration* assert at pp592–593 and 596 that this principle cannot be applied to the review of arbitral decisions. To do so, they say, would be to broaden the basis on which arbitral awards can be appealed on questions of law. This would be contrary to the general principle that the arbitrator is master of the facts (now to be found in this country in article 19(2) of the First Schedule to the 1996 Act) and to the specific aims of the legislation, which include the promotion of finality in arbitral awards and limiting of judicial intervention. See also David Williams QC, *Arbitration and Dispute Resolution* [2000] NZ Law Review 61 at pp77–78. Citing *Russell on Arbitration* (21st ed 1997) para 8–057.

- 117 We also note that rule 887(2)(a) of the High Court Rules seems to assume that a claim of no evidence to support a finding of fact will be regarded as a question of law. The validity of that rule would depend upon whether the Act contemplated an appeal to lie in such circumstances.

SUBMISSIONS

- 118 Submitters addressed two questions. First, they considered what is meant by the phrase “error of law”. Second, submissions were made on the reform issue as to what matters should come within that term. Several submissions in fact linked the two issues; that is, they submitted that because the term “error of law” had been interpreted in a certain way, then that meaning should apply in the context of the Act.
- 119 The competing contentions as to whether a perverse finding of fact made by an arbitrator should constitute an error of law for the purposes of clause 5(1)(c) of the Second Schedule to the Act can be summarised as follows:
- (a) Because the term “error of law” has been interpreted in other contexts as including perverse findings of fact, it was inappropriate to exclude perverse findings of fact made by arbitral tribunals from the purview of the phrase.
 - (b) As a matter of justice, a party ought to be able to challenge a decision, which has no evidence to support it, or one which no reasonable arbitral tribunal could have made.
 - (c) Perverse findings of fact should be excluded from the ambit of the phrase “error of law” because inclusion of such a ground runs contrary to the underlying themes of the Act; that is, reduced judicial involvement and increased powers for the arbitral tribunal.

- (d) There is “a growing tendency” for parties to exclude rights of appeal, which offers implicit support for limiting rights of appeal. We note at this stage, however, that we are not satisfied a broad conclusion can be drawn from the single submission made on that issue.

ANALYSIS AND RECOMMENDATION

120 We agree that there is clear authority for the proposition that a perverse finding of fact, or one based on no evidence, may amount to an “error of law”. The most commonly cited case on the point is *Edwards (Inspector of Taxes) v Bairstow*,¹⁶⁹ which we note was applied at least three times by the Court of Appeal in 2001 in the context

¹⁶⁹ *Edwards (Inspector of Taxes) v Bairstow*, above n 167. It is questionable whether the decision is really authority for this proposition. The passage usually cited is an extract from Viscount Simonds’s speech at page 29. The passage states: “... it [the finding of fact] may be set aside ... if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained”.

Read in isolation the passage does indicate that findings of fact can be challenged. We consider, however, reading his speech as a whole, that in referring to “facts” he actually meant legal conclusions drawn from facts; and in referring to “evidence”, he meant factual findings drawn from the evidence. We say this, firstly, because of the context of the decision: the House of Lords decided the appeal purely on a statement of factual findings from a tribunal; it did not consider the evidence adduced at all. Further, whenever Viscount Simonds referred to his jurisdiction to review the “evidence” (which he did on several occasions), he followed up the statement by proceeding to ascertain whether the statement of facts found by the tribunal supported its legal conclusion; for example, immediately following the quote set out above, Viscount Simonds said “It is for this reason that I thought it right to set out *the whole of the facts as they were found by the commissioners* ... having read and re-read them ... I find myself [unable to support the determination]” [our emphasis added].

Read in this way, Viscount Simonds’s speech is not authority for the principle that a perverse factual finding is a mistake of law; simply that reaching an incorrect legal conclusion from factual findings may be. We note that Mustill and Boyd interpret the speech in much the same way as we have stating: “*Edwards v Bairstow* was not concerned with the relationship between ‘raw’ evidence and the tribunal’s findings of primary fact” (Michael Mustill and Stewart Boyd *The Law and Practice of Commercial Arbitration in England* (2edn, Butterworths, London, 1989) 593); similarly in *Fence Gate Ltd v NEL Construction* (5 December 2001) English and Welsh High Court HT 01 000088, Judge Thornton QC sitting in the Technology and Construction Court on an appeal from an arbitration, classified *Bairstow* as a case “involving the application of the facts to a relevant statutory or contractual label such as ‘adventure in the nature of trade’ or ‘frustration’”.

of employment law appeals.¹⁷⁰ Another example where perverse findings of fact have been held to be errors of law are appeals to the Privy Council under the Medical Act 1983 (UK). In a recent case, Lord Steyn delivering the Privy Council's advice said:

A clearly erroneous [factual] finding may disclose an error of law warranting interference. And a material misunderstanding of the evidence may amount to an error of law ... Without trying to be exhaustive about the circumstances in which they may intervene their Lordships are satisfied that their appellate jurisdiction is wide enough to ensure that justice is done.¹⁷¹

- 121 The cases, however, also show that whether or not the appellate body has power to interfere with factual findings (as errors of law) usually depends upon the context of the legislation and the nature of the challenge. Thus, in *Stefan v General Medical Council* Lord Steyn prefaced his comments above by saying:

The distinction between law and fact is often crucially influenced by the context.¹⁷²

In an earlier decision Steyn LJ (as he then was) made similar comments:¹⁷³

It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact. In law the context is always of critical importance. The inquiry “is it a question of law?” must therefore always be answered by the counter-inquiry “for what purpose?”... In short the closest attention must always be paid to the context in order to decide whether a question of law arises.

- 122 We are of the view that in the context of an appeal from an arbitral award it would be inappropriate to include a perverse finding of fact within the term “error of law”. We have come to that view for the following reasons:

- While there is an immediate attraction to the notion that a finding of fact based on no evidence or a finding to which no reasonable arbitrator could come should be regarded as an error of law as a matter of justice, that initial attraction must yield to

¹⁷⁰ See *Wellington Free Ambulance Service Inc v Ross* (29 May 2001) Court of Appeal CA 181/00, para 29; *Webb v Dunedin City Council* (29 May 2001) Court of Appeal CA 196/00, para 14 and *Coutts Cars Ltd v Baguley* (21 December 2001) Court of Appeal CA 102/01, paras 19–31.

¹⁷¹ *Stefan v The General Medical Council* (6 March 2002) Privy Council 92/2001, para 6.

¹⁷² *Stefan v The General Medical Council*, above n 171, para 6.

¹⁷³ *Geogas SA v Trammo Gas Ltd* [1993] 1 Lloyd's Rep 215, 231 (CA).

the fact that the person who has made the findings is a person chosen by the parties to the dispute to decide their dispute or, at least, has been appointed by a body in whom they have reposed confidence for that purpose. There is a difference in kind between consensual resolution of disputes by arbitration and resolution of a dispute by a judicial officer of a court or tribunal who happens to sit on the particular case.

- From a purely pragmatic point of view any advantages of arbitration in relation to cost and timeliness may be outweighed if, on an application to leave to appeal under clause 5(1)(a) it is necessary to transcribe all of the evidence heard by an arbitral tribunal in order to demonstrate to a High Court judge that no evidence on a particular point existed. It is also difficult to see how the streamlined process for determining applications for leave to appeal contemplated by both the Court of Appeal judgment in *Doug Hood Ltd*,¹⁷⁴ and by Part 17 of the High Court Rules would be workable if alleged perverse finding of fact amounted to a question of law for the purposes of clause 5 of the Second Schedule of the Act.

123 We note that these views are supported by contemporary judicial comments concerning the role of appeals in arbitration. In *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* Lord Mustill said:

Where the criticism is that the arbitrator has made an error of act, it is an almost invariable rule that the court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however, flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.¹⁷⁵

124 In *Geogas SA v Trammo Gas Ltd* Steyn LJ said:¹⁷⁶

The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of facts of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a

¹⁷⁴ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155, 335–336, paras 56–60 (CA) and Part 17 of the High Court Rules which came into force on 1 August 2000. The provisions in the High Court Rules dealing with applications for leave to appeal are, to our knowledge, the only procedural rules in force in New Zealand which specify the amount of time each counsel has to address the court on a particular issue.

¹⁷⁵ *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338n, 339 (PC).

¹⁷⁶ *Geogas SA v Trammo Gas Ltd*, above n 173, 228 (CA).

mistake by the arbitrators on issues of fact might be. This is of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the court. Parties who submit their disputes to arbitration bind themselves by agreement to honor the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question arbitrators' findings of fact.

... since 1979 a number of unsuccessful attempts have been made to invoke the rule that the question whether there is evidence to support the arbitrators' findings of fact is itself a question of law. The historical origin of the rule was the need to control the decisions of illiterate juries in the 19th century. It never made great sense in the field of consensual arbitration. It is now a redundant piece of baggage from an era where the statutory regime governing arbitration, and the juridical philosophy towards arbitration, was far more interventionist than it is today...

- 125 In summary, we consider that the Arbitration Act should be amended to state expressly that perverse findings of fact, or findings based on no evidence, do not constitute “errors of law” for the purposes of clause 5(1)(c) of the Second Schedule to the Act. In order to give effect to our recommendation we recommend that the Act be amended by concluding within the definition section a definition of the term “error of law”.
-

Part 3
Transitional issues

Transitional issues

INTRODUCTION

126 SECTION 19 of the Arbitration Act 1996 contains transitional provisions. It provides, in full:

19 Transitional provisions

- (1) Subject to subsections (2) and (3),—
 - (a) This Act applies to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement; and
 - (b) A reference in an arbitration agreement to the Arbitration Act 1908, or to a provision of that Act, shall be construed as a reference to this Act, or to any corresponding provision of this Act.
- (2) Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been passed.
- (3) Where an arbitration agreement, which is made before the commencement of this Act, provides for the appointment of 2 arbitrators, and arbitral proceedings are commenced after the commencement of this Act,—
 - (a) Unless a contrary intention is expressed in the arbitration agreement, the 2 arbitrators shall, immediately after they are appointed, appoint an umpire; and
 - (b) The law governing the arbitration agreement and the arbitration is the law that would have applied if this Act had not been passed.
- (4) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or, where the parties have agreed that any other date is to be taken as the date of commencement of the arbitral proceedings, then on that date.
- (5) This Act applies to every arbitral award, whether made before or after the commencement of this Act.

- 127 In paragraph 29 of our preliminary paper we identified two issues, which we proposed to address, arising out of the transitional provisions contained in section 19 of the Act. They were:
- Does the interpretation to be given to the words “provides for the appointment of two arbitrators” in section 19(3) include agreements that provide for the appointment of two arbitrators and an umpire?
 - Is the transitional provision, in any event, appropriate? The long tale for arbitrations which could be conducted under the Arbitration Act 1908 is the concern that we address.
- 128 Another matter raised was the issue of statutes that provided that where parties agree to arbitrate their disputes, they are each required to appoint an arbitrator; with the arbitrators then to appoint an umpire. There had been suggestions that this may lead to difficulties because the 1996 Act makes no provision for umpires.
- 129 The general thrust of the submissions received is that all arbitrations commenced after the 1996 Act came into force should now be conducted under that Act. Accordingly, the real issue for our consideration in this report is how to deal with arbitration agreements or statutes which require arbitrations to be conducted either before two arbitrators or before two arbitrators and an umpire.
- 130 We deal with that issue in the following sequence:
- First, under the heading of “Background issues” we outline the role of umpires under the 1908 Act, consider the conflict of authority over the proper interpretation of the words “provides for the appointment of two umpires”, and comment on statutes that require the appointment of umpires.
 - Second, we explain why we consider it desirable that all arbitrations commenced on or after 1 July 1996 are heard and determined under the 1996 Act.
 - Third, we consider how reform can best be achieved and set out our recommendations.

BACKGROUND ISSUES

The role of umpires

- 131 Under the Arbitration Act 1908 there was an ability for each party to appoint an arbitrator if they could not agree on the appointment of a single arbitrator. Those two arbitrators then appointed an umpire. If the two arbitrators agreed on the result their award would be binding on the parties. In those circumstances the umpire would not even be involved in the decision-making process. But, where the two arbitrators could not agree they were relieved of the need

to make a decision. The decision-making power then passed solely to the umpire. This caused practical difficulties because while, as a matter of practice, it was necessary for the umpire to sit at the hearing of the arbitration (so that he or she could hear evidence and observe the demeanour of witnesses) that person could not participate in discussions with the arbitrators on the issues raised and, in many cases, never made a decision. The cost effectiveness of such a procedure is questionable.¹⁷⁷

- 132 The Act of 1996 is designed to apply either where a sole arbitrator is appointed or where a panel of arbitrators sit. When a panel is appointed majority decision prevails.¹⁷⁸

Conflict of authority on interpretation of section 19(3)

- 133 Section 19(3) of the Act provides:

19 Transitional provisions

...

