Methanex Motunui Ltd v Spellman - [2004] 1 NZLR 95

High Court Auckland
CL 3/03

17 March; 9 May; 18 August 2003
Fisher J

Arbitration -- Interpretation -- Interpretive approach to be taken to provisions of Arbitration Act 1996.

Arbitration -- Setting aside award -- Whether parties can contract out of right to apply to have award set aside for breach of natural justice -- Nature and extent of parties' right to notice of and reply to matters before arbitrator -- Arbitration Act 1996, First Schedule, art 34.

Arbitration -- Standing -- Who qualifies as party for the purposes of application to set aside award -- Arbitration Act 1996, First Schedule, art 34.

A contract for sale existed for gas from the Maui gas field. The gas was sold by a consortium of mining interests (the sellers) to the Crown. The Crown in turn sold the gas to downstream gas users which included the plaintiff, Methanex. The quantity of gas that the sellers were obliged to deliver to the Crown was determined by the amount of economically recoverable reserves in the Maui gas field. That figure was in tum used to determine the amount of gas that the Crown was obliged to deliver to the plaintiff and other downstream gas users. The figure was subject to redetermination in accordance with the contract of sale between the sellers and the Crown. The sale price under the contracts of sale was significantly less than the market price for gas. Consequently, the greater any redetermined figure of economically recoverable reserves the better off the plaintiff would be.

A dispute arose as to the recalculation of the economically recoverable reserves figure. In particular the plaintiff disputed the figure reached between the sellers and the Crown. It was ultimately agreed that the issue would be submitted to arbitration and that the plaintiff would agree to accept that determination in return for certain rights to participate in the arbitration. The arbitration agreement stated: "... there shall be no appeal against any decision of the Independent Expert except if the decision was induced or affected by fraud or corruption".

The first defendant was appointed as the independent expert to conduct the arbitration in accordance with agreement. The arbitration was conducted by written and electronic correspondence in which the plaintiff had limited rights of participation. After receiving submissions from the Crown and the sellers the defendant requested, and was provided with, further information from the sellers. The plaintiff requested an opportunity to make further submissions in light of the information. The defendant declined that request.

The defendant issued a draft determination. The determination was based in part on a reservoir simulation model that had been generated by the defendant independently of the submissions of the parties. In its response to the draft ruling the plaintiff complained that inadequate reasons were given, requested that details of the reservoir simulation model be released, and also made submissions regarding the further information that had been provided by the sellers. The request for the release of the reservoir simulation model was declined.

The defendant issued his final award, which relied on the defendant's reservoir simulation model. It determined the economically recoverable reserves at 405.1 petajoules. The plaintiff asserted that this understated the economically re-
coverable reserves by some 378 petajoules, which translated to a difference of value of some $600m. The plaintiff applied to have the award set aside for breach of natural justice.

Held:

1 When interpreting the Arbitration Act 1996 the purposes of finality and party autonomy had to be balanced against the intention that parties be afforded minimum standards of procedural protection. In the present case the parties had expressed themselves in an apparently contradictory manner by appointing an expert to determine the matter while stating that the process was to be an arbitration. Although the issue was to be resolved by identifying the dominant contractual intention, where the parties use the language of arbitration the Court would not lightly assume that a mere expert determination was intended which precluded the rules of natural justice (see paras [39], [40], [44], [46], [51], [53]).

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

Czarnikow v Roth, Schmidt and Co [1922] 2 KB 478 (CA) referred to.

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

Pupuke Service Station Ltd v Caltex Oil NZ Ltd [2000] 3 NZLR 338 (PC) referred to.

Forestry Corporation of New Zealand Ltd (in receivership) v Attorney-General [2003] 3 NZLR 328 referred to.

2 Only a party to an arbitration had standing to challenge an award under art 34 of the First Schedule to the Arbitration Act. A person was a party where:

(a) The person and some other person expressed differing views about a matter that would have legal consequence, or a matter that if left unresolved might give rise to such a dispute. The person need not necessarily have been a party to the dispute itself, but might be an affected third party;
(b) The question in dispute concerned rights which could be the subject of a legal remedy;
(c) The resolution of the dispute would be of legal consequence; and
(d) There was an agreement between the person and the other party submitting the matter to arbitration (though the actual issue might concern rights between third parties that flowed from the resolution of the question);
(e) The person and one or more of the other individuals with whom the person had the dispute were parties to the agreement to arbitrate;
(f) The arbitration agreement expressly or impliedly conferred on the person the right to participate in the arbitration process; and
(g) The agreement provided that the person would be bound by the result of the arbitration.

In the present case the plaintiff met these requirements and therefore had standing to apply to have the award set aside (see paras [101], [123]).

3 Where the parties agreed to resolve a dispute by arbitration a purported contractual exclusion of a right to review for breach of natural justice would be ineffective. A corollary of this was that it was not possible to contract out of the right to respond to evidence put before the arbitrator or argument of other parties to the arbitration. However, in the present case any breaches of the rights of the plaintiff were either not proved or were cured by subsequent events (see paras [130], [132], [173]).

4 The right of a party to notice of and response to new material was primarily founded in the terms of the First Schedule to the Arbitration Act and not the arbitration agreement. A party was entitled under arts 18 and 24(3) to notice of, and opportunity to respond to, material if it was: (a) evidence and argument provided by other parties to the arbitration; (b) the report of an independent expert specific to the dispute in question; (c) a document which might be used as proof of the truth of human assertions made therein with respect to facts in issue or the credibility of a witness; or (d) a document the existence or nature of which represented a new source of information bearing upon facts in issue or the credibility of a witness. Whether these categories extended to marginal cases might well be affected by the contractual intention of the
parties in the particular case. Disclosure obligations did not extend to internally prepared documents resulting from the 
research, reasoning process, copies of published works, or documented matters of which the arbitrator could take judicial 
notice (see paras [134], [144], [147]).


5 While lay arbitrators had to confine their fact finding to information provided by the parties, arbitrators chosen for their 
special expertise in the matter could draw on their knowledge and experience for facts which formed part of the general 
body of knowledge within their area of expertise, as occurred here. However, such experts could not rely on their ex­tra­neous knowledge of the specific events in question (see paras [155], [157]).


Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452 discussed.

Mediterranean and Eastern Export Co Ltd v Fortress Fabrics Manchester Ltd [1948] 2 All ER 186; [1948] WN 244 
referred to.


Proceeding dismissed.

Observations:

(i) The parties may contract out of the right to review of a dispute resolution determination for breach of natural justice by 
adopting a process other than arbitration, such as mediation or the determination of an expert (see para [127]).

(ii) It is implicit in art 18 of the First Schedule to the Arbitration Act that each party not only has the right to present its 
case in relation to issues known at the outset, but also to respond to such evidence and argument as may emanate from the 
other parties to the process (see para [139]).

Other cases mentioned in judgment

Acorn Farms Ltd v Schnuriger (High Court, Hamilton, M 136/02, 6 November 2002, Heath J).
Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2003] 2 NZLR 92.
Haddad v Norman Mir Pty Ltd [1967] 2 NSWR 676.
Heyman v Darwins Ltd [1942] AC 356; [1942] 1 All ER 337 (HL).
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1997) 145 ALR 500.
Honeybun v Harris [1995] 1 NZLR 64.
Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128 (HC).
Application

This was an application by the Attorney-General, the second defendant, Todd Petroleum Mining Co Ltd, the third defendant, Shell (Petroleum Mining) Co Ltd, the fourth defendant, Energy Exploration New Zealand Ltd, the fifth defendant, Energy Petroleum Investments Ltd, the sixth defendant, Maui Development Ltd, the seventh defendant, Natural Gas Corporation, the eighth defendant, and Contact Energy Ltd, the ninth defendant, for the proceeding taken by Methanex Motunui Ltd, first plaintiff, and Methanex Waitara Valley Ltd, second plaintiff, against Joseph Spellman, the first defendant, and themselves, to be dismissed under R 477 of the High Court Rules, or alternatively for the statement of claim to be struck out under R 186 of the High Court Rules and under the inherent jurisdiction of the Court.


M W Wilson QC for Mr Spellman.

J S Kos and S E Fitzgerald for the Attorney-General.

M G Colson for the third to seventh defendants.

F Miller (17 March 2003) and N MacFarlane (9 May 2003) for NGC.

Q Hay for Contact Energy.
FISHER J.

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Introduction

[1] Underground reserves of gas were present in an area known as the "Maui" field on the west coast of the North Island. The plaintiffs (Methanex) joined with others in the commercial use of the gas. Methanex's continuing contractual right to share in the gas turned on the amount left after calculating the economically recoverable reserves (ERR).

[2] Following a disagreement with most of the other defendants, Methanex agreed that redetermination of the ERR would be submitted to arbitration by the first defendant (the independent expert). In return for certain rights to participate in the arbitration, Methanex agreed that it would not challenge the independent expert's award unless it was "induced or affected by fraud or corruption". When the independent expert issued his award Methanex concluded that he had understated the ERR by 378 petajoules (PJ), which had a value of about $600m. Although there was no suggestion that the award had been "induced or affected by fraud or corruption" Methanex brought these proceedings challenging the award for breach of natural justice. The question is whether the proceedings should be allowed to continue.

[3] The dispute over ERR stemmed from the sale of natural gas under the Maui gas contract of 1 October 1973. The sale was from the third to sixth defendants (collectively referred to here and in the agreement as "Seller") to the second defendant ("the Crown", also referred to in the agreement as "Buyer"). The Crown entered into further long-term agreements on-selling the gas to Methanex and the eighth and ninth defendants (collectively referred to as "downstream gas users" or "DGUs"). The DGUs' interest in any redetermination of ERR as between Seller and the Crown was that it consequentially determined the quantity of gas which the Crown was in turn required to sell to the DGUs. The current market price of gas
The Maui supply contracts

[6] The facts that follow are a provisional outline for the purpose of this application only. They are taken from the statement of claim and undisputed assertions in the affidavits.

[7] Under the Maui gas contract the quantity of gas Seller was required to sell to Buyer was affected by the ERR (art 8). Once Seller had sold Buyer a quantity of gas that equated to the ERR, and subject to certain provisions for winding down Seller's contractual commitments, Seller was released from the obligation to sell more to Buyer. That was economically significant given the possibility, as in fact later occurred, that the price at which Seller was committed to sell under the Maui gas contract would fall below the market rates that later prevailed.

[8] Article 6 of the Maui gas contract provided for an initial determination of ERR with provision for redeterminations from time to time on the strength of revised information and data that Seller was to provide to Buyer. Either party could trigger the redetermination process by giving 90-days' written notice fixing a time and place for a meeting for that purpose. If the parties were unable to agree upon the ERR the dispute could be referred to an "independent expert" (arts 6.2 and 16.1). If the parties so agreed, the process before the independent expert would take the form of an arbitration to which the Arbitration Act would apply (art 16.1(g)).

[9] Following the Maui gas contract the Crown entered into a series of agreements on-selling the gas to the DGUs. A distinct agreement for sale and purchase was entered into for each DGU. Between them the DGUs took all the gas that had been purchased in the first instance by the Crown. Accordingly in substance the Crown was no more than an intermediary between Seller on the one hand and the DGUs on the other. The DGUs were directly affected by any redetermination of the ERR. The gas which could be purchased by any given DGU was that DGU's contractually specified proportion of the total gas available to the Crown from Seller.

[10] In view of the direct stake that each DGU had in the result of any ERR redetermination, the DGU agreements gave the DGUs certain contractual rights, as against the Crown, as to the way in which the Crown would conduct itself in any redetermination process. Pursuant to cl 6.8 of each DGU agreement, the Crown and each DGU were to negotiate a hearing agreement for the purpose of each redetermination. Failing agreement default provisions would come into operation. Of these, cl 6.8.8 provided:

"The Crown and the Gas Users will participate in the redetermination hearing before the Maui Expert strictly in accordance with the relevant Hearing Agreement but not otherwise. The Buyer shall present the arguments determined in accordance with Clauses 6.8.1(c) and 6.8.4 at the redetermination hearing before the Maui Expert and subject thereto, neither the Crown nor any Gas User will intervene in any way on its own behalf at such hearing. Unless specifically precluded by the relevant Hearing Agreement or by the Maui Expert the Crown and each Gas User will have the right to be present at the redetermination hearing before the Maui Expert, to consult with the persons presenting the Buyer's case on behalf of the Crown and the Gas Users and to provide to and receive from
such person information concerning the hearing subject to Clause 6.9 and to such conditions as may be provided for in the Hearing Agreement or imposed by such person, including without limitation, as to confidentiality, conflicts and protection of privilege.

