ReSolution

ISSUE 21 / June 2019

FROM THE EDITOR

Welcome to the 21st issue of ReSolution® in which we draw on the experience and knowledge of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to domestic and international dispute resolution.

In this issue, we look at conferring exclusive jurisdictions on experts in rent review disputes, the granting of access to documents for use in arbitral disciplinary proceedings by the Commercial Court in London, the ruling by the Supreme Court of Canada that affirms the enforceability of arbitration clauses despite related class action, the benefits of arbitrating banking and finance disputes and more.

In Case in Brief we review the English High Court's decision in *Sonact Group Limited v. Premuda SPA [2018]*, where the Court confirmed it's pro-arbitration approach to the interpretation of arbitration agreements.

In the first of an exciting new six part series, Catherine Green provides an introduction to the Singapore Mediation Convention. Successive articles in the series will explore the question of whether becoming signatories to the Singapore Convention would be a positive development for states located within the Trans-Pacific region.

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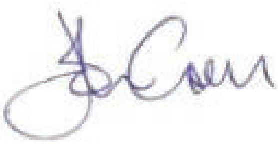
I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professionals, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world-class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution.

Contributions of articles, papers and commentary for future issues of ReSolution® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute ReSolution® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Warmest regards,



John Green
Editor

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ReSolution Issue No. 21

Contents

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ReSolution:In Brief

Arbitration Amendment Bill passes third reading

On 1 May 2019 the Arbitration Amendment Bill 2017 passed its third reading, the final hurdle before being made law.

The Bill established three amendments to the Arbitration Act 1996. The amendments are:

1. Clarification of jurisdictional challenges;
2. Clarification of the setting aside and enforcement provisions; and
3. Removal of the 'quick draw' provision for the appointment of the arbitral tribunal.

The amendments remedy a loop-hole in the existing legislation which allowed parties to make unexpected and untimely challenges to awards on the basis of jurisdiction. They also remove the 'quick draw' procedure for appointing arbitrators when parties were unable to agree. This 'quick draw' provision allowed either party to a dispute to give notice to the other that they were in 'default' and if the 'default' was not remedied within seven days then the notifying party's chosen arbitrator would automatically be appointed – although the Court held in Hitex Plastering v Santa Barbara Homes that such procedure required a genuine attempt to be made to agree before resort could be had to the default appointment procedure.

The amendments gained cross-bench support and will keep New Zealand up to date with the changing landscape of arbitration.

Two proposals were left out of the final bill; the first, that court proceedings related to arbitration should, by default, be held in private was rejected by committee in favour of the status quo. The second, which concerned the validation of arbitration provisions in trust deeds, will be dealt with by the Trusts Bill, which is under consideration by the same committee.

Bill sponsor, Andrew Bayly MP, endorsed the Bill to the House saying "Arbitration is a very cost-effective and timely method of resolving commercial and other disputes."

The Chair of the Justice Select Committee, Mr Raymond Huo MP commented "let's not regard the third reading of this bill as the end of this conversation. Rather, we should regard this third reading debate as a beginning of many thought-provoking discussions about good ideas of how to promote New Zealand as a business-friendly destination for international commercial arbitration hearings. So my message to the sector is: let's work together".

The Arbitration Amendment Act 2019 came into force on 8 May 2019.

To read the Bill, click Here

Arbitration in Papua New Guinea to be raised to global standards

Prime Minister Peter O'Neill, when addressing the more than 300 delegates who attended the International Arbitration and Mediation Conference in Port Moresby in March, assured the PNG judiciary that mediation and arbitration will be taken to the next level. The PNG justice system has long been restricted by unmanageable backlogs and mediation and arbitration could be

Mr O'Neill said the PNG judiciary was already providing the direction and facilitating for this process that was empowering communities. "But this process of mediation is important for our business both high and small, for persons in our community who are aggrieved and want their voice to be heard.

"Our next step in our country is making sure that we take the international and domestic arbitration to the next level, we are committed to the process of United Nations Convention.

"We are now producing a draft Arbitration Bill which will be ready for consultation so that the process is complete.

"This committee includes the PNG judiciary with the support and input from Asian Development Bank, UN Commission on International Trade Law and other international bodies are included in the process and of course after the conclusion of the consultation process we will take it to parliament and enacted well before the end of this year."

Mr O'Neill, who announced his resignation as Prime Minister on 29 May said the PNG judiciary had also taken steps to make sure that the arbitration process continued to work in the country by making the necessary facilities available and as an annex to the courts.

"This is to ensure that there are appropriate practices taking place in the arbitration process and also in identifying in the court list an arbitration clause that these court cases be removed from the court list and placed on the courts arbitration list.

"Our Judiciary will also approve the list of persons to conduct both international and domestic arbitration and this will include some of the most eminent individuals who are attending this conference today," Mr O'Neill said.

French Tycoon on trial over $450 million arbitration deal

French tycoon Bernard Tapie, 73, is facing criminal charges for a fraudulent 403 million-euro ($450 million) arbitration award linked to the sale of his

majority stake in sportwear company Adidas in 1993.

Mr Tapie, a former TV actor, purchased the French Ligue 1 Marseille soccer team in 1986 and guided the struggling club to new heights, including winning the UEFA Champions League in 1993. In the same year Tapie sold his shareholding in Adidas – a sale he then disputed and litigated against for a decade, claiming that he had been defrauded by his lenders which included the state-owned Credit Lyonnais. The dispute was eventually settled in 2008 through an arbitration which saw Tapie awarded the historically high pay-out.

The pay-out to Tapie was to be made from state funds which prompted public indignation and questions were raised as to whether he benefited from political connections, including with then-President Nicolas Sarkozy. The arbitration was challenged, and a Paris Court of Appeal court ruling found the unusually generous 2008 award was the result of fraud and directed Tapie to refund the money.

Tapie, along with five others appeared in court in Paris in March in a trial to determine whether they should also face criminal penalties for fraud and the misuse of public funds.

The Court's decision is due on July 9th.

NZIAC and NZDRC
New Panelist Announcement

Lauren Lindsay

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Lauren is a generalist commercial litigator and international arbitration practitioner. Lauren has developed particular expertise in disputes arising in the life sciences, telecommunications and energy sectors. She also has considerable experience in formulating and responding to complex damages claims, an area that suits her scientific background.

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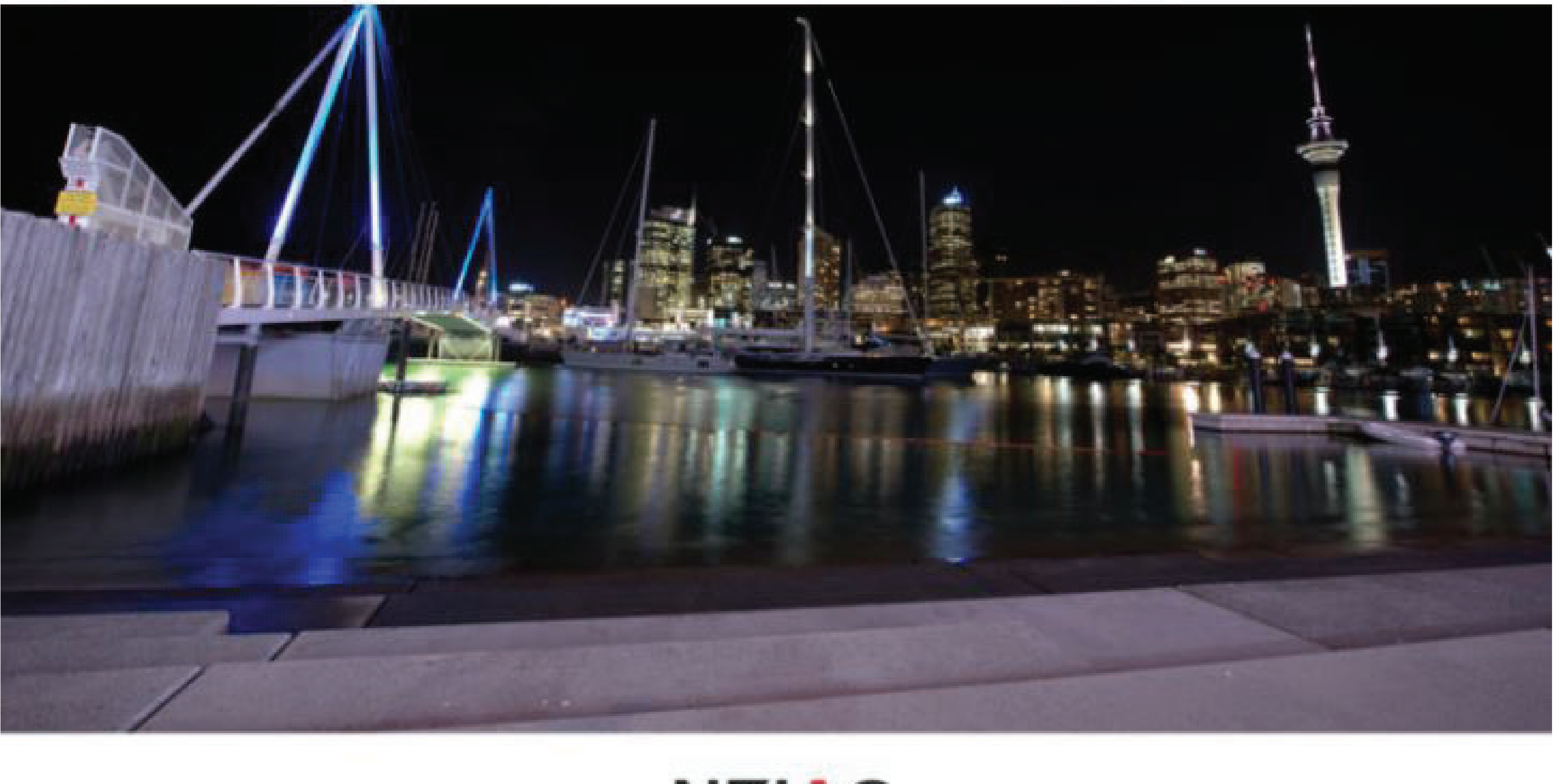

NZIAC

CONFERRING EXCLUSIVE JURISDICTION ON EXPERTS IN RENT REVIEW DISPUTES

By Barry Edgar, Gareth Hale and Lisa Cruickshank

In two recent Scottish cases, the Court of Session has considered the question of whether – and, if so, under what circumstances – a lease can make rent review disputes the exclusive jurisdiction of an independent expert, with the result of excluding challenge through the courts.