- (3) Where an arbitration agreement, which is made before the commencement of this Act, provides for the appointment of 2 arbitrators, and arbitral proceedings are commenced after the commencement of this Act,—
- (a) Unless a contrary intention is expressed in the arbitration agreement, the 2 arbitrators shall, immediately after they are appointed, appoint an umpire; and
 - (b) The law governing the arbitration agreement and the arbitration is the law that would have applied if this Act had not been passed.

- 134 In essence, section 19(3) provides that in a limited number of situations, the 1908 Act will continue to apply to arbitrations started after the commencement of the 1996 Act. We noted, in our preliminary paper, that there were conflicting decisions of the High Court as to the circumstances in which section 19(3) would be triggered. Master Venning, in *Con Dev Construction Ltd v Financial Shelves No 49 Ltd*¹⁷⁹ held that section 19(3) did not apply to an arbitration agreement, which expressly provided for the appointment of an umpire (that is, it provided for the appointment of two arbitrators, who were then to appoint an umpire.) The Master held this was so for two reasons:

¹⁷⁷ See Arbitration Act 1908, second sch, cl 2, and Arbitration Amendment Act 1938, s 7.

¹⁷⁸ Arbitration Act 1996, first sch, arts 10, 11, and 29.

¹⁷⁹ *Con Dev Construction Ltd v Financial Shelves No 49 Ltd* (22 December 1997) High Court Christchurch CP 179/97 Master Venning.

- First, because section 19(3) was intended to ensure that where an agreement provides for two arbitrators, there would be no deadlock.¹⁸⁰
- Second, he relied on the Government Administration Committee's Report on the Arbitration Bill, which had commented that section 19(3) was intended to apply to agreements providing for the appointment of only two arbitrators.¹⁸¹

135 A contrary view was put forward by Goddard J in *Granadilla Ltd v Berben*.¹⁸² In the course of her reasons for judgment, Goddard J noted:

(e) The practical implication of s 19(3) is that arbitrations commenced under agreements made prior to 1 July 1997 and providing for the appointment of two arbitrators will continue to be governed by the 1908 Act and associated common law rules, rather than the 1996 Act.

...

(g) The lease in this case provides ... [for] ... two arbitrators, who are to appoint a third person as umpire Therefore s 19(3) applies, and the law governing that arrangement ... must be the law in existence before the 1996 Act came into force.¹⁸³

136 As noted in our preliminary paper, Goddard J did not refer to *Con Dev*; neither did she provide any reasoning to support the conclusion set out in paragraph (g) above. Because the point was not directly in issue it may not have been argued or, at least, fully argued. The decision of Goddard J in *Granadilla* was taken, on appeal, to the Court of Appeal. But, the Court of Appeal did not deal with the issue with which we are concerned.¹⁸⁴

137 In light of this conflict, in our preliminary paper we raised the possibility of amending section 19(3) to make the proper interpretation clear.

138 Subsequent to the publication of the preliminary paper, Elias CJ considered the issue in detail in *Bowport Ltd v Alloy Yachts*

¹⁸⁰ *Con Dev Construction Ltd v Financial Shelves No 49 Ltd*, above n 179, 4.

¹⁸¹ *Con Dev Construction Ltd v Financial Shelves No 49 Ltd*, above n 179, 5. The passage of the report that he relied upon is: Arbitration Bill 1996, no 117–2 (the Government Administration Committee Report) viii–ix.

¹⁸² *Granadilla Ltd v Berben* (1998) 12 PRNZ 371 (HC).

¹⁸³ *Granadilla Ltd v Berben*, above n 182, 376.

¹⁸⁴ *Granadilla Ltd v Berben* (1999) 4 NZ Conv C 192,963 (CA).

*International Ltd.*¹⁸⁵ Her Honour, agreeing with Master Venning, held that section 19(3) did not apply to agreements providing expressly for two arbitrators and an umpire. As with Master Venning, she said that section 19(3) was enacted for a specific purpose: to overcome the difficulty that may arise if parties to a pre-1997 agreement had agreed to two arbitrators in the expectation that the default procedures in the 1908 Act would resolve any deadlock. She considered that this difficulty does not arise where parties to such agreements provide expressly for an umpire, and the provision was not intended to cover that situation.¹⁸⁶

- 139 It was submitted that the interpretation in *Con Dev* gives the 1996 Act an undesirable retrospective effect; in particular, it was argued that the provisions of the 1908 Act may be necessary to deal with the position of umpires, since umpires are not provided for in the 1996 Act. Elias CJ rejected this argument. She considered that the 1996 Act did in fact cover the position of umpires,¹⁸⁷ on the basis that umpires fell within the meaning of arbitrators, and the parties were free to agree on the process by which the arbitrators determined the dispute; in particular, they were able to agree that a third arbitrator (described as an umpire) would decide the dispute in the event of disagreement by the other two.¹⁸⁸ More generally, Elias CJ stated that it was in fact desirable that pre-1997 agreements were determined under the 1996 Act:

The prevalence of the two arbitrator and umpire model in pre-commencement submissions would otherwise ensure that two systems under two Acts will have to be maintained for many years. I would come to such conclusion with reluctance.¹⁸⁹

¹⁸⁵ *Bowport Ltd v Alloy Yachts International Ltd* (14 January 2002) High Court Auckland CP 159-SD01 Elias CJ.

¹⁸⁶ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185, paras 19–43.

¹⁸⁷ If this is correct, it raises the issue as to what the need was for s 19(3)(b) (which provides that the 1908 Act will continue to apply in whole), since s 19(3)(a) resolves the problem of deadlock by itself. We suggested in para 36 of the preliminary paper that the reason was that the Government Administration Committee had doubts as to whether the 1996 Act accommodated umpires, and so thought it wise that the 1908 Act continue to apply. On this issue Elias CJ says: “Why it was thought necessary to retain the preexisting legislation in whole, is not clear.” (*Bowport Ltd v Alloy Yachts International Ltd*, above n 185, para 40.)

¹⁸⁸ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185, paras 30–33. We made similar comments in para 38 of our preliminary paper; see para 141 below.

¹⁸⁹ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185, para 42.

Statutes that require the appointment of umpires

- 140 In the preliminary paper we raised the issue of statutes which provided that where parties agree to arbitrate their disputes, they are each required to appoint an arbitrator; with the arbitrators then to appoint an umpire. There had been suggestions that this may lead to difficulties since the 1996 Act makes no provision for umpires.¹⁹⁰ Examples of legislation under which this procedure is required to be followed are: the First Schedule of the Public Bodies Leases Act 1969, section 6 of the South Canterbury Catchment Board Act 1958, section 6 of the Tokoroa Agricultural and Pastoral Association Empowering Act 1968, section 39 of the Marine Farming Act 1971, section 5 of the Land Drainage Act 1908, section 109 of the Building Societies Act 1965 and section 6 of the Building Research Levy Act 1969. These are but examples of over 100 provisions located by us when researching this issue.
- 141 In our preliminary paper we indicated a provisional view that Article 10 of the First Schedule to the Arbitration Act may resolve problems with the appointment of an umpire. In paragraph 38 we said:
- Under that article “the parties are free to determine the number of arbitrators to determine their dispute”. While the term “umpire” is not used, there is nothing to prevent parties from agreeing that two arbitrators shall hear the case and only if they disagree shall the umpire enter upon the reference and make the binding determination. The default rule contained in Article 10(2) of the First Schedule does, however, anticipate that a sole arbitrator will determine domestic arbitrations.
- 142 In submissions made to us it was pointed out by Mr Tom Weston QC that the statutory overlay created by enactments of the type to which we refer in paragraph 140 above took the appointment of the umpire outside of the contractual arena. Accordingly, Mr Weston QC submitted that Article 10 did not resolve the issue and that legislation may be required, possibly treating the umpire as a third arbitrator.
- 143 While accepting the force of Mr Weston QC’s submission we think that there are two discrete issues arising. Some of the statutes¹⁹¹ impose the obligation to arbitrate through the use of two arbitrators and an umpire as an implied term of the agreement between the

¹⁹⁰ As to which, see para 128 above.

¹⁹¹ For example, the Marine Farming Act 1971, s 39.

parties. If it is an implied term, it can, presumably, be amended by express agreement. But, there are other provisions that impose the obligation to arbitrate in this way as a matter of law.¹⁹² Therefore, a question of construction arises as to which category the dispute falls within.

- 144 We will consider the broad issue of statutes providing for umpires again in the context of considering how clauses providing for umpires can best be dealt with under the 1996 Act.

SHOULD ARBITRATIONS STARTED AFTER THE COMMENCEMENT OF THE 1996 ACT BE CONDUCTED EXCLUSIVELY UNDER THAT ACT?

- 145 As set out above, the submissions took the view that all arbitrations should now be carried out under the 1996 Act. We agree for the following reasons:

- (a) The general thrust of section 19 of the Act is to ensure that all arbitrations, after 1 July 1997, are conducted under the 1996 Act. This is reinforced specifically by:
- The words of section 19(1)(b): that provision requires a reference in an arbitration agreement to the 1908 Act, or to a provision in that Act, to be construed as a reference to the 1996 Act or to a corresponding provision of the 1996 Act.¹⁹³
 - The Act was intended to apply to every arbitral award whether made before or after 1 July 1997: see section 19(5). Apart from the exception governing arbitration proceedings which had been commenced before 1 July 1996 (section 19(2)), the only remaining exception to that general transitional rule is section 19(3).
- (b) The general rule, which is described in sub-paragraph (a) above, is plainly an erosion of the party autonomy principle. Parliament made it clear that, unless the case fell within narrow exceptions, the 1996 Act was to apply even though the parties, when making their agreement to arbitrate, could not have turned their minds to the provisions of the 1996 Act.

¹⁹² For example, the South Canterbury Catchment Board Act 1958, s 6, the Tokoroa Agricultural and Pastoral Association Empowering Act 1968, s 6, the Land Drainage Amendment Act 1908, s 5, the Building Societies Act 1965, s 109, and the Building Research Levy Act 1969, s 6.

¹⁹³ Section 19(1)(b) is expressly subject to s 19(3) at the present time.

- (c) The need to streamline the arbitral process in respect of domestic arbitrations is underscored by Article 10(2)(b) of the 1996 Act, which provides that unless the parties agree otherwise, a sole arbitrator shall act as arbitral tribunal in a domestic arbitration. Efficiency is enhanced by one arbitrator acting. Costs are also saved.
- (d) It is desirable that repealed law should not apply any longer than it is absolutely necessary. As noted in the preliminary paper, the present section 19(3) could result in an extremely long transition period for some classes of contract (for example, perpetually renewable leases, contracts of supply, franchise agreements, partnership agreements and joint ventures.) This is unsatisfactory because it means that a law recognised as being outdated will continue to apply; and confusion may occur as to which Act is the correct one to apply.

RECOMMENDATION

146 Given our view that all arbitrations should now be conducted under the 1996 Act¹⁹⁴ we now consider how this can best be implemented where a submission to arbitration provides for an umpire, or for two arbitrators. It seems to us that there are two law reform options available:

- repeal the current section 19(3) and replace it with a provision which will state expressly that where parties have agreed upon resolution of their disputes by two arbitrators or by two arbitrators and an umpire they may continue to have their dispute resolved in that way; or
- repeal section 19(3) and replace it with a provision which provided that any reference to two arbitrators or to two arbitrators and an umpire would be deemed to be a reference to three arbitrators appointed under the 1996 Act.

147 The second option would need to be coupled with a provision making it clear that any reference to an umpire in other legislation would be construed as a reference to the appointment of a third arbitrator under the 1996 Act. This would overcome any potential difficulties identified in paragraphs 140 to 143 above.

