Arbitration and Dispute Resolution

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Since the last review in 2006, the Arbitration Amendment Act 2007 ("the 2007 Act") has implemented most of the recommendations of the New Zealand Law Commission (see *Improving the Arbitration Act 1996*, NZLC R83, 21 February 2003) and also introduced the new interim measures and preliminary orders regime proposed by the United Nations Committee on International Trade Law ("UNCITRAL") in its Model Law on International Commercial Arbitration 1985 (as amended in 2006). The decisions of the English Court of Appeal and the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267 (EWCA); [2007] 1 Lloyd's Rep 254 (HL) represent the most important judicial development in recent years. They contain both a welcome reassertion of the separability doctrine enshrined in Art 16 of Schedule 1 to the Arbitration Act 1996 ("the 1996 Act") and confirmation of the general principles that arbitration clauses should be enforced where possible and that "one-stop" dispute resolution should be supported. The New Zealand Court of Appeal has introduced an appropriately restrictive test to be applied when special leave to appeal from the High Court to the Court of Appeal is sought in relation to questions of law arising out of an award. Finally, the growing importance for New Zealand of investment treaty arbitration has been underscored by the arbitration provisions of the New Zealand/China Free Trade Agreement 2008 ("the NZ/China FTA"). These matters will be the primary focus of this review but several New Zealand decisions on various arbitration topics will also be briefly noted.

The Arbitration Amendment Act 2007

The important 2007 Act has already been analysed in depth; see Kawharu, "New Zealand's Arbitration Law Receives a Tune-Up" (2008) 24 Arb Int

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405. Hence, this review will be confined to highlighting the main changes introduced by the legislation.

A *Confidentiality and privacy of arbitral proceedings*

The most important aspect of the 2007 Act is the introduction of a new confidentiality regime. In 1996, the New Zealand legislature introduced s 14 of the 1996 Act — a statutory implied term as to confidentiality and privacy — in response to widespread concerns about the decision of the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 128 ALR 391 (HCA). There the majority of the High Court of Australia had ruled against a general duty of confidentiality in the absence of express agreement.

In 1996, the United Kingdom Departmental Advisory Committee on the Arbitration Bill ("the DAC") considered the possibility of including provisions on confidentiality in the Arbitration Act 1996 (UK) (see DAC Report on the Arbitration Bill (February 1996) paras 9–17, quoted in Merkin & Flannery, *Arbitration Act 1996* (4th ed, 2008) 267–268), but concluded that:

> For English arbitration, the exceptions to confidentiality are manifestly legion and unsettled in part; and equally, there are important exceptions to privacy [of arbitral proceedings] … Given these exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue. Far from solving a difficulty … it would create new ones.

The DAC therefore decided that a comprehensive confidentiality provision was too difficult to draft and that the matter was better left for judicial development on a case-by-case basis. However, the Privy Council expressed reservations about the desirability of characterizing the duty of confidentiality as an implied term and then formulating exceptions to it; see *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 (PC). Nevertheless, the recent decision of the English Court of Appeal in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 represents a comprehensive judicial attempt to lay down general principles regarding implied terms as to arbitral confidentiality. As shall be demonstrated below, there are both similarities and divergences when one compares the New Zealand legislative regime with the judicial statement of principles in *Emmott*.

The original New Zealand provision in s 14 of the 1996 Act was of a fairly elementary nature and simply introduced a so-called "default rule"

that established a statutory implied obligation of confidence in all arbitral proceedings. Its major defect was that it did not address obvious exceptions to the general rule of confidentiality. Its inadequacies were soon exposed by the High Court in *Television NZ Ltd v Langley Productions Ltd* [2000] 2 NZLR 250, where it was held that arbitral confidentiality had to give way to the principle of open justice when the parties resorted to the courts to challenge an arbitral award. Robertson J said (at 255):

> In order for the cloak of confidentiality which attached to the private dispute resolution of the parties to necessarily apply to subsequent proceedings in the High Court, would in my judgment require a clear and unambiguous determination of Parliament.

Consequently, in its 2003 Report, the New Zealand Law Commission recommended that a more comprehensive confidentiality regime be established. Parliament accepted this recommendation.

The amending legislation has replaced s 14 of the 1996 Act with ss 14A–14I, which establish detailed provisions dealing with the privacy of arbitral proceedings, the obligation of confidence in relation to information generated by the arbitration, and the exceptions. The obligation of confidence has been retained in s 14B, extending to the tribunal and not just the parties themselves. In turn, s 14C lists more detailed exceptions to this obligation of confidentiality than its predecessor provision in s 14(2) of the 1996 Act. For example, it provides for disclosure when it is necessary to protect a party's legal rights in relation to a third party.

Parliament has affirmed the open justice principle in s 14F, with a rebuttable presumption in favour of public hearings of arbitral matters in the courts. Section 14F reflects a balancing of the competing interests in transparency and accountability of the judicial process and the expectation by many commercial parties that the arbitration be confidential. As a corollary to s 14F, s 14H sets out the criteria to which the courts must have regard in determining whether to order private hearings, namely the open justice principle; the privacy and confidentiality of arbitral proceedings; any public interest considerations; the terms of the arbitration agreement between the parties; and the reasons put forward by the applicant for closed court hearings. Whilst no indication has been given in the 2007 Act directing as to how these competing interests should be evaluated, the general presumption of open justice will usually prevail.

A notable feature of the 2007 Act is the requirement that during the course of the arbitral proceedings any disputed issues concerning confidentiality must first be addressed by the arbitral tribunal itself, with the High Court available for appeals against such arbitral decisions.

B Emmott v Michael Wilson & Partners Ltd

As Dundas has explained in his helpful article (see Dundas, "Confidentiality in Arbitration: The Final Chapter?" (2009) Asian DR 26), the English Court of Appeal decision in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 establishes some important principles in relation to the scope of the implied confidentiality obligation in arbitration.

Emmott involved a claim for breach of contract and trust, resulting in arbitration in London and litigation in several other jurisdictions. The respondent argued that part of the litigation derived from the same dispute as the London arbitration, and was concerned that in the foreign litigation the applicant continued to allege fraud on the part of the respondent, despite the fact that such assertions had been withdrawn from the London arbitration. The English High Court gave permission to the respondent to disclose certain arbitration documents in the foreign litigation. Flaux J accepted that while the material was prima facie confidential, such confidentiality was subject to two applicable exceptions, namely where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party and also a public interest exception.

In the principal judgment of the English Court of Appeal, Lawrence Collins LJ dismissed the appeal, finding that whilst there was an implied obligation on the parties not to disclose, for any other purpose, documents that had been prepared for and used in the course of an arbitration, the present case fell under the "interests of justice" exception to this principle identified by Flaux J (para 111).