The 2000/2001 redetermination process

[11] On 3 December 2001 Seller advised the Crown in writing that it required a redetermination. That triggered the procedural rights of the DGUs with respect to the way in which the Crown was to conduct itself in the redetermination process. Disputes then arose between Seller, the Crown, and the DGUs, over the adequacy of the data and information provided by Seller and other procedural aspects of the redetermination process.

[12] Methanex launched proceedings in the High Court concerning those issues (Wellington, CP 106/02). Joined as defendants were the Crown, the Seller group, Seller's agent MDL, and the two other DGUs, Natural Gas Corporation (NGC) and Contact Energy (Contact). Against the Crown, Methanex alleged failure to conduct the redetermination process in a way that adequately protected Methanex's interests. Against the defendants together described as "Seller", Methanex alleged deficiencies in the information that the Maui gas contract required Seller to provide as part of the redetermination process. Seller's shortcomings in that respect were said to amount to a breach of the Fair Trading Act 1986, deliberate interference with Methanex's economic interests, inducement of breach of contract, and unjust enrichment.

2002 settlement agreement

[13] Methanex's CP 106/02 proceedings were settled by a written agreement of 20 June 2002 (the settlement agreement). It was signed by all parties to that litigation. In return for Methanex's abandonment of those proceedings, the other parties agreed to a mechanism for resolving the current redetermination process. Clause 1 of the settlement agreement provided for the appointment of an independent expert who was to be one of three specified consultancies. The choice between the three was to be made by the three DGUs or, failing agreement between them, by the Crown. Once the choice was made, Seller and the Crown were to communicate with the independent expert over his appointment.

[14] Clause 2 required Seller to give the independent expert, Buyer, and the three DGUs, the data and information necessary for assessment of the ERR. As to the procedure that would follow, cls 5 - 7 and 10 materially provided:

5. The Crown, Methanex, NGC and Contact are to seek to agree a Hearing Agreement by 5pm on 12 July 2002. The Hearing Agreement may contain any provision to which all of those persons agree, whether or not provided for in clause 6.8.1 of Contact's agreement with the Crown (and equivalent provisions of other agreements). If by that time they have not agreed to, and executed, a Hearing Agreement then, immediately after 5pm on 12 July 2002, a Hearing Agreement will come into effect between them on the following terms:

5.1 The Independent Expert process is to be conducted as an arbitration under the Arbitration Act 1996, on the following agreed basis:

5.1.1 The Independent Expert is to determine the timetable and procedure for the arbitration (including, for example, whether to hold an oral hearing, to determine Economic Recoverable Reserves 'on the papers' or to adopt other procedures) but subject always to the rest of this paragraph 5.1. Buyer's counsel will tender any submission that any of the Buyer, Methanex, NGC or Contact wishes to make regarding process.

5.1.2 The Independent Expert's determination of Economic Recoverable Reserves is to proceed in 2 phases, namely:

(a) whether the data and information made available by Seller to Buyer before the date of the Independent Expert's appointment is all the data and information that may reasonably be required to assess the Economic Recoverable Reserves ("phase (a)"). If the Independent Expert decides that further data and information is reasonably required, the Independent Expert is promptly to request it under paragraph 2; and

(b) the determination of Economic Recoverable Reserves.

5.1.4 Subject to paragraph 5.2, the experts referred to in that paragraph may make submissions to the Independent Expert in each of the phases referred to in paragraph 5.1.2.

5.1.5 The timetable for the Independent Expert process is to be, or to be determined by the Independent Expert, as follows:

(a) Seller is to provide the Independent Expert with all the data and information which Seller has provided to Buyer in connection with the current redetermination of Economic Recoverable Reserves as soon as practicable after the date of the Independent Expert's appointment.
as such ('date of appointment'), being the data and information provided by Seller to Buyer from and including the 1998/1999 data pack and up to the date of appointment.

(b) The parties expect that the Independent Expert will make its decision in respect of the issue to be considered in phase (a) of paragraph 5.1.2 ('phase (a)') within 30 days of the date of appointment.

(c) The parties are respectively to make their submissions to the Independent Expert in connection with phase (a) within 7 days of the date of appointment.

(d) The parties expect that the Independent Expert will complete the redetermination of the Economic Recoverable Reserves, and deliver its award as provided in paragraph 5.1.10, within 120 days of the date of appointment.

(e) The parties are respectively to make any submissions to the Independent Expert in connection with the timetable and procedure of the Independent Expert process (in so far as not provided for in this paragraph 5.1) within 7 days after the Independent Expert calls for them.

(f) Promptly after making a decision in connection with phase (a), the Independent Expert is (subject to paragraph (d) above and paragraph 5.5) to determine the timetable and procedure for the remainder of the Independent Expert process - the redetermination of the Economic Recoverable Reserves. In particular:
   (i) there is to be a reasonable opportunity to make submissions, including in response to any issues raised by the Independent Expert, but
   (ii) no more than 21 days is to be allowed for the preparation and delivery to the Independent Expert of submissions, including substantive submissions, from the date the Independent Expert calls for them;
   (iii) no more than 14 days (commencing the day of the end of the relevant submission period) is to be allowed for the preparation and delivery to the Independent Expert of submissions in reply; and
   (iv) no more than 7 days (from the date it is provided) is to be allowed for submissions on the draft decision referred to in paragraph 5.1.10.

(g) Seller and, subject to this paragraph 5.1 and paragraph 5.4, Buyer may participate in any hearing or meeting before the Independent Expert and have like rights to present submissions and, subject to paragraph 5.1.9, cross-examine.

(h) The parties to the Independent Expert process are Buyer and Seller and, without limiting paragraph 5.6, Methanex, Contact and NGC have no right to have their own legal representatives participate in a hearing or meeting before the Independent Expert.

5.1.6 The Independent Expert is entitled to use its own expertise and judgment in redetermining the Economic Recoverable Reserves as long as it hears or takes into account the expert's submissions referred to in paragraph 5.1.4 (provided in accordance with paragraph 5.2) and has regard to the data and information supplied by Seller to Buyer prior to the date of the Independent Expert's appointment and such other data and information as the Independent Expert requires and receives under paragraph 2.

5.1.10 The Independent Expert's decision is to include the number of PJs at which the Independent Expert determines the Economic Recoverable Reserves, the allocation of those reserves between reservoirs and brief reasons for the determination and allocation. Before finalising and releasing that decision the Independent Expert is to provide the parties with an up-to-date draft of that decision, and paragraph 5.1.5(f)(iv) is to apply.

5.2 The experts appointed by Methanex, NGC and Contact respectively for the purposes, among others, of assessing the Economic Recoverable Reserves may make submissions to the Independent Expert, as expert witnesses called by Buyer. Those submissions are to be made in writing and, if the Independent Expert requires, in person, are to be provided to the other parties to this agreement at the same time as they are provided to the Independent Expert and are to include any supporting data and information, models and associated software and must be made according to the timetable decided by, and procedure chosen by, the Independent Expert as provided in paragraph 5.1. At an oral hearing the experts appointed by Methanex, NGC and Contact respectively to make oral submissions may not include their respective legal advisors nor exceed 3 in number.
5.4 Buyer's counsel is to take a neutral stance in relation to the respective views of the experts appointed by Methanex, NGC and Contact and is not to advocate for any particular position either on the part of Buyer or of Methanex, NGC or Contact (or any of them) and:

5.4.1 Buyer's counsel is to present any submissions on process referred to in paragraph 5.5.1;

5.4.2 Without limiting paragraph 5.1.9 if the Independent Expert requests cross-examination on any particular point or issue, Buyer's counsel is to conduct that cross-examination by asking the questions given to him or her for the purpose by each of Methanex, NGC and Contact.

5.6 Clauses 6.8.1 - 6.8.7 of Contact's agreement with the Crown (and the equivalent provisions in Methanex's and NGC's agreements with the Crown) are not to apply. Clause 6.8.8 (and the equivalent provisions) do apply on the basis that the arguments referred to in the second sentence of clause 6.8.8 are those referred to in paragraph 5.4 above.

6 Seller and Buyer agree that the Independent Expert process is to be conducted as an arbitration under the Arbitration Act 1996 on the basis set out in paragraph 5.1. Buyer and Seller agree that there shall be no appeal against any decision of the Independent Expert except if the decision was induced or affected by fraud or corruption. None of the Seller, Buyer, Contact, Methanex and NGC will otherwise challenge the number of PJ at which the Economic Recoverable Reserves are quantified.

7 Seller and Buyer agree to give effect to paragraph 5.2 above.

10 CP 106/02 is dismissed by consent order. Methanex agrees not to advance any claim on the same or similar grounds. Methanex is not to seek any Court order, whether by way of appeal or review or otherwise, that would have the effect of delaying the Independent Expert process, except as permitted by the second sentence of paragraph 6. Costs will lie where they fall as at the date of dismissal subject to Methanex paying the costs awarded on the interim injunction application."

The arbitration sequence

[15] The DGUs chose the first defendant's firm as independent expert. As a representative of that firm the first defendant accepted appointment in August 2002. No point has been taken as to possible differences between the first defendant and his firm. For the remainder of this judgment it will be convenient to concentrate upon him alone.

[16] The arbitration process that followed did not include any oral hearing. All communication between the participants and the independent expert was conducted in writing, whether conveyed by email or personal delivery. This included the parties' provision of electronic data and models. A legal practitioner was appointed as Buyer's counsel pursuant to cl 5.3 of the settlement agreement. She acted independently of the Crown's counsel and solicitors. The Crown did not appoint any expert or offer substantive submissions. The submissions were prepared by the participants and their non-legal experts.

[17] "Phase (a)" of the redetermination process concerned the adequacy of data and information to be provided by Seller pursuant to art 6.1.1 of the Maui gas contract. Also to be resolved at the outset were the timetable and procedure required for the arbitration. Seller and each of the DGUs filed submissions with the independent expert on both subjects. In its submissions Methanex asked for the opportunity to present further submissions on the effects of any further data and information to be provided by Seller.

[18] In a ruling of 4 September 2002 the independent expert held that Seller did need to provide further data and information. In the ruling he foreshadowed the possibility that he would generate his own interpretations and models. No objections to his doing so were made by the parties. He repeated the warning in a ruling of 9 September 2002 concerning timetable and procedure required for the arbitration. Seller and each of the DGUs filed submissions with the independent expert on both subjects. In its submissions Methanex asked for the opportunity to present further submissions on the effects of any further data and information to be provided by Seller.

[19] On 13 September 2002 Seller provided the further data and information required by the independent expert. Seller and the DGUs filed their phase (b) submissions on 30 September 2002. On 8 October 2002 Buyer's counsel wrote to the independent expert advising that Buyer considered that Seller's phase B submissions raised matters outside the independent expert's jurisdiction. On 14 October Methanex and other defendants filed submissions on that topic and also in reply to the substantive phase (b) submissions of other parties. On 16 October 2002 the independent expert ruled that he did not need to hold an oral hearing on the substantive phase (b) submissions or reply submissions. Instead he would ask any specific questions that might be required in order to clarify issues as they arose.
[20] On 17 October 2002 the independent expert requested from Seller further data and information referred to by Seller in its reply phase (b) submissions. When Seller provided the further data and information to the independent expert and counsel for Buyer on 25 October 2002, counsel for Buyer forwarded them on to Methanex. By letter of 22 November 2002 Methanex requested Buyer's counsel to forward to the independent expert a letter from Methanex asking for the opportunity to make additional submissions on the further data and information provided by Seller.

[21] On instructions from the Crown, counsel for Buyer declined to forward Methanex's letter to the independent expert but she did inform the independent expert of Methanex's request that it be permitted to make further submissions in response to the further information from Seller. The independent expert responded that he did not consider it necessary to request additional submissions at that time and that the further data requested of the Seller on 17 October 2002 was a data request and not a request for additional submissions. By letter of 5 December 2002 Methanex requested the independent expert to reconsider his decision not to allow additional submissions with respect to the new data. This was not acceded to.

[22] On 13 December 2002 the independent expert released his draft ERR decision for comment. In doing so he rejected the concerns earlier raised by Buyer that he had exceeded his jurisdiction. In his draft decision the independent expert indicated that he had generated the foreshadowed interpretations and models on technical and economic aspects of the ERR redetermination.

[23] On 18 December 2002 Methanex wrote to Buyer's counsel advising that in its view the draft ERR decision did not provide adequate reasons. Methanex requested production of the independent expert's reservoir model. Buyer's counsel forwarded the letter to the independent expert. On 19 December 2002 he responded that he had complied with the settlement agreement. In his view he could not produce the reservoir simulation model without the agreement of the other parties. Such agreement was not forthcoming.