148 Our preference is for the second option (that is, a provision which would treat both arbitrators appointed by parties and the umpire

¹⁹⁴ Apart from arbitrations started before the commencement of the Act under s 19(2).

as arbitrators who would, together, comprise the arbitral tribunal). Our reasons for reaching this view are:

- The continuing problems caused by long transitional provisions are overcome and it is unnecessary to address the conflicting court decisions to which we have referred.
 - It better reflects the desire evidenced by Parliament that all proceedings be under the 1996 Act unless they fell within legitimate exceptions. It is difficult to see any prejudice to parties caused by adopting this recommendation as the cost is effectively the same when an umpire has to sit through a hearing but may not participate in decisions. The only benefit which could, arguably, be lost to the parties is the possibility of saving deliberation time by the umpire if the two arbitrators agree. We do not think that consideration is enough to preserve the 1908 Act continuing to apply.
 - There is merit in the two arbitrators discussing matters during the deliberation phase with the independently appointed umpire.
-

Part 4
Issues affecting consumers

8

Consumer issues

BACKGROUND

149 **I**N CHAPTER 5 of our preliminary paper we raised potential difficulties arising out of section 11 of the Act. Section 11 of the Act provides:

11. Consumer arbitration agreements—

- (1) Where—
 - (a) A contract contains an arbitration agreement; and
 - (b) A person enters into that contract as a consumer,—the arbitration agreement is enforceable against the consumer only if—
 - (c) The consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and
 - (d) The separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of the Second Schedule do not apply to the arbitration agreement.
- (2) For the purposes of this section, a person enters into a contract as a consumer if—
 - (a) That person enters into the contract otherwise than in trade; and
 - (b) The other party to the contract enters into that contract in trade.
- (3) Subsection (1) applies to every contract containing an arbitration agreement entered into in New Zealand notwithstanding a provision in the contract to the effect that the contract is governed by a law other than New Zealand law.
- ...
- (6) Nothing in this section applies to a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies.

150 The questions raised by us, in relation to consumers, are summarised below:

- Should consumer arbitration agreements continue to be treated differently from others?

- If so, are the present protections adequate?
- How should “consumer” be defined?
- Should the Act require the consumer to agree to arbitration only after the dispute has arisen?
- Have any problems arisen in relation to “machinery” provisions?
- Should “machinery” clauses be excluded from the scope of section 11, or at least be excluded if they were entered into prior to the passing of the Act?

151 We received six submissions dealing with the consumer issues. One of those, from the Ministry of Consumer Affairs (the Ministry), was primarily directed to deal with matters affecting consumers.¹⁹⁵ We deal with issues in this chapter as follows:

- First, we consider whether the existing definition of the term “consumer” is satisfactory for the purpose of the Act. In this section we also consider issues arising out of “machinery” provisions.
- Second we consider the two remaining issues raised in the preliminary paper under the heading “Are present protections adequate?”.
- Finally, we mention a further issue raised by the Ministry in its submission.

DEFINITION OF CONSUMER

Submissions

152 Section 11(2) of the Act provides that, for the purposes of section 11, a person enters into a contract as a consumer if he or she enters into the contract otherwise than in trade and the other party to the contract enters into that contract in trade. The question is whether that definition is appropriate to meet the needs of consumers in the context of contemporary New Zealand society.

153 The Ministry of Consumer Affairs criticised the current definition on two bases:

- (a) that it is expressed negatively: that is, a person must have entered into a contract “otherwise than in trade”;
- (b) it focuses, in part, on the capacity of the other party to the agreement: that is, whether that party entered the contract in trade.

¹⁹⁵ The submission also touched on questions of jurisdiction, in particular, whether the District Court should be given extended jurisdiction to deal with matters arising out of an arbitration which are currently within the exclusive jurisdiction of the High Court. All issues were, however, addressed from the stand point of a consumer.

154 The Ministry of Consumer Affairs recommended partial adoption of the definition of “consumer” to be found in Article 7 of the Draft Convention on Jurisdiction and Recognition of Foreign Judgments which is in the course of preparation by the Hague Conference on Private International Law.¹⁹⁶ The definition it suggests is in the following terms:

A natural person who concludes a contract primarily for personal, family or household purposes.

¹⁹⁶ The nature and scope of this Draft Convention is discussed in: New Zealand Law Commission *International Trade Conventions* (NZLC SP5, Wellington, 2000) paras 167–174. See also, the definition of “consumer” in art 2 of the *Vienna Sales Convention* which has been adopted in New Zealand by the *Sale of Goods (United Nations Convention) Act 1994*. The full text of the most recent draft for art 7 is as follows. (Three alternatives are currently being considered; we have only included the first four paragraphs which are common to all three.):

Article 7 Contracts concluded by consumers

1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, [unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise].
2. Subject to paragraphs [5–7], a consumer may bring [proceedings][an action in contract] in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, [unless [that party establishes that] –
 - a) the consumer took the steps necessary for the conclusion of the contract in another State; [and
 - b) the goods or services were supplied to the consumer while the consumer was present in the other State.]]
- [3. For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.]
4. Subject to paragraphs [5–7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.

(Hague Conference on Private International Law *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference: Jurisdiction and Foreign Judgments in Civil and Commercial Matters: 19th Session* (6–20 June 2001); available at <<http://www.hcch.net>>.)

155 The Ministry of Consumer Affairs submitted to us that this definition is:

- more accessible to the public;
- reasonably consistent with purpose tests used in relation to consumer activities in both New Zealand and overseas legislation; and
- is likely to be familiar to traders, consumers and judges who deal with consumer disputes in the context of international arbitration.

156 Alternatively, the Ministry of Consumer Affairs refers us to the definition of “consumer” in the Consumer Guarantees Act 1993. Section 2(1) of that Act defines the term “consumer” as a person who:

- (a) Acquires from a supplier goods or services of the kind ordinarily acquired for personal, domestic, or household use or consumption; and
- (b) Does not acquire the goods or services, or hold himself or herself out as acquiring goods or services, for the purpose of –
 - (i) Resupplying them in trade; or
 - (ii) Consuming them in the course of a process of production or manufacture; or
 - (iii) In the place of goods, repairing or treating in trade other goods or fixtures on land.

The Ministry pointed out that this definition could cause difficulties in the context of the Arbitration Act 1996 as it is likely to capture businesses which purchase goods or services of a kind ordinarily acquired for personal, domestic or household consumption. Accordingly, the Ministry favours a definition, which addresses the dominant purpose of the consumer.

157 Other submissions made the following points:

- (a) The term “consumer” should be defined in a way that expressly excludes lessees under Glasgow leases of residential properties and under cross-lease arrangements entered into before 1 July 1996.
- (b) The current definition is too wide. Reference was made to a judgment of Wild J in *Marnell Corrao Associates Inc v Sensation Yachts Ltd*¹⁹⁷ where it had been argued that a large corporation

¹⁹⁷ *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (22 August 2000) High Court Auckland CP 294-SW100 Wild J.

which signed a contract for the building of a \$20 million yacht was, for the purposes of the Act, a “consumer”. While Wild J held against that submission, the opportunity for the submission to be made is said to raise a law reform issue. It is suggested that it would be preferable to redraft section 11 to address directly Parliament’s intention to protect consumers who are genuinely uninformed. It is suggested that section 11, in its departure from the principle of party autonomy, should be restricted to situations in which parties genuinely require legislative protection.

After the closing date for submissions, another decision was delivered which provides a striking example of the potential width of section 11. In *Bowport Ltd v Alloy Yachts International Ltd*¹⁹⁸ the purchaser of a \$7 million yacht, a company, was held to be entitled to rely on the section 11 protection, despite the fact that the owner of the company was legally advised, and aware of the arbitration clause. Elias CJ distinguished *Marnell Corrao* on the basis that, in that case, the evidence was that the intended use of the yacht was for corporate entertainment; in contrast, in *Bowport*, Elias CJ accepted the evidence of the company’s owner that the yacht “was always and remains primarily a sailing vessel for my own and my children’s personal use”.¹⁹⁹ Accordingly, the company had entered into the contract “otherwise than in trade” and was a consumer. Elias CJ, however, appeared to have doubts as to the justice of permitting the company to avoid arbitration.²⁰⁰

It may be thought a curious result of a consumer protection clause designed to protect “genuine and uninformed consumers” and to “ensure a reasonable degree of informed consent to arbitration” [NZLC R20, paragraph 245] that a company acquiring a \$7 million yacht, advised as to its execution of the building contract containing the arbitration clause by solicitors, with acknowledged understanding of the existence of the arbitration clause and an acceptance that it would be

¹⁹⁸ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185.

¹⁹⁹ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185, para 54. The evidence was further that the owner only used the corporate structure because of his “personal desire for privacy” (para 53). The owner acknowledged that the yacht had been let out on charter. Elias CJ, however, held that the section 11 protection would not be lost unless the commercial use was “clearly material” (para 71). And, on the facts, she accepted that it was not since “the charter use is equivalent to renting out a holiday home for a few weeks a year” (para 73).

²⁰⁰ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185, para 74.

appropriately invoked for matters of warranty, can avoid the clause for non-compliance with the requirement of separate written agreement. But in my view that result is required by s11(2). Bowport entered into the transaction 'otherwise than in trade' and is therefore a consumer.

- (c) Two submitters suggested that the value of the transactions undertaken that would come within the consumer exception should be limited to \$25,000; one submitter suggested that any limitation should be in the context of adoption of the definition of "consumer" from the Consumer Guarantees Act 1993.
- (d) Another submitter suggested that, in its present form, the definition of "consumer" could conceivably apply to substantial enterprises such as schools, local authorities, churches, sport organisations and the like whenever contracts were entered into which were not in trade. One suggestion made, in that regard, was that transactions to which section 11 applied be limited to those where the consumer was unable to reclaim goods and services tax (GST).

Analysis and recommendations

Replace present definition with new one

- 158 Criticisms of the current definition can be broadly categorised under two headings: First, it fails to target adequately genuine consumers. Second, other models are more accessible to consumers, in terms of being easier to understand. We consider these criticisms now. We will consider more specific suggestions separately.
- 159 With respect to the definition of not properly targeting consumers, we understand the force of the submission that only parties who genuinely require legislative protection should be covered by the definition of "consumer" for the purposes of section 11. We think, however, that it will be too difficult in practice to achieve a workable definition which will truly address those who genuinely require protection. Consumer law recognises that, in some circumstances, those who are better off than others will receive a protection even though they might be expected to bring more business acumen to a transaction. That recognition is based primarily on pragmatic considerations. In order to protect those who require protection it is necessary to ensure that the term is defined sufficiently widely.
- 160 On balance, we consider that the existing definition is adequate with regard to this particular issue, particularly given the wide interpretation of the term "in trade" in relation to section 9 of the

Fair Trading Act 1986. Further, we are not persuaded that the alternatives overcome the problem of targeting any better than the present definition. For example, an experienced businessperson buying a \$20 million yacht for recreational purposes would still seem to come within the definition suggested in paragraph 154.

- 161 With respect to the lack of accessibility in the present definition, we do not consider that it is overly difficult for consumers to understand. And, as stated above, traders and judges should be familiar with the term “in trade” as a result of its prominence in the Fair Trading Act 1986. We agree with the Ministry’s point that it is undesirable that definitions are expressed in negative terms. However, this has been done to ensure that transactions between consumers are not caught. We consider that this is appropriate. The object of the consumer protection provision is to provide protection to consumers who may be vulnerable when dealing with businesses in a stronger bargaining position. If two consumers wish to enter into a private contract, and also wish to agree to arbitrate any disputes, they should be free to do so without legislative interference or form requirements being imposed. As it stands, the definition suggested in paragraph 154 would require a proviso to exclude such transactions, which would reduce the accessibility of that definition.
- 162 In summary, we consider that the basic definition of consumer is adequate and do not recommend any fundamental change.

Monetary limitations

- 163 We are not persuaded that it would be appropriate to insert a monetary limit on the value of the transaction in question. In essence, we consider that a set monetary limit is too crude an instrument to distinguish properly true consumer transactions from others. Further, fixing a value would, necessarily, require adjustment of that value periodically.

Limiting to natural persons

- 164 We do think it appropriate to amend the definition of the term “consumer” to ensure that it refers only to natural persons. This meets the objection that, as currently framed, the definition may reach too far and include bodies such as schools, churches and local authorities. Such a definition would also have resulted in the purchaser being bound by the arbitration clause in *Bowport Ltd v Alloy Yachts International Ltd*.²⁰¹

²⁰¹ *Bowport Ltd v Alloy Yachts International Ltd*, above n 185.