Thomas LJ identified the following established principles in relation to the confidentiality of documents generated in the course and conduct of arbitration (para 129):

> (i) The obligations of privacy and confidentiality are contractual. If there is an express agreement ... those obligations must be interpreted and applied.
> (ii) There is implied, in the absence of specific [contrary] agreement, a specific obligation of confidentiality in relation to documents produced by each party to the arbitration ... analogous to that [applicable in litigation].
> (iii) An obligation of confidentiality will attach to documents or evidence in an arbitration where the evidence or documents are inherently confidential or private (such as a trade secret).
> (iv) In the absence of an express term, it is implied that the conduct of an arbitration is private [and] [t]he parties are under an obligation to keep it so. [This obligation is distinct from those in (ii) and (iii).]

(v) Although there has plainly been a move to greater privacy … the obligations of privacy are not however absolute … [for example,] the right of a party to provide information about the arbitration which it is compelled by law to provide, such as to a regulator or in annual accounts.

(vi) … [A] party is not bound to keep a matter relating to an arbitration private where it is reasonably necessary to use that matter to protect its legitimate private interests or where the public interest reasonably requires that the obligation of privacy no longer attaches to that matter. …

(vii) There may be other ways in which the obligations are qualified, but these remain to be determined; they do not arise in this appeal.

(viii) As the obligations, whether express or implied, are contractual, the parties may modify them by subsequent agreement.

(ix) Where the parties do not agree on the scope or the application of the obligations, then the issue must be determined by the tribunal having jurisdiction to determine it.

Many of these elements are specifically addressed in the 2007 Act. The second principle is encapsulated in the new s 14B, which provides that, unless the parties agree otherwise, an obligation of confidentiality will be implied into all arbitration agreements. The fourth principle is reflected in s 14A, which provides for privacy in the conduct of the proceedings. The fifth principle, recognizing that an obligation of confidentiality is not absolute, is expressed in s 14C, which sets out those exceptions to the presumptive default rule. Thomas LJ recognized several of those exceptions stated under s 14 C, including situations where disclosure is required by law or a regulatory body (see s 14C(d)(i) of the 2007 Act). His Lordship's sixth principle can also be found in s 14C(b), which acknowledges that disclosure may be reasonably necessary to ensure that a party has a full opportunity to present its case or to establish and protect its legal rights in relation to a third party. The public interest consideration is articulated in s 14E(2)(a), which provides that the High Court may allow or prohibit disclosure of confidential information if it is satisfied that the public interest will be preserved by its ruling. In his seventh principle, Thomas LJ also acknowledged that there may be other exceptions to the obligation of confidentiality. Under s 14C of the 2007 Act, some of these other exceptions are specifically set out, including s 14C(a) — disclosure to a professional or other adviser of any party — and s 14C(b)(i)(C) — disclosure for the making and prosecution of an application to a court under the 2007 Act.

Thomas LJ expressed the firm view, reflected in his last principle, that the scope of confidentiality obligations is a matter to be determined by the arbitral tribunal. Lawrence Collins LJ suggested more tentatively the same

view. As noted earlier, under s 14D of the 2007 Act, the arbitral tribunal is given precedence to determine whether confidential information should be disclosed. The High Court may only consider a matter of disclosure, under s 14E of the 2007 Act, where the tribunal has been terminated or on appeal by a party against a decision of the tribunal.

It remains an open question whether it is more desirable that the legislature or courts enumerate the principles governing confidentiality and privacy. One sub-issue that arises from this question is whether courts or arbitral tribunals should enumerate exceptions to confidentiality based on public interest or interests of justice considerations. Arguably, a tribunal may not have the same legitimacy as a court to decide definitely on what is or is not in the public interest, although some investment treaty arbitral tribunals have decided cases involving corruption on public interest grounds; see, for example, *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No ARB/00/7, Award: 4 October 2006. Section 14E(2)(a) of the 2007 Act clarifies the issue to the extent that it empowers the High Court to overrule a tribunal's decision not to disclose, if disclosure is in fact in the public interest.

The reviewers consider that the New Zealand legislative regime is likely to be more efficient than a case-by-case development, since it introduces greater certainty and a clearer demarcation of the role of the courts and the arbitral tribunal; see further Hwang, "Defining the Indefinable — Pratical Problems of Confidentiality in Arbitration" (Kaplan Lecture, 2008).

C *Consumer protection in arbitration agreements*

The consumer protection provisions in s 11(1)(c) of the 1996 Act have spawned considerable litigation and created marked uncertainty as to who should be classified as a "consumer"; see, for example, *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608; *Bowport Ltd v Alloy Yachts International Ltd* [2004] 1 NZLR 361.

The more restrictive definition of consumer introduced by s 5(2) of the 2007 Act eliminates the unintended protection previously given to parties such as local authorities and corporate players that could hardly be properly characterized as "consumers". Under the 2007 Act, a consumer party to a contract must be an individual in order to trigger the protections of the amended s 11.

D *The meaning of "questions of law" for appeals on questions of law*

Since the enactment of the 1996 Act, widely different judicial views have been expressed in the High Court as to whether a perverse finding of fact made by an arbitral tribunal, or the complete absence of evidence to support an arbitral finding, are capable of amounting to a "question of law" that may be the subject of an appeal under cl 5 of Schedule 2 to the 1996 Act; see [2000] NZ L Rev 61, 72–79. In *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA), para 55, the New Zealand Court of Appeal saw "some force in the argument that whether there was any evidence to support a particular finding of fact … is not a question of law in the context of the 1996 Act". Resolving this uncertainty, cl 5(10)(b) expressly states that a "question of law" does not include "any question as to whether — (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts". The addition of this clause promotes the objectives of encouraging arbitration by clarifying the limits of judicial intervention. The amendment reflects the established principle that the arbitral tribunal, and not the court, is the master of the facts. As Lord Mustill said in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* (UKPC, 16 November 1995, Lords Keith of Kinkel, Jauncey of Tullichettle, Mustill, Nicholls of Birkenhead & Hoffmann) (reported as an appendix to *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318, 338):

> Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions … the findings of fact by the arbitrator are impregnable, however flawed they may appear.

E *Interim measures and preliminary orders*

The 2007 Act has also seen a significant overhaul to the limited and undefined interim measures provisions in Art 17 of Schedule 1 to the 1996 Act. The 2007 Act introduces the interim measures regime introduced in 2006 into the UNCITRAL Model Law on International Commercial Arbitration 1985. The 2006 provisions were finalized after the New Zealand Law Commission had completed its report, but they were brought to the attention of the Justice and Electoral Committee, which decided that these provisions should be incorporated in order to further international harmonization and to achieve increased certainty as to when and how interim measures would be made available to the parties.

Another feature introduced by the 2007 Act is the new UNCITRAL preliminary orders regime. A "preliminary order" is defined in Art 17 of Schedule 1 to the 1996 Act as "an order directing a party not to frustrate the purpose of an interim measure". It is secured initially from the tribunal without notice being given to the opposing party. As initially drafted, this new regime received a hostile reaction from the arbitration community; see, for example, Van Houtte, "Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration" (2004) 20 Arb Int 85. The preliminary orders regime in its final form reflected a compromise solution containing numerous safeguards against abuse; see Menon & Chao, "Reforming the Model Law Provisions on Interim Measures of Protection" (2006) 2 Asian Int Arb J 1, 10–17. The procedure, which is subject to an opt-out provision, is designed to give protection to applicants for interim measures in situations where prior disclosure of the request for an interim measure to the respondent risks frustrating the purpose of that measure; see Arbitration Act 1996, Schedule 1, Art 17D(1). It is important to note that preliminary orders are not enforceable by the courts; see Arbitration Act 1996, Schedule 1, Art 17G. This resulted from a compromise reached in the amended Model Law text to reflect concerns about the propriety of an arbitral tribunal operating on an ex parte basis.