[24] On 20 December 2002 Methanex provided a submission in reply to the independent expert's draft decision. In the submission Methanex repeated its complaint that the independent expert had not provided the reservoir simulation model for comment. It appended the submissions it had sought to make earlier regarding the supplementary data and information from Seller.

[25] On 6 February 2003 the independent expert issued his final award. In substance it repeated the draft distributed on 13 December 2002. The only changes were minor numerical differences and some changes to the reasons given. The changes addressed issues raised by Methanex and others in response to the draft determination. The award confirmed the independent expert's reliance on his own reservoir simulation model and the various interpretations that he derived from it.

[26] In his final award the independent expert assessed total original ERR at 3561.8 PJ and consequent remaining reserves at 405.1 PJ as at 1 October 2002. Methanex's expert GCA contends that due to errors in the independent expert's model, his ERR figure has been understated by about 378 PJ. At the current Maui contract price the difference has a value of about NZ$600m. The difference would almost double the Maui reserves remaining subject to the Maui gas contract.

[27] Methanex has production facilities at Motunui and Waitara valley. They are owned by the first and second plaintiffs respectively. Each has a DGU contract with the Crown to buy Maui gas. The effect of the independent expert's award is to markedly reduce the gas Methanex thought it was entitled to. The Crown contends that based on the final determination the first plaintiff has already substantially overtaken its contractual entitlement and there is little remaining for the second plaintiff.

[28] An increase of 368 PJ would increase the Methanex entitlement by 168 PJ. An increase in ERR by even 10 PJ would entitle Methanex to another 1.2 PJ. Under the DGU agreements 1 PJ costs Methanex approximately $2m. The contract price that Seller committed itself to under the Maui gas contract is now well below the market price of the gas. As a result of the independent expert's final award Methanex has had to suspend operations at two of its three New Zealand plants. Methanex says that if the final award prevails it will probably have to close the last of its New Zealand plants next year. Being anxious to challenge the award, it issued these proceedings on 11 February 2003.

The issues

[29] Methanex pleads a denial of natural justice in three respects which I would summarise in these terms:

(a) It was denied the opportunity to respond to the supplementary information and data provided by Seller to the independent expert on 25 October 2002;
[30] As to the first of those complaints, Methanex pleads that on 25 October 2002 Seller provided the independent expert with the additional information called for by the independent expert and that this was forwarded on to Methanex on 29 October 2002. The new data had been used by Seller in its reply phase (b) submissions to rebut GCA's submissions provided on behalf of Methanex. On 28 November 2002, through Buyer's counsel, Methanex asked for permission to make further submissions in response to the information in question. The complaint is that the independent expert wrongly declined that request.

[31] The other two issues are essentially two sides of the same coin. Methanex pleads that when the draft decision was issued by the independent expert it noted the reference to the independent expert's creation of his own reservoir model. Its request to see the model, and the assumptions on which it was based, was declined. It pleads that the independent expert had "generated independent interpretations and models on many of the technical and economic aspects of the Maui gas reserves determination" in a way which was "not reasonably foreseeable by the plaintiffs in the circumstances", and did not give Methanex an opportunity to respond to the independent work carried out by the independent expert. It went on to plead that the independent expert "created and ultimately relied on an independent reservoir model that incorporated many adjustments not proposed or commented upon by the participants in the arbitration" and "generated and used (without proper explanation or opportunity for submission) a recovery factor significantly lower than the range of figures submitted by the participants and by the experts acting for the participants in the arbitration".

[32] It is not suggested that any inadequacy in the reasons provided for the award would have been of practical consequence to Methanex other than for the purpose of providing Methanex with an opportunity to comment thereon. Essentially, therefore, Methanex's complaints all turn on an alleged right to be advised of matters likely to influence the outcome of the arbitration with the opportunity to advance evidence and/or argument in response. On those grounds Methanex seeks an order pursuant to art 34(2) and (4) of the First Schedule to the Arbitration Act 1996 remitting the award to the independent expert on terms, or alternatively an order pursuant to art 34(2) setting aside the award.

[33] In the application now before the Court all defendants other than the independent expert seek to have Methanex's current proceedings struck out. The independent expert was not included as a formal applicant but on his behalf Mr Wilson QC presented brief submissions rejecting Methanex's criticisms of the award.

[34] The defendants contend that the statement of claim does not disclose a reasonable cause of action and is an abuse of process. The twin grounds are that Methanex lacks the party status required for proceedings under art 34 of the First Schedule to the Arbitration Act, and that the proceedings are barred by cls 6 and 10 of the settlement agreement. The primary order sought is dismissal of the proceedings under the High Court Rules, R 477. In the alternative the defendants ask that the plaintiff's statement of claim be struck out under R 186 and the Court's inherent jurisdiction.

[35] The principles upon which applications of this kind are to be approached are well settled: see Southern Ocean Trawlers Ltd v Director-General of Agriculture & Fisheries [1993] 2 NZLR 53 (CA) at p 62 and Peters v Davison [1999] 2 NZLR 164 (CA) at p 180. The proceedings or pleadings should be struck out if the Court is satisfied that even on the most favourable interpretation of the facts pleaded or available, the plaintiff could not succeed in law. For this purpose the facts asserted in the pleading may be supplemented by affidavits so long as the material relied upon is incontrovertible. The Court will not attempt to resolve genuinely disputed issues of fact, all of which must be left to trial. The jurisdiction is to be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material, and the assistance from the parties, required for a definite conclusion. A claim should be struck out only if it is so clearly untenable that it could not possibly succeed.

[36] In the present case the ultimate question is whether the statement of claim, key documentary exhibits, and other incontrovertible facts, demonstrate that Methanex's challenge to the award could not possibly succeed. The incidental questions are whether a person who had not been a party to an arbitration can apply for relief under art 34 who qualifies as a party for that purpose, whether Methanex has an arguable case that it qualified in this case, whether Methanex purported to contract out of its right to review for breach of natural justice, the extent to which an arbitration agreement can affect the
scope of the natural justice to be applied in a particular case, and whether Methanex has an arguable case that its right to natural justice was in fact breached.

Finality versus individual rights

[37] Those questions turn largely on the proper interpretation of the Arbitration Act 1996. Mr Turner for Methanex, and Mr Kos delivering the main argument for the defendants, differed over its interpretation in a number of areas. These included: the legal standing necessary for an application to review an award under art 34 of the First Schedule to the Act; the extent to which the Act now permits contracting out of the right to review an award for breach of natural justice; the scope of natural justice as a ground for review since the Act 1996; and the extent to which an arbitration agreement can now limit the natural justice requirements that would otherwise have applied. I have not found those questions simple ones. So far as counsel could ascertain they are surprisingly devoid of authority.

[38] Pursuant to s 5 of the Interpretation Act 1999, the meaning of an enactment is to be ascertained from its text and in the light of its purpose. Before turning to the individual questions of interpretation in more detail it will be useful to consider the relevant purposes of the Arbitration Act.

[39] The statutory purpose that has tended to attract the most attention since the 1996 Act was enacted is that of finality (see, for example, Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 318 (CA) at pp 330 and 332; Acorn Farms Ltd v Schuurman [High Court, Hamilton, M 136-02, 6 November 2002, Heath J]; and Pathak v Tourism Transport Ltd [2002] 3 NZLR 681). As Blanchard J said in Gold and Resource at p 332, para [52], "Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made". These days the Courts will not interfere with awards in the absence of compelling reasons for doing so.

[40] That had become the approach even before the 1996 Act. The law has come a long way since Scrutton LJ said in Czarikow v Roth, Schmidt and Co [1922] 2 KB 478 (CA) at p 488 that any provision in an arbitration agreement purporting to exclude a party's right to have a point of law referred to the Courts for determination would be contrary to public policy in that "[t]here must be no Alsatia in England where the King's writ does not run". By 1989 Cooke P noted in RBI NZ Ltd v Badger Chiyoda [1989] 2 NZLR 669 (CA) at p 680 that "... modern public policy points strongly towards non-interference with arbitral decisions if the parties clearly intended them to be final. In all such cases non-interference should be the prima facie rule ...", a sentiment he repeated in Manukau City Council v Fencible Court Howick Ltd [1991] 3 NZLR 410 (CA) at p 412.

[41] Although dicta of that kind have usually been made in the context of challenges for error of law, their broad language suggests that they were intended to have wider application. As Lord Mustill said in Pupuke Service Station Ltd v Caltex Oil NZ Ltd; appendix to Gold and Resource Developments [2000] 3 NZLR 318 at pp 338 - 339:

"LORD MUSTILL. [1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it."

[42] Those expressions of judicial policy can only have been strengthened by the 1996 Act. Section 5 includes among the purposes of the Act the encouragement of the use of arbitration (s 5(a)) and the redefinition and clarification of the limits of judicial review (s 5(d)). The power of the Courts to intervene is expressly limited (arts 5, 34 and 36 of the First Schedule). Even appeals on questions of law may be precluded by agreement (s 6(2)(b); art 5 of the Second Schedule).

[43] Decisions prior to the 1996 Act in New Zealand, the Arbitration Act 1996 in England, and the International Arbitration Act 1974 (Cth) in Australia, can no longer be uncritically applied given the sea change brought about by adoption of the UNCITRAL Model Law on Arbitration and its variants in those three countries. Considerable caution must now be employed before applying authorities from an era when Courts were more ready to intervene.
[44] But in that climate it would be easy to overlook an important competing consideration. By the 1996 Act Parliament also revealed a clear intention to ensure that each party would enjoy, and where necessary be able to enforce, a minimum standard of procedural protection. Certain procedural rights in the First Schedule are inalienable - notably those relating to impartiality (art 12), opportunity to be heard (art 18), notice (art 24(2)) and disclosure (art 24(3)). Those rights have been coupled with an express power to set aside awards (art 34) or decline to enforce them (art 36). The grounds for intervention under arts 34 and 36 are broad. "Public policy", "fraud", "corruption", and "natural justice" do not appear to be confined to those procedural protections specifically identified earlier in the schedule. They appear to tap into existing common law grounds and principles to at least some degree.

[45] Parliament evidently intended that New Zealand's minimum standards of natural justice would not slip below those generally recognised abroad. The purposes of the Act include the promotion of international consistency of arbitral regimes (s 5(b)), the recognition and enforcement of arbitration agreements and awards (s 5(e)), and the implementation of New Zealand's international treaty obligations (s 5(f)). New Zealand's international treaty obligations are recorded in the Third Schedule to the Act. Broadly speaking a New Zealand award will be recognised and enforced in other treaty countries only if the award is not contrary to their public policy and/or laws - see art I(e) of the Geneva Convention on the Execution of Foreign Arbitral Awards 1923 and art V, cl 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In most countries public policy requires observance of at least the rudiments of natural justice. So the price of enforcement overseas appears to be natural justice at home. Consistency between international and domestic arbitral regimes (s 5(e)) also implies that appropriate regard will be paid to the standards of natural justice recognised on the international stage as well as the local one.

[46] By submitting their dispute to arbitration the parties have manifested a wish to have their dispute determined judicially, with the natural justice that that entails. They have an open choice in this regard. They can dispense with natural justice by referring their dispute to expert determination rather than arbitration: see in that regard Forestry Corporation of New Zealand Ltd (in receivership) v Attorney-General [2003] 3 NZLR 328 and the decisions referred to therein, in particular Langham House Developments Ltd v Brompton Securities Ltd (1980) 256 EG 719; Palacath Ltd v Flanagan [1985] 2 All ER 161; Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] BLR 65; and AIG Europe SA v QBE International Insurance Ltd [2001] 2 Lloyd's Rep 268. Opting for arbitration rather than expert determination is synonymous with adopting natural justice safeguards. And natural justice safeguards would be hollow ones if unenforceable when needed. So finality of awards must always be balanced against the need to respect the parties' free and deliberate choice of a process that would entail enforceable procedural protections.

[47] It follows that when interpreting any given provision in the Arbitration Act 1996 it will never be enough to stop at the point that awards should be upheld in the interests of finality and party autonomy. In each case a balance must be struck between that statutory purpose and the competing statutory purpose of vindicating the fundamental procedural rights of each party.

[48] Achieving that balance will be particularly challenging in a case where the parties have purported to opt for arbitration and yet have purported to exclude enforceable standards of natural justice. In the present case, for example, the parties have purported to adopt arbitration and yet have purported to deny Methanex the right to seek judicial redress for breach of natural justice. Mr Kos submitted that to permit proceedings in those circumstances would frustrate the new emphasis on party autonomy. I would see that as one of the central dilemmas in a case like the present one.