Leases and other machinery provisions

- 165 We also agree that it would be desirable to exclude leases from the ambit of the definition because of the difficulties which arise if a consumer declines to participate in an arbitration under a lease. The entire agreement may fail for lack of a working machinery in respect of the arbitration.²⁰² Rather than seeking to define particular types of leases (such as the Glasgow lease or cross-lease arrangements) we prefer to exclude all leases on the basis that residential tenancies are adequately protected by the mechanisms to be found in the Residential Tenancies Act 1986.
- 166 Theoretically, it is possible that other types of contract could be entered into by consumers resulting in similar consequences as we have described with leases. But, in the context of the consultation which we have undertaken, no other examples have been drawn to our attention. We have been unable to identify any other class of contract that would raise these issues. In those circumstances, we do not recommend exclusion of contracts beyond leases.

Summary of recommendations

- 167 We do not recommend any changes to the present definition of consumer, other than:
- the term should only apply to natural persons;
 - all leases should be excluded from the ambit of the term.

ARE PRESENT PROTECTIONS ADEQUATE?

Submissions

- 168 We raised in our preliminary paper the question whether or not the requirement in section 11 of the Act for the consumer to sign the agreement to arbitrate at the same time as entering into the main contract was an adequate protection.²⁰³ This was the main area under this heading upon which submissions were received. The specific issue considered was whether section 11 should be amended so that an arbitration agreement between a consumer and a business only took effect if arbitration had been agreed as a method of dispute resolution after the dispute arose.

²⁰² But, see also *Money v Ven-Lu-Ree Ltd* [1989] 3 NZLR 129 (PC).

²⁰³ New Zealand Law Commission *Improving the Arbitration Act 1996*, above n 3, para 44.

169 In its submission, the Ministry reminds us that:

- (a) Arbitration is not necessarily the most cost-effective way for consumers to resolve disputes; often the Disputes Tribunal will be the forum of choice for consumers. An arbitration agreement cannot oust the jurisdiction of the Disputes Tribunal.²⁰⁴
- (b) The purpose of consumer protection is to ensure that consumers are not placed at a disadvantage because of their lack of knowledge and experience of the arbitral process.

170 The Ministry takes the view that arbitration agreements should only be binding if signed by consumers after a dispute arises. While acknowledging that arbitration may well be beneficial to consumers, the Ministry considers that consumers must be given time to assess how to resolve their disputes. The Ministry also points out that it is undesirable for consumers to be required to seek external advice on dispute resolution clauses prior to entering into low value transactions. We see merit in that submission.

171 Other submitters accept that consumer agreements should be treated differently from other arbitration agreements. Some considered existing protections to be adequate while another suggested enactment of a “cooling off” period.

Analysis and recommendation

172 There is a tension between the party autonomy principle and the need to protect consumers. We see that tension best resolved by viewing the issue as one affecting the viability and integrity of the arbitral process. If the arbitral process works well for those who wish to use it and does not harm those who inadvertently come within its purview then it is likely that the reputation of arbitration as a method of dispute resolution will be enhanced.

173 We have real doubts whether the current provisions contained in section 11(1)(b), (c) and (d) afford the degree of protection required. The Commission agrees with observations made by Commissioner Dugdale in response to the 1991 Law Commission report where he said:

What happens in real life is that the nice kind salesman says “sign here, here and here”, and the consumer like a lamb signs there, there and there without any clear idea of what he is signing or why.²⁰⁵

174 Because we consider that some reform is needed, the next issue is the form that it should take. Prior to the enactment of section 11 of

²⁰⁴ Disputes Tribunals Act 1988, s 16.

²⁰⁵ DF Dugdale “Arbitration as Oppression” [1992] NZLJ 135, 136.

the Arbitration Act there were, in existence, two statutory provisions governing arbitration agreements in relation to consumers. The first, section 16 of the Disputes Tribunals Act 1988 provides that an arbitration agreement cannot oust the jurisdiction of the Disputes Tribunal. The second, section 8 of the Insurance Law Reform Act 1977 provides that arbitration agreements are not binding on the insured unless the insured agrees to submit a dispute to arbitration after it arises. Section 8 of the Insurance Law Reform Act 1977 was expressly saved by section 11(6) of the Arbitration Act.

175 We take the view that it is desirable to have a consistent approach to the enforceability of arbitration agreements with consumers. We prefer the approach set out in section 8 of the Insurance Law Reform Act 1977 because it enables arbitration to proceed if the parties are both satisfied that is the most appropriate dispute resolution forum after the actual dispute has arisen.

176 Equally, it seems to us that if a consumer and a business enterprise execute an arbitration agreement *after* a dispute has arisen then that agreement to arbitrate should oust the jurisdiction of the Disputes Tribunal. We therefore recommend an amendment to the Disputes Tribunals Act 1988 to ensure consistency of approach.

FURTHER ISSUE RAISED BY THE MINISTRY

177 We are also asked by the Ministry of Consumer Affairs to reconsider section 11 in the context of increasing online contracts. In particular:

- The Ministry considers that it is desirable that the protections in section 11 apply wherever a contract is governed by New Zealand law even though the consumer may not be present in New Zealand physically.
- The Ministry considers it desirable that section 11 applies to New Zealand consumers whatever the applicable law of the contract and wherever the business is based.

178 It is submitted that an explicit provision to this effect would help limit the risk of compromising New Zealand consumer protection through inadvertently requiring mandatory arbitration with an overseas business in circumstances where the arbitration agreement would be invalid if it had been entered into in New Zealand.

179 This submission raises difficult conflict of laws issues. Without the benefit of further submissions and research we are not prepared to make any recommendation.

Part 5
Remaining issues raised by
preliminary paper

9

Default appointment of arbitrators

ISSUE

180 **I**N OUR PRELIMINARY PAPER we suggested that a difficulty could arise, as a result of the default provisions, where the parties are unable to agree on the choice of arbitrator. The problem we envisaged was that if one party served a default notice on the other, nominating his or her choice of arbitrator, then the other party would be compelled to accept that choice, with no possibility of recourse to the court. We set out the reasoning in our preliminary paper in full:

- 50 Article 11(2) of the First Schedule provides that the parties are free to agree on a procedure for the appointment of the arbitrator. Failing such agreement, article 11(3)(b) provides that a party may request the High Court to appoint the arbitrator.
- 51 Clause I of the Second Schedule sets out a default procedure, which, unless the parties agree otherwise, is deemed to be the procedure agreed under article 11. Subclauses (3), (4) and (5) provide:
- (3) In an arbitration with—
- (a) A sole arbitrator
 - ...
- the parties shall agree on the person... to be appointed as arbitrator.
- (4) Where, under ... subclause (3) ...—
- (a) A party fails to act as required under such procedure; or
 - (b) The parties ... are unable to reach an agreement expected of them under such procedure; or
 - (c) A third party ... fails to perform any function entrusted to it
 - ...—
- any party may, by written communication delivered to every such party, arbitrator or third party, specify the

details of that person's default and propose that, if the default is not remedied within the period specified in the communication (being not less than 7 days after delivered), a person named in the communication shall be appointed to such vacant office of arbitrator as is specified in the communication ...

- (5) If the default specified in the communication is not remedied within the period specified in the communication,—
 - (a) The proposal made in the communication shall take effect as part of the arbitration agreement on the day after the expiration of that period; and
 - (b) The arbitration agreement shall be read with all necessary modifications accordingly.

52 The difficulty arises where the parties are unable to agree on the single arbitrator. Under subclause (4) this is a default. As a result, the party whose suggested arbitrator was rejected may then immediately send a default notice to the other party, stating that unless the default is remedied within seven days then the suggested arbitrator will be appointed. If the party receiving the notice does nothing, then the appointment will take effect in accordance with subclause (5). However, even if the party does respond, for example by suggesting an alternative arbitrator, arguably the first party's choice will still take effect under subclause (5). This is because the second party, by suggesting an alternative arbitrator, has not remedied the default (that is, the failure to agree). The second party could also respond with his own default notice. But by the time it expires, the first party's choice would already have taken effect.

53 Article 11 (4) of the First Schedule provides that any party may apply to the High Court where under an agreed procedure, they are unable to reach the "agreement expected of them". However, the article does not apply where "the agreement on the appointment procedure provides other means for securing appointment". Accordingly the article does not assist since clause 1 does provide another means for securing the appointment, that is, the default notice procedure.

54 In summary, on a plain reading of the schedules, a party who does not agree to the other party's choice of arbitrator, for valid reasons, may find himself forced to accept that choice, with no recourse to the High Court.

181 We sought submissions as to whether any difficulties had, in fact, arisen in practice.

SUBMISSIONS AND SUBSEQUENT COURT DECISION

- 182 None of the submissions that we received identified a particular problem that had arisen in practice. But, the five submissions all acknowledged that the potential problem identified above existed. All submitters were of the view that the potential difficulties were sufficient to justify an amendment to the legislation.
- 183 The AMINZ, referring to the consultation on this issue carried out during the course of the New Zealand Law Society (NZLS) seminar conducted by Messrs David Williams QC and Fred Thorp suggested that there were two main reasons why, up to then, no specific problems had been identified. The AMINZ said:
- First, in a significant proportion of cases, the parties nominate an appointing authority in case of disagreement. Second, even where there is no such provision the issue of the default procedure being invoked usually leads to agreed appointment.
- 184 Two submitters expressed the view that they would be surprised if a court would interpret the combined provisions in the way we had suggested. The most cogent reason put forward by one of the submitters was that our analysis assumed that failure to agree immediately on an appointment under clause 1(3)(a) meant that the parties were “unable to reach an agreement” for the purposes of clause 1(4)(b). We can see some substance in that view because the fact that two parties are initially in disagreement does not mean that they never will reach agreement. However, this appears to us to create a further problem. If that analysis is correct, at what point are the parties unable to reach an agreement for the purposes of clause 1(4)(b), so as to trigger the default notice procedure? The object of predictability in legislation of this type should be at the forefront of public policy considerations on this issue.
- 185 After receiving the submissions, the precise issue did in fact come before the High Court in *Hitex Plastering Ltd v Santa Barbara Homes Ltd*.²⁰⁶ In that case, Hitex and Santa Barbara had agreed that disputes between them would be resolved by arbitration. They were unable to agree, however, as to who should be appointed as arbitrator. (Importantly, there was no dispute that both had made genuine attempts to reach agreement; a point we return to later.) Eventually, Hitex sent a default notice to Santa Barbara requiring it to accept its choice of arbitrator within seven days. Santa Barbara did not agree, and Hitex then sent a further notice saying that its

²⁰⁶ *Hitex Plastering Ltd v Santa Barbara Homes Ltd* [2002] 3 NZLR 695.

nominee had now been appointed pursuant to the default provisions in the Arbitration Act. Santa Barbara did not participate in the arbitration and an award was made against it. The issue reached the High Court when Hitex sought judgment on its award, which Santa Barbara opposed on the grounds that the arbitrator had not been validly appointed.

- 186 Justice Rodney Hansen held that the arbitrator had been properly appointed and granted the application of Hitex that its award be enforced as a judgment. In doing so, he relied upon an analysis of the default provisions that was virtually identical to that set out in the preliminary paper. (Although he did not refer to the paper.) His Honour had sympathy for the argument of counsel for Santa Barbara that this analysis produced an “absurd result” which would result in “[t]he task of appointing an arbitrator [becoming] nothing more than a race to issue the first default notice”,²⁰⁷ saying:

There is merit in the concern voiced by the commentators and echoed in Mr Cooper’s submissions. It seems odd to characterise an inability to agree as a default. It might also be thought unlikely that the legislature should have intended to give an unqualified right to appoint an arbitrator to the first party to issue a notice. That would tend to foment disagreement contrary to a procedure which is designed to promote rational resolution of differences.²⁰⁸

- 187 Rodney Hansen J added that there was still a requirement that the parties must have made a “genuine attempt” to reach agreement, before a default notice could be issued.²⁰⁹ This is a similar point to the one that we developed in paragraph 184 above; that is, the parties will not be considered “unable to reach an agreement” unless they make some genuine attempt at doing so. However, this requirement gives rise to a similar difficulty to that we identified above: exactly when will a party be taken to have made a sufficiently “genuine attempt” to reach agreement?

- 188 The case indicates that the problems with the default provisions are more than hypothetical.

OPTIONS FOR REFORM

- 189 A variety of options for reform were suggested to us. We summarise those options as follows:

²⁰⁷ *Hitex Plastering Ltd v Santa Barbara Homes Ltd*, above n 206, 698–699.