Ashtead Plant Hire Company Limited v. Granton Central Developments Limited (Ashtead)

In *Ashtead*, a lease of a warehouse and surrounding land in Granton, Edinburgh provided for the level of rent to be reviewed every five years, on an open market basis. As is extremely common, the lease said that if the landlord and tenant were unable to agree upon the open market rent at any rent review, an independent expert should be appointed to determine the figure. The lease stated that the decision of the expert would be "final and binding" on the parties to the lease.

At the 2017 rent review, the landlord and tenant found themselves unable to agree on the open market rent figure. This was primarily because they had differing views on how a specific provision of the rent review clause should be interpreted, namely a statement that, in calculating the open market rent, there should be disregarded "the effect on any rent of the value of any buildings or other constructions erected on and any improvements carried out to the subjects of lease". The tenant argued that this meant the open market rent should be calculated on the basis of the ground only, disregarding all buildings, constructions and tenant's improvements on it. The landlord on the other hand argued that the disregard was only intended to prevent rentalisation of any improvements carried out by the tenant, meaning that the buildings which existed at lease commencement could and should be taken into account.

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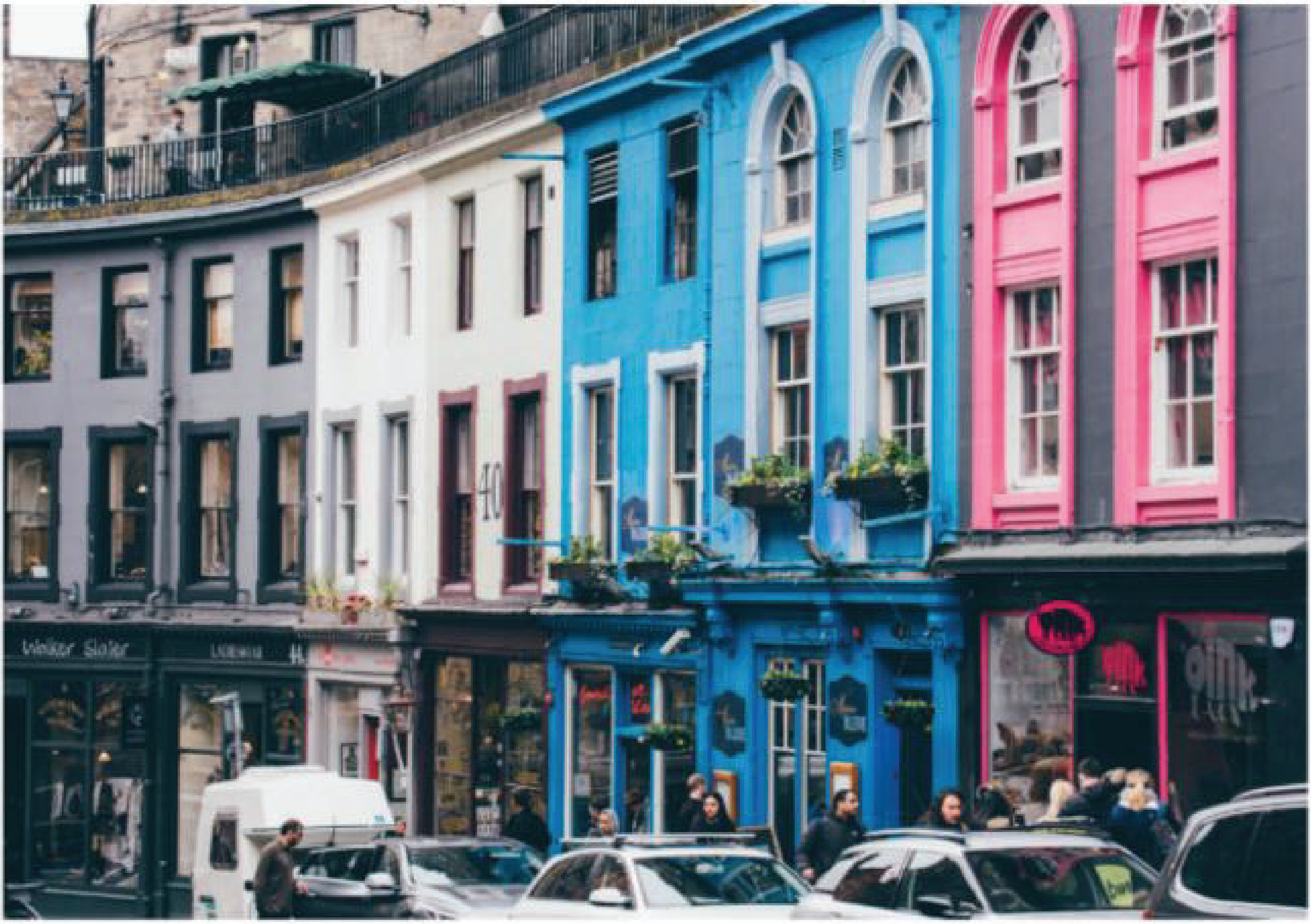
Before the dispute reached the stage of an expert being appointed, the tenant raised a court action seeking a declarator that the open market rent should be calculated on the basis of the ground only, disregarding all buildings. In response, the landlord argued that because the lease provided for reference to an expert (whose decision would be final and binding) in the event of a rent review dispute, the court had no jurisdiction to decide the matter, as it was within the exclusive jurisdiction of the expert.

Both the parties and the court agreed that in theory it would be competent to remit exclusive jurisdiction to an expert - not just on factual valuation matters, but also on legal matters such as the correct interpretation of the rent review



provisions. The question before the court therefore came down to whether, on a proper interpretation of the lease, the parties had (expressly or impliedly) agreed that such legal matters were the exclusive jurisdiction of the expert.

The court concluded that the lease did not confer exclusive jurisdiction upon the expert on legal matters. Lord Doherty observed that a lease would have to "make it very clear indeed" if it were conferring exclusive jurisdiction as to the correct legal interpretation of such important lease clauses.

Cine-UK Limited v. Union Square Developments Limited (Cine-UK)

A similar dispute arose a couple of months later, in the ***Cine-UK case***, which involved a lease of a multiplex cinema in Aberdeen. As in ***Ashtead***, the lease provided for the level of rent to be reviewed every five years, on an open market basis, and for any disagreement over the open market rent to be referred to an independent expert to determine. However in marked contrast to ***Ashtead***, the lease in dispute in ***Cine-UK*** said that the decision of the expert would be "final and binding" on the parties to the lease **"both on fact and law"**.

At the 2014 rent review, the landlord and tenant were unable to agree on the open market rent figure and in due course an expert surveyor was appointed, issuing her determination of the revised rent in 2017. The tenant subsequently raised a court action disputing the level of the revised rent, alleging that the expert had made an error in law. The alleged error in law related to the expert's interpretation of one of the disregards in the rent review clause (being a disregard of landlords' concessions which might normally be given to compensate tenants for fitting out periods). The tenant argued that the expert had erroneously applied the disregard too widely, by also disregarding other types of concessions typically granted by landlords in the market.

Whilst the landlord disputed that there had been any error of law, its main argument was that the court had no jurisdiction to hear the action because the lease expressly conferred exclusive jurisdiction on the expert, including on matters of law.

The court found in favour of the landlord, confirming that it is competent for contracting parties to confer upon a non-legal expert exclusive jurisdiction on matters of both fact and law. In her judgment, Lady Wolffe made reference to *Ashtead* and other case law, and found that it is a matter of contractual interpretation as to whether parties have so conferred exclusive jurisdiction. She held that, in this instance, "there is no ambiguity in the finality provision. It could not be clearer in its terms". She noted that two other features of the lease reinforced the intention to confer exclusive jurisdiction: first, the absence of a requirement for the expert to provide reasons for her determination (as such a requirement might indicate a right to appeal); and second, the fact that the lease did not carve out from the expert's jurisdiction any particular types of dispute or legal questions (indicating an intention for all types of disputes remitted to the expert to have the benefit of finality on matters of both fact and law).