[49] "Party autonomy" is usually equated with respect for the agreement between the parties. Agreement between the parties has always been the foundation for arbitrations, albeit with an overlay of statutory amplification. I agree that the 1996 Act reinforces party autonomy. Parties will be encouraged to arbitrate if they know that their agreements will be implemented (cfs 5(a)). Subject to express provisions to the contrary, they can determine their own procedure (art 19 of the First Schedule), contract out of the procedural provisions of the Second Schedule (s 6(2)(b)), and contract out of a number of others found in the First Schedule.

[50] However I do not think that dilemmas of the present kind are usefully viewed as tensions between party autonomy and judicial control. They are ultimately tensions between competing contractual intentions. The object is not to deny party autonomy but to give effect to it. If the parties say that they want arbitration, but in the same breath say that they do not want enforceable natural justice, their two statements are incompatible. Arbitration is a process by which a dispute is determined according to enforceable standards of natural justice. The scope of the particular natural justice to be applied
in a given case may be modified by agreement. But enforceable natural justice cannot be excluded altogether if the process is to remain arbitration.

[51] The inherent conflict in such an agreement must therefore be resolved by identifying the dominant contractual intention. In one case the conclusion might be that what the parties had really wanted was expert determination, whatever the language used. In another the conclusion might be that they wanted arbitration, with its attendant natural justice protections. Such conflicts can only be solved by interpreting the particular arbitration agreement in the particular case. However in cases where the parties have deliberately used the expression "arbitration", I do not think that the Courts will lightly assume that all they really wanted was expert determination. Expert determination assumes that the parties were content to cast themselves adrift from that bundle of rights and duties that has been developed over many years to protect the integrity of the arbitration process - a clear right to stay of competing Court proceedings, automatic arbitrator immunity, curial assistance with enforcement of interlocutory procedures and awards, international recognition, and a detailed statutory code of procedure designed to meet in advance the issues that experience shows are likely to arise when two parties ask a neutral third party to determine their dispute.

[52] There may be similar conflict between purporting contractually to confer participation rights on a named individual, on the one hand, and purporting to deny that individual the right to enforce them, on the other. With exceptions that are not material for present purposes, contractual rights assume significance only if they are enforceable. Again it is a question of seeking the dominant contractual intention in the particular case.

[53] To summarise, then, when interpreting the Arbitration Act 1996 it will be appropriate to take into account the increased emphasis on finality and party autonomy. The Courts will be more slow to intervene than in yesteryear. But the Act contemplates that by choosing arbitration rather than expert determination the parties have manifested an intention to adopt minimum standards of procedural fairness that each will be entitled to enjoy and enforce. The Act stipulates what the minimum standards are. Whether the parties are entitled to more will be a matter of contractual intention. The intention will be gleaned from the terms of the arbitration agreement, the nature of the dispute, and the appointment of an arbitrator known to have special expertise. These are all normal aids to contractual interpretation. The Act contains the machinery for enforcing the resultant procedural rights through the Courts. Individual provisions of the Arbitration Act are to be interpreted in that light. I now turn to the individual issues. The first is whether this was intended to be an arbitration at all.

**Was this intended to be arbitration or expert determination?**

[54] The defendants did not argue that this process was intended to be anything other than arbitration. In isolation the referral of the dispute to an "expert" in circumstances where the grounds for challenge were purportedly confined to fraud or corruption (cl 6) might have been consistent with expert determination. But the explicit statements that the process was to be conducted as an arbitration under the Arbitration Act 1996 (cls 5.1 and 6), coupled with the many contractually conferred procedural rights discussed below, place it beyond doubt that the dominant intention here was to have an arbitration. I approach the remainder of the case on that assumption.

**Can a person who was not a party to the arbitration apply for relief under art 34?**

[55] Mr Kos submitted that Methanex was not a party to the arbitration and therefore lacked the standing to bring these proceedings. Mr Turner submitted the contrary. The legislative background begins with s 6 of the Act which materially provides:

6. Rules applying to arbitrations in New Zealand -- (1) If the place of arbitration is, or would be, in New Zealand,
(a) The provisions of the Schedule 1; and
(b) Those provisions of the Schedule 2 (if any), which apply to that arbitration under subsection (2), -
apply in respect of the arbitration.
(2) A provision of the Schedule 2 applies -
(b) To every other arbitration referred to in subsection (1), unless the parties agree otherwise.
It is common ground that this was an arbitration in New Zealand and that in consequence the First Schedule applied to it. Article 34 of that schedule materially provides:

34 Application for setting aside as exclusive recourse against arbitral award – (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).

(2) An arbitral award may be set aside by the High Court only if -

(a) The party making the application furnishes proof that -
   (i) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or
   (ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
   (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Schedule; or

(b) The High Court finds that -
   (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
   (ii) The award is in conflict with the public policy of New Zealand.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if -

(a) A breach of the rules of natural justice occurred -
   (i) During the arbitral proceedings; or
   (ii) In connection with the making of the award.

Mr Kos pointed out that art 34(2)(a) explicitly refers to the "party" making the application. Methanex relies upon art 34(2)(b). Although art 34(2)(b) does not explicitly use the word "party", it was implicit that the qualification as a party referred to in art 34(2)(a) was required. Thus the time limit imposed by para (3) presupposes that it is a "party" that is making the application, as does the power to suspend the setting aside of proceedings under art 34(4). To allow non-parties to apply under art 34 would conflict with the consensual and private foundation for arbitrations. An award could not have any direct impact upon a person who was not a party to the arbitration agreement.

Mr Turner responded that Methanex qualified as a "party" for the purposes of the Arbitration Act but that in any event status as a party was not a prerequisite for relief under art 34(2)(b)(ii) and (4). On the latter point, Mr Turner pointed to the lack of any express use of the word "party" in art 34(2)(b)(ii) and the peculiar nature of a challenge founded upon fraud, corruption, or breach of natural justice. Vitiating factors of that kind were contrary to public policy. He submitted that the Act recognised this by allowing any person, party to the arbitration or not, to apply to set aside the award.

Jurisdiction for the present proceeding stems from art 34(1) and (2)(b)(ii). Although the word "party" is not used in those particular paragraphs accept Mr Kos' submission that only a party can challenge an award under art 34, and for the
reasons he advanced. The word "party" is used at various points throughout art 34. The fact that it is not found in paras (1) and (2)(b)(ii) is readily explainable by their grammatical structure which would have made reference to the applicant redundant. I agree that to allow strangers to challenge an award to which they had not been a party in a contractual sense would be contrary to the consensual and private nature of arbitrations. If the parties themselves do not complain that their award is contrary to public policy, I can see no warrant for allowing a stranger to do so. The objectives of finality and party autonomy discussed earlier point the same way. I accept that only a party can apply for relief under art 34.

Who qualifies as a "party" for the purposes of art 34?

[60] Mr Turner contended that Methanex qualified as a "party" to the arbitration for the purposes of art 34. Mr Kos contended the contrary. By way of preliminary Mr Kos pointed out that cl 5.1.5(h) of the settlement agreement provided that "The parties to the Independent Expert process are Buyer and Seller ..." (emphasis added). The "Independent Expert process" was the arbitration. "Buyer" and "Seller" were the Crown and the gas vendor companies. Methanex was neither. So it was not included in the contractual expression "parties to the Independent Expert process".

[61] Whether Methanex qualifies as a "party" for the purposes of art 34 is ultimately a matter of statutory intent. I do not think that the answer can be found in the labels that the parties gave themselves in their agreement. I accept that contractual labels can help to show what procedural rights a designated person was intended to have, or not to have, in an arbitration. Such expressions may even have an indirect bearing upon contractual intentions with respect to review rights. But by agreeing that their dispute would be resolved by arbitration the parties deliberately chose a process that they knew would be governed by the Arbitration Act. The Act has its own meaning for "party".

[62] Statutory meaning, and its application to the facts, is a matter for the Courts. In general it is for parties to prescribe the scope of their contractual rights and for the Courts legally to classify the result: Fatac Ltd (In Liquidation) v Commissioner of Inland Revenue [2002] 3 NZLR 648 at p 660. As Lord Templeman put it in Street v Mountford [1985] AC 809 (HL) at p 819:

"... the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

[63] The principal question is therefore what Parliament had in mind when it used the word "party" in art 34. "Party" is defined in s 2 of the Act in the following way:

Party means a party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

[64] "Arbitration agreement" is defined in the same provision as follows:

Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[65] The meaning of these expressions attracted much argument. There is a degree of circularity between the definition of "arbitration agreement", which includes the expression "parties", and the definition of "party", which includes the expression "arbitration agreement". The overworked word "party" is also used in different senses within the definitions themselves. It seems that one can be a "party" to an arbitration agreement without being a "party" to the associated arbitration. The reference to "the" parties in the definition of "arbitration agreement" presupposes that all the parties to the arbitration agreement submit disputes between them to arbitration but the definition of "party" envisages that there will be some situations in which arbitrations will not involve all of the "parties" to the arbitration agreement. No doubt the un-
comfortable relationship between the two definitions is due to the attempt to marry a New Zealand definition of "party" with the UNCITRAL Model Law definition of "arbitration agreement".

[66] Nor is the UNCITRAL definition of "arbitration agreement" itself free of difficulty. The pregnant expression "defined legal relationship" is an invitation to debate, as is the overcompressed expression "disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". On a purely semantic analysis it is impossible to say whether "between them" qualifies disputes "which have arisen" as well as those "which may arise" and whether "in respect of a defined legal relationship" qualifies disputes "which have arisen" as well as those "which may arise".

[67] Although the meaning of "party" arises in the present case solely for the purpose of determining standing to apply for a review of the award, its meaning has wider implications. The word "party" is used liberally throughout the Act. It serves a host of different purposes. The Act has been drafted on the assumption that everyone who submits current or future disputes to arbitration will be a "party".

[68] The same applies to the associated expression "arbitration agreement". It too is found at many points throughout the Act - see, for example, the arbitrariness of disputes (s 10), special provisions relating to consumers (s 11), implied terms (ss 12 and 14), the form of the arbitration agreement (First Schedule, art 7), stay of proceedings (First Schedule, art 8), applications to set aside (First Schedule, art 34(2)(a)) - although somewhat disconcertingly the term "submission to arbitration" is used in art 34(2)(a)(iii) - and extensions of time for commencing arbitration proceedings (Second Schedule, cl 7).

[69] Of those other provisions which use the expressions "party" and/or "arbitration agreement", the most important for present purposes is s 10(1). It provides:

10. Arbitrality of disputes -- (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

[70] The empowering statement in s 10 is that, subject to express exceptions, any dispute which the "parties" have agreed to submit to arbitration under an "arbitration agreement" may be determined by arbitration. But the converse may well be implied, namely that where individuals agree to submit a dispute to arbitration in circumstances where they do not qualify as "parties", or have not signed a qualifying "arbitration agreement", the Act will not apply. At common law the parties to a contract could agree to submit almost anything to arbitration: *Heyman v Darwins Ltd* [1942] AC 356 at pp 360, 370 and 377; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (CA) at p 247. A narrow interpretation of the expressions "party" and "arbitration agreement" in s 10 could therefore introduce a new constraint upon the disputes to which the Arbitration Act 1996 could apply. This could scarcely be reconciled with the statutory purpose of encouraging the use of arbitration as an agreed method of resolving commercial and other disputes (s 5(a)).

[71] Those are reasons for attributing to "party" and "arbitration agreement" an expansive meaning where the Act makes that semantically possible. The matter does not end there given that s 2 definitions are qualified by the phrase "unless the context otherwise requires". However, no argument was advanced that standing to apply for review under art 34 requires a more narrow interpretation of "party" than that adopted for the remainder of the Act. Nor can I see any basis for drawing such a distinction. It would be anomalous if a "party" to an arbitration had all the rights and obligations applicable to arbitrations under the Act in general, and yet was denied eligibility to seek review of the award under art 34. My conclusion is that the meanings of "party", and the associated expression "arbitration agreement", were intended to be broad. With that in mind I turn to the detailed wording of the definitions.

[72] The definition of "party" takes the reader immediately to the definition of "arbitration agreement". The first requirement when addressing the latter definition is to determine the intended distribution of the qualifiers "between them" and "in respect of a defined legal relationship". Although unclear on a purely semantic basis, I have concluded that the phrase "between them" must have been intended to qualify disputes "which have arisen" as well as disputes "which may arise".