²⁰⁸ *Hitex Plastering Ltd v Santa Barbara Homes Ltd*, above n 206, 700.

²⁰⁹ *Hitex Plastering Ltd v Santa Barbara Homes Ltd*, above n 206, 701–702.

- (a) Clause 1 of the Second Schedule to the Act could be restricted to cases where one party to the arbitration agreement is wholly refusing to participate in the arbitration and has taken no steps at all to make or to agree an appointment within the minimum notice period. This could be achieved by providing that if the recipient of the notice under clause 1 disagrees with the proposed default appointment then, if the parties cannot thereafter reach agreement within a specified time, the matter would go to the High Court for resolution; conversely if the recipient did nothing, then the proposed appointment would automatically take effect.
- (b) A longer minimum length of time could be inserted into clause 1(4) within which a specified default must be remedied. The suggestion is that the minimum seven day deadline is unnecessarily tight given the time taken to serve documents and obtain legal advice. It is suggested that a minimum 14 day deadline would be more appropriate.
- (c) Clause 1(4)(b) of the Second Schedule could be amended so that a failure by the parties to agree on an arbitrator does not constitute a default. This would leave the parties free to apply to the High Court for an appointment to be made under Article 11(4) of the First Schedule.
- (d) Two submitters suggested that the legislation could be amended to enable default appointments to be made by the court (one suggesting the District Court as well as the High Court) or AMINZ.
- (e) One submitter suggested insertion of a provision akin to section 7(2) of the 1908 Act, which empowered the High Court to set aside a default appointment.²¹⁰

²¹⁰ Section 7 of the 1908 Act provided:

7 Power For Parties To Supply Vacancy

- (1) Where a submission provides that the reference shall be to 2 arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention,—
 - (a) If either of the appointed arbitrators fails to act, or is or becomes incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; and
 - (b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for 7 days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

ANALYSIS AND RECOMMENDATION

- 190 Appointment of an arbitrator or members of an arbitral tribunal is a fundamental element of the arbitral process. An important consideration is the need for the parties to repose confidence in either an arbitrator appointed by them jointly or in the appointing authority. It is for that reason that the High Court is the ultimate appointing authority if the parties have not agreed either on the arbitral tribunal or the appointing authority.
- 191 It is undesirable that there be any lack of clarity with regard to the procedure to be followed if parties cannot agree upon a sole arbitrator or upon a panel of arbitrators. We see the need for predictability in this regard as the most important consideration.
- 192 It seems to us that the problem identified has been caused by the procedure set out in clause 1(4) of the Second Schedule, because, once parties “are unable to reach an agreement expected of them”, a default procedure then arises. If the default procedure is defined precisely and the times within which it is to be applied are also clearly defined, the difficulties identified should be removed.
- 193 Our preference is for repeal of clause 1(4) in its current form. We suggest replacement of clause 1(4) with a provision which will:
- Allow the parties to agree, in their arbitration agreement, upon a default procedure if they are unable to agree upon the appointment of an arbitral tribunal.
 - Entitle the parties to exercise the default procedure set out in Article 11(3) of the First Schedule if:
 - (a) the default procedure agreed between the parties has not been followed; or
 - (b) an appointing authority has failed to make an appointment as contemplated.

Such an approach provides the degree of predictability required by parties to an arbitration agreement while maintaining consistency between the approaches set out in Article 11(3) of the First Schedule and clause 1(4) of the Second Schedule.

²¹⁰ *continued*

(2) The Court may set aside any appointment made in pursuance of this section.

For cases on s 7(2) see *Bell v Connolly and Kemp* [1968] NZLR 13 (HC); *Ronke v King* (1990) 4 PRNZ 346 (HC) and *Gillies v Beryl's Emporium Ltd* (29 August 1997) High Court Rotorua M 107/97 Master Kennedy-Grant.

194 The only disadvantage of this approach is that the default notice procedure outlined in clause 1(4) of the Second Schedule would be abolished. However, we think that it is preferable to proceed in the manner we have suggested because:

- It is open to the parties to adopt a default notice provision which meets their particular needs (including times for response) if they so desire.
- Submitters have suggested to us that the seven day period may be too short in any event; this may often depend upon the nature of the arbitrating party and its location.
- The need for predictability must be paramount and the proposal we have made is entirely consistent with the approach evidenced in Article 11(3) of the First Schedule. And, Article 11(3) is based upon the UNCITRAL Model Law.

195 There will always be disadvantages to an arbitrating party who is forced to go to the High Court for an order appointing an arbitral tribunal because of the failure of the other party either to act in terms of agreed procedures or those procedures laid down by the Act. Ultimately, however, we think that those consequences can be adequately compensated by awards of costs made by the High Court where the High Court is satisfied that the defaulting party has not acted in a way which demonstrates a desire to proceed promptly with the arbitration.

Requests for interpretation

196 **T**HE ISSUE is whether a request for an interpretation of an award needs the agreement of both parties, or whether one party may unilaterally make such a request. In paragraphs 55–57 of our preliminary paper we said:

55 Article 33(1) provides:

33. Correction and interpretation of award: Additional award

(1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties,

(a) A party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature:

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

56 Under the article, the arbitrator may be requested to attend to the matters in article 33(1)(a) by only one of the parties. However, a request to give an interpretation must be agreed to by all of the parties. The issue is whether it should be sufficient for one of the parties to make such a request.

57 The competing arguments can be summarised briefly as follows:

- There is a concern that if all parties do not agree to the interpretation process, then one party could use the procedure to prolong or reopen a concluded dispute. The concern is alleviated to some extent by the need for the arbitral tribunal to be satisfied that the request is justified and by the short time within which a request can be made.
- Alternatively, it is said that if a significant question arises which can be clarified readily by the arbitral tribunal, in order to promote finality the tribunal should be allowed to give the interpretation, which it favours.

197 Three submissions addressed this issue. None favoured any amendment to Article 33. The main reasons for not intervening can be summarised as follows:

- The interpretation procedure can be used by a disgruntled party to reopen a case which it has lost, cause delay or harass the arbitral tribunal. Such an approach is contrary to the desirability of finality.
- While one party may request a correction without consent from the other party that is seen to be justified on the basis of a “slip” provision. An expedient method to resolve arithmetical or typographical errors and to restore the true intention of the arbitral tribunal’s decision is quite different in kind from a decision which, under the guise of the request for interpretation, in effect asks the arbitral tribunal to reopen the case.
- No existing problems have been identified with Article 33: we draw this information from the lack of any specific problems identified by submitters and from the informal consultation undertaken at the NZLS seminars.
- The underlying jurisdiction of an arbitral tribunal is based on the agreement of the parties and it is open to the parties to agree, in advance, if they wish an arbitral tribunal to have power to interpret its award on request.²¹¹ It is also open for the parties to agree to extend or truncate the period of time within which interpretation of an award could be requested.²¹²

198 We are convinced by these submissions and recommend no change to the law.

²¹¹ Arbitration Act 1996, first sch, art 33(1)(b).

²¹² Arbitration Act 1996, first sch, art 33(1).

Jurisdiction of District Court

199 **I**N OUR PRELIMINARY PAPER we raised the issue as to whether the District Court should be given increased jurisdiction in respect of matters relating to arbitrations. In paragraphs 58–60 we said:

58 The 1996 Act differentiates between powers which can be exercised by the High Court or the District Court.

- 59 The provisions of the Act follow a consistent approach:
- (a) Applications for a stay are heard in the court where the proceedings were filed.
 - (b) Applications where “assistance” is sought may be heard in either the High or District Court.
 - (c) The other types of application involve contested matters, involving either review of an arbitrator’s decision or making orders against the arbitrator or enforcing the award. These are heard in the High Court.

60 The issue is whether the District Court should be given jurisdiction to hear contested matters falling within the scope of category (c).

200 As paragraph 60 of our preliminary paper indicates, the question is whether the District Court should be given jurisdiction to hear contested matters falling within the scope of category (c) of paragraph 59. In particular, enforcement of arbitral awards might be enhanced by the ability to execute through District Court procedures and given the wider range of locations at which District Courts are to be found.

201 The main ground for seeking an extension of District Court jurisdiction is based on difficulties of cost and access faced currently by consumers. Although that submission was made by the Minister of Consumer Affairs, it can be said, we think legitimately, that the same concern applies to small businesses. On the other hand, the major objection to an extension of jurisdiction is that High Court judges are likely to have greater experience in dealing with arbitration issues than judges in the District Court.

- 202 We see merit in the view that the jurisdiction to deal with contested issues should continue to be exercised in the High Court. The role of the High Court in supervising arbitral proceedings is akin to the public law function which it performs in areas such as judicial review. It is a case of the public justice system overseeing the administration of a private dispute resolution mechanism. We think it is desirable to retain the jurisdiction of the High Court for contested matters.
- 203 However, we think there is also merit in seeking to overcome the difficulties, caused by cost and accessibility, that are faced by consumers, and small businesses which may need to enforce an award. We think that the balance can be properly struck by allowing an application to be filed in a District Court to recognise and enforce an award of a sum within the jurisdiction of the District Court. But, if there is any challenge to the recognition or enforcement of the award, then the recognition and enforcement proceedings in the District Court should be removed to the High Court for determination. Thus, in uncontested recognition and enforcement proceedings, consumers and small-to-medium-sized enterprises will have the ability to use a wider range of courts at different locations in New Zealand and to take advantage of the wider, and cheaper, enforcement procedures in the District Court.
- 204 We note that a judgment obtained initially in the High Court can be transferred to a District Court, and then District Court execution processes can be utilised. The transfer procedure is in fact simple and inexpensive.²¹³ This would tend to indicate that the increased jurisdiction recommended is not required simply to enable parties to utilise cheaper execution processes. However, the new High Court Fees Regulations 2001 now require payment of a commencement fee in the High Court of \$900. This compares with \$120 in the District Court. This effectively means that for small parties there is now considerable benefit in being able to commence enforcement of awards in a District Court.
- 205 An ancillary recommendation which we are minded to make is as follows: an arbitrating party which wishes to have an award recognised and enforced is simply using an administrative process to ensure that the award is enforced. It does not seem to us to be right that such a person should be charged with commencement

²¹³ Pursuant to s 68 of the District Courts Act 1947, High Court judgments may be transferred to a District Court simply by filing a sealed certificate of judgment in the District Court. This is a purely administrative act which can be done by mail.

fees of the type we have just mentioned. We suggest that it would be more appropriate to charge a modest filing and sealing fee for the recognition and enforcement proceedings, and require any party opposing recognition or enforcement to pay a commencement fee. In real terms, it is the opponent who will be the initiator of the contested application.

12

Witness subpoenas

206 **T**HE BASIC ISSUE is whether parties to an arbitration should be permitted direct access to a court to obtain a subpoena (as was the position under the 1908 Arbitration Act) or whether the request should be made through, or with the consent, of the arbitral tribunal (as is the present position). In paragraphs 61 and 62 of our preliminary paper we said:

61 Article 27 of the Act provides:

27. Court assistance in taking evidence

- (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.
- (2) For the purposes of paragraph (1),
 - (a) The High Court may make an order of subpoena or a District Court may issue a witness summons to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents:
 - (b) The High Court or a District Court may order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the court, or any other person for the use of the arbitral tribunal:

62 Compared with procedures in the High Court and the District Court, the procedure under the Act has significant disadvantages. It requires two applications: first from a party to the arbitrator and then from the arbitrator (or a party with the consent of the arbitrator) to the court. It is also unclear whether the arbitral tribunal should deal *ex parte* with an application for consent or whether the application should be on notice to other parties. That lack of clarity is also undesirable. Under the Arbitration Act 1908 it was possible to obtain subpoenas from the High Court as of right upon the filing of a praecipe.

207 The competing contentions on this issue can be summarised as follows:

- The view that the arbitral tribunal should retain its role in screening applications for witness subpoenas is based on a perceived need for arbitrators to control the arbitral proceedings. The AMINZ submits that the arbitral tribunal, rather than the parties, should control proceedings subject only to the equal treatment provisions of Article 18 of the First Schedule. The AMINZ says:

In relation to witnesses who will not appear voluntarily, the arbitral tribunal presently acts as a useful filter. Experience has shown that an approach to the tribunal may reveal that there is no need for the proposed evidence. In addition, the tribunal and/or the opposing party may be able together to facilitate the voluntary attendance of the witness, or it may be possible to reach an agreement under which the relevant facts to be adduced by the witness can be provided in another way.