The same criteria are to be applied by the arbitral tribunal in considering a preliminary order application as govern the grant of an interim measure, except that the harm to be assessed is that likely to result from the order being granted or not; see Arbitration Act 1996, Schedule 1, Art 17D.

In addition to the above conditions, the 2007 Act imposes a number of procedural safeguards that acknowledge the fact that it is an exceptional remedy. These include the requirement that the arbitral tribunal immediately notify all parties of a determination in respect of an application for a preliminary order and disclose any communications between a party and the arbitral tribunal relating to the order. The party against whom the preliminary order is directed must be given the opportunity to present its case at the earliest practicable time, with the tribunal's decision to be given promptly; see Arbitration Act 1996, Schedule1, Art 17E(1). In a similar vein, a preliminary order may only remain in force for 20 days after the date on which it is issued, but subject to the possibility that the arbitral tribunal may grant an interim order adopting or modifying the order after giving notice to the respondent and providing an opportunity for the respondent to present its case; see Arbitration Act 1996, Schedule 1, Art 17F.

Moreover, an arbitral tribunal must require an applicant for a preliminary order to provide appropriate security, unless it is inappropriate or unnecessary to do so; see Arbitration Act 1996, Schedule 1, Art 17I(2). The regime also imposes an obligation on the applicant to disclose to the arbitral tribunal all circumstances that are likely to affect the determination until the

respondent has had the opportunity to present its case; see Arbitration Act 1996, Schedule 1, Arts 17J(2)–(3).

Finally, the applicant for a preliminary order is liable for costs and damages should the arbitral tribunal later determine that the order should not have been issued; see Arbitration Act 1996, Schedule 1, Art 17K(1). As with interim measures, an arbitral tribunal may modify, suspend, or terminate a preliminary order upon the application of any party, or, in "exceptional circumstances", on its own initiative; see Arbitration Act 1996, Schedule 1, Art 17H.

The Scope of Arbitration Clauses and the Doctrine of Separability — *Fiona Trust & Holding Corporation v Privalov*

The Fiona Trust is a holding company owned by Sovcomflot, a Russian state-owned enterprise. Through the Fiona Trust and its subsidiaries, Sovcomflot operates one of the largest commercial shipping fleets in the world. *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267 (EWCA); [2007] 1 Lloyd's Rep 254 (HL) arose out of eight charterparty contracts whereby the Fiona Trust, as owners, and eight one-ship companies in the Sovcomflot group granted time charters to certain chartering companies controlled by Mr Nikitin, a Russian businessman living in England. It was alleged that Mr Nikitin had obtained the charters on highly favourable terms by paying bribes to three senior executives in the Sovcomflot group. This was one element of a larger action in the English Commercial Court, in which the Fiona Trust and related companies were seeking to recover over £500 million from Mr Nikitin and others on the basis of allegations of conspiracy to defraud and bribery in the management of the Russian commercial fleet.

Each charter contract contained a clause permitting either party to elect to have disputes referred to arbitration in London. After the shipowners purported to rescind the contracts, the charterers commenced arbitration proceedings. In response, the shipowners commenced court action pursuant to s 72 of the Arbitration Act 1996 (UK), seeking to restrain the arbitral proceedings on the grounds that they had rescinded the contracts, and correspondingly the arbitration clauses contained within them. In return, the charterers sought a stay of the court action in favour of the arbitration pursuant to s 9 of the Arbitration Act 1996 (UK).

The question that arose was whether it was for the courts or an arbitrator to determine the owner's entitlement to rescind the contract. The arbitration clause contained in cl 41 of the charter contract provided:

> ...
>
> (b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred ... to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime Association of Arbitrators, in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.

(i) A party shall lose its right to make such an election only if:

(a) it receives from the other party a written notice of dispute which —

(1) states expressly that a dispute has arisen out of this charter;

(2) specifies the nature of the dispute; and

(3) refers expressly to this clause 41(c); and

(b) it fails to give notice of election to have the dispute referred to arbitration not later than 30 days from the date of receipt of such notice of dispute ...

At first instance, Morrison J ([2006] EWHC 2583 (Comm)) declined the stay and granted interlocutory injunctions in favour of the owners, restraining the arbitral proceedings pending trial of the court action.

A *The English Court of Appeal's decision*

The charterers appealed. The English Court of Appeal ([2007] 2 Lloyd's Rep 267 (EWCA)) was faced with two principal issues. First, whether the scope of the arbitration clauses was wide enough to cover the question of whether the contract was procured by bribery. Secondly, in light of the doctrine of separability, whether the court or the arbitral tribunal was to determine whether a party would be bound, by submission, to arbitration when it alleges that, but for the bribery, it would never have entered into the contract containing the arbitration clause.

On the first issue, the matter was complicated by inconsistency in the wording of the clause: the main part referred to any dispute arising "under this charter", but one of the sub-clauses referred to a dispute arising "out of this charter". The owners were able to point to dicta that "arising under" is narrower than "arising out of". The English Court of Appeal was unimpressed with this citation of authority and held that a jurisdiction or arbitration clause in an international commercial contract should be liberally construed.

The English Court of Appeal chose to depart from previous case law that had attempted to draw fine distinctions between these alternatively

formulated clauses. Instead, the Court called for a "fresh start", asserting that the difference between such phrases was immaterial. The Court suggested pragmatically that arbitration clauses, in particular those arising in international commercial contracts, should be subject to a liberal construction. Longmore LJ reasoned that when businessmen agree to have their disputes heard in a particular court or by a particular tribunal, "they do not expect ... that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause" (para 17). Longmore LJ said that, although in the past the words "arising under the contract" had sometimes been given a narrower meaning, that should no longer continue to be so (para 18). His Lordship continued (para 19):

> One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction.

Applying this approach, the Court concluded that in the present case the dispute as to whether the contract could be set aside or rescinded for alleged bribery fell within the meaning of the arbitration clause.

On the second issue of separability, the English Court of Appeal affirmed the principle that an arbitration clause is a separate contract, and will survive the destruction or termination of the principal contract, adopting a similar approach to the United States Supreme Court in *Buckeye Check Cashing v Cardegna*, 546 US 440 (USSC, 2006). The Court held that bribery will not impeach the whole contract, unless there is a special reason for saying that the bribery impeaches the arbitration clause in particular. The Court, however, did note that there may be limits to this principle. As intimated by Hoffmann LJ in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 (EWCA), an arbitration clause may not be protected by the doctrine of separability in cases of non est factum, where, as a matter of fact, it is found that no agreement was ever reached between the parties.