[73] The reference to disputes which "have arisen" and those which "may arise" seems intended to capture the temporal distinction between: (a) a generalised contractual formula for resolving disputes which may arise in the future; and (b) situations in which a particular dispute having already arisen, the parties agree to refer it to arbitration. The former are
usually referred to as "arbitration clauses" and form part of a larger and ongoing contractual relationship for other principal purposes. The latter are sometimes referred to as "specific", "ad hoc" or "submission agreements". For the purpose of deciding whether the parties submitting the dispute to arbitration must have a dispute "between them", it is difficult to think of any reason for distinguishing between those two classes of agreement. I conclude that the phrase "between them" was intended to qualify both.

[74] There is similar ambiguity over the object of the qualifier "in respect of a defined legal relationship" in the definition of "arbitration agreement". Again, it is difficult to think of any reason for distinguishing between disputes "which may arise" and those "which have arisen". Mr Turner did not challenge Mr Kos' submission that the phrase qualified both classes of agreement. I agree.

[75] It follows that to constitute an "arbitration agreement" the agreement must relate to all or certain disputes between parties who have agreed to submit the disputes to arbitration. It must involve all or certain disputes in respect of a defined legal relationship. That is so whether or not the dispute in question had already arisen at the time of the arbitration agreement.

[76] The next word, and it is one that is particularly significant in the present case, is "dispute". At least in respect of existing disputes, useful dictionary definitions of "dispute" appear to include "argument or quarrel" (Collins English Dictionary, meaning 5) and "controversy, debate" (Concise Oxford Dictionary). Both appear to contemplate a situation in which two or more individuals have a relationship of conflict due to their expression and maintenance of conflicting views or positions. The provision for entry of an arbitral award as a judgment pursuant to art 35(1) of the First Schedule to the Act implies that the dispute between the parties must be one in respect of which an arbitration award would be of legal consequence. For there to be an existing dispute it also seems necessary that a nexus be formed between the different views or positions of the disputants by means of direct or indirect communication between them and that the difference of view or position be maintained in a way which continues to be of significance between them. That seems implicit in the dictionary definitions cited. It follows that for the purposes of the Act there will be a "[dispute] ... between them" when two or more individuals express and maintain in relation to each other conflicting views or positions the resolution of which will or may be of legal consequence.

[77] The position is less obvious where the question submitted to arbitration is not the subject of any current dispute. In the present case, for example, there is no allegation that the parties had expressed conflicting views on the subject at which the ERR should be set before execution of the settlement agreement. The argument appears to have been confined to preliminaries which would affect the redetermination process rather than the ERR figure itself. Questions concerning value or quantity are sometimes submitted to arbitration without any prior exchange of conflicting views on the subject. A related lessor and lessee may prefer to have a rent review determined by an independent third party notwithstanding the absence of any conflict on the subject. Not all questions referred for the determination of independent third parties are associated with the actuality or prospect of a dispute. That is not to deny the utility of arbitrations in situations of that kind.

[78] There was no difficulty under the Arbitration Act 1908. Application of that Act turned on the s 2 definition of "submissions", which included not only agreements to submit "present or future differences" (the equivalent of "disputes which have arisen or which may arise" under the Act 1996) but also agreements "under which any question or matter is to be decided".

[79] The Law Commission considered the point in "Arbitration Report" (1991) NZLC R20 para 201, p 129. The commission considered that limitation to "disputes which have arisen or which may arise" did not diminish the reach of the new Act on the basis that a question or matter which is not the subject of any present dispute can still be submitted to arbitration in that a dispute concerning it "may arise".

[80] The 1996 definition undoubtedly embraces arbitration clauses which provide a formula for the resolution of future disputes. The more natural reading of the statutory language, however, may well be to confine its application to agreements that contemplate the existence of a dispute by the time the arbitration commences, whether or not the dispute had existed at the date of the agreement. The same assumption seems to underlie art 8(1) which withholds the protection of a stay of Court proceedings if there is no "dispute between the parties with regard to the matters agreed to be referred".

[81] The concluding words in art 8(1) were added to the UNCITRAL Model Law provision for stays to maintain the integrity and efficiency of the summary judgment procedure for cases in which there was no arguable defence: see New
Zealand Law Commission report NZLC R20 para 309, p 167. On the face of it art 8, and that part of the Commission's report, assume that the only arbitration processes worthy of protection would be those in which a dispute existed by the commencement of the arbitration. However the inference is oblique. A possible alternative is that non-disputatious arbitrations were thought to be capable of statutory recognition even though unworthy of protection against supervening Court proceedings.

[82] I previously concluded that in cases of ambiguity the reach of the Act should be expansive. It should embrace as many types of arbitration as possible. The Courts should be slow to assume that in comparison with its predecessor the scope of the new Act has diminished. In my view that justifies a liberal interpretation of "disputes ... which may arise". The desired result can be achieved by interpreting "disputes ... which may arise" as meaning "questions which may give rise to a dispute if left unresolved". For brevity I will use the expression "dispute" from this point to include not only existing disputes but also potential disputes of that kind.

[83] The next phrase traversed in argument was "a defined legal relationship". Several factors suggest that this phrase has a particularly broad meaning. First, the relationship need not be contractual ("whether contractual or not"). Secondly, s 10(1) appears to envisage that arbitration agreements can embrace any dispute which the parties have agreed to submit to arbitration so long as the arbitration agreement is not contrary to public policy or, under any other law, is not capable of determination by arbitration. Thirdly, the survey of policy considerations and implied legislative intentions conducted earlier suggests that Parliament would not have intended to reduce the range of disputes previously amenable to arbitration.

[84] Those considerations support the view that "defined legal relationship" is neither confined to relationships recorded in documents nor to formal relationships such as contracts, trusts or partnership agreements. Consistent with this view, it has been held that they include relationships between persons in breach of statutory duty and their victims: Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1997) 145 ALR 500 (arbitration clause upheld where dispute under Trade Practices Act 1974 (Aust), the Australian equivalent of the Fair Trading Act 1986 (New Zealand), appeal allowed on another aspect (1998) 149 ALR 142).

[85] There must be some limitation imposed by the expression "defined legal relationship" if complete redundancy is to be avoided. As a bare minimum, the expression would seem to indicate that the dispute must be of a legal nature as distinct from a merely religious, cultural, academic, or social one. That would be consistent with the enforceability provisions of art 35(1) of the First Schedule which provides:

35. Recognition and enforcement -

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.

I take it from art 35(1) that for two individuals to have a "defined legal relationship" for present purposes there must be a relationship which gives rise to the possibility that one is entitled to some form of legal remedy against the other.

[86] Counsel strongly differed over the next question which is whether the defined legal relationship must lie between the parties to the dispute submitted to arbitration. At first sight one might assume that to be so. However, the plain language of the provision does not require it. The definition of "arbitration agreement" does not say that there must be an agreement by the parties to submit to arbitration disputes in respect of "their" defined legal relationship. It is sufficient if they agree to submit to arbitration a dispute in respect of "a" defined legal relationship. On the face of it that must include a dispute between A and B in respect of a defined legal relationship between B and C or between C and D.

[87] That interpretation is reinforced by the breadth of the expression "in respect of". As was said by Mann CJ in Trustees Executors & Agency Co Ltd v Reilly [1941] VLR 110 at p 111:

"The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer."
That passage was cited with approval in *Equiticorp Industries Group Ltd (In Statutory Management) v Hawkins* (1993) 8 ANZ Insurance Cases 61-207 at p 75-273. To similar effect Viscount Simon LC said in *Heyman v Darwins*, at p 360:

"...the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties 'in respect of the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it.'"

[88] The point can be illustrated by a situation in which A has an agreement to indemnify B who faces a contract claim by C. The circumstances may be such that there is no legal relationship between A and C that would entitle either to sue the other notwithstanding the direct conflict between their respective commercial interests. C argues that B is liable to C. A disagrees. It is a matter of indifference to B. Why should not A and C be permitted to refer their dispute to arbitration? For the award to be of legal consequence B may have to agree to be bound by it. But subject to that possibility, I can see no reason why A and C should not be permitted to submit to arbitration the dispute between them in respect of the defined legal relationship between B and C. Neither the plain words of the section, nor the commercial realities, suggest otherwise.

[89] The result is that an agreement by A and C to submit to arbitration a dispute between A and C over B's liability to C amounts to an "arbitration agreement" for the purposes of s 2(1). The same is true of an agreement by A and B to submit to arbitration a dispute between them over C's liability to D.

[90] The next question is the meaning of "party to" such an agreement for the purposes of the definition of "party". A person is generally considered to be a "party to" an agreement if, by entering into the agreement, the person undertakes to be contractually bound by all or some of its terms. The matter does not end there, however, because in principle the same document could be used to record an exchange of promises between different combinations of signatories in ways that are not necessarily interdependent. Further, in return for A's promise, B and C might agree to submit to arbitration a dispute that lies solely between B and C. In that situation B and C have agreed to submit to arbitration a dispute which had arisen "between them" in terms of the statutory definitions but the same could not be said of A.

[91] Where a series of individuals sign the same contractual document it will generally be for the proponent to demonstrate that promises made in the document are not interdependent. Severance is usually possible only if it can be demonstrated that there is no nexus between the consideration offered by one party and the consideration offered by another. I do not think that Courts will be anxious to find that where there is a multi-party contract containing an arbitration clause some of the signatories to the document are not parties to the arbitration clause. It will usually be more productive to move the focus to the question whether the arbitration, as distinct from the arbitration agreement, "does not involve all of the parties to the arbitration agreement", a question to which I now turn.

[92] The definition of "party" contemplates that there will be some situations in which an arbitration does not "involve" all of the parties to the arbitration agreement. Being "involved" in an arbitration is clearly interchangeable with being a "party to the arbitration" in the same definition but this sheds no further light on the meaning of either expression.

[93] I agree with Mr Kos that at least the primary purpose of including the phrase "where an arbitration does not involve all of the parties to the arbitration agreement" is to cater for those multi-party contracts, typically large construction ones, that include an arbitration clause for the referral of future disputes. These are the clauses contemplated in the first limb of art 7 of the First Schedule which provides that arbitration agreements "may be in the form of an arbitration clause in a contract or in the form of a separate agreement". All the parties to the former may be parties to the "arbitration agreement" in question. Not all will necessarily be parties to every dispute that follows. The definition of "party" addresses cases in which only some of the parties to the arbitration agreement are parties to a particular dispute. In such cases "involvement" in the associated arbitration is limited to those who are parties to the particular dispute, who are entitle to participate procedurally in its resolution, and who will be bound by the award.

[94] The interpretation suggested would be consistent with the focus on "disputes" "between" "parties" in the definition of "arbitration agreement". Those are the parties who will be affected by the award, and therefore the ones who could be expected to enjoy the various procedural rights, and attract the various procedural duties, that the Act attaches to the arbitration in question. There would be little point in extending to a person who is not affected by the arbitrated dispute, or who is contractually precluded from procedural participation, the rights and duties associated with equality of treatment (art 18), opportunity to present one's case (art 18), notice of the hearing (art 24(2)), disclosure of statements, documents
and other information supplied to the arbitral tribunal (art 24(3)) and disclosure of expert reports and evidentiary documents relied upon by the arbitral tribunal (art 24(3)). Nor is it easy to see why such a person should be subject to directions to file pleadings (art 23) and contribute to costs (art 6 of the Second Schedule). These are all consequences of classification as a "party" for present purposes.

[95] I conclude that a party to an arbitration agreement is "involved" in an arbitration if the dispute to be arbitrated lies between that person and one or more of the other parties to the agreement, the person has the express or implied right to participate in the arbitration process, and the award will be binding on the person. In line with the earlier discussion of arbitrations unaccompanied by any current dispute, "dispute" must here be taken to include questions in respect of which future disputes may arise between that person and one or more of the other parties to the agreement.

[96] Before leaving the meaning of "involved" there remains the Court of Appeal's enigmatic obiter dictum on the subject in Overton Holdings Ltd v Owens Properties Ltd (Court of Appeal, CA 114/02, 24 October 2002). In that case the lessor, the lessee, and the lessee's guarantor signed a lease. The lease contained an arbitration clause submitting to arbitration any dispute or difference between the "parties". The arbitration clause was drafted in such a way as to suggest that only the lessor and lessee could be "parties" to any arbitration that might follow. It also stated that the "parties" agreed to be bound by any award. The guarantee clause made the guarantor a principal debtor.

[97] An arbitration was later set in train between lessor and lessee without the knowledge of the guarantor. On the eve of the arbitration the lessee was placed in liquidation. The arbitrator declined the liquidator's application for an adjournment and awarded a substantial sum to the lessor. The lessee brought summary judgment proceedings against the guarantor for that sum. The guarantor sought to defend the proceedings on two grounds, one that the lease had been materially altered without the guarantor's knowledge and the other that the guarantor had not been given proper notice of the arbitration proceedings. The latter turned on the contention that the guarantor was a "party against whom the award was invoked" for the purposes of art 36(1)(a)(ii) of the First Schedule to the Act.