Furthermore, it may be disruptive and inefficient for a party to be able to go to court to obtain a subpoena without any reference to the tribunal.

- Direct access to the court to issue a subpoena should be permitted because it is a matter for the party calling the witness to decide which witnesses it wishes to call. In that regard, we also note that no specific problems have been identified to us which suggest any problem with the direct access approach evidence under the 1908 Act.

208 Article 19 of the First Schedule to the Act makes it clear that *the parties* are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.²¹⁴ Only if there is no such agreement is the arbitral tribunal entitled to conduct the arbitration in such a manner as it considers appropriate.²¹⁵ Read as a whole, it seems to us that the thrust of Article 19 is to put the control of the proceedings in the hands of the parties in the first instance with the arbitral tribunal having power to impose procedural rules on the parties if they fail to agree.

209 Article 27 is arguably inconsistent with the broad theme of the 1996 Act of party autonomy. In this regard, however, we note that Article 27 is derived from the UNCITRAL Model Law. Two points are, we think, relevant in that regard:

- In determining the form of Article 27 it was necessary to balance competing interests of common law and civil law countries.

²¹⁴ Arbitration Act 1996, first sch, art 19(1).

²¹⁵ Arbitration Act 1996, first sch, art 19(2).

Judges in civil law countries exercise greater power over who may be called as a witness than those exercising similar jurisdiction in common law countries.²¹⁶

- The Model Law is a model law on international commercial arbitration and is therefore designed to take account of international issues. In that context it may be seen as appropriate for an arbitral tribunal to screen requests for the issue of a subpoena²¹⁷ which may require witnesses to travel from another jurisdiction.

210 In a domestic context, it is usual for an arbitral tribunal to direct, as a matter of procedure, that briefs of evidence be exchanged in advance of the arbitration. But, the arbitral tribunal seldom, if ever, directs whom a party may call. Why, then, should an arbitral tribunal have power to refuse a request from a party to call a witness who will not co-operate in providing a brief of evidence? It seems to us that power should properly reside with the parties, with the intended witness then having the right to apply to set aside the subpoena in the High Court or a District Court.

211 The view that we take is consistent also with our recommendations with regard to confidentiality and the administration of justice

²¹⁶ There was division amongst delegates in the UNCITRAL Working Group that drafted the Model Law as to the proper role of the arbitral tribunal in issuing subpoenas. Some delegates considered that only the tribunal should be permitted to apply for a subpoena, in order to prevent parties using the process to delay the arbitration. Others considered that the tribunal should have no role, as this would imply an investigative role for arbitrators, inconsistent with the adversarial system. In the end, the present Article 27 was a compromise between those two positions. Thus, the Commission report states:

It was noted that the current provision was a compromise between those legal systems in which only the arbitral tribunal might request the court for assistance and those legal systems in which a party might request the court for assistance.

(United Nations Commission on International Trade Law *Commission Report* (A/40/17, Vienna, 1985) para 226.)

A detailed history of the discussions which led to the compromise is set out in Howard M Holtzmann and Joseph E Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, Deventer, the Netherlands, 1989) 734–762.

²¹⁷ The Working Group also gave detailed consideration as to the issue of subpoenas to witnesses in other jurisdictions. Ultimately, for a variety of reasons, it was decided that Article 27 should not deal with the matter. (See Holtzmann and Neuhaus, above n 216, 734–762.)

exception. We think it is preferable for any challenge to the issue of a witness subpoena to be made to a court rather than be dealt with privately by an arbitral tribunal.

- 212 We recommend that Article 27 be amended so that the prior approval of the arbitral tribunal is not required before court assistance is sought to take evidence.

13

Immunity for appointing authorities

ISSUE

213 **WE** SOUGHT SUBMISSIONS on whether immunity from actions should be given to those bodies named in arbitration agreements to appoint arbitrators.²¹⁸ In paragraphs 63 and 64 of our preliminary paper we said:

63 Arbitrators are accorded judicial immunity when they act as arbitrators. A question which has been raised with us is whether similar immunity should be granted in favour of those required, under the particular arbitration agreement, to appoint arbitrators.

64 There is plainly public interest in professional bodies, such as the Arbitrators' and Mediators' Institute of New Zealand Inc, appointing arbitrators from those known to be qualified to undertake the particular task. The issue is whether there is likely to be any scope for argument that those bodies are liable for damages if a party turns out to be dissatisfied with the result achieved at arbitration. This may flow from dissatisfaction with the performance of the particular arbitrator (whether justified or not).

SUBMISSIONS

214 Submissions made to us trespassed on a further issue: whether the current provisions conferring immunity on arbitrators was sufficiently wide. We deal with that issue separately in chapter 17.

215 Submissions were divided on whether it was appropriate to enact a provision immunising an appointing authority from claims. However, the competing contentions were not analysed in detail in the context of relevant public policy factors.

²¹⁸ In seeking submissions on whether appointing authorities should be granted immunity we noted that the scope for work by appointing authorities may increase under the Construction Contractors Bill which will enable adjudicators to be appointed to determine cash flow issues affecting those working in the construction industry.

ANALYSIS AND RECOMMENDATION

216 Before we address the competing public policy interests we note that, by section 74 of the Arbitration Act 1996 (UK), an appointing authority is provided with a degree of immunity. The essence of section 74 of the UK Act can be summarised as follows:

- An appointing authority is not liable for anything done or omitted in the discharge or purported discharge of that function unless the Act or omission is shown to have been in bad faith.²¹⁹
- An appointing authority is not liable, by reason of having appointed or nominated a person for appointment as arbitrator, for anything done or omitted by the arbitrator in the discharge or purported discharge of his or her functions as arbitrator.²²⁰
- The immunity granted in favour of an appointing authority extends to its agents or employees.²²¹

217 The Departmental Advisory Committee on Arbitration Law²²² outlined the policy reasons which it considered justified immunity in the United Kingdom. In essence there were two reasons:

- Without immunity parties would be encouraged to reopen disputes.
- As appointing authorities generally provide a useful service voluntarily, they may not have the resources to defend litigation or even afford insurance. Accordingly, they should be allowed immunity “so that their good work can continue”.²²³

218 The views expressed by the Departmental Advisory Committee (chaired by Lord Saville) preceded a decision of the House of Lords which removed barristerial immunity as a matter of English and Welsh law. We refer to *Arthur Hall v Simons*.²²⁴ In that case the House of Lords considered that the immunity could only be justified if there were compelling public policy factors in its favour.²²⁵ It held (at least in respect of civil cases) that there were not.

²¹⁹ Arbitration Act 1996 (UK), s 74(1).

²²⁰ Arbitration Act 1996 (UK), s 74(2).

²²¹ Arbitration Act 1996 (UK), s 74(3).

²²² Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) paras 299–301.

²²³ Departmental Advisory Committee on Arbitration Law, above n 222, para 301.

²²⁴ *Arthur Hall v Simons* [2000] 3 All ER 673 (HL).

²²⁵ Generally, see *Arthur Hall v Simons*, above n 224, 685 Lord Browne-Wilkinson, 689 Lord Hoffmann, 710 Lord Hope of Craighead, 726 Lord Hutton, 735 Lord Hobhouse of Woodborough and 750 Lord Millet.

- 219 In our view, it is appropriate to consider immunity for appointing authorities by undertaking a similar analysis: are there public policy factors which provide compelling justification for the immunity proposed?
- 220 It seems to us that there are three specific issues that need to be considered in balancing public policy factors; viz:
- Whether parties would, in fact, be encouraged to reopen disputes if immunity was not granted; and even if they would, is this a sufficient justification for immunity?
 - Whether the unavailability or cost of insurance for an appointing authority was likely to result in withdrawal of the service.
 - Whether it is appropriate to decline immunity for appointing authorities when the High Court, exercising default jurisdiction under Article 11(3) of the First Schedule, would have no liability because of the doctrine of judicial immunity.²²⁶
- 221 We are not persuaded that the possibility of reopening the dispute should be given particular weight. While it must be accepted that speculative claims could well be brought against appointing authorities, circumstances in which proper claims may be brought can equally be postulated. For example, a multi-million dollar dispute arises between substantial companies and the appointing authority appoints someone with no experience in conducting large civil cases to act as arbitrator. If, because of a lack of competence on the part of the arbitrator, the parties are adversely affected (or perhaps just one of them) there may be justification in bringing a claim. Similarly, a claim may be justified if an appointing authority appoints as an arbitrator a person who turns out to have no integrity. If that person seeks to run the arbitration to achieve maximum payment for his or her services to the detriment of the parties, a claim may well be justified. We think it is significant that the threat of relitigation of a civil dispute was not considered a weighty factor by the House of Lords in determining to reverse the law relating to barristerial immunity in *Arthur Hall v Simons*.²²⁷
- 222 In relation to potential withdrawal of the service, we note the availability of insurance and the opportunity for appointing authorities to fix a fee for appointing arbitrators at a level which will recover both premium and potential excess. In addition, from

²²⁶ Generally, see *Harvey v Derrick* [1995] 1 NZLR 314 (CA) 317 Cooke P, 324–325 Richardson J and 335–337 Fisher J.

²²⁷ See in particular *Arthur Hall v Simons*, above n 224, 688, 699–707 Lord Hoffmann.

a contractual point of view, the appointing authority could decline to act unless a waiver was signed by the people seeking an appointment so that no claims could be brought against the appointing authority. Such a waiver is also likely to trump a claim based on *Hedley Byrne* principles,²²⁸ there being no assumption of responsibility in such a case. A waiver may limit or exclude liability on the part of an appointing authority.

- 223 The point that has troubled us the most is whether appointing authorities should be treated differently from courts which exercise the final right of appointment if the parties cannot agree and there is no appointing authority. Courts will be protected by the doctrine of judicial immunity. But, in the end, the answer to this question lies in the ability of the appointing authority to decline to appoint in the absence of a suitable waiver. The High Court has no such ability.
- 224 For those reasons we have come to the view that there is no compelling justification for imposing immunity on appointing authorities from the public policy perspective.
- 225 By way of postscript we add this. There may well be justification in immunity being granted in favour of the appointing authority in a manner akin to section 74 of the Arbitration Act 1996 (UK) if the appointing authority is compelled to appoint by the terms of a particular statute. In that situation it would be difficult to differentiate the position of the High Court and the appointing authority in principle and we think the same immunity should apply to each.

²²⁸ *Hedley Byrne and Co v Heller* [1964] AC 465 (HL).

14

Employment Relations Act 2000

226 **T**HE ISSUE is whether any amendment should be made to the Employment Relations Act 2000 so as to provide that the Arbitration Act 1996 applies to arbitrations arising out of employment disputes. In paragraph 65 of our preliminary paper we said:

65 Section 155 of the Employment Relations Act 2000 permits arbitration but provides that the Arbitration Act 1996 does not apply. The concern was apparently a fear that the provisions in the Arbitration Act 1996 for recourse to the High Court would undermine the Employment Court's specialist jurisdiction. Disapplying the 1996 statute means that some other (unspecified) law applies; but what law?

227 We received only two submissions on this issue. Both took the view that the Arbitration Act 1996 should apply to arbitration of employment disputes permitted by section 155 of the Employment Relations Act 2000.

228 Our concern, like those of the two submitters, is that if arbitration of disputes is permitted, but the Arbitration Act 1996 is disapplied, there is no statute which governs the arbitration; so presumably the common law would apply. It would appear that the common law position was as follows:

- If the parties participated in an arbitration, and an award was made, that award was binding upon them as a matter of contract. Conceptually, the award had the character of an accord and satisfaction and was enforceable by bringing a separate action in debt.²²⁹
- An agreement to determine a dispute by arbitration was not specifically enforceable; neither was it a defence to an action brought in breach of the agreement because such clauses were

²²⁹ *Doleman & Sons v Ossett Corp* [1912] 3 KB 257, 267 (CA) Fletcher Moulton LJ and *Bulk Chartering v T & T Metal Trading* (1993) 31 NSWLR 18 (NSW CA).

invalid as agreements to oust the jurisdiction of the court.²³⁰ A drafting technique was, however, available to overcome this rule: If the arbitration clause stated that no cause of action arose until arbitration had been completed, then there would be a complete defence to any court action brought in breach of the clause.²³¹ So, the validity of arbitration clauses depended not on what the parties really intended, but rather the technical form of the clause.