Lady Wolffe found that even if there had been an error of law, the expert's decision was final and conclusive unless it could be proved that the expert had not performed the task assigned to her. Here, the task assigned to the expert was to determine the new open market rent, and she had done just that. In any case, Lady Wolffe also found that the tenant had failed to demonstrate any error of law.

What now?

Reading these two cases together, it is clear that if parties to a lease wish to confer exclusive jurisdiction on an independent expert, particularly on matters of law, this must be clearly and explicitly stated in the lease. As seen in Cine-UK, the other clauses in the lease should reinforce this intention, for example by not requiring the expert to give reasons for his/her decision. If there is any room for doubt as to whether parties meant to confer exclusive jurisdiction, it is likely that the courts will follow ***Ashtead*** and say that none was conferred.

When entering into a lease, the parties should therefore think carefully about their preferred dispute resolution method(s) and the lease should be drafted accordingly. They should think about whether there are certain types of dispute (particularly legal) which might be more suitable for determination by the courts, and weigh this up against the speed, certainty and finality that reference to the exclusive jurisdiction of an independent expert can provide.

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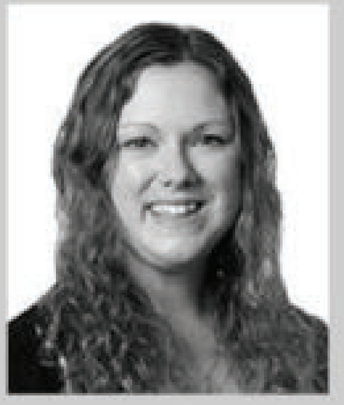

Lisa Cruickshank
Senior Practice Development Lawyer

COURT GRANTS ACCESS TO DOCUMENTS FOR USE IN ARBITRAL DISCIPLINARY PROCEEDINGS

By Adam Greaves and Liz Williams

In *The Chartered Institute of Arbitrators v B and others [2019] EWHC 460 (Comm)*, the Commercial Court allowed a non-party to gain access to court documents that were used in proceedings to remove an arbitrator. What makes this case particularly interesting is that arbitration proceedings ordinarily give rise to an obligation of confidentiality.

Background

B was appointed as an arbitrator in a dispute between C and D. An issue later arose as to B's impartiality. C successfully applied to the court to remove him under section 24 of the Arbitration Act 1996 *(Cofley Limited v Anthony Bingham and Knowles Limited [2016] EWHC 240 (Comm))*. The Chartered Institute of Arbitrators (CIArb) then brought disciplinary charges against B, alleging amongst other matters that he had failed to disclose interests affecting his impartiality, conducted a meeting inappropriately and questioned counsel in an aggressive or hostile manner. CIArb applied to the court for copies of the documents which had been filed in the removal application - including statements of case, witness statements and exhibits, skeleton arguments, transcripts of the arbitral proceedings, and correspondence that had been read out in open court - and for permission to rely on the documents in its proceedings. C consented to the application, and D took no position. B objected on the grounds that the arbitration proceedings were confidential.

Exercise of discretion and legitimate interest

The Commercial Court held that the CIArb was entitled to copies of the statements of case as of right under Civil Procedure Rule 5.4C. However, the remaining categories were a matter of discretion for the court. Moulder J referred to the requirement reiterated in *Cape Intermediate Holdings Ltd v Dring [2018] EWCA Civ 1795* that the applicant must have a "legitimate interest" in inspecting the documents/ She concluded that CIArb was seeking copies of the documents for a legitimate purpose, namely to provide an independent and impartial disciplinary procedure for its members, which was in the public interest. The court had to balance that interest against B's private interest in preserving his confidentiality and against any possible damage to other parties.

The judge noted the statement in *Glidepath BV v Thompson [2005] EWHC 818 (Comm)* that a court may order disclosure of documents generated in an arbitration when it is reasonably necessary in the interest of justice. She concluded that the charges were based on B's conduct in the arbitral proceedings and surrounding correspondence, and it would therefore be impossible for CIArb to proceed without access to the transcripts and correspondence. It was also in the interests of justice for the witness statements and exhibits to be available to assist the disciplinary tribunal. They were already in the public domain as a result of their use at trial, and the tribunal could avoid any further damage to the confidentiality rights of B or other parties by sitting in private to the extent necessary.

However, since the charges were not based upon the arguments presented in the removal proceedings or upon the judge's findings in those proceedings, it was not necessary for CIArb to have access to the skeleton arguments.

Comment

This case demonstrates the tension between the duty of confidentiality in arbitral proceedings and a non-party's legitimate interest in documents. In holding that CIArb should be granted access to the

majority of the documents it sought, the judge highlighted "the general public interest in maintaining the quality of and standards of arbitrators". Public interest is therefore regarded as a sufficiently important consideration to justify erosion of the general rule of arbitral confidentiality. In general, however, this should not give rise to undue concern on the part of businesses that are considering using arbitration; the contents of the documents which were disclosed to CIArb were already largely in the public domain due to their use at trial.

The authors would like to acknowledge the assistance of Kiana Banafshe, intern at CMS London, in preparing this article.

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NZIAC New Panelist Announcement

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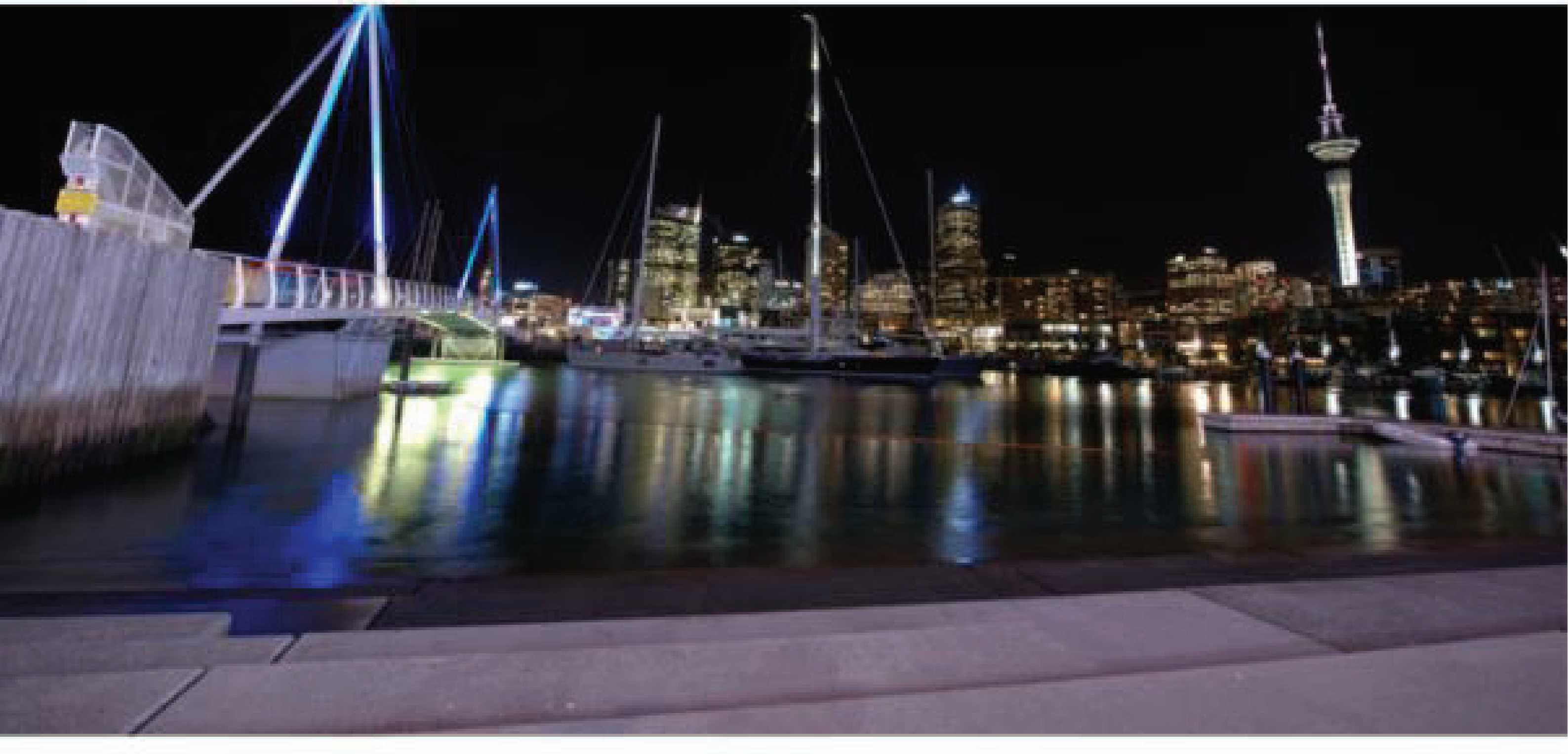

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CASE IN BRIEF

ENGLISH HIGH COURT RECOGNISES ARBITRAL TRIBUNAL'S JURISDICTION OVER SETTLEMENT AGREEMENT IN ABSENCE OF EXPRESS ARBITRATION

By Nicholas Peacock and Charlie Morgan

In the recent decision of *Sonact Group Limited v. Premuda SPA [2018] EWHC 3820 (Comm)*, the English High Court confirmed its pro-arbitration approach to the interpretation of arbitration agreements. The Court held that an arbitration agreement contained in a charterparty contract could apply in relation to disputes arising out of a subsequent settlement agreement contained in correspondence between the parties relating to the sum allegedly due under the charterparty. The Court concluded the parties could be taken to have intended that the arbitral tribunal under the principal agreement would also have jurisdiction over disputes arising out of a settlement agreement between the same parties, despite the absence of an express arbitration clause in the settlement agreement.