[98] The refusal of summary judgment was upheld in the Court of Appeal on the first of those grounds. However, the Court went on to comment, obiter, at para [24] that:

"It is doubtful, however, that the guarantor comes within the description of a 'party against whom the award is invoked'. 'Party' is defined in s 2 of the Arbitration Act as follows:

'Party' means a party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

[25] The better view appears to us to be that the arbitration did not 'involve' the guarantor even though it had agreed to be bound by the award. It was a party to the arbitration agreement in cl 14.5 but was not a party to the award." (Emphasis added.)

[99] "Party to the award" would be a new concept. Perhaps what was intended was "party to the arbitration". The Court did not articulate the reasoning underlying its view that the arbitration did not "involve" the guarantor. Mr Turner's interpretation of the decision was that the guarantor was not "involved" because it did not have any right to participate in the arbitration process. Mr Kos thought that the decision illustrated the principle that even where a person had interests that would be affected by an award, and had agreed to be bound by it, the arbitration would not "involve" the person unless he or she was one of the disputing parties who had agreed to refer their dispute to arbitration.

[100] I can think of a number of possible explanations for the dictum in Overton but it can at least be said that the interpretation I suggested earlier would not be inconsistent with it. My own view is that in that case the guarantor was not "involved" in the arbitration in that the arbitration agreement did not confer on it the right to participate in the arbitration process. The arbitration in question was almost certainly preceded by a fresh arbitration agreement specific to the dispute. Even the arbitration clause in the antecedent lease appears to have excluded the guarantor from participation.

[101] Without attempting any exhaustive formula, it seems to me to follow that for the purposes of the Arbitration Act, A will be a "party" to the arbitration of a dispute that has already arisen at least in circumstances where the following elements are satisfied:
(a)  A is party to a dispute, in the sense that A and at least one other person have expressed, and at the time of the submission to arbitration continue to maintain, conflicting views or positions the resolution of which would or may be of legal consequence. Alternatively A has an interest in a question which, left unresolved, might give rise to a dispute of that nature between A and at least one other person in the future. For the remainder of this summary "dispute" will be taken to include questions of that kind.

(b)  The dispute turns on the question whether one person (an actual or potential claimant) is entitled to rights which could be the subject of a legal remedy against another person (an actual or potential defendant) bearing in mind that A need not necessarily be the actual or potential claimant or the actual or potential defendant.

(c)  The resolution of the dispute would be of legal consequence.

(d)  There is an agreement submitting the dispute to arbitration. The dispute submitted must be the dispute between A and another individual but the subject-matter of the dispute may be the question whether some other actual or potential claimant is entitled to rights which could be the subject of a legal remedy against some other actual or potential defendant.

(e)  A and one or more of the other individuals with whom A has the dispute are parties to the agreement.

(f)  The agreement confers on A the express or implied right to participate in the arbitration process.

(g)  The agreement provides that any resultant award will be binding on A.

[102] In adopting that approach I can see no reason for distinguishing between the meaning of "party" for the purpose of establishing eligibility to bring review proceedings under art 34 of the First Schedule and the meaning of that word for the remainder of the Act. In this case it is unnecessary to consider the elements required where a person becomes a "party" with respect to future disputes.

Was Methanex a "party" in the present case?

[103] Applying the above principles, the first question is whether at the time of the settlement agreement of 20 June 2002 Methanex was a party to a relevant dispute in the sense that Methanex and at least one other person had expressed, and at the time of that agreement continued to maintain, conflicting views or positions the resolution of which could be of legal consequence.

[104] The only disputes that could qualify for present purposes are those which were referred to the independent expert. Until the settlement agreement there were disputes between Methanex and Seller over liability under the Fair Trading Act, interference with economic interests, inducement of breach of contract, and unjust enrichment. I agree with Mr Kos that those disputes could not qualify because they were brought to an end by cl 10 of the settlement agreement. Similarly the dispute between Methanex and the Crown over their procedural approach to the redetermination of ERR was determined by cls 5 and 10 of the settlement agreement.

[105] The only questions submitted to the independent expert were "whether the data and information made available by Seller to Buyer before the date of the Independent Expert's appointment is all the data and information that may reasonably be required to assess the Economic Recoverable Reserves" (cl 5.1.2(a)), the determination of "the number of PJs at which the Independent Expert determines the Economic Recoverable Reserves", and "the allocation of those reserves between reservoirs" (cls 5.1.2(b) and 5.1.10). Ancillary issues were the timing of the delivery of Seller's data and information in relation to the redetermination process, and residual details of procedure (cls 5.1.1, 5.1.5(f), 5.1.8 and 5.1.9).

[106] Mr Kos submitted that there could be no dispute between Seller and Methanex over those matters in that there was no relevant contractual relationship between them. The general principles I have adopted suggest otherwise. Even putting to one side the disclosure and procedural rights Methanex acquired against Seller under the settlement agreement, a contract between two persons is not a precondition to a dispute between them. It is sufficient if they have expressed, and at the time of the arbitration agreement continue to maintain, conflicting views or positions the resolution of which may be of legal consequence.

[107] The evidence presently available suggests that Methanex and Seller had communicated to each other conflicting views over the adequacy and timing of information and data from Seller and the timing of a meeting for redetermination purposes (see MDL letter of 22 March 2002 to Methanex). That ancillary dispute was submitted to the independent expert for determination but the principal matter referred was redetermination of ERR themselves. There is presently no allegation or evidence that Methanex and Seller had already expressed conflicting views on that subject by the time they signed the settlement agreement.

[108] On the principles previously discussed it would suffice if at the time of the settlement agreement Methanex had an interest in a question or matter which, if not resolved, might give rise to a dispute between Methanex and Seller. Methanex
and Seller had conflicting interests in relation to the level of ERR and the disclosure and procedures incidental to their redetermination. A low ERR redetermination would hasten the day when Seller could sell remaining gas to others at higher market rates. A high ERR redetermination would prolong Methanex's right to purchase from the Crown on existing terms. Without Methanex's agreement the Crown would not agree to Seller's ERR proposals. The commercial interests of Methanex and Seller were in direct conflict. They had already communicated conflicting views over adequacy and timing of disclosure by Seller. I think it reasonable to conclude that if left unresolved, there would or might have been a dispute between them over the proper figure for ERR themselves. The first ingredient required for Methanex's qualification as a party to the arbitration is therefore satisfied.

[109] The same must apply to redetermination of ERR as between Methanex and the Crown. The DGU agreement provided a contractual relationship between Methanex and the Crown capable of giving rise to a dispute between them over the ERR that would govern Methanex's rights under that agreement. Although there was no existing dispute between them over the ERR figure itself, there was at the time of the settlement agreement a question capable of giving rise to such a dispute in the future. The ERR redetermination could be expected to resolve the potential for a future dispute between Methanex and the Crown on that subject.

[110] The second requirement was that the dispute be over rights which could be the subject of a legal remedy. The rights and remedy did not have to be those of the disputants. In the present case redetermination of ERR would determine the extent to which Buyer was entitled to purchase gas from Seller. Clearly that was a matter which, if necessary, could have lent itself to a legal remedy in contract as between Seller and Buyer. For the reasons earlier outlined, it was not essential that Methanex be the one entitled to that remedy. Methanex was also directly involved in questions of disclosure and procedure affecting the redetermination process. For reasons I will come to shortly, these could have been enforced by Methanex against Seller in contract, given the procedural rights it acquired under the settlement agreement. Finally, the redetermination could have given rise to a legal remedy as between Methanex and the Crown.

[111] The third requirement was that the resolution of the question outstanding between Methanex and one or more of the other parties to the actual or potential dispute would be of legal consequence. In the present case the ERR redetermination was of legal consequence in that it affected contractual rights and liabilities as between Seller and the Crown, and in turn as between the Crown and Methanex. The disputes over disclosure, timing, and procedure also affected Methanex's procedural rights in the arbitration.

[112] The fourth requirement was an agreement submitting to arbitration the question giving rise to actual or potential disputes. Mr Kos submitted that the settlement agreement of 20 June 2002 formed only part of the relevant "arbitration agreement", the other parts being the original Maui gas contract and the subsequent letter of appointment to the independent expert. In my view it was the settlement agreement that submitted the dispute to the independent expert although it incorporated relevant terms from the Maui gas contract and DGU agreements by reference. The letter of appointment was merely a consequential administrative act. The Maui gas contract as a whole formed part of the background, and might well have resulted in some other submission to arbitration if this one had not occurred, but it was overtaken by the settlement agreement. In referring the disputes to this particular independent expert, the settlement agreement provided the essential contractual foundation for the arbitration.

[113] In case I am wrong in that view, I have considered the original Maui gas contract as a whole, and the letter of appointment to the independent expert, from a contractual perspective. In my view they would not have added anything of consequence to the discussion that follows. In particular, references in those documents to Seller and the Crown as the only "parties" to the arbitration add nothing significant to the statement to similar effect in cl 5.1.5(h) of the settlement agreement.

[114] The fifth requirement was that Methanex and one or more of the other disputants were parties to the agreement to submit the dispute to arbitration. For this purpose it would suffice if there were a question between Methanex and one or more of the other parties which, left unresolved, might give rise to a dispute. It is common ground that Seller and the Crown were parties to the agreement. Mr Kos submitted that while a party to the settlement agreement as a whole, Methanex was not a party to that portion of it that constituted an agreement to submit the disputes to arbitration. He submitted that only Buyer and Seller were parties to the original Maui gas contract; that it contained an arbitration clause as part of the redetermination process; and that in the settlement agreement cl 6 provided that "Seller and Buyer agree that the Independent Expert process is to be conducted as an arbitration ... ".

...
In my view the arbitration clause in the settlement agreement was interdependent with Methanex's promises not to challenge the number of PJ at which the ERR were quantified (cl 6) and to dismiss its High Court proceedings (cl 10). In return for those promises the dispute was submitted to arbitration and Methanex given the right to participate in the ways that I will shortly come to.

Mr Kos argued that the procedural rights Methanex acquired under the settlement agreement were solely a matter of contract between Methanex and the Crown. In my view Seller too became bound by those terms. Any resistance by Seller to the presentation of submissions from experts for Methanex, for example, would have been met by the response that Seller had agreed to that course. Methanex cannot be excluded from the arbitration agreement by attempting to sever the arbitration clause from the rest of the settlement agreement.

The sixth requirement was that the agreement did not preclude Methanex from participating in the arbitration process. Despite initial appearances to the contrary, I think that a close analysis of the settlement agreement and an incorporated portion of the DGU agreement shows that Methanex had extensive procedural rights in the arbitration. It was entitled to participate in selection of the independent expert (cl 1.2 of the settlement agreement), receive information concerning the dispute and hearing (this appears to be the combined effect of cls 2, 5.1.2(a) and 5.6 of the settlement agreement and cl 6.8.8 of the DGU agreement), make submissions (cl 5.1 of the settlement agreement), and be present at any oral hearing (cl 5.6 of the settlement agreement and cl 6.8.8 of the DGU agreement).

Clause 6.8.8 of the DGU agreement, as incorporated by cl 5.6 of the settlement agreement, gave Methanex the right "to consult with the person presenting the Buyer's case on behalf of the Crown and the Gas Users and to provide to and receive from such person information concerning the hearing ..." (emphasis added). Bearing in mind Buyer's rights under art 24(3) of the First Schedule to the Arbitration Act these provisions gave Methanex an indirect right of access to all material provided to the independent expert.

Through its experts Methanex was also given the express or implied right to make submissions as to timetable and procedure (cl 5.1.1), the sufficiency of data and information from Seller (cls 5.1.3 and 5.1.2(a)), determination of the ERR (cls 5.1.3 and 5.1.2(b)), and issues raised by the independent expert (cl 5.1.5(f)(i)). Methanex also had an implied right to make submissions in response to the independent expert's draft decision (cl 5.1.5(f)(iv)) and to comment on further information from Seller (cl 5.1.1(f)(iii)). The opportunity for submissions in reply within 14 days (cl 5.1.5(f)(iii)) was additional to the opportunity to make submissions on the draft decision within seven days (cl 5.1.5(f)(iv)).

Although Methanex could not present submissions through its own lawyer (cl 5.1.5(h)) no limitations were placed on the content of submissions from its experts. There does not appear to have been anything to prevent the experts from taking instructions from Methanex on any matter relevant to the issues and putting them forward as a submission. Methanex also had the right to consult counsel for Buyer.