B *The House of Lords' decision*

The House of Lords ([2007] 1 Lloyd's Rep 254 (HL)) affirmed the decision of the English Court of Appeal. In the leading judgments of Lord Hoffmann and Lord Hope of Craighead, the House of Lords adopted a consistent position on the two principal issues, providing a pertinent discussion of the interpretation and construction of arbitration clauses. Lord Hoffmann emphasized that as arbitration is consensual, it is dependent on the intention of the parties as expressed in their agreement. Therefore, in order to determine what kinds of dispute the parties intended to submit to arbitration, it is necessary to look to the words of the agreement in light of its commercial background. Adopting this approach, Lord Hoffmann questioned whether the parties "as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts" (para 7). The House of Lords concluded that very clear language would be required in order to find an intention to exclude certain questions from the arbitrator's jurisdiction. Lord Hoffmann observed though that such an intention was unlikely, as "... businessmen frequently ... want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration ..." (para 10). Applying this reasoning, the House of Lords concluded that there was nothing in the dispute resolution clause to suggest that the parties intended to exclude disputes concerning the validity of the contract.

In his discussion of the construction of arbitration clauses, Lord Hope of Craighead suggested that in light of the standard-form nature of many contracts, negotiated between parties in the international market, many businessmen were "unlikely to trouble themselves too much about its precise language" (para 26). With this in mind, his Lordship expressed the opinion that a liberal construction of such clauses, on the basis of the assumption that the parties agree that a single tribunal will resolve all disputes, may promote legal certainty.

On the second issue of separability, Lord Hoffmann agreed with the approach of the English Court of Appeal — that an arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds that relate directly to the arbitration agreement. This principle is set out in s 7 of the Arbitration Act 1996 (UK) and in Art 16 of the UNCITRAL Model Law on International Commercial Arbitration 1985; see Arbitration Act 1996, Schedule 1, Art 16.

Lord Hoffmann did contemplate circumstances in which both the principal and arbitration agreement could still be found invalid, such as where the signature to the document encompassing both agreements had been forged. However, his Lordship distinguished such circumstances from

those alleged in *Fiona Trust*, where an agent had allegedly merely exceeded his authority to enter into the principal agreement, acting for improper reasons. Lord Hoffmann asserted that in the latter circumstances, the arbitration agreement may remain valid, as circumstances that suggest the owners were bribed to consent to the main agreement will not necessarily mean the agent was also bribed to enter into the arbitration agreement. As Lord Hope of Craighead explained, "[a]llegations that are parasitical to a challenge to the validity to the main agreement" will not be sufficient to impeach the arbitration agreement (para 35).

Lord Hope of Craighead noted that the views of the English Court of Appeal on construction of arbitration clauses were in line with overseas trends (paras 29–31):

> The Court of Appeal said that the time had come for a fresh start to be made, at any rate for cases arising in an international commercial context. It has indeed been clear for many years that the trend of recent authority has risked isolating the approach that English law takes to the wording of such clauses from that which is taken internationally. It makes sense in the context of international commerce for decisions about their effect to be informed by what has been decided elsewhere. ... The Bundesgerichtshof's Decision of 27 February 1970 to which Lord Hoffmann has referred makes two points that are relevant to this issue. The first is that haphazard interpretations should be avoided and a rule of construction established which presumes, in cases of doubt, that reasonable parties will wish to have the claims arising from their contract decided by the same tribunal irrespective of whether their contract is effective or not. The second is that experience shows that as soon as a dispute of any kind arises from a contract, objections are very often also raised against its validity. As the Bundesgerichtshof said, entrusting the assessment of the facts of the case to different tribunals according to the approach that is taken to the issues between them is unlikely to occur to the contracting parties. ... In *AT&T Technologies Inc v Communications Workers of America*, (1986) 475 US 643 at 650, the United States Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail. In *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* (1991) 923 F 2d 245 at 248, the court observed that federal arbitration policy required that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration and that arbitration clauses should be construed as broadly as possible. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 at [165] the Federal Court of Australia said that a liberal approach to the words chosen by the parties was underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of

> having possible disputes from their transaction being heard in two places, particularly when they were operating in a truly international market. This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too.

There are a number of New Zealand cases that have drawn a distinction between phrases such as "arising under" or "arising out of" arbitration; see, for example, *New Zealand Insurance Life Ltd v Partington Consultants Ltd* (HC Auckland, M 1842-90, 13 December 1990, Wylie J); *Williams v Chase* (HC Auckland, CP 465-91, 3 May 1991, Tompkins J) (discussed [1991] NZ Recent L Rev 372–375). Some of these earlier cases may well be decided differently in the future, as the suggested distinctions between these phrases are unlikely to be sustained.

The Test for Leave to Appeal from the High Court to the New Zealand Court of Appeal under the Arbitration Act 1996, Schedule 2, clause 5(5)

In *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [2008] 2 NZLR 591 (CA), the New Zealand Court of Appeal addressed an application for leave to appeal under cl 5(5) and cl (6) of Schedule 2 to the 1996 Act. Downer Construction had entered into a contract with Silverfield to design and construct townhouses in Auckland, which shortly after completion started to leak. Relying on a warranty that Downer had provided, Silverfield called on the construction company to make good the damage. After the parties failed to agree who was at fault for the damage, the matter went to arbitration.

The Arbitrator found in favour of Silverfield that Downer had breached its obligations under the contract, and that the respondent was entitled to an order for specific performance. Heath J ordered that the awards be entered as judgments on 12 December 2005. Downer then made a belated attempt to appeal Heath J's decision, bringing an application under r 29(4) of the Court of Appeal (Civil) Rules 2005 (SR 2005/69). Randerson J granted Downer leave on one question of law, asserting that during the course of the oral hearings the issues had been narrowed. Consequently, Downer also sought leave to appeal Randerson J's partial refusal to grant leave under cl 5(1)(c) pursuant to the provision in cl 5(5). Clause 5(5) permits a party to appeal to the New Zealand Court of Appeal against a refusal by the High Court to grant leave. This application was dismissed by Harrison J in July 2006, and so Downer sought to appeal Harrison J's judgment, making an application under cl 5(6) for the New Zealand Court of Appeal to grant special leave to appeal.

A *Grant of special leave to appeal out of time*

The New Zealand Court of Appeal refused to grant Downer special leave to appeal on three main grounds. First, the Court held that the application was filed well outside the appeal period, almost two and a half months out of time, and in circumstances where no acceptable reason for delay had been advanced. Secondly, Downer had consented to the entry of the awards as judgments, which the Court considered an important factor weighing against the applicant. Thirdly, the Court asserted that in any event, the proposed appeal had no reasonable chance of success.

B *Test for leave to appeal from the High Court under the Arbitration Act 1996, Schedule 2, clauses 5(5) and 5(6)*

The Court considered for the first time what should be the appropriate test governing the right to appeal from the High Court to the New Zealand Court of Appeal under cl 5(5) and cl 5(6). The Court acknowledged that in *Cooper v Symes (No 2)* (2001) 15 PRNZ 166, Randerson J had suggested that the test under cl 5(5) be akin to an application for leave to appeal to the New Zealand Court of Appeal under s 67 of the Judicature Act 1908. However, in *Downer*, the New Zealand Court of Appeal was not so much concerned with equating these two tests, holding instead that the primary focus should be whether the question of law was worthy of consideration. The Court concluded by stating that a determination to grant leave under cl 5(5) should be governed by the following principles in *Symes* (para 33):

> (a) The appeal must raise some question of law … capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
> (b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.
> (c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation that has been twice considered and ruled upon by a Court.