- Breach of an arbitration agreement would, however, give rise to an action for damages.²³² Further, the court appeared to have an inherent jurisdiction to stay proceedings commenced in breach of an arbitration agreement.²³³

229 We have concerns as to the inaccessibility of common law dealing with an arbitration that is not governed by statute.²³⁴ We also have concerns as to the technical, and often inconsistent nature of the common law in relation to arbitration. We agree with those who have made submissions to us that the most appropriate remedy is to make an arbitration conducted under the Employment Relations Act 2000 subject to the provisions of the Arbitration Act 1996 with one important qualification. The qualification would be that all references to the High Court should be replaced by references to the Employment Court, so that the supervisory jurisdiction is carried out by that specialist court. Thus, for example, an application for leave to appeal on a question of law would be brought to the Employment Court and the appeal would be heard

²³⁰ *Doleman & Sons v Ossett Corp*, above n 229, and *Novamaze v Cut Price Deli* (1995) 128 ALR 540 (FCA).

²³¹ The technique was upheld in *Scott v Avery* [1855–56] HLC 811 (HL).

²³² *Doleman & Sons v Ossett Corp*, above n 229, 267–268 and *Bulk Chartering v T & T Metal Trading*, above n 229, 34 (NSWCA) Sheller JA; see also Rhidian Thomas “*Scott v Avery* Agreements” [1991] LMCLQ 508, 526–527.

²³³ The power was recognised in modern times in *Channel Group v Balfour Beatty Ltd* [1993] AC 334 (HL); however, it appears that as early as the nineteenth century courts also utilised their inherent jurisdiction to stay proceedings brought in breach of arbitration agreements (see Law Commission of New South Wales *Working Paper on Commercial Arbitration* (NSW, 1973) paras 103–106).

²³⁴ In the Parliamentary debates that preceded the passing of the Arbitration Act, strong emphasis was given to the desirability of replacing the old law with a modern Act. Peter Hilt, in introducing the Bill, said “The aim of the Bill is to facilitate the use of arbitration in New Zealand. The existing ... law ... fails in that respect as it is hopelessly out of date and difficult to follow.” Hon David Caygill added “The importance of this subject is a good example of why it is necessary to keep New Zealand’s commercial law up to date” (See Peter Hilt (21 August 1996) 557 NZPD 14245, 14247.)

in that court if leave were granted. If there were a subsequent appeal it would go to the Court of Appeal which, in all matters under the Employment Relations Act 2000, is also the final arbiter.

- 230 If this recommendation is adopted we see merit in repealing section 155(3) of the Employment Relations Act 2001 so that submission of an employment relationship problem to arbitration (after it has arisen) will prevent access to the Employment Relations Authority or the court for adjudication, but will not prevent the use of mediation services.²³⁵
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²³⁵ In *Tutty v AC Blackmore* [1999] 1 ERNZ 587, the Employment Court considered whether, under the Employment Contracts Act 1991, a submission to arbitration in an employment contract was enforceable. On the wording of the particular contract, it held that it was not, since the relevant clause did not provide for personal grievances. The judgment, however, contemplated that a submission to arbitration, which did provide an effective procedure, may be enforceable. The Court gave specific attention to the question of provisions in the Arbitration Act 1996 providing for applications and appeals to the High Court, noting, without deciding the question, that these may be able to be dealt with by the Employment Tribunal or Court (607–608).

Part 6
New issues raised by
submissions

New issues raised by
submissions

INTRODUCTION

231 **T**HE SUBMISSIONS that we received in response to the preliminary paper also raised some new issues. For the sake of completeness we now outline those issues. However, we have taken the view that we will only make recommendations if the issues raised are unlikely to require reconsideration through further consultation. We are mindful of the fact that submitters have not had an opportunity of commenting on these particular issues.

232 The topics with which we deal in the chapters which follow are:

- Whether a new “purposes” provision should be added to the Arbitration Act.
 - Whether section 13 of the Act is drawn sufficiently widely in relation to the immunity granted in favour of arbitrators.
 - Whether added words inserted into Article 8 of the First Schedule to the Act should be deleted.
 - Whether the parties should be entitled to agree to a higher standard of review when the courts of general jurisdiction hear appeals from arbitral awards.
 - Whether the powers of the High Court on matters of interim relief should be extended.
-

16

Purposes of the Arbitration Act 1996

233 **S**ECTION 5 OF THE ACT sets out certain specific purposes. It states:

The purposes of this Act are—

- (a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
- (b) To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and
- (c) To promote consistency between the international and domestic arbitral regimes in New Zealand; and
- (d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
- (e) To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
- (f) To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in the Schedule 3).

234 The AMINZ, drawing on legislation in other jurisdictions, submits that a further provision should be inserted into the Act, as section 5A, to identify the main objects of the Act. The AMINZ submits that a new section 5A should be enacted in the following terms:

5A General Principles

The provisions of this Act are founded upon the following principles and shall be construed accordingly:

- (a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- (b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

- 235 The AMINZ submits that these objects are already implicit in the Act and it is appropriate to make explicit what is currently implicit.
- 236 We are not prepared, at this stage, to embark upon a consideration of this new issue. We say that because:
- We have already summarised in the preface to this report the principles underpinning the Act which we believe have now been widely accepted. The possibility of adding a new section dealing with general principles, to be read alongside a provision dealing with purposes, seems to us to have the potential to cause difficulties. Which provision is to be given priority? And, why? As an example of a judgment which acknowledges principles underpinning the Act we refer to *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* where Blanchard J, delivering the judgment of the Court of Appeal, referred to Parliament's intentions to encourage the use of arbitration to resolve disputes between parties, and to limit the High Court's involvement in reviewing and setting aside arbitral decisions, citing, as support, observations made by the sponsor of the Arbitration Bill into the House of Representatives, Mr P Hilt MP, during the course of debates before the House.²³⁶
 - We think that any suggestion of this type cannot properly be characterised as incidental to the issues which we addressed in our preliminary paper. In the absence of consultation on the issue we are not prepared to make any recommendation.

²³⁶ *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 155, 322–323 (CA).

17

Extent of immunity for arbitrators

- 237 **S**ECTION 13 OF THE ARBITRATION ACT provides:
An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.
- 238 The question has been raised with us as to whether that immunity ought to be extended beyond negligence so as to preclude the possibility of speculative causes of action being framed to defeat the objective of section 13. Given that, for reasons set out in paragraph 15 above, the arbitrator is a party to the arbitration agreement, the fact that a claim may be brought in contract creates an issue as to whether the term “negligence” is sufficient.
- 239 The Arbitration Act 1996 (UK) provides an immunity for arbitrators in the following terms:
29.-(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the Act or omission is shown to have been in bad faith.
- 240 Given that the basis for arbitral immunity is the analogy with judicial immunity, it seems to us to be preferable to express the immunity in the terms adopted in the United Kingdom. In passing, we note that the choice of words in section 13 of our Act is taken from Australian precedent.²³⁷
- 241 While expressing the view that the wording adopted in the United Kingdom may be preferable, we take the matter no further as we have not consulted on the issue. If legislation is introduced to give effect to recommendations in this report, it will be for the sponsoring minister to decide whether to amend section 13 in the manner suggested, or leave the matter for submissions to a select committee.

²³⁷ New Zealand Law Commission, above n 1, paras 262–264.

The “added words” of Article 8 of the First Schedule

- 242 **T**HIS ISSUE CONCERNS the situation where parties have agreed to submit disputes to arbitration, but one of the parties, rather than pursuing arbitration, issues summary judgment proceedings against the other. The law reform issue is whether they should be entitled to obtain judgment by that means if the other party has no arguable defence, but still genuinely disputes the claim.
- 243 At present, the position is governed by Article 8 of the First Schedule. We set out Article 8 with the critical passage (the “added words”) italicised:

8 Arbitration agreement and substantive claim before court—

- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party’s first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, *or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.*

- 244 The italicised words were added as a result of a recommendation made by this Commission in 1991. The reasons for insertion of the added words were explained in full in paragraphs 308 and 309 of our 1991 report in the following terms:

- 308 The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report:

Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely “that there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 *Arbitration International* at 53).

The phrase makes explicit in this provision the element of “dispute” which is already expressly included in article 7(1) when

read with s 4. The same reasoning underlies the recommendation in the Alberta ILRR report that a court be empowered to refuse to stay an action if “the case is a proper one for a default or summary judgment”.

309 In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no “matter which is the subject of an arbitration agreement” within the meaning of article 8(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

245 The AMINZ drew to our attention a decision of Master Thomson in *Todd Energy Ltd v Kiwi Power (1995) Ltd*.²³⁸ In that case, Master Thomson criticised the “added words” because, in his view, the court was required to hear the summary judgment application before the application for stay. The Master took the view that the Commission had made a “serious error” in recommending the insertion of the “added words”.²³⁹ The Master went so far as to suggest that applying for summary judgment had the potential to sabotage the ability to go to arbitration.²⁴⁰

246 Master Thomson summarised his reasons for thinking that the “added words” had potential to create problems in the following terms:²⁴¹

- (1) The necessity for the court in each case to determine what constitutes a dispute?
- (2) The approach the Court should take when faced with concurrent applications for summary judgments and stay.
- (3) The fact that if the Court hears the summary judgment application and refuses it then two hearings (at least) will result. In such cases duplication of judicial resources and the extra time and costs will follow.
- (5) There is a real danger if the summary judgment application fails and the dispute goes to arbitration, the arbitrator (often possessed of greater expert knowledge than the Court as to the nature of the dispute) will be handicapped in resolving it by findings made

²³⁸ *Todd Energy Ltd v Kiwi Power (1995) Ltd* (29 October 2001) High Court Wellington CP 46/01 Master Thomson.

²³⁹ *Todd Energy Ltd v Kiwi Power (1995) Ltd*, above n 238, 9, 10.

²⁴⁰ *Todd Energy Ltd v Kiwi Power (1995) Ltd*, above n 238, 22.

²⁴¹ *Todd Energy Ltd v Kiwi Power (1995) Ltd*, above n 238, 10 para 34.

by the Judge which will be res judicata *Maclean v Stewart* (1997) 11 PRNZ 66.

- (6) To determine the summary judgment may take hours even days to hear (the English experience), and the Master's experience here.

247 We are not prepared to revisit this issue. The efficacy of the summary judgment procedure is in issue. Clearly the Commission, in 1991, made its recommendation after receiving submissions which led it to believe that the “added words” were necessary. We are not prepared to reject that view without undertaking further public consultation. It is a matter which submitters will be at liberty to raise with a select committee if a Bill is introduced into the House of Representatives to give effect to recommendations made in this report.

Contracting for a higher standard of review on appeal

- 248 **T**HE ARBITRATORS' AND MEDIATORS' INSTITUTE of New Zealand Inc referred us to three decisions from Federal appellate courts in the United States which have considered whether parties to an arbitration are able to agree to expand the standard of review on appeals from awards from the narrow grounds presently contained in the (US) Federal Arbitration Act.²⁴²
- 249 The cases demonstrate a conflict of opinion between the appeal courts for the Ninth and Tenth Circuits. We note that the extent of disagreement is somewhat wider. We refer to judgments of the Third and Fourth Circuits Courts of Appeals respectively in *Roadway Package System v Kayser*²⁴³ and *Syncor International v McLeland*.²⁴⁴ We are invited by AMINZ to add to clause 5 of the Second Schedule to the Arbitration Act to outlaw any agreement by the parties to extend the scope of appellate review.
- 250 This is an issue of policy on which we are not inclined to make recommendations without the benefit of public consultation.

²⁴² See *Lapine Technologies Corp v Cyocera* (1997) 130 F3d 884; *Owen v Amoco Pipeline Co* (2001) 245 F3d 925; *Gateway Technologies Inc v MCI Telecommunications Corp* (1995) 64 F3d 993.

²⁴³ *Roadway Package System v Kayser* (2001) 257 F3d 287.

²⁴⁴ *Syncor International v McLeland* (11 August 1997) US App Lexis 21248, No 96-2261. In footnote 3 of *Roadway Package System v Kayser*, above n 243, a number of other cases from Federal District Courts, which have considered the issue, are cited. For a recent review of the cases and literature on the topic, see Robert T Greig and Inna Reznik "Current Developments in Enforcement of Arbitration Awards in the United States" (2002) 68 *Arbitration* 120, 122–126.