The initial appearance of contractual limitation upon Methanex's right to participate in the arbitration was therefore misleading. In substance Methanex had the procedural rights of a conventional party. It was entitled to all relevant information concerning the case it had to meet from Seller with an associated opportunity to respond. Within the limits applicable to the other parties it also had the opportunity to respond to the factors and issues which the independent expert considered to be relevant and to the draft determination to be issued by the independent expert for comment.

The final requirement for party status was that Methanex agree to be bound by the award. This was clearly satisfied by cl 6 of the settlement agreement.

All requirements being satisfied, I conclude that Methanex has shown an arguable case that it was a "party" to the arbitration for the purposes of the Arbitration Act and that it had the standing to bring these proceedings. Its case cannot be struck out on that ground.

**Did Methanex purport to contract out of its right to review for breach of natural justice?**

Mr Kos submitted that even if Methanex had the prima facie standing to apply for relief under art 34, cls 6 and 10 of the settlement agreement contractually barred Methanex from pursuing that course. Mr Turner's response was first that Methanex's current proceedings do not conflict with cls 6 and 10 of the settlement agreement, and secondly that it is not
legally competent for a party who would otherwise have the right to review for breach of natural justice to relinquish it by contract.

[125] In my view the first of Mr Turner's responses can be quickly disposed of. Clause 6 of the agreement explicitly states that "there shall be no appeal against any decision of the Independent Expert except if the decision was induced or affected by fraud or corruption". Methanex agreed not to "otherwise challenge" the determination. There is no allegation of fraud or corruption. Nor do I regard use of the word "appeal" rather than "review" in cl 6 as determinative. In this context "appeal" is often used to embrace both. That is clearly the intention in cl 6, given that in New Zealand a challenge for fraud or corruption must be brought by way of review. Clause 6 goes on to provide that "None of Seller, Buyer, Contact, Methanex and NGC will otherwise challenge the number of PJ at which the Economic Recoverable Reserves are quantified". Mr Turner's submission that the current proceedings do not challenge the number of PJ cannot be sustained.

[126] Clause 10 also purports to bar these proceedings. It provides that "Methanex is not to seek any Court order, whether by way of appeal or review

or otherwise, that would have the effect of delaying the Independent Expert process, except as permitted by the second sentence of paragraph 6". The present proceedings seek a Court order remitting or setting aside the award. Such orders would inevitably delay the independent expert process pending a further determination. As Mr Kos said, by bringing these proceedings Methanex is doing the very thing that it had agreed not to do. In their terms, cls 6 and 10 purport to contractually bar the proceedings. The next question is whether they are effective in doing so.

Can a party contract out of its right to review for breach of natural justice?

[127] It is clear that parties to a dispute can contract out of a right to review for breach of natural justice by the simple expedient of adopting a process other than arbitration for its determination. One option is mediation. Another is expert determination.

[128] However, arbitration is determination by an ad hoc tribunal contractually required to act judicially. To act judicially is to observe the requirements of natural justice. As discussed earlier, it would be a contradiction in terms to adopt a process which is described as an arbitration but which does not attract a duty to observe the requirements of natural justice. When parties agree to arbitrate their dispute they are presumed to do so in the knowledge that the process will attract the provisions of the Arbitration Act 1996. To agree to arbitrate is to knowingly adopt those provisions of the Act that are mandatory, and those default provisions that are not specifically excluded by the agreement.

[129] In contrast with s 6(2), which permits the parties to contract out of provisions in the Second Schedule, s 6(1) provides that the provisions of the First Schedule apply to a New Zealand arbitration without qualification. Some of the individual articles in the First Schedule make express provision for contracting out but there is no such provision in respect of those which are key to the present proceedings - art 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case"), art 24(3) ("All statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties"), and art 34 (right to apply to set aside on stated grounds including breach of natural justice). In circumstances where the dominant intention of the parties is to have their dispute determined by arbitration, arts 18, 24(3), and 34 will override any conflicting attempts to exclude the right to review for breach of natural justice.

[130] I have already concluded that in the present case the process intended by the parties was arbitration. Mr Kos did not argue the contrary. Where the parties have opted for arbitration, any purported contractual exclusion of a right to review for breach of natural justice will be ineffective. As Panckhurst J put it in Redcliff Estates Ltd v Enberg ( High Court, Christchurch, M 150/99, 22 July 1999) at p 10:

"As I understood it counsel acknowledged that certain of the provisions of the Schedule were mandatory in nature, from which the parties could not `derogate'. Moreover, I understood that the natural justice requirement enshrined in Article 24(3) was accepted to be in the mandatory category. I agree. As the Law Commission noted (Report 20: Arbitration, October 1991 at para [291]) those requirements recognised as sufficient to warrant setting aside an award pursuant to Article 34 `must be taken to be fundamental to the procedure which the First Schedule establishes.'"

(Emphasis in original.)
Panckhurst J was there responding to an argument that a party to an arbitration had waived its right of review for breach of natural justice but in my view the same principle must apply to a provision in the arbitration agreement itself purporting to exclude such a right.

The reference to public policy in art 34(2)(b)(ii) and (6) of the First Schedule also provides an express link to prior and continuing common law principles: see further Amalal Corporation Ltd v Maruha (NZ) Corporation Ltd [2003] 2 NZLR 92. Common law principles made a contractual provision purporting to oust the right to resort to the Courts of law contrary to public policy: Laws NZ, Contract para 219. Although that principle has been modified in respect of questions of law (s 6(2); Second Schedule, art 5) the principle is enshrined in the reference to public policy in art 34. Neither party contended that the Illegal Contracts Act 1970 applied in that regard.

I conclude that in circumstances where the dominant intention of the parties is to have their dispute determined by arbitration, attempts to contractually exclude the right to review for breach of natural justice must be regarded as incompatible with that intention and therefore ineffective. Methanex is entitled to apply to review this award. What remains is the question whether its pleadings, in association with the incontrovertible facts, leaves an arguable case that there was a breach of natural justice.

Sources of a party's right to notice of, and opportunity to respond to, new material

It will be recalled that the significant natural justice complaints pleaded by Methanex were that it was denied the opportunity to respond to: (a) the supplementary information and data provided by Seller to the independent expert on 25 October 2002; and (b) the independent expert's own reservoir simulation model and associated assumptions. Both complaints turn on the scope of Methanex's right to notice of the matters on which the independent expert would or might rely, and the opportunity to offer evidence and argument in response. It will be convenient to refer to these as "notice and response rights".

At common law the ascertainment of a party's notice and response rights began with the express and implied terms of the particular arbitration agreement: London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd; [1958] 1 All ER 494 at p 497. That used to be the logical starting point because an award made in breach of the agreed procedure could be set aside, not because there had necessarily been any breach of natural justice, but because the parties had not agreed to be bound by an award made by the procedure in fact followed: In the first instance the Court was not concerned with the question whether the agreement violated natural justice as a matter of public policy, although views as to what procedure tended to achieve a just result could influence conclusions as to what was implied where the written agreement was silent on that subject.

Where there had been no breach of agreed procedure the Court was required to move on to the second step of considering natural justice from a public policy viewpoint. As an award entitled the claimant to call upon the executive power of the state to enforce it, it was the function of the Courts to see that the executive power was not abused: London Export at p 498. It would be an abuse of the executive power, and contrary to public policy, to enforce awards vitiated by fraud, corruption, denial of natural justice, or their dependence upon certain classes of agreement regarded as unacceptable from a public policy viewpoint.

Given the more restricted grounds for setting aside now available under art 34 of the 1996 Act, the first of those rationales for intervention has disappeared. Non-compliance with the terms of an arbitration agreement per se is no longer a ground for setting aside an award. However it remains the case that awards can be set aside on the ground that they conflict with public policy; that a breach of the statutory and common law requirements of natural justice conflicts with public policy; and that the scope of natural justice in any given case is affected by the terms of the applicable arbitration agreement. It follows that on a review for breach of natural justice, the most convenient sequence will usually be to start with the specific natural justice requirement imposed by the Act, then to consider those principles of common law that the Act appears to invoke under art 34, and then to consider the extent to which the natural justice rights that would otherwise have applied have been legitimately modified by the arbitration agreement. I will consider each in turn.
What is the prima facie scope of a party's notice and response rights under the Act?

[137] The statutory starting point is art 34 of the First Schedule. I referred to this article earlier in connection with status to apply for the review of an award for breach of natural justice (art 34(2)(b)(ii) and (6)(b)(ii)). Parallel provisions are found in the grounds for refusing recognition or enforcement of an award under art 36 to which no further reference need be made. In both cases the material starting point is the jurisdiction with respect to "a breach of the rules of natural justice". Arguably the allegations here are concerned with a breach "during the arbitral proceedings" as well as a breach in the "making of the award". The difference is immaterial for present purposes.

[138] "Natural justice" has traditionally been taken to refer to the right to be heard (audi alteram partem) and the right to an impartial tribunal (freedom from bias). Much on the topic is codified in the First Schedule, procedural fairness being supported by the right to notice of hearing (arts 24(2) and 34(2)(a)(ii)), equal treatment of parties (art 18), opportunity to present one's case (art 18) and disclosure (art 24(3)). Impartiality is also addressed in art 12. Of particular significance for the present case are two of those provisions:

18. Equal treatment of parties - The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.

... (3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

[139] Article 18 requires that "each party . . . be given a full opportunity of presenting that party's case". In its report "Arbitration" (1991) NZLC R20 para 340, at p180 the New Zealand Law Commission considered that the opportunity to respond to another party's case is implicit in the idea of "presenting" a case pursuant to art 18. They rejected the recommendation in the 1998 Alberta Institute of Law Research and Reform Report, and in s 19(2) of the Uniform Law Conference of Canada draft, that the right to respond to the case presented by other parties should be express rather than implicit. Whatever may have been desirable drafting, I agree that it is implicit in art 18 that each party has not only the right to present its case in relation to issues known at the outset but also to respond to such evidence and argument as may emanate from the other parties in the course of the hearing or process.

[140] Article 18 operates in tandem with art 24(3) in that respect. The first limb of art 24(3) provides that "all statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party". There would be no point in a provision of that nature unless it were associated with the opportunity to provide any relevant evidence and argument in response. Each party is entitled not only to notice of all new material presented by the other party but the opportunity to respond to it. This must be subject, of course, to the usual rule that to avoid an infinite reverberation of responses, the claimant's reply to new material from the defendant must itself be free of unheralded new material.

[141] The first limb of art 24(3) is limited to material provided by the other party. The second is that "... any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties". Here too there is an implied link to art 18. There would be little point in communicating the relevant material to the parties unless they were given the opportunity to present their case in response to it before any decision were made. To the extent that art 24(3) required disclosure of new material presented to, or relied upon by, the independent expert, Methanex had an implied right to present evidence and argument in response to it.

[142] Counsel differed over the scope of the art 24(3) expressions "expert report" and "evidentiary document". "Expert report" implies that the arbitrator has received a statement of fact or opinion prepared by a stranger to the arbitration with specific reference to the dispute in question. In context the expression does not appear to extend to the publications of experts on matters of general application. Nor would the word "report" seem appropriate for internal working documents prepared by the arbitrator and his or her own staff.

[143] "Evidentiary documents" appear to be at least primarily concerned with facts given that opinions will normally come within the expression "expert reports". "Evidentiary" seems to connote a source of information bearing upon the
facts in issue in the arbitration or bearing upon the credibility of a witness in the arbitration. Evidentiary documents would
normally seem to fall within one of two categories. In one the document is offered as proof of the truth of an assertion
made in the document by a human ("reported evidence", sometimes referred to as "testimonial evidence" or evidence of
assertions by "the maker of the statement"). In the other the document is relied upon for its significance as a material
object ("real evidence").

[144] An arbitrator's use of a document as a source of reported evidence, and the separate provision for material supplied
by a party in the first limb of art 24(3), implies that with this class of document the arbitrator derives relevant factual
information from a stranger to the arbitration. Information will be relevant if it bears upon the facts in issue or the credi­
bility of a witness. An arbitrator's use of a document as real evidence implies that there has come into the arbitrator's
possession a document whose existence or nature represents a new source of information which is similarly relevant. Both
classes of
document will normally have to be disclosed. The limitation to "documents" is curious given that oral statements to the
arbitrator will be equally significant for audi alteram partem purposes. Oral statements are presumably picked up under
the more general requirements of natural justice pursuant to art 34(2)(b)(ii) and (6)(b).