With regard to applications under cl 5(6), the Court held that where the High Court has already refused leave, the New Zealand Court of Appeal will only grant special leave if the High Court judge's decision is plainly wrong or if the test set out in *Symes* has not been applied, or has been misapplied. The

Court was hesitant to find any difference in the tests under cl 5(6) and cl 5(5). Instead, the Court expressed the view that the tests were essentially the same, but that the New Zealand Court of Appeal would exercise its powers sparingly, mindful of why the High Court had already declined leave.

C *Limitation on those issues on which leave will be granted on appeal*

In determining whether to grant special leave to appeal, the Court also established that those issues on appeal, set out in an application to the New Zealand Court of Appeal, could not be wider than those for which leave to the High Court was first granted. The Court in *Downer* supported the narrow approach advocated by Harrison J, that "the appellate funnel should narrow rather than widen" (para 39). The Court further held that Downer could not use a second appeal "as a backdoor means of expanding its argument into a wider challenge to the award than was contemplated when leave was granted" (para 39). Instead, the Court held that Harrison J had been "right to express surprise as to how a determination of one question of law could possibly give rise to ten questions of law at the next rung of the appellate ladder" (para 41).

Investment Treaty Arbitration

The development of treaty-based foreign-investment dispute resolution mechanisms arose out of the need to supplement customary international law rules at a time when newly independent states required foreign capital to develop their economies. These states were often unable to attract foreign investment and wealth-creating international transactions in the absence of reliable protections for investors. Early bilateral investment treaties ("BITs") involved reciprocal undertakings between states, whereby each state guaranteed a minimum standard of treatment to investors of the other state. These treaties did not confer any rights on investors that they could enforce directly against a host state. Instead, disputes had to be resolved between the state parties to the treaties under the established rules of international law, which have been summarized as follows in Cremades, "Promoting and Protecting International Investments" (2000) Int Arb L Rev 53, 56:

> For most purposes, individuals and private business organizations have no standing under international law. A complaint that a state has breached its international obligations can be made only by another state. Historically, this was as true in the area of foreign investments as in any other. If a private investor experienced an injury as a result of an action by a state in breach

> of its international obligations, the investor's only means of redress was to seek to have its national government take action on its behalf …

Such dispute resolution procedures depended upon states being prepared to sponsor claims and pursue them through time-consuming intergovernmental arbitration or other dispute resolution methods. However, from the 1960s there emerged a trend towards giving foreign investors the right to bring actions directly against host states. Initially, host states recognized the legal personality of foreign investors by individual contract, but the most significant development was the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ("the ICSID Convention"). The ICSID Convention created the International Centre for Settlement of Investment Disputes ("ICSID") and permitted foreign investors to refer a dispute with a state party directly to ICSID, if consent was obtained in writing. The source of consent in BITs came to be seen as the making of an offer to resolve disputes by ICSID arbitration, which an investor could accept by referring a dispute to ICSID — a system that has been characterized as "arbitration without privity"; see Paulsson, "Arbitration Without Privity" (1995) 10 ICSID Rev-Foreign Investment LJ 232.

Blanket consents to arbitration became common in the 1970s and the number of BITs containing such provisions increased dramatically in the 1980s and 1990s. It is estimated that over 2,600 BITs are in force and that the number of BIT arbitrations continues to grow; see United Nations Conference on Trade and Development, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (2008) 17. In *Sancheti v The Mayor and Commonality & Citizens of the City of London* [2008] EWCA Civ 1283, Lawrence Collins LJ summarized the expansion of investment treaty cases as follows (paras 1–3):

> The number of arbitrations on the plane of public international law has greatly expanded in recent years as a result of the widespread use of [BITs] under which each Contracting State agrees in advance that the nationals of the other Contracting State will have a right of recourse to international arbitration against it. The method of arbitration agreed may be arbitration under the auspices of [ICSID] or it may be ad hoc arbitration … Typically under a BIT the investor is given direct standing to pursue his own claim against the State of the investment in respect of any 'investment dispute'. The arbitration provision in the BIT can amount to a standing offer to investors to arbitrate, and acceptance of this standing offer to arbitrate by an investor gives rise to a binding arbitration agreement between the investor on the one hand and the host state on the other. In the absence of a specific choice of law, the law to which the agreement to arbitrate between

the investor and the host state is subject is international law: *Republic of Ecuador v Occidental Exploration & Production Company* [2005] EWCA Civ 1116, [2006] QB 432; *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep 421.

The NZ/China FTA contains specific chapters on "Investment" and "Investor-State Dispute Settlement". This BIT is well developed in its legal structure, as may be highlighted by its comparison with the Model United States Bilateral Investment Treaty 2004 ("the Model United States BIT"). The investment provisions in the NZ/China FTA and, specifically, those providing for investor–state dispute settlement are very similar to the United States Model BIT.

A *Substantive protections*

The investment dispute resolution provisions in the NZ/China FTA are much more comprehensive and far reaching in scope than those contained in other recent trade and investment agreements to which New Zealand is a party. The parties give their clear consent (unconditioned apart from the usual "cooling-off" period considered below) to arbitrate investor claims in Art 153. This is in marked contrast to the ambiguous and possibly conditional consent given in the Closer Economic Partnership Agreements ("CEPA") that New Zealand signed with Singapore in 2001 and Thailand in 2005. Indeed, the only other unconditional treaty commitment by New Zealand to arbitrate investor disputes is contained in the little-known BIT with Hong Kong dating back to 1995 (compare Angelo & Xiong, "Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand" (2007–2008) 5 NZYIL 65, 76–77).

Whilst, at face value, the investment provisions concerning national and "most favoured nation" treatment in Arts 28 and 29 of the NZ/Singapore CEPA seemed broad, Art 32 qualified the application of these provisions significantly, providing that those limitations listed by the parties in Annex 3 would not receive the benefits of such treatment. Likewise, the NZ/Thailand CEPA qualified the national treatment obligations of the parties by the limitations listed in Annex 4. The virtue of the Singapore and Thailand CEPAs is that the limitations are listed, and therefore certain. The NZ/China FTA also includes exceptions to both the national treatment and "most favoured nation" obligations. In respect of national treatment, Art 141 permits any existing but unspecified discrimination to continue, subject only to a weak obligation on the parties to endeavour to remove the otherwise non-conforming measures. Article 141 also limits the application of national treatment to the scope of each party's national treatment commitments contained in existing BITs

that the party has entered into with other countries. China has entered into nearly 100 other BITs. The position of the New Zealand investor in China is made somewhat uncertain by Art 141 (and vice versa), and the provision may provide fertile ground for dispute in the future. Unlike the Singapore and Thailand CEPAs, the national treatment rule in the NZ/China FTA does not extend to the pre-establishment phase, and the "most favoured nation" rule only applies with respect to future (and not existing) treaties. The "most favoured nation" rule also includes a standard reservation for fisheries and maritime affairs; see NZ/China FTA, Art 139(5).