Powers of High Court on applications for interim relief

- 251 **A**N ISSUE has been raised by AMINZ as to whether the words “as it has for the purposes of proceedings before that court” in Article 9(2) of the First Schedule and the phrase “as it would have in civil proceedings before that court” at the end of clause 3(3) of the Second Schedule unduly restrict powers of the High Court or the District Court to grant interim relief.
- 252 We take the view that the powers of the court to give assistance to the arbitral tribunal and to order interim relief cannot go beyond the powers conferred upon those courts. We are not prepared to make any recommendations in relation to this issue.
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APPENDIX A

HONG KONG ARBITRATION ORDINANCE

Section 2D Proceedings to be heard otherwise than in open court

2D Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court. (Added 64 of 1989 s5)

Section 2E Restrictions on reporting of proceedings heard otherwise than in open court

2E(1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court.

- (2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.
- (3) A court shall not give a direction under subsection (2) permitting information to be published unless—
 - (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

2E(4) Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall—

- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
 - (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate. (Added 64 of 1989 s5)
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APPENDIX B

SINGAPORE INTERNATIONAL ARBITRATION ACT (CHAPTER 143A)

Proceedings to be heard otherwise than in open court

22. Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.

Restrictions on reporting of proceedings heard otherwise than in open court

- 23.(1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.
- (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.
- (3) A court shall not give a direction under subsection (2) permitting information to be published unless—
- (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.
- (4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall—
- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and

- (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.
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APPENDIX C

STATUTES WHERE EXPRESS PROVISION IS MADE FOR PRIVATE APPEALS

Children, Young Persons, and Their Families Act 1989

- B1 Section 166 of the Act places significant restrictions on those permitted to be at the hearing of any proceedings in a Family Court under the Act. Section 329 places similar restrictions on hearings in a Youth Court. Sections 346 and 357 provide that the restrictions in sections 166 and 329 carry through to appeals from a Family Court and Youth Court respectively.

Bail Act 2000

- B2 The Act provides:

18 Bail hearing may be in private

A court may, having regard to the interests of the defendant or any other person and to the public interest, order that the whole or any part of an application for bail or an appeal against a bail decision be heard in private.

19 Court may prohibit publication of matters relating to hearing

A court may make an order prohibiting the publication of any report or description of the hearing or any part of the hearing including, without limitation, all or any of the following:

- (a) the identity of the defendant applying for bail;
- (b) the decision of the court on the application;
- (c) the conditions of bail, if bail is granted.

Property (Relationships) Act 1976

- B3 The relevant provisions state:

35 Proceedings may be in private

(1) Any application or appeal under this Act shall be heard in private if [either spouse or de facto partner] so desires it.

[(2) Subject to subsection (1) of this section, where any application is made under this Act to a District Court, the provisions of section 159 of the Family Proceedings Act 1980 shall apply.]

35A Restriction of publication of reports of proceedings

- (1) No person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the leave of the Court which heard the proceedings.

Disputes Tribunals Act 1988

B4 Section 39(1) provides that all Tribunal proceedings are to be held in private. Section 53(1) of the Act says:

53 Powers of District Court Judge on appeal

...

- (3) An appeal under this section shall be heard by a District Court Judge in chambers and, subject to this Act and to any rules made under this Act, the procedure at any such hearing shall be such as the Judge may determine.

What constitutes a hearing “in chambers” and the publicity attendant to it, is not defined in either the District Courts Rules 1992 or the High Court Rules. There is no express requirement that a hearing in chambers be conducted in private; although customarily such hearings are conducted privately.²⁴⁵ Decisions made in chambers may be published.²⁴⁶

STATUTES THAT PROVIDE THAT ALL RELATED PROCEEDINGS ARE PRIVATE

Adoption Act 1955

B5 Section 22 of the Act says:

22 Applications not to be heard in open Court

No application under this Act shall be heard or determined in open Court, and no report of proceedings under this Act shall be published except by leave of the Court which heard the proceedings.

The Act also restricts the inspection of adoption records.

The question of what is meant by the term “application” for the purposes of section 22 was considered in *Re E*.²⁴⁷ That case

²⁴⁵ There is a useful discussion of the meaning of the term “chambers” in this context in the judgment of Dame Elizabeth Butler-Sloss P in *Allan v Clibbery*, above n 18, paras 17–19 (CA). See also the discussion of “chambers” hearings in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 (CA) Lord Woolf MR and *Re PB (Hearings in Open Court)* [1996] 2 FLR 765, 769 and *Forbes v Smith* [1998] 1 FLR 835.

²⁴⁶ District Courts Rules 1992, r 74; High Court Rules, r 72A.

²⁴⁷ *Re E* [1958] NZLR 532 (HC).

concerned an application for writs of mandamus and certiorari directed at a magistrate in respect of adoption proceedings. It was conceded by counsel that section 22 expressly contemplated appeals, being proceedings contemplated by the Adoption Act. But, counsel doubted whether proceedings in the High Court for prerogative writs came within the prohibition. FB Adams J held that the applications were covered by section 22, holding that any proceedings in the High Court “necessarily incidental to adoption proceedings” should be held in private.²⁴⁸

Family Proceedings Act 1980

B6 Section 159(2) and (4) provide:

159 Conduct of proceedings

- (2) No person shall be present during the hearing of any proceedings under this Act (other than criminal proceedings or proceedings under section 130 of this Act) except—
- (a) Officers of the Court;
 - (b) Parties to the proceedings and their barristers and solicitors;
 - (c) Witnesses;
 - (d) Any other person whom the Judge permits to be present.
- ...
- (4) Notwithstanding subsection (2) of this section,—
- (a) Where proceedings under the [Property (Relationships) Act 1976] are heard together with proceedings under this Act, the whole of the proceedings shall be heard in private if a party to the proceedings so requests; and
 - (b) Where proceedings under the [Property (Relationships) Act 1976] are heard together with proceedings under this Act, and no party to the proceedings requests that they be heard in private, the provisions of subsection (2) of this section shall, unless the Court otherwise determines, apply as if the whole of the proceedings were proceedings under this Act.
- ...

The words “the hearing of any proceedings under this Act” seem to be the same in all material respects to those in the Adoption Act. So appeals appear to be covered by s 159(2).

²⁴⁸ See also *Director General of Social Welfare v TVNZ* (1989) 5 FRNZ 594 (HC) in which Gault J reached a similar conclusion with regard to s 24 of the Children and Young Persons Act 1974.

Guardianship Act 1968

B7 The relevant parts of the Act state:

27 Proceedings not open to public

- (1) No person shall be present during the hearing of any proceedings (other than criminal proceedings) under this Act except—
 - (a) Officers of the Court;
 - (b) Parties to the proceedings and their barristers and solicitors;
 - (c) Witnesses;
 - (d) Any other person whom the Judge permits to be present.
- (2) Any witness shall leave the courtroom if asked to do so by the Judge.
- (3) Nothing in this section shall limit any other power of the Court to hear proceedings in private or to exclude any person from the Court.

27A Restriction of publication of reports of proceedings

- (1) No person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the leave of the Court which heard the proceedings.
...
- (3) Nothing in this section shall limit—
 - (a) The provisions of any other enactment relating to the prohibition or regulation of the publication of reports or particulars relating to judicial proceedings; or
 - (b) The power of any Court to punish any contempt of Court.
- (4) Nothing in this section shall apply to the publication of any report in any publication that—
 - (a) is of a bona fide professional or technical nature; and
 - (b) is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of marriage counselling, or social welfare workers.

The relevant parts of the legislation seem identical to those in the Adoption Act 1955, and so appeals appear to be covered by section 27(1).

Domestic Violence Act 1995

B8 Section 83 of the Act provides:

83 Conduct of proceedings

- (1) No person may be present during the hearing of any proceedings under this Act (other than criminal proceedings) except the following persons:
 - (a) Officers of the Court;
 - (b) The parties to the proceedings;

- (c) Any lawyer representing any party to the proceedings:
 - (d) Any lawyer appointed pursuant to section 81 of this Act in respect of the proceedings:
 - (e) Where, pursuant to any provision of this Act, any person is bringing or defending the proceedings on behalf of another person,—
 - (i) The person so bringing or defending the proceedings:
 - (ii) The person on whose behalf the proceedings are so brought or defended:
 - (f) Witnesses:
 - (g) Any person who is nominated by the applicant for a protection order or by a protected person in accordance with subsection (2) of this section:
 - (h) Any other person whom the Judge permits to be present.
- (2) For the purposes of any proceedings to which this section applies, any party to the proceedings (being an applicant for a protection order or a protected person) may nominate a reasonable number of persons (being members of his or her family, whanau, or family group, or any other person) to attend any hearing of those proceedings for the purpose of providing support to that person.
 - (3) Any witness must leave the courtroom if asked to do so by the Judge.
 - (4) No person present in the courtroom pursuant to subsection (1)(g) of this section is entitled to be heard at the hearing, and the Court may exclude any such person from the hearing at any time.
 - (5) Nothing in this section limits any other power of the Court to hear proceedings in private or to exclude any person from the Court.

The section is slightly different from the preceding provisions, but again contains the words “hearing of any proceedings under this Act” which seem materially indistinct from those in the Adoption Act.

Alcoholism and Drug Addiction Act 1966

B9 Section 35 of the Act states:

35 Legal proceedings

- (1) Every application made to a Court or a Judge or a [District Court Judge] under this Act shall be heard and determined in private.
- (2) Every person who is the subject of any such application shall be entitled to be heard and to give and call evidence and may be represented by a solicitor or counsel.
- (3) No Court fees shall be payable in respect of any such application. The determination of an application under section 9 of this Act may be adjourned in accordance with the provisions of [section 23

of the Mental Health Act 1969] which section shall apply with such modifications as are necessary, but this subsection shall not limit any other power of the Court, Judge, or [District Court Judge] to adjourn the determination of the application.

STATUTES WHERE NO PROVISION IS MADE FOR PRIVATE APPEALS

Taxation Review Authorities Act 1994

B10 Section 16(4) of the Taxation Review Authorities Act 1994 provides:

16 Hearing of objections by an Authority

...

- (4) The hearing of an objection [or a challenge] before an Authority shall not be open to the public.

Section 16(4) refers only to proceedings before the Authority. While, in *Commissioner of Inland Revenue v Dick*,²⁴⁹ Glazebrook J held that appeals should proceed under Part X of the High Court Rules²⁵⁰ Her Honour did not address the question whether it was appropriate for the appeal to be heard in private.

The High Court also deals with taxation issues under the Case Stated procedure in Part XI High Court Rules; see also Part 8 Tax Administration Act 1994. These procedures have no equivalent rule corresponding to rule 718(7) of the High Court Rules.

There is conflicting authority on questions of confidentiality in this context. In *Trustees of the Auckland Medical Aid Trust v Commissioner of Inland Revenue*²⁵¹ Chilwell J opined that confidentiality should prevail for two reasons. First, a taxpayer should not be prejudiced because he or she chose to have a point of law determined in the High Court rather than the Taxation Review Authority; second, preservation of secrecy is a basic policy

²⁴⁹ *Commissioner of Inland Revenue v Dick* (2000) 14 PRNZ 378 (HC).

²⁵⁰ The relevant rule is r 718(7) of the High Court Rules on which r 889 of the High Court Rules (dealing with appeals from arbitral tribunals) is based. The Court is given all powers and discretions of the tribunal, or person whose decision is appealed from, to hold the hearing or any part of it in private and to make orders prohibiting the publication of any report or description of the proceedings or any part of them.

²⁵¹ *Trustees of the Auckland Medical Aid Trust v Commissioner of Inland Revenue* (1979) 4 NZTC 61,404 (HC).

underlying New Zealand's tax legislation.²⁵² But, in *P v Commissioner of Inland Revenue*²⁵³ Neazor J took a contrary approach. In Neazor J's view the principle of open justice prevailed except to the extent that personal and business details could be suppressed if they were not central to an understanding of the case.²⁵⁴

²⁵² See also ss 6 and 6A Tax Administration Act 1994.

²⁵³ *P v Commissioner of Inland Revenue* (1997) 18 NZTC 13,487 (HC).

²⁵⁴ On the facts, however, Neazor J, although favouring open justice, granted the application for confidentiality, while Chilwell J, favouring confidentiality, denied the application; cf *Wattie v Commissioner of Inland Revenue*, above n 70.

APPENDIX D

List of submitters

Arbitrators' and Mediators' Institute of New Zealand Inc

David Cairns

WG Draper

Alisa Duffy, QC

David Gately

Ministry of Consumer Affairs

New Zealand Law Society

David O'Neill

Terence Stapleton

Don Sweet

Tom Weston, QC

David William, QC

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