Background

The defendant owned the "Four Island" tanker, which it chartered to the claimant. The charterparty included an arbitration clause and the parties elected London as the seat of arbitration.

The owner claimed demurrage of US $718,948.08 and heating costs of US $190,200 from the charterer under the charterparty. That claim was settled by means of an exchange of emails in which the charterer agreed to pay US $600,000. However, the charterer failed to make the payment.

The owner served a notice of arbitration on the charterer claiming payment of demurrage and heating costs, but ultimately pursued a claim for payment of the agreed sum of US$600,000, which the Tribunal in due course awarded. The charterer challenged the jurisdiction of the arbitral tribunal to decide a claim arising under the settlement agreement on the basis that the settlement agreement did not include an arbitration clause.

The tribunal concluded that it had jurisdiction as the nature of the negotiations and the manner in which they had been carried out suggested the parties intended, although they did not say so expressly, that the settlement agreement should be governed by the same provision for dispute resolution as the original charterparty.

Application under section 67 of the Arbitration Act

The charterer sought to challenge the arbitral award under section 67 of the Arbitration Act 1996. The charterer argued that the tribunal did not have jurisdiction to issue its award.

The Court re-affirmed that a challenge under section 67 of the Arbitration Act requires the question of

jurisdiction to be analysed *de novo* by the Court (as per the Supreme Court's decision in Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan [2010] UK SC 46). As a consequence, the Court did not consider itself bound by the decision of the tribunal and although the tribunal's decision could inform and be of interest to the Court, it was not to be given any particular status or weight.

The decision

The charterer presented two arguments on jurisdiction. First, the owner's claim was a claim under the settlement agreement and that agreement did not contain an arbitration clause. Second, pursuant to the notice of arbitration sent by the owner, the tribunal was appointed to hear disputes under the charterparty and not under the settlement agreement.

The Court concluded that the parties intended for the arbitration clause contained in the charterparty to continue to apply in the event that the sum agreed to settle claims under that agreement was not paid. The wording of the arbitration clause was broad enough to encompass such a claim, even though the settlement agreement to pay US $600,000 represented a new cause of action under a new and binding agreement. The Court considered it inconceivable that the parties could be taken to have agreed that if the agreed sum was not paid, the owner would be unable to pursue its claim in arbitration and, instead, would be required to commence court proceedings. Further, the Court concluded that although the settlement agreement did not contain a choice of law provision, the parties intended that the choice of English law contained in the charterparty would continue to apply. The Court considered that it would be very odd to assume that the settlement agreement, which said nothing about choice of law, was to be governed by any law other than the law that governed the charterparty.

The Court also held that – although the notice of arbitration did not refer to the settlement sum and, instead, referred to "a claim for demurrage and heating costs as well as other possible claims" – the claim for the agreed sum could properly be regarded by commercial parties as a claim for demurrage and heating costs. Thus, the Court concluded that the notice of arbitration was effective. The arbitration clause allowed the parties to submit further disputes to arbitration after proceedings had commenced, as long as such disputes arose under the charterparty. Thus, the Court concluded that, even if the notice of arbitration as submitted had not encompassed a claim for the US $600,000, the owner could, in any event, have submitted such claim at a later stage in the arbitration as long as it was a claim under the charterparty. On that hypothesis, the Court found that this is what it did.

Conclusion

This case provides a reminder of the complexities that can arise (leading to delays and increased costs) if settlement agreements or contractual amendments do not expressly state the applicable governing law and dispute resolution mechanism.

In this instance, the English Court took a commercially pragmatic, pro-arbitration approach and held that the arbitration clause in one agreement could effectively be implied into a subsequent agreement seeking to settle a claim under the former. The outcome of this case turned on its particular facts, including the commercial context of maritime practice, and parties should not assume that the dispute resolution mechanism and governing law that is set out in an underlying agreement will necessarily apply to every agreement seeking to settle a claim arising under the original agreement. Parties are recommended to always document the settlement they have reached in express terms, including a governing law and dispute resolution clause.

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NO "PIGGYBACKING" TO AVOID B2B ARBITRATION: SUPREME COURT OF CANADA AFFIRMS ENFORCEABILITY OF ARBITRATION CLAUSES DESPITE RELATED CLASS ACTION

By Robert Wisner

In its recent 5-4 decision in *Telus Communications Inc v. Wellman,*[1] the Supreme Court of Canada ruled that courts must enforce valid arbitration agreements between businesses despite the existence of parallel litigation by other plaintiffs against the same defendant - even where that litigation is a class action raising identical issues.

The decision is an important victory for Canadian businesses that rely on arbitration clauses in either standard form B2B agreements or carefully negotiated commercial contracts between sophisticated parties. In order to take full advantage of this important decision, Canadian businesses should review their contracts to ensure that their arbitration clauses cover a broad range of claims and can efficiently address the risk of parallel proceedings.

The Dilemma of Arbitration and Third Party Litigation

Should a court enforce a valid arbitration clause between two parties if one of them is involved in related litigation with a third party? On the one hand, courts usually enforce valid contracts. Doing so for an arbitration clause gives effect to the parties' choice of an alternative dispute resolution method that offers procedural flexibility, a chance to select an expert decision-maker and other advantages. On the other hand, enforcing an arbitration clause where there is related litigation may give rise to multiple proceedings and potentially inconsistent results. Some claims are also too small to arbitrate individually and can only be prosecuted by a class action. While courts respect freedom of contract, they also try to avoid inefficient overlapping proceedings and ensure access to justice.

Prior to *Telus*, Canadian courts in most common law provinces were often reluctant to allow multiple proceedings or restrict access to class actions. However, the *Telus* case should lead lower courts to favour party autonomy and enforce valid arbitration clauses.

The *Telus* Business and Consumer Contract Claims

The *Telus* case involved a proposed class action of Ontario residents who entered into per minute billing plans for mobile phones. The plaintiff alleged that Telus' terms and conditions made no mention of a practice of "rounding up" calls to the next minute, resulting in overbilling. He sought to certify a proposed class consisted of about 1,400,000 consumers and 600,000 businesses.

Although the arbitration clause in Telus' standard terms and conditions covered the plaintiff's claims, Ontario's Consumer Protection Act[2] invalidated the clause in agreements with consumers. As result, at least 70% of the claims would proceed in court under the Class Proceedings Act.[3] The issue was whether Ontario's domestic *Arbitration Act*[4] gave the courts discretion to refuse a stay of the proposed class proceeding for the remaining 30% of Telus' business customers. Refusal of the stay of proceedings would effectively invalidate the otherwise binding arbitration clauses in the business agreements.

The plaintiff relied on a long line of cases in which Canadian courts refused to stay court proceedings in favour of arbitration on the basis that only some

of the litigants were bound by the arbitration clause and the litigation claims were so closely related to the arbitration claims that it would be unreasonable to separate them.[5] Many of these cases were ordinary commercial disputes in which a plaintiff named a non-party to the arbitration agreement as a co-defendant in the litigation.[6] In the class action context, plaintiffs seeking to circumvent arbitration clauses would take a different approach. They tried to piggyback on the related claims of other plaintiffs against the same defendant. Both strategies would lead to a risk of multiple proceedings and, until the Supreme Court's *Telus* decision, Canadian courts tended to look for ways of consolidating the related disputes in a single action.

Discretion to Refuse a Stay Is Limited

The *Arbitration Act* uses the mandatory language "shall" to direct courts to stay proceedings by parties to an arbitration agreement.[7] This mandatory stay is only subject to narrow exceptions such as those relating to capacity or the validity of the arbitration agreement,[8] none of which applied to the businesses in the *Telus* case.

However, section 7(5) of the *Arbitration Act* includes an additional provision that is also found in the domestic arbitration legislation of other Canadian jurisdictions. It applies where:

1. the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

2. it is reasonable to separate the matters dealt with in the agreement from the other matters.

If these preconditions are satisfied, the court "may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters."[9]

The majority of the Supreme Court recognized that section 7(5) of the *Arbitration Act* does not create an additional category of exceptions to the narrow grounds for refusing a stay of proceedings. Instead, it expands a court's power to stay proceedings that are only partly covered by an arbitration clause. This power to issue a partial stay of proceedings and permit residual litigation that is beyond the scope of an arbitration clause does not allow a court to refuse to stay proceedings that do fall within the scope of the clause.

The Supreme Court's minority decision warned that this interpretation of section 7(5) risked limiting access to justice for small claims that could only be pursued by class actions and risked multiple inefficient proceedings for larger claims. As a result, the minority preferred to interpret the statute as allowing courts to override arbitration in these circumstances. While the majority recognized these risks, it insisted that they should be addressed by the legislature rather than the courts.