The dispute resolution clauses in the NZ/China FTA are broadly comparable to the Model United States BIT. Both encourage the settlement of disputes by way of consultation and negotiation between the parties, requiring a six-month "cooling off" period, before arbitration proceedings may be instigated. Like the Model United States BIT, the NZ/China FTA allows the aggrieved investor to select whether to submit to arbitration governed by ICSID or UNCITRAL rules, although under the Model United States BIT, the parties have the alternative option of choosing to submit their dispute to another arbitral institution. ICSID arbitration is institutional arbitration; UNCITRAL is not. However, claimants opting for arbitration under UNCITRAL rules will often agree to partial administration by the Permanent Court of Arbitration.

This selection of forum by the claimant may affect the review process available to the parties subsequent to arbitration. In ICSID arbitration, the ICSID Convention creates a supranational system that excludes appeal, thus foreclosing challenges to awards on the traditional grounds under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This was pointed out by Heron J in *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649. The autonomous character of ICSID arbitration is clearly stated in Art 26 of the ICSID Convention, which provides that consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of other remedies. By submitting to ICSID arbitration, the parties therefore have the assurance that they may take full advantage of procedural rules specifically adapted to their needs and, equally importantly, that the administration of these rules will be exempt from the scrutiny or control of the domestic courts of states that are parties to the ICSID Convention. ICSID itself supplies the only remedies available to the losing party, namely as to the interpretation of the meaning or scope of the award, revision on the grounds of the discovery of a previously unknown factor of decisive importance, and annulment of the award by an ad hoc review committee. In short, ICSID itself is expected to supply its own internal quality control systems. If an investment treaty claimant selects ICSID arbitration under the ICSID Convention, the review process is internalized within ICSID itself and the parties may not challenge

enforcement of the award in domestic courts by way of appeal or other remedy.

However, if arbitration under the UNCITRAL rules is chosen, those rules do not provide an international review procedure for recourse against awards. The matter is left to the courts at the seat of the arbitration, and the scope and procedure of review will be determined by the applicable international commercial arbitration legislation at the seat of the arbitration, as was the case in the controversial *United Mexican States v Metalclad Corporation* [2001] BCSC 664 (2 May 2001); see Williams, "Challenging Investment Treaty Arbitration Awards — Issues Concerning the Forum Arising from the *Metalclad Case*", in Van Den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (2003).

The question arises whether this lack of a uniform forum in investment treaty claims is avoidable or, if not, whether it matters. At a basic level, arbitral alternatives have to be offered under investment treaties that provide investors with the right to arbitrate directly against state parties because of the undeniable fact that not all states are party to the ICSID Convention. Moreover, if one key object of such BITs is to encourage investor confidence, then the provision of alternative fora may help to serve that purpose by presenting widely different alternatives to claimants. If the choice of the claimant-investor may possibly lead to different outcomes, then that is primarily a matter for the investor to consider. The lack of uniformity appears to be no different in character from that which often exists under forum selection options available in both domestic and international litigation.

The timeline for arbitration proceedings set out in the NZ/China FTA is comparable to the Model United States BIT, with both agreements requiring that the investor give three months' notice prior to submitting the claim to arbitration, as well as establishing a limitation period of three years in which a claim must be brought (starting from the point at which the investor is deemed to have constructive notice of a breach of an obligation under the Agreement). Unlike Art 24 of the Model United States BIT, the NZ/China FTA does not include a detailed statement of the nature of those claims that may be submitted to arbitration.

B *"Fork in the road" provisions*

Article 153(3) of the NZ/China FTA sets out the relationship between arbitral and court proceedings. It is not necessary that a case be first brought to the domestic courts. Instead, where a dispute has already been brought to a domestic court, those proceedings must be withdrawn before final judgment and before arbitration may proceed. Such provisions have often been characterized as a "fork in the road", requiring the party to elect the forum in

which its dispute will be heard. The Model United States BIT further requires that the election to instigate arbitral proceedings be accompanied by a waiver of the right to initiate or continue proceedings before an administrative tribunal or court. However, unlike the NZ/China FTA, the Model United States BIT allows a claim for interim injunctive relief to be made to a judicial or administrative tribunal, despite the instigation of arbitration proceedings and as long as proceedings do not involve the payment of monetary damages.

C *Appointment of arbitral tribunal*

The NZ/China FTA does not make specific provision for the appointment or selection of arbitrators, although it may be assumed that, depending on whether the claimant elects to have arbitration proceedings conducted under the ICSID or UNCITRAL rules, appointment will follow the ICSID arbitration rules or Art II of the UNCITRAL rules.

D *Applicable law*

Another notable feature of the NZ/China FTA is that it does not include a specific clause stipulating the law that governs the determination of a claim. Under the Model United States BIT, the governing law to be applied is clearly set out. Article 30 provides that the tribunal shall decide a claim in accordance with the BIT and applicable rules of international law. If the claim concerns a breach of investment authorization or an investment agreement, the tribunal will apply the rules of law specified in the investment authorization or as the disputing parties otherwise agree. In the absence of agreed rules, the tribunal may have recourse to applicable rules of international law. The governing law is stipulated in Art 9(16) of New Zealand's CEPA with Thailand. For the purposes of that CEPA, the arbitral tribunal is required to reach its decision on the basis of the national laws and regulations of a party to the dispute, the provisions of the present CEPA, and the applicable rules of international law.

E *Confidentiality*

The NZ/China FTA arguably requires a lesser degree of transparency in relation to the arbitral proceedings than is facilitated by the Model United States BIT, which starts with the presumption under Art 29(2) that the tribunal conduct its hearings in public, but provides that the tribunal may ensure the protection of information designated as being protected by either

disputing party. By contrast, under Art 157 of the NZ/China FTA, the tribunal's documents relating to the arbitral proceedings will only be made publicly available if the state party considers it appropriate. On a related issue, Art 28(3) of the Model United States BIT permits, with the tribunal's approval, participation in the proceedings by non-disputing parties (through written submissions) on matters of public interest. There is no such provision in the NZ/China FTA.

F *Definition of "investment"*

This is an important topic and there have been many BIT cases that have had to consider the definition of "investment" as a jurisdictional matter; see Williams, "Jurisdiction and Admissibility", in Muchlinski, Ortino & Schreuer (eds), *Oxford Handbook of International Law* (2008) ch 22, 875–882. The particular language used in Chapter 11 on "Investment" in the NZ/China FTA is distinct from New Zealand's previous BITs; see Xiong & Angelo, "New Zealand-China FTA" [2008] NZLJ 403. These authors have also drawn attention to the fact that, whilst "natural person" is defined in Art 135 of the NZ/China FTA and the phrase "legal person" is also used, the term "juridical person" has been replaced in the NZ/China FTA by the term "enterprise". This use of the term "enterprise" is notable for its breadth and is defined in Art 135 as:

> ... any entity constituted or otherwise organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization ...