Lessons for Canadian Businesses

While the *Telus* case dealt with related proceedings against the same defendant, the court's reasoning appears to also address cases where a single plaintiff adds non-signatory defendants to its litigation against a party to the arbitration clause. Although those situations may involve a single "proceeding", as long as the claim asserted against a signatory defendant falls within the scope of the arbitration clause, it should be stayed by a court.

In light of the *Telus* decision, Canadian businesses seeking to ensure the enforceability of their arbitration clauses should:

- **Use broadly-worded clauses**: A stay of proceedings can only be fully effective if the arbitration agreement is sufficiently broad to deal with all of the matters in dispute. Parties should use language that covers all claims arising out of their relationship regardless of whether the claims are contractual or not.

- **Ensure a fair arbitration procedure:** Both the majority and minority opinions in *Telus* signaled that courts will look more closely at whether contracts of adhesion containing arbitration clauses are unconscionable. Indeed, the majority cited with approval a recent Ontario Court of Appeal decision finding that Uber's use of a widely accepted set of international arbitration rules was unconscionable in its contracts of adhesion with drivers.[10] Companies should incorporate arbitration rules that all can handle smaller disputes fairly and efficiently, e.g. without imposing large filing fees on the parties.

Consider the potential for consolidation: The *Telus* decision notes that the potential for a multiplicity of proceedings is a foreseeable result of the contracting parties' choice of arbitration. In some cases, parties may wish to obtain the advantages of arbitration while still consolidating related claims. Some, but not all, arbitration rules allow for consolidation of related claims provided that all relevant parties have consented to this possibility in their agreements. Businesses should review their contracts to determine whether or not their arbitration agreements provide for consolidation of related disputes.

End Notes

[1] 2019 SCC 19 ["Telus"]

[2] Consumer Protection Act, 2002 S.O. 1992, c.30

[3] Class Proceedings Act, 1992 S.O.1992, c.6

[4] Arbitration Act, 1991 S.O. 1991, c17, s.7

[5] Telus at para.33

[6] For example, in Radewych v. Brookfield Homes (Ontario) Ltd., 2007 ONCA 721, the Court of Appeal refused to stay a claim by a homeowner against a builder where the plaintiff had named the home's architect and a sub-contractor as co-defendants.

[7] Arbitration Act, s.7(1)

[8] Arbitration Act, s.7(2)

[9] Arbitration Act, s.7(5)

[10] Heller v. Uber Technologies Inc., 2019 ONCA 1 [invalidating a standard ICC arbitration clause]

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THE SINGAPORE MEDIATION CONVENTION: a panacea for trade in the Trans-Pacific Region or just one piece of the puzzle?

By Catherine Green

Part One: An Introduction

The important correlation between private dispute resolution and cross-border trade and investment is not new to those engaged in either international law or international trade and commerce. However, recent developments in international law, with the United Nations Commission on International Trade Law (**UNCITRAL**) approving the final draft of the Convention on International Settlement Agreements Resulting from Mediation and its associated Model Law (the **Singapore Convention**), have brought this topic to the fore once again.

The Singapore Convention provides an effective mechanism for the enforcement of mediated settlement agreements in the international commercial arena, adopting the same approach as the highly successful New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**), which was concluded in 1958. The New York Convention has been lauded as one of the most successful treaties in the area of commercial law to date.

Over the course of six articles, of which this is the first, I intend to provide an introduction to the Singapore Convention before exploring the question whether becoming signatories to the Singapore Convention would be a positive development for states located within the Trans-Pacific region – with a specific focus on Pacific Island nation states.

In overview, it is certainly more than arguable that accession to the Singapore Convention would promote and underpin greater cross-border trade, commerce, investment and sustainable economic development and growth in the region. It would do this by helping to address one of the significant barriers to foreign investment in the Trans-Pacific; namely, the perceived risk of any disputes arising out of commercial relations in the region being determined by local courts, with any judgment then to be enforced in the ordinary way which can be costly, time-consuming and uncertain.

However, it is my view that the Singapore Convention is only one piece of the puzzle. The non- binding nature of mediation does not provide enough certainty to potential investors looking to engage in commercial projects taking place within the Trans-Pacific Region; parties are under no obligation to conclude a binding settlement agreement as a result of electing to participate in mediation. Foreign investors' needs can only fully be met when they can be satisfied that they can also achieve finality regarding any commercial dispute without recourse to litigation in the local courts. As such, arbitration (within the scheme of the New York Convention) needs to be available as a backstop where mediation fails to result in a legally binding (and enforceable) settlement agreement.

Nevertheless, the importance of the Singapore Convention to the overall picture is not diminished, as mediation provides access to additional and important benefits which arbitration under the New York Convention is simply unable to deliver, at least not as successfully as mediation might.

To look at this question in more detail, Part Two of this series will consider the 'Trans-Pacific' experience and why the question of accession needs to be considered taking into account the specific characteristics of the constituent member states within that region. Parts Three to Five of this

series will then look at the question from the perspective of each of the following areas of focus:

- facilitation of trade and investment (Part Three);
- diversity and culture (Part Four); and
- the dual questions of cost and time (Part Five),

with Part Six providing an overarching summary and conclusions.

But first, a brief introduction to the Singapore Convention and international commercial mediation.

Mediation: what is it and why use it for international commercial disputes?

Mediation is a consensual, confidential and relatively informal negotiation process in which parties to a dispute use the services of a skilled and independent mediator to assist them to define the issues in dispute, to develop and explore settlement options, to assess the implications of settlement options and to negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.

The objective of mediation is to enable and empower the parties to negotiate and resolve the dispute promptly, cost effectively and confidentially, rather than to have a decision imposed upon them by a judge, arbitrator or adjudicator. The process enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.

The inherent flexibility of the process is one of its defining features. The other benefits of international commercial mediation which are most often referenced bear substantive similarities to the widely accepted benefits of international commercial arbitration, including in particular that mediators are impartial and neutral, the process is confidential, and parties are able to select a mediator from a body of people who are experts in the subject matter field.

The question of enforcement: enter the Singapore Convention

The one benefit extolled in relation to international commercial arbitration which has remained absent in the context of international commercial mediation is the ability to readily enforce any mediated outcome in jurisdictions outside where the mediated outcome is rendered.

It is widely said that it is for this reason that mediation has fallen well behind arbitration in terms of popularity as a process to resolve international commercial disputes, so it is perhaps unsurprising that attention has been given over time to remedying this perceived disadvantage.

In the years prior to World War II, mediation was in fact arguably the preferred means of resolving international business disputes with statistics on the use of ICC arbitration and conciliation cited as being in favour of negotiation and conciliation in the period from 1923- 1929:[1]

> In May 1929, of the 337 requests registered by the ICC Court, 120 had been brought to conclusion as follows: eighty by amicable settlement, twenty-one by conciliation, and nineteen by arbitral award.

The key reason typically cited for the decreasing use of mediation in the international commercial arena is the lack of enforceability of any mediated outcome and this is where the Singapore Convention comes in.

The Singapore Convention is not UNCITRAL's first attempt at formulating comprehensive rules to govern the delivery of mediation or conciliation processes and enforcement of agreed outcomes arising out of those processes.

Work in this area can be traced back to 1980 with the promulgation and adoption of the UNCITRAL Conciliation Rules (**Conciliation Rules**). Those Rules were intended to "significantly contribute to the development of harmonious international economic relations" and were to: [2]

> apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

The Conciliation Rules set out a framework for the conciliation process. However, they did not provide any enforcement mechanism which left settling parties to rely on general principles of contract, in the context of the applicable law, to enforce any settlement agreement resulting from such a conciliation process.

In 2002, a Model Law on International Commercial Conciliation developed by UNCITRAL followed. Again, there was no concrete resolution to the question of enforceability. The point had not been entirely missed however, as is evident from the Guide to Enactment and Use of the UNCITRAL Model Law, 2002:[3]

> Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award (A/CN.9/514, para 77).

The question of enforcement of mediated outcomes was not finally grappled with until more recently when, in May 2014, the United States prompted the debate again, proposing to UNCITRAL's Working Group II[4] that the enforceability of settlement agreements resulting from international commercial mediation processes should be addressed. It was recognised that mediation was likely to increase in usage "as parties continue to seek options that reduce costs and provide faster resolutions" but that an obstacle to that increase in usage was that "settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards, if a party that agrees to a settlement later fails to comply."[5]

By concluding the Singapore Convention, UNCITRAL has now given states the opportunity to sign up to a regime which would obviate the need

for parties to rely on principles of domestic contract law to enforce any rights they might have arising under a mediated settlement agreement.

The Singapore Convention provides for the enforcement of agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute save for in specific and limited circumstances. The Singapore Convention essentially provides parties to a mediated settlement with the same enforceability protections that parties to an arbitral award have under the New York Convention.

The inclusion of a mechanism to enforce mediated settlement agreements advances matters substantially. After all, without such a mechanism, where parties to a commercial contract conclude a mediated settlement agreement and one party to that settlement breaches that agreement, the other party is really in no better position than when it started – seeking to enforce its contractual rights in the courts (or potentially by arbitration if the settlement agreement itself provides for disputes arising under it to be arbitrated).

The disadvantages of having to rely on conventional enforcement of contracts in the courts include first, the additional cost involved; second, confidentiality (a hallmark characteristic of private dispute resolution) is compromised; and third, enforcement is not guaranteed but rather contingent on the relevant laws which apply in the specific jurisdiction in which enforcement is sought.

The Singapore Convention also provides for similar limited grounds for refusing enforcement and permits a state to become a signatory subject to a reciprocity reservation. Broadly, the Singapore Convention is to international commercial mediation what the New York Convention is to international commercial arbitration. The question remains to be seen however, whether it will be as successful. With the Singapore Convention opening for signature in August this year, we can only say 'watch this space'.

End Notes

[1] Linda Reif "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes (1990) 14 Fordham Int'l LJ 578 at 614.

[i2] Resolution on Conciliation Rules of the United Nations Commission on International Trade Law GA Res 35/52, XXXV (1980).

[3] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, Part Two: Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002) at 55.

[4] The UNCITRAL Working Group currently (since 2002) tasked with the topic 'Arbitration and Conciliation'. 27 Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822 (2014).

[5] Proposal by the Government of the United States of America: Future Work for Working Group II, A/CN.9/822 (2014).

Look out for Part Two of this series: 'The Trans-Pacific Experience'.

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EFFECTIVE COMMUNICATION AT WORK

By Gloria Masters

Have you ever wondered how it is that some people attract loyalty and commitment effortlessly? Or that they make time show an interest in people around them?

If you answered yes, you have just recognised some key attributes effective communicators have, and with a little time and energy spent - you can be one too! There is a misnomer out there that communication is a 'softer' skill and therefore doesn't need attention paying to. In other words, we all communicate and should know how to do this easily. Nothing could be further from the truth. If in doubt, consider these questions:

- Who are the people you feel the most uncomfortable with at work?
- Who is well known to you and others as being difficult to deal with?
- When you consider times of unhappiness at work whose face or faces usually come to mind?

If you found that you had the same names for each - that is not a coincidence. These people are clearly not good communicators, and could be the reason you, and possibly others - would consider leaving your place of work. This area of workplace effectiveness should not be ignored for any longer – the impact poor communication has on others is measurable in terms of motivation, culture and even the amount of sick days taken. Everybody needs to think about what they contribute to their communication at work and each individual needs to consider this: when interacting with others are you leaving them with a brick or a bouquet? If the former is true you need to look at what can be changed so that you are more positive and insightful in your communication.

There are several attributes an effective communicator has – let's see which ones you embody and the ones you feel need your attention:

Are you?

Focused

Perceptive

Empathic

Confident

Encouraging

A good Listener

Genuine

Available

Positive

Considerate

The important point is that all of these attributes need to become part of your communication repertoire. For you to succeed in business - realise that 'you do not do business with business you do business with people!' Those same people know what you are like to deal with, so - how do they view you? If that is too hard to answer, then think about aspects of your interactions that you feel good about, and start to recognise the ones you would like to be more effective at. Also look at the other side of the coin and consider the last time you had an unpleasant interchange with someone, because of how they communicated with you. Be aware that you may not always remember exact words said, but what you will never forget is the way they said it, and that is what underpins all communication at work. The impact you have on others!

The way something is stated, a missive is delivered or a change is implemented is exactly what people take on board when next they either discuss the situation, have further meetings or interact with you again. If you are considerate and genuine in your communication – people will not mind meeting with you. If on the other hand you are abrupt, dismissive and 'far too important' to worry about the quality of your interactions, you will struggle to garner loyalty and commitment from others. If in doubt think about the teams in your Company that 'work' – I would bet they are run by someone who communicates well. This person will be empathic and genuine in all their dealings with others.

Conversely look at the teams within the work place who never quite seem to gel; there is a higher than normal attrition rate and you hear murmurings about that team leader being difficult to deal with.

So where do you want to be in your communication? Let's add to what you already know by asking others how they see you! To establish this, it is helpful to get feedback from others whom you trust. This could be colleagues, bosses, external clients or stakeholders. Simply ask them their experience of your communication style. If that feels too difficult or imposing, try family/ friends or contact me for a simple test to discover where your skills lie. Another technique is to start today to notice other's body language when you are communicating with them. Recent statistics show, that in any face to face communication, people place 55% importance on body language, 38% on tone of voice and only 7% on the actual words used. Think about that! Be aware that telephone communication is different again, and the rating becomes 82% on tone of voice and only 18% on the actual words used. Astonishing really, when you consider that most of us do not take much notice of others body language! So what should you look for when reading body language?

Body language – is the person turned towards or away from you? This could denote disinterest – no matter what words they may be saying to contradict that.

Voice quality – is there tone of voice abrupt and clipped or considerate and engaging? This shows they are prepared to make the time and want to invest in this discussion with you. Intention – Are you picking up on good/focused intent or rushed annoyance? This indicates they are too stressed/ unwilling to make the situation work – they are leaving it to you. Manner – is there a directness/ sincerity to this or is it more dictatorial/ uncompromising? This can show intolerance for any more time spent on this discussion or task.

Eye contact – Do they look away from you/avoid looking at you much, or is there direct eye contact? This can show a willingness to have the best outcome possible with clarity/respect. Setting – Is this the most inconvenient time/place to do this? Or is the timing and setting appropriate. This can denote commitment and consideration for both you and the project. Sensitivity – Is this being handled with kindness appropriate to the situation? Or is this just another 'thing' that needs to be completed within a certain time frame? If left unchecked, this can lead to the attrition rate being added to.

Attitude – Are you picking up on a genuine willingness and healthy respect for your contribution to this? Or is the opposite true? This indicates difficulty/hard work ahead. Rapport – Do you notice there is no interest in building/ maintaining a relationship with you? Or that this person takes time to share stories, laugh and discuss other things with you? This shows a healthy/useful working relationship ahead, with lots of value being placed on you!

These are very general guidelines but may show you some things you had seen but not taken on board previously. The key message through this writing is to hold a mirror up to yourself and see just what impact you may be having on others around you. By all means observe other people, but start to notice in yourself when your body language changes and decide to change it for the better. Notice the difference around you when you do. People react to everything whether it is positive or negative. You will begin to get more positive responses from people as you 'lift your game' and be more effective at communicating. Will you always get it right? Will you think you finally have it all conquered? Probably not, but at least you can begin to start thinking more about your impact on others and how they may 'feel' after communicating with you.

Keep in mind, 'People sometimes remember what they said to you - but they always remember what you said to them!'

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ARBITRATING BANKING AND FINANCE DISPUTES - WHAT ARE THE BENEFITS?

Barbara Badertscher

While there has been some growth in the use of arbitration as a means of resolving disputes in the finance sector, court litigation is still by far the preferred-choice of financial institutions in Switzerland. At the SCAI Conference "Arbitrating banking disputes – Are there tangible benefits?" it was discussed how the wider use of arbitration in the finance sector can be promoted and encouraged. This blog post provides a short overview which kind of banking disputes may be suitable and what advantages choosing arbitration may have.

Which types of banking disputes are suitable for arbitration?

First, it is to be addressed for which areas of banking, arbitration could be a suitable alternative.

For a number of reasons, arbitration seems not a suitable choice for disputes with retail customers ("consumer disputes"). On the one hand, the amount in dispute often will be disproportionate to the costs of the proceedings. On the other hand, arbitral awards in such disputes may not be enforceable at the domicile of the customer due to national law providing for the mandatory jurisdiction of its courts. While Swiss law considers such disputes in an international context arbitrable, this does not hold true for some countries. For example, certain banking contracts with consumers such as future trades are not arbitrable under German law (§101 WpHG).

Moreover, there could be difficulties with satisfying the form requirements for an arbitration agreement. For example, including an arbitration clause in the general terms and conditions may raise issues of formal and substantive validity.

These concerns do not apply to contracts with institutional investors or high-net worth individuals providing for investment advisory services or asset/wealth management, agreements with outsourcing providers and vendors, interbank agreements and contracts with states or state-controlled parties. Accordingly, agreeing to submit disputes arising out of these contracts to arbitration could be a viable alternative.

What advantages does arbitration offer?

Arbitration may have significant advantages for Swiss financial institutions. This holds, in particular, true with customers, partners and providers in an international context.

First, an arbitral award is better enforceable than a Swiss court decision. 156 of 193 nations worldwide are member states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Recognition and enforcement in these states may only be refused based on the limited grounds specified in the Convention. This is an important factor to consider if enforcement potentially would have to be sought in a state outside the EU with a restrictive approach or practice of recognizing and enforcing foreign court decisions.

Second, arbitration provides a higher degree of confidentiality. In contrast to court proceedings, the public and press are not entitled to be present at hearings. This significantly reduces the risk that the press becomes aware of the case. Considering the reputational damage negative or biased press coverage may have, this is a factor speaking strongly in favor of arbitration.

Third, arbitration may be the preferred choice for Swiss financial institutions if the customer or business partner is not willing to agree to litigation in Switzerland. Arbitration can be invoked as neutral alternative to agreeing to the jurisdiction of foreign courts. Not only can the risk of a biased court be avoided but also proceedings with a very long duration. Even in jurisdiction with a court system known to be efficient, the possibility of several instances of appeal renders arbitration with its very limited opportunities to appeal the award more attractive.