There is a very broad definition of "investment" in Art 135 of the NZ/China FTA:

> 'Investment' means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following: (a) movable and immovable property and other property rights such as mortgages and pledges; (b) shares, debentures, stock and any other kind of participation in companies; (c) claims to money or to any other contractual performance having an economic value associated with an investment; (d) intellectual property rights, in particular, copyrights, patents and industrial designs, trade marks, trade-names, technical processes, trade and business secrets, know-how and goodwill; (e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources; (f)

> bonds, including government issued bonds, debentures, loans and other forms of debt [defined as '[l]oans and other forms of debt, which have been registered to the competent authority of a Party, do not mean trade debts where the debts would be non-interest earning if paid on time without penalty'), and rights derived therefrom; (g) any right conferred by law or under contract and any licences and permits pursuant to law ...

The definition of "investments", confusingly, follows the definition of "investment". Its placement in the definitions section is problematic — the provision extends the application of the protection against uncompensated expropriation (but not other protections) to certain entities in third countries that are "owned or controlled" (not defined) by investors of one party and made in the territory of the other party. The provision applies if the "third country" (rather than its investors) has no right or abandons the right to claim compensation after the "investments" (referred to in the plural) have been expropriated by a party. While one can make assumptions about its intended purpose, the logic and effect of this provision as written are not entirely clear.

Recent New Zealand Cases

A *Todd Taranaki Ltd v Energy Infrastructure Ltd*

Todd Taranaki Ltd v Energy Infrastructure Ltd (HC Wellington, CIV-2007-485-2684, 19 December 2007, Dobson J) involved an originating application seeking the removal of an arbitrator in the course of arbitral proceedings on the basis that there were justifiable doubts as to the arbitrator's impartiality. It was alleged that certain informal remarks had been made by the arbitrator that showed prejudice. In the end, it was found that the allegedly inappropriate words had not been uttered by the arbitrator, and that the observations that were made did not evidence any lack of impartiality. Therefore, the Court found that no justifiable doubts had been made out, and the application for an order that the arbitrator withdraw or be removed was dismissed.

There is no doubt about the soundness of the decision. However, there are two procedural aspects of the case that cause concern. The first is the unspoken assumption that the Court had jurisdiction to entertain a challenge during the arbitration. An earlier review ([2004] NZ L Rev 87) has dealt with a similar instance in *Auckland Co-operative Taxi Society Ltd v Perfacci Ltd* (HC Auckland, CIV-2003-404-5495, 10 October 2003, Heath J), where the High Court assumed jurisdiction during a partially completed arbitral hearing. In that earlier review, it was considered that the Court had mistakenly assumed jurisdiction, a point made in the following terms:

> Was Art 13 indeed an available procedure to challenge the arbitrator's alleged biased conduct during the arbitration? It is submitted that it was not. Arts 12 and 13 appear in Chapter III, under the heading 'Composition of Arbitral Tribunal'. There is a later Chapter V, consisting of Arts 18–27, concerning the 'Conduct of Arbitral Proceedings'. Article 12(1) establishes the duty of disclosure, which begins when a person is approached with a view to appointment and continues throughout the arbitral proceedings. Article 12(2) restricts the grounds upon which challenge may be made and precludes a challenge by a party who has appointed an arbitrator to reasons of which that party has become aware only after the appointment has been made. The latter restriction obviously deals with conflicts issues relating to the arbitrator's own professional circumstances and personal relationships. It is not directed to his or her conduct in the arbitration. ... Having set out the limited grounds for challenge in this way in Art 12, Art 13 provides for the challenge procedure, which is obviously confined to challenges falling within Art 12. There is a 15-day time limit following the constitution of the arbitral tribunal or after the challenging party first becomes aware of matters during its involvement in the appointment. This obligation of disclosure extends to any subsequent event relating to the arbitrator's qualifications for appointment that come to light during the course of the arbitral proceedings, but are outside those proceedings. In short, the challenge procedure in Art 13 is designed to deal with those situations where the arbitrator has a possible disqualifying conflict of interest. It is not designed to encompass challenges to the arbitrator's conduct during the course of the proceedings.

This view is strongly supported by reference to the *travaux préparatoires* to the UNCITRAL Model Law on International Commercial Arbitration 1985; see [2004] NZ L Rev 87, 96.

There are very good reasons for confining challenges regarding the arbitrator's conduct during the arbitral proceedings to the post-award stage; see [2004] NZ L Rev 87, 96. First, such challenges may be premature. The observations of an arbitrator during the claimant's case could be of concern, but fears of bias would be assuaged if the arbitrator makes similar comments when the respondent presents its case. Secondly, the eventual award may favour the party who considers that there has been arbitral bias or misconduct during the hearing, so that the alleged instances of bias will come to nothing. Thirdly, there are grave dangers in allowing challenges during the arbitral proceedings. It may allow a party, who forms an initial impression that it may have chosen "the wrong arbitrator" and not one disposed to their case, to disrupt the arbitral proceedings. It is a matter of regret that once again neither counsel nor the Court in *Todd Taranaki* considered this important jurisdictional question.

The second feature of *Todd Taranaki* worthy of mention is the fact that the arbitrator was subpoenaed by the party resisting the application for removal. He was asked a few questions about his qualifications and experience. He was then cross-examined for about an hour about whether he had made the alleged statement that was said to reveal his partiality. The Court ruled that "[u]ltimately, his evidence was that he did not make any such comment" (para 30). The Judge also records the argument of counsel, including an insinuation of "... a direct denial coming only when pushed in cross-examination and after numerous earlier deflections of the issue by statements that he would have not made such a remark, [counting] against the credibility of that ultimate direct denial" (para 31). So the arbitrator's credibility was being assailed by the very counsel who was appearing before him and who would continue to do so if the challenge was rejected, which is what happened. Such tactics may make it difficult for the arbitrator to regain the necessary goodwill of the parties that is so important for the effective functioning of the tribunal. Moreover, the challenging party may conclude that there is nothing to be lost in making the challenge — "if we succeed in removing him, all to the good; if not, he may unconsciously incline toward us". While it is true that the court needs to ascertain what precisely are the facts that are said to found the allegation of partiality, it does seem rather unusual for the arbitrator to be summoned and interrogated. Surely the proper course in the general run of cases will be for the arbitrator to file an affidavit as to any relevant factual matters, and then to stand aside and let the court decide upon the validity of the challenge. Leave to permit cross-examination should not be freely granted.

B *Aitken v Ishimaru Ltd*

Ms Aitken was the director of a company, Good Look Co Ltd, who had contracted with Ishimaru Ltd to act as a commission agent for the sale of properties developed by Ishimaru Ltd. When a dispute arose between the parties as to the payment of commissions, Ms Aitken issued proceedings against Ishimaru Ltd. In return, Ishimaru Ltd sought a stay on the grounds that proceedings related to a matter that was the subject of an arbitration agreement.

In determining the order, the High Court in *Aitken v Ishimaru Ltd* (HC Auckland, CIV-2006-404-7953, 25 October 2007, Venning J) addressed the question of whether the parties' agreement in 2003 did in fact contain an agreement to arbitrate, despite the fact that the arbitration process was predicated on the parties' first undergoing optional mediation.