Other advantages of arbitration are that arbitrators with specific expertise and experience in banking law and/or with finance disputes may be chosen and that the proceedings can be conducted in English.

Are the usual concerns still justified?

The availability of interim relief is still perceived as argument in favor of litigation (and against arbitration). This perception is, however, unjustified and outdated considering that the rules of the major arbitration institutions today provide the possibility to request interim relief from an emergency arbitrator. As a consequence, interim relief against a contractual party can also be obtained swiftly before the constitution of the arbitral tribunal. Likewise, if arbitral proceedings have already been initiated and the arbitral tribunal constituted, interim relief can be obtained from the arbitral tribunal. While in case of non-compliance, state courts need to be involved to enforce the interim relief granted, parties have an incentive to comply voluntarily in order not to displease the arbitral tribunal.

Alternatively, interim relief can be requested directly from a state court. The arbitration clause does not bar the parties to do so.

Further concerns raised include the proper application of Swiss law. These concerns stem from the fact that the arbitrators may not be Swiss qualified lawyers and that awards cannot be challenged based on the improper application or wrong interpretation of Swiss law before the Swiss Federal Court. These concerns can be addressed by including an arbitration clause requiring all or the presiding arbitrator to have certain qualifications in Swiss law. In addition, arbitral tribunals tend to consider the relevant literature and case law much like state court judges.

Conclusion

In conclusion, it seems that the financial industry's strong preference of state court litigation is no longer justified. For certain contractual relationships financial institutions regularly are parties to, arbitration offers significant advantages compared to state court litigation in Switzerland.

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VISCHER

HIGH COURT FINDS PARTIES AGREED TO VARY APPLICATION OF "WITHOUT PREJUDICE" RULE IN SUBSEQUENT "WITHOUT PREJUDICE SAVE AS TO COSTS" CORRESPONDENCE

Matthew Eglezos

The High Court has held that correspondence marked "without prejudice save as to costs" and which described the conduct of prior "without prejudice" (WP) negotiations (including a mediation and subsequent discussions) was admissible in an application for costs against the claimant's lawyers: Willers v Joyce & Ors [2019] EWHC 937 (Ch).

The court accepted that the WP rule attached to the negotiations during and following the mediation. However, the subsequent "without prejudice save as to costs" correspondence amounted to an agreement to vary the WP status of the earlier negotiations, so that both parties would be able to deploy evidence of the WP negotiations in future arguments about costs.

The decision serves as a reminder to parties and practitioners to exercise care when referring to the substance of mediation discussions (or any other WP communications) in any subsequent correspondence that is not expressed to be WP. Depending on the terms of that correspondence, a court may conclude that the correspondence amounts to an agreement to exclude or vary the application of the WP rule, and therefore the circumstances in which the WP communications may be admissible.

Matthew Eglezos outlines the decision below.

Background

The respondent solicitors and junior counsel (the Lawyers) represented the claimant in proceedings against the defendant (and subsequently his estate) for malicious prosecution and abuse of process. In the malicious prosecution claim, the claimant alleged that one of the companies through which the defendant conducted his business (Langstone) had maliciously brought a claim against the claimant. The underlying claim had been discontinued and Langstone had been ordered to pay the claimant's costs, but those costs were reduced on detailed assessment, leaving a substantial shortfall which the claimant was liable to pay to the Lawyers (who had also represented the claimant in the underlying claim)

The claimant sought to recover that shortfall, among other damages, from the defendant's estate in the malicious prosecution claim. As the claimant was clearly unable to pay the shortfall from his limited resources, the Lawyers had a substantial financial interest in the outcome of the malicious prosecution claim.

The claimant and the defendant executors (the Executors) engaged in two mediations, which were unsuccessful. The claim went to trial and was dismissed, and the claimant was ordered to pay the Executors' costs. As the claimant was impecunious, the Executors successfully applied for the Lawyers to be joined as parties to the malicious prosecution proceedings so that the Executors could make a costs application against the Lawyers personally.

For the purposes of that application, the Executors sought to rely on references to what was said and done at, and shortly after, one of the mediations, which communications were agreed at the time to be WP. Those references were included in four letters between the parties' solicitors that were marked "without prejudice save as to costs" (the "Contested Material").

The Executors argued that the Contested Material was admissible in the costs application on the basis that:

- the WP rule did not apply to the Contested Material;

- if it did apply, the case fell within an exception to the WP rule for statements wholly unconnected with the issues between the parties in the proceedings or for negotiations used as a cloak for impropriety; or

- the right to rely on the WP rule had been waived for the purposes of arguments concerning the costs of the malicious prosecution claim.

Decision

The court (Andrews J) concluded that the WP rule did apply to the Contested Material and that no relevant exception to that rule was engaged. However, the Contested Material was admissible in relation to the Executors' costs application because that material indicated that the parties had agreed to vary the WP status of the settlement negotiations.

In reaching that conclusion, the court adopted what it described as Fancourt J's "masterly analysis" in *Briggs v Clay* [2019 EWHC 102 (Ch) (considered here) of the relevant principles and authorities in relation to the WP rule and its exceptions.

Application of the WP rule and exceptions to it

The judge said that the Executors' first two propositions could be tested by considering what

the position would have been if the Contested Material had not been sent and the Executors had sought to rely on the evidence of the mediation. In such circumstances, that material would have been inadmissible.

The Executors contended that the WP rule did not apply in later unconnected proceedings to protect statements in earlier proceedings which were unconnected with the subject matter of those proceedings. The court held that even if that were correct (which the court did not need to decide), and even if the costs claim against the Lawyers was to be treated as litigation independent of the malicious prosecution claim, the costs claim was nonetheless "intimately connected" with it.

The court also rejected the argument that the WP protection afforded to the claimant could not be relied upon by his Lawyers in a subsequent application against them for costs. The situation in this case was "very similar" to that in *Briggs*, where the legal representatives of one of the parties were held to be bound by the WP rule in a claim made against them.

The court then turned to consider whether there was a relevant exception to the WP rule (pursuant to which the Contested Material might be rendered admissible). The court concluded that no such exception arose. The court dismissed, in relatively short order, the suggestion that the exception to the WP rule which allowed the admission of evidence to prove some impropriety had any application in this case.

The court also rejected an argument that Contested Material fell within an exception for "independent facts" which were in no way connected with the merits of the case. The "independent fact" which the Executors said the evidence established was the "extent of the influence or control" that the Lawyers had over the malicious prosecution claim. The court did not see how such a fact could be segregated from the content of the settlement negotiations themselves, and considered that admitting the evidence for that purpose would undermine the policy of the WP rule.

Waiver and the parties' agreement to deploy the WP material

The court noted that there was no reason why the parties could not enter into an agreement to vary the effect of the WP rule. Such an agreement or waiver was not to be lightly inferred, but the parties could expressly agree that communications were WP save as to costs.

As established in the authorities, once the protection of the WP rule had been waived, the waiver covered the whole of the WP communications and not just those aspects that one party had sought to deploy. The court noted that in this case neither party had actually deployed WP material, though they had indicated an unequivocal intention to do so in the relevant correspondence.

The court then proceeded to analyse the references in the letters constituting the Contested Material. Objectively construed, the first letter in that correspondence, which was sent by the Lawyers on behalf of the claimant, evinced a clear intention to use evidence about the WP negotiations at a future costs hearing. This could be viewed as an anticipatory repudiatory breach of the agreement to treat the negotiations as WP but, the judge concluded, was better characterised as an offer to vary the agreement's terms. That offer had been accepted on behalf of the Executors in their response to the letter, which made it clear that both parties would be able to deploy evidence of the negotiations for the purposes of arguments about costs.

The court concluded that the parties had, by their correspondence marked WP save as to costs, agreed that "everything said and done at the mediation by or on behalf of either party … could be referred to at a future costs hearing". In effect, the parties had agreed to vary the WP rule to treat the settlement negotiations as if they had been conducted on the basis that they were WP save as to costs. Evidence of those negotiations was therefore admissible, solely on the basis of an agreement between the parties, which was binding on the Lawyers. The WP material could therefore be deployed by the Executors in their claim for costs against the Lawyers.

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HIGH COURT OF AUSTRALIA RULES ON INTERPRETATION OF ARBITRATION CLAUSES

Leon Chung & Andrew Mason

In an important and clarifying decision, the High Court of Australia has handed down its decision in *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors.*[1]

The decision is significant for the conduct of international arbitration in Australia because:

- the High Court held that the phrase "any dispute under this deed" in an arbitration clause was sufficiently broad in the context of the deeds in question to encompass disputes about the validity of the arbitration agreement as well as substantive claims; and

- the High Court found that in this case, third parties who were not contractual parties to the deed in question, but who wished to rely on certain releases and clauses in the deed containing the arbitration agreement could be treated as a party to the arbitration under the *Commercial Arbitration Act 2010* (NSW) (**Commercial Arbitration Act**).

The Facts and Proceedings Before the Federal Court and the Full Court

In a previous Legal Briefing, we outlined the background of the case before the Federal Court and Full Court. In short, the dispute concerned the actions of Gina Rinehart in her capacity as trustee of a trust (the **HFMF Trust**). The beneficiaries of that trust (**the Plaintiffs**) commenced Federal Court proceedings against Ms Rinehart and others (**the Respondents**) alleging a breach of equitable and contractual duties that she owed in her capacity as trustee of the HFMF Trust. The Plaintiffs also commenced court proceedings against a number of companies controlled by Gina Rinehart (the **Third Party Companies**), who were the recipients of commercial assets from the HFMF Trust.

The Respondents sought to have the court proceedings stayed and the matter referred for arbitration on the basis that the dispute was the subject of an arbitration agreement contained in deeds which had been entered into between the parties.

The Third Party Companies also made an application to have the claims against them referred for arbitration, on the basis that they were a party claiming "through or under" the Respondents, and therefore were parties within the meaning of section 2(1) of the *Commercial Arbitration Act.*

THE HIGH COURT'S DECISION

Was the dispute subject to an arbitration agreement?

The arbitration clause in the deeds stated that "any dispute under this deed" should be referred for arbitration. The High Court unanimously held that this clause was sufficiently broad to encompass claims relating to the validity of the deeds and the arbitration agreements themselves as well as other

substantive claims. The Court found that the background to and the purposes of the deeds, as reflected in their terms, pointed clearly to arbitral clauses of wide coverage with respect to what was to be the subject of confidential arbitration.[2] Having regard to those matters, the Court held that it could not have been understood by the parties to the deeds that any challenge to the efficacy of the deeds was to be determined in the public spotlight, as opposed to through a confidential arbitration.[3]

Were the Third Party Companies a "Party" to the Arbitration Clause?

Section 2(1) of the *Commercial Arbitration Act* states that "a party to an arbitration agreement" includes "any person claiming through or under a party to the arbitration agreement". A majority of the High Court found that the Third Party Companies were persons claiming through or under the Respondents, and therefore were parties for the purposes of the *Commercial Arbitration Act*.[4]

The majority reasoned that as the Third Party Companies were assignees of the mining tenements under the deed, there was no good reason why the claims against the Third Party Companies should not be determined as between the Plaintiffs and the Third Party Companies in the same way as it would be determined between the Plaintiff and the Respondent (as the assignor of the mining tenements under the Deeds).[5]

The majority reasoned that to exclude the Third Party Companies from the scope of the arbitration agreement would give the arbitration agreement an uncertain operation, and would potentially lead to duplication of proceedings. For this reason, the Court held that it would frustrate the evident purpose of the statutory definition of a "party" in the *Commercial Arbitration Act*.[6]

The majority of the Court also held that the rights of the Respondents under the Deed were an "essential element" of the Third Party Companies' defence which vested in and was exercisable by the parties to the Deed.[7]

THE IMPORTANCE OF THE DECISION

The Importance of Context in Construing the Words of an Arbitration Agreement

The High Court's decision emphasises the importance of construing the words of an arbitration clause, like any clause in an agreement, in its context. Specifically, the context of the substantive agreement will be important to construing the words of the arbitration agreement.

While on one level the Court's decision conforms with the pro-arbitration approach adopted in recent years by various Australian courts and legislatures, the Court's decision falls short of providing a general endorsement because it was not necessary for the Court to consider broader issues such as the separability principle which treats an arbitration agreement as distinct and limits attacks upon its validity or the related kompetenz-kompetenz principle by which an arbitral tribunal is competent to rule on its jurisdiction. Nor was it necessary for the Court to consider the correctness of *Fiona Trust & Holding Corporation v Privalov*,[8] a decision by the House of Lords as to the construction of arbitral clauses, or previous authorities which had given a more restrictive meaning to clauses featuring the words "under this agreement". In this case, the Court was able to resolve the issues by reference to orthodox principles of interpretation.

Who is a Party to the Arbitration Agreement?

The majority decision has provided some additional clarity as to the circumstances when a third party will be able to bring an action under an arbitration agreement. However, the majority expressly limited its opinion on the scope of who is a "party" for the purposes of the *Commercial Arbitration Act* to the discrete controversy raised by this case.[9]

The Court observed that it was not necessary to consider cases involving multiple contracts where a defendant's purported reliance on an arbitral clause in a contract to which the defendant is not a party is precluded by the absence of an arbitral clause from the contract to which it is a party. In addition, the Court noted that it did not receive submissions about the wider and complex issues of arbitral consent and privity and third party claims more generally.

Accordingly, while there will be some cases where third parties who are not a party to a contract may be able to rely on an arbitration clause in that contract, that is not a principle of general application. The most prudent course is for parties to expressly contract for arbitration, if they wish to have their disputes resolved by arbitration.

End Notes

1. Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors [2019] HCA 13.

2. [2019] HCA 13 [44]-[48] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

3. [2019] HCA 13 [48] (Kiefel CJ, Gageler, Nettle and Gordon JJ) and [83] (Edelman J).

4. [2019] HCA 13 [74] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

5. [2019] HCA 13 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

6. [2019] HCA 13 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

7. [2019] HCA 13 [79] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

8. [2007] 4 All ER 951.

9. [2019] HCA 13 [78] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

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INDEPENDENT PANEL'S REPORT ON FAMILY JUSTICE SYSTEM WELCOMED

by John Green

Yesterday the Minister of Justice, Hon. Andrew Little, released the much-awaited report by the Independent Panel established to consider the 2014 family justice reforms.

The Panel, headed by former Human Rights Commissioner, Ros Noonan, and comprising panellists La-Verne King and Chris Dellabarca, recommended a raft of changes to the law, policy and practices that currently govern family justice services. In particular, the report recommends the creation of a joined-up family justice service, Te Korowai Ture ā-Whānau, to strengthen and connect family justice services, including the Family Court, so that children, parents and their whānau are treated with dignity and respect, listened to, and supported, to make the best decisions for them.

While the Panel concluded on the basis of extensive consultations, submissions and research that elements of the 2014 reforms must change, the really good news is that it says the evidence is compelling that it's in the best interests of children and young people to make arrangements about their care and other decisions about their lives with the least conflict and without having to go to court, which is inherently adversarial and concluded that parents and whānau should be encouraged to reach agreement and that FDR has a central role in that process.

We were delighted that the panel adopted our suggestion that there be a 'rebuttable presumption' that parties engage in FDR irrespective or where they enter the family justice system ie, that FDR should be the default process for most cases and that the Care of Children Act 2004 should be strengthened to provide that parties to parenting or guardianship proceedings who have not attended FDR are directed to attend FDR unless there are good reasons not to. Presently parents and whānau are required to complete FDR before filing an application in court however court directions to FDR are rarely made with only around 1% of cases filed in court directed to FDR. The changes recommended are intended to encourage judges, lawyers and Family Justice Coordinators to refer appropriate cases to FDR at the most appropriate time for parents and whānau.

The panel also recommended that FDR be accessible at the most appropriate time and be fully funded for all participants as the costs can be a financial strain for those required to pay for FDR and can cause resentment, particularly where one party is funded and the other is not. Presently FDR is partially funded by the government. It is free for people who meet the eligibility criteria. Those who are not eligible for funding must pay their share of $897 which in some cases is a barrier to engagement.

Importantly, the Panel believes that Te Korowai Ture ā-Whānau should be a model for the justice sector as a whole, in being child centred, in how te ao Māori is recognised, in its responsiveness to diversity, accommodation of disability and the handling of family violence. The panel says Māori parents and whānau should be able to access kaupapa Māori services that are delivered for, by

and to Māori and based on a Māori world view.

Our experience at the FDR Centre is that the present, largely two party, monocultural, one size fits all approach does not align with tikanga Māori or Māori views of whānau, particularly the role grandparents and extended whānau play in caring for children and mokopuna. Accordingly, it is unlikely to meet the needs of Māori in relation to developing whānau centric solutions to caring for children and mokopuna as the (presently funded) time available is likely to be insufficient to achieve those outcomes in most cases.

The Panel observed that transition from a siloed family justice system to Te Korowai Ture ā-Whānau will require sustained leadership at the political level, within the judiciary, the legal profession, from all other family justice services and from the Ministry of Justice.

Clearly, strengthening the family justice system to enhance access to justice for children, parents and whānau and improve the well-being of children and young people, will take time, resources and a high level of collaboration and commitment from all stakeholders. However, the Panel reported there is widespread agreement that change is urgently needed and a significant degree of consensus about the recommendations in the report, which it says provides a sound basis from which to make the changes that are so urgently required to restore pride and confidence in the family justice services - services where children and their whānau are treated with dignity and respect, listened to and supported to make the best decisions for them.

JOHN GREEN

John is the Director and founder of the Family Dispute Resolution Centre.

The FDR Centre works with the most respected and experienced FDR mediators to help you and your family resolve conflict out of court.

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Arbitration (2nd edition)

Arbitration (2nd edition) is a leading text in its field, which, as with its previous edition, provides a thorough commentary on, and guide to, the law and practice of arbitration in New Zealand. The book is well respected amongst those who practice in the field of arbitration. The commentary in this new edition is informed by the collective knowledge and experience of arbitrators and co-authors Anthony Willy and Terrence Sissons.

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