The dispute resolution clause in cl 11.1 of the 2003 agreement stated in relevant part (emphasis added):

> Every dispute which the Contractor may have with the Company shall be resolved by the following procedures. ... If any dispute or difference arises between the parties in connection with or arising out of this Contract or its performance, any party may give written notice specifying the nature of the dispute and its intention to refer such dispute or difference, in the first instance, to mediation. If a request to mediate is made then the party making the request will invite the chairperson for the time being of the New Zealand Chapter of Lawyers Engaged in Alternative Dispute Resolution ("LEADR") to appoint a mediator to enable the parties to mediate and settle the dispute. ... If a dispute or difference is unresolved after the parties have attended mediation, either party *may* thereafter by written notice to the other, require the matter to be determined by arbitration of a single independent arbitrator, if the parties can agree on one, or otherwise by an arbitrator appointed by the Company for the time being of the Auckland District Law Society, which shall be conducted as soon as practicable at Auckland in accordance with, and subject to, the Arbitration Act 1996.

In his judgment, Venning J held that the use of the word "may" in the second paragraph of the arbitration clause did not render the arbitration clause non-binding, observing that this wording is commonly used in the context of such clauses — the same conclusion was reached by Bingham J in *The Messiniaki Bergen* [1983] 1 All ER 382. Venning J held that, as parties to a dispute can always agree to go to mediation, cl 11.1 would be rendered meaningless unless it was understood to have binding effect. The direct language of the opening words of the dispute resolution clause — "every dispute ... shall be resolved by the following procedures" — were held unambiguously to confirm this conclusion. Consequently, the Court concluded that, read as a whole, the clause was clear and therefore, by executing the contract containing this clause, both parties had agreed to adopt the procedures it set out for dispute resolution. The first stage required mediation, followed by a second stage involving arbitration in the event that mediation proved unsuccessful. On this basis, the Court determined that cl 11.1 was an agreement to submit to arbitration, with its staged procedure for dispute resolution not detracting from the binding nature of the process ultimately leading to arbitration.

On this basis, the Court held that Art 8 of Schedule 1 to the 1996 Act required it to stay its proceedings and refer the parties to arbitration. The Master's decision to refuse a stay was overturned. The soundness of this decision is unquestionable, and it exemplifies the principle that wherever reasonably possible the courts should enforce arbitration agreements.

C *General Distributors Ltd v Melanesian Mission Trust Board*

In *General Distributors Ltd v Melanesian Mission Trust Board* [2008] 3 NZLR 718, Lang J ruled that an arbitral tribunal's ruling on discovery of documents was not an award, and thus was not amenable to appeal under cl 5 of Schedule 2 to the 1996 Act. Arbitration proceedings were instigated when General Distributors Ltd, the operator of one of New Zealand's main supermarket chains, fell into a dispute with the owner of the premises of one of its Auckland supermarkets over the market value of its lease. During the interlocutory process leading up to the arbitration, the parties were unable to reach agreement regarding the scope of discovery. The tribunal therefore issued a "discovery ruling" ordering General Distributors Ltd to provide information that had been sought by the Melanesian Mission Trust Board. Subsequently, General Distributors Ltd sought leave to appeal the ruling to the High Court under cl 5(1)(c) of Schedule 2 to the 1996 Act, contending that the tribunal's decision had been based on an error of law.

The application required Lang J to determine whether the Court had the necessary jurisdiction to determine the appeal, namely whether General Distributors Ltd's appeal was in respect of an "award". Clause 5 of Schedule 2 to the 1996 Act provides that "… any party may appeal to the High Court on any question of law arising out of an award …". The term "award" is defined in s 2(1) of the 1996 Act as "… a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award …".

In his judgment, Lang J observed that the use of the phrase "substance of the dispute" in cl 5 draws a distinction between procedural and practical matters and substantive matters that affect the rights of the parties. The Judge referred favourably to *McConnell Dowell Constructors Ltd v Pipeflow Technology Ltd* (HC Auckland, M 2029-98, 25 March 1999, Paterson J), where Paterson J articulated these distinctions (at 7–8):

> Substantive law defines, creates or confers legal rights or legal status or imposes and defines the nature and extent of legal duties. The function of practice and procedure is to provide the machinery for the manner in which legal rights or legal status and legal duties are recognized or enforced by the properly constituted tribunal, … in this case, the Arbitrator. … The right of appeal to this Court on any question of law arising out of an award, as given by [cl] 5 of the Second Schedule to the Act, is a right in respect of awards which touch on the legal rights or duties which arise from the dispute between the parties which has been referred to arbitration. There is no right of appeal in those cases where the award is a procedural award which does not cover the substance of the dispute.

Lang J affirmed this position. His Honour held that parties to an arbitration may only appeal to the court against an interim or final decision of an arbitral tribunal that decides the "'actual dispute" that the tribunal has been asked to decide, or appeal those issues of law that substantially affect the rights of one or more of the arbitral parties. Considering the application for appeal at issue in this case, Lang J stressed that an order relating to matters of discovery had no immediate effect on the legal rights and obligations of the parties to the arbitration. Whilst the tribunal had characterized the decision in question as a "discovery ruling", it involved only the determination of an interlocutory procedural issue. Expressing this in another way, Lang J emphasized that the parties had not referred their dispute regarding discovery to arbitration. Rather, the dispute submitted to arbitration concerned the rental to be paid in respect of the leased premises.

In support of his decision to dismiss the application for leave to appeal, Lang J also highlighted several important policy considerations. His Honour noted s 5 of the 1996 Act, which sets out the purposes of that legislation as being, inter alia, "... [t]o encourage the use of arbitration as an agreed method of resolving commercial and other disputes ..." and "... [t]o redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards ...". Lang J concluded that it was the legislative intention to limit the High Court's involvement in reviewing arbitral decisions, and therefore cl 5 must be interpreted accordingly. Further, attention was drawn to the fact that a sophisticated commercial party, such as General Distributors Ltd, must be assumed to be familiar with the disadvantages of electing to pursue arbitration rather than litigation, which include in particular "the strict statutory limit on the extent to which parties may have recourse to this Court in relation to decisions made by an arbitral tribunal" (para 30).

Subsequently, General Distributors Ltd applied for leave to appeal to the New Zealand Court of Appeal. In an oral judgment, Chisholm J considered whether Lang J had been right to find that the High Court did not have jurisdiction to entertain the appeal against the tribunal's ruling on discovery; see *General Distributors Ltd v Melanesian Mission Trust Board* (HC Auckland, CIV-2008-404-4436, 21 November 2008, Chisholm J). Chisholm J followed Lang J's decision, affirming that his conclusion reflected the underlying philosophy of the 1996 Act and arguing that to grant leave to appeal to the High Court (or the New Zealand Court of Appeal) "where purely procedural matters are involved would be entirely contrary to the statutory regime" (para 16). These two decisions represent a welcome confirmation that the courts will not review the procedural rulings of arbitrators during the arbitral proceedings.