[145] Disclosure obligations under art 24(3) do not appear to extend to internally prepared documents resulting from the
reasoning processes of the arbitrator, research copies of published works of general application, or documented matters of
which the arbitrator could properly take judicial notice without evidence. One would not normally attach the word "ev­
identiary" to facts of which the arbitrator could properly take judicial notice in any event. That appears to exempt pub­
lished documents of general, legal, academic and public knowledge, along with matters falling within an arbitrator's
specialist area of expertise. Materials generated by the arbitrator's own staff were presumably intended to be included in
the exemption, but not so those emanating from independent contractors engaged by the arbitrator.

[146] There is some support for that approach in UNCITRAL's report A/40/17 (21 August 1985, para 21). The original
draft of art 24(4) of the draft Model Law (subsequently art 24(3) of the New Zealand Act) had provided that "any expert
report or other document on which the arbitral tribunal may rely in making its decision shall be communicated to the
parties" (emphasis added). Summarising the commission's response, Holtzmann and Neuhaus state in A Guide to the
UNCITRAL Model Law on International Commercial Arbitration (Kluwer, Deventer, 1994) p 697:

"The Commission agreed with the first sentence of paragraph (4) that all documents supplied to the arbitral tribunal by one party,
regardless of their nature, had to be communicated to the other party. However, the Commission was agreed that in the second sen­
tence of paragraph (4) it should be made clear that such documents as research material prepared or collected by the arbitral tribunal
did not have to be communicated to the parties. The Drafting Group was invited to consider whether that result should be achieved by
deletion of the words 'or other document'."

[147] My conclusion is that arts 18 and 24(3) require notice of, and opportunity to respond to, material provided to the
arbitrator if it is: (a) evidence and argument provided by other parties to the arbitration; (b) the report of an independent
expert specific to the dispute in question; (c) a document which may be used as proof of the truth of human assertions
made therein with respect to the facts in issue or the credibility of a witness; or (d) a document whose existence or nature
represents a new source of information bearing upon the facts in issue or the credibility of a witness. Whether these
categories extend to marginal cases may well be affected by the particular contractual intention of the parties to be de­
termined in the particular case.

What is the prima facie scope of a party's notice and response rights drawn from
the common law?

[148] Given the unqualified use of the expression "natural justice" in art 34 there does not seem to be any reason for
confining it to the particular examples that arts 12, 18 and 24(3) represent. The travaux préparatoires to the UNCITRAL
Model Law from which art 34 was taken refer to the need for a broad approach to public policy and natural justice.
Equality of treatment, and full opportunity to present one's case, do not necessarily cover all the
circumstances in which awards might need to be set aside: see representations of United Kingdom delegation UN Doc
A/CN 9/263 Add 2, paras.29 - 35; UN Doc A/40/17, para 297 cited in Redfern and Hunter: Law and Practice of Inter-
Given that the "natural justice" referred to in art 34 is not so confined, resort must be had to the common law for the broader principles involved by that expression. The detailed demands of natural justice in a given case will turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of an arbitrator known to have special expertise: Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452 at p 463. Of equal importance is Mr Turner's submission that except where expressly absorbed from doing so, an arbitrator is bound to observe the ordinary rules laid down for the administration of justice: Gas & Fuel Corporation (Vic) v Wood Hall Ltd [1978] VR 385 at p 394; Trustees of Rotoaira at p 463.

The particular form of natural justice material to the present case is captured in the maxim audi alteram partem. A party is entitled to know the case it has to meet and to have the opportunity of presenting its own evidence and argument in response. As with the two limbs of art 24(3), in determining the scope of that right at common law a distinction can usefully be drawn between party-sourced material (that is to say, evidence and argument provided to the arbitrator by another party to the arbitration) and material coming to the arbitrator from sources other than the parties.

No particular difficulty is presented by party-sourced material. It must all be disclosed to the other side with an opportunity to respond. The common law adds nothing significant to the literal wording of the first limb of art 24(3), in combination with art 18, in this respect. All statements, documents and other information supplied to the tribunal by one party must be communicated to the other. The latter must then be given full opportunity to present its case in response. Redcliff Estates Ltd v Enberg was a recent New Zealand case in which that principle was applied.

Less straightforward are the circumstances in which an arbitrator may rely upon evidence, opinions, methods, and ideas, from sources other than the parties without first advising the parties and allowing them an opportunity to respond. Although there have been many decisions on the point (for example, in England see Fox v P G Wellfair Ltd [1981] 2 Lloyd's Rep 514 (CA); Société Franco-Tunisienne D'Armement-Tunis v Government of Ceylon [1959] 3 All ER 25 (CA); Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865 (HL); and H Sabey & Co Ltd v Secretary of State for the Environment [1978] 1 All ER 586) their combined effect is less clear.

On this aspect Mr Kos emphasised the finality of arbitral awards (see discussion of Gold and Resource Developments at p 330 and other decisions discussed) and the concept of party autonomy. He submitted that an arbitrator who is appointed because he or she has special knowledge, skill or expertise relevant to a dispute can be expected to draw upon it in determining the dispute, and without advising the parties that he or she is doing so: Mediterranean and Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd [1948] 2 All ER 186; Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84 per Lord Justice Ward. In Dugdale v Kraft Foods Ltd [1977] ICR 48 at pp 54 - 55 Phillips J considered that so long as it would not conflict with evidence given at the hearing, experts were "entitled to use their knowledge and experience to fill gaps in the evidence about matters which will be obvious to them but which might be obscure to a layman". "Filling gaps in the evidence" implies fact-finding on information from sources extraneous to the hearing.

Mr Turner, on the other hand, submitted that an arbitrator could use his or her experience and knowledge solely to understand the evidence that was given and to appreciate its worth. He based this more modest role upon the statement of Lord Denning MR in Fox v Wellfair at p 522 that an arbitrator "can and should use his special knowledge so as to understand the evidence that is given . . . and to appreciate the whole of that all he sees upon a view. But he cannot use his special knowledge - or at any rate he should not use it - so as to provide evidence on behalf of the defendants . . . ". To similar effect were other remarks of Phillips J in Dugdale at pp 54 - 55 that "the main use which they [experts] will make of this knowledge and experience is for the purpose of explaining and understanding the evidence which they hear". Mr Turner submitted that the scope of an expert has to use his general experience and knowledge to understand the evidence "did not permit the Independent Expert to carry out independent work (namely to create his own reservoir simulation model containing his own undisclosed assumptions, parameters and information) without providing full details of these matters to the parties and allowing submissions on it".

It seems clear that as a general principle, and in the absence of agreement to the contrary, lay arbitrators must confine their fact finding to the information provided by the parties. It seems implicit in the authorities that this is subject only to those matters that would have been the subject of judicial notice in Courts of general jurisdiction, there being no reason for requiring arbitrators to be more blinkered than Judges in that respect. But with that qualification, lay arbitrators must draw their facts from evidence provided by the parties.
The position is different where arbitrators have been chosen for their expertise in the subject-matter of the dispute. Even without express agreement on the subject, it is presumed that such arbitrators can draw on their knowledge and experience for general facts, that is to say facts which form part of the general body of knowledge within their area of expertise as distinct from facts that are specific to the particular dispute: Zermalt Holdings SA v Nu-life Upholstery Repairs Ltd [1985] 2 EGLR 14. An arbitrator appointed for his or her special knowledge, skill, or expertise, is entitled to draw upon those sources for the purpose of determining the dispute and need not advise the parties that he or she is doing so: Mediterranean and Eastern Export Co and Checkpoint Ltd v Strathclyde.

In the absence of agreement to the contrary, not even experts may rely upon their extraneous knowledge of the specific events in question, whether or not derived from independent work or investigations they may have carried out: F R Waring (UK) Ltd v Administraçao Geral Do Acucar E Do Alcool EP [1983] 1 Lloyd's Rep 45. But otherwise objectionable fact finding by an expert arbitrator may be rendered acceptable if notice and opportunity to respond is given to the parties: see further Mustill and Boyd Commercial Arbitration (2nd ed, London, Butterworths, 1989) p 311.

Fact-finding is one function. Another is the way in which the facts are used and interpreted once found - the arbitrator's choice of issues, ideas, arguments and evaluation methods. Mr Turner submitted that an arbitrator may not decide a case against a party on an issue which had not been raised in the case without drawing the point to the party's attention and allowing the opportunity to address it. For this purpose he relied on Motrix Supplies Pty Ltd v Bonds and Kirby (Victoria Avenue) Pty Ltd (Supreme Court, New South Wales, BC9002025, 12 September 1990, Giles J) and Top Shop Estates v Danino (trading as Goldrush) [1985] 1 EGLR 9. To similar effect Bingham J (now Lord Bingham of Cornhill) said in Zermalt Holdings at p 15 that "if an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment". As I interpret these cases, however, the limitations they impose are rebuttable by agreement subject only to certain minimum standards of natural justice to be discussed shortly.

An arbitrator must also be wary of adopting an unforeseen methodology for evaluating the evidence. An award may be set aside where the arbitrator has adopted a valuation method differing from that advanced by the experts for the two parties: Unit Four Cinemas Ltd v Tosara Investment Ltd [1993] 2 EGLR 11. On the other hand, it has never been suggested that a tribunal must give notice of its provisional thinking in order that the parties can criticise it: F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 at p 369.

I explored these matters in greater detail in Trustees of Rotoaira Forest Trust at pp 460 - 463. In the end the unifying question at common law is whether a reasonable litigant placed in the shoes of the objecting party would have foreseen the possibility of reasoning of the type revealed in the award, and hence had the opportunity to present evidence and argument in anticipation of it (Navrom v Callitiss Ship Management SA (The "Radauti") [1987] 2 Lloyd's Rep 276 at p 284). It is a test which must ultimately be applied according to the facts of each individual case.

To summarise, the scope of notice and response rights at common law can be stated in broad terms only because each case must be tailored to the circumstances of the particular case. The overriding objective is to avoid surprise, and therefore lack of opportunity to respond in the way that the parties had envisaged when setting up the arbitration. The following are illustrations of that principle, bearing in mind the potential for contractual modification to which I will shortly come:

(a) Party-sourced material, that is to say evidence and argument provided to the arbitrator by another party to the arbitration, must be disclosed to the other parties with opportunity to respond. The common law appears to add nothing significant to arts 18 and 24(3) in this respect.

(b) In the absence of agreement to the contrary, non-expert arbitrators must confine themselves to the evidence provided by the parties unless judicial notice would have been possible in conventional Courts. The same applies to the observations and knowledge of expert arbitrators concerning facts specific to the particular dispute, any general matters that fall outside their area of expertise, and any reports or opinions obtained from others.

(c) An expert arbitrator is entitled to draw on his or her knowledge and experience to supplement the facts drawn from party-sourced evidence, and without prior notice to the parties, provided that the additional facts are ones of general application as distinct from those specific to the particular dispute.

(d) In general an arbitrator must provide notice of, and an opportunity to respond to, issues, ideas, methods, research, investigations and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments traversed before the arbitrator.
The 1996 Act does not appear to have rendered those common law requirements of natural justice obsolete. In fine questions of degree the statutory emphasis upon finality will doubtless increase the reluctance to intervene. But the principles have been incorporated into the statutory structure by the unqualified use of the expression "natural justice" in art 34. The next question is the extent to which the parties may exclude them by agreement.

To what extent can prima facie notice and response rights be qualified by contract?

The defendants say that even if Methanex had been entitled to natural justice in principle, the level at which the guaranteed procedural standards were set was minimal. That was said to follow from the referral to an expert, cls 6 and 10 of the settlement agreement, and other details in the agreement.

It is clear that at common law the parties could authorise a procedure that would otherwise have breached natural justice: Haddad v Norman Mir Pty Ltd [1967] 2 NSWR 676; London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd at p 498; Honeyburn v Harris [1995] 1 NZLR 64 (HC) at p 71. Authority to depart from natural justice in that way could be express or implied in the particular arbitration agreement, usage in the trade, or the conduct of the parties.

Even at common law there appear to have been minimum procedural standards below which an enforcing Court, taking heed of its own principles of fairness and due process, could not be expected to go: Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39; London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd at p 498.

What was less clear was the point at which those minimums would be encountered. Varying approaches are shown in the decisions collected in Mustill and Boyd, pp 359 - 361.

The point is illustrated by the "look and sniff" arbitrations concerning the valuation and quality of goods. They were exceptions to the usual rule that even expert arbitrators had to provide an opportunity to respond to their personal observation of facts specific to the dispute and reports obtained from third party experts. In "look and sniff" arbitrations usage authorised the arbitrator/expert to carry out his own inspection and inquiries, obtain and rely upon an analysis from an independent chemist, and arrive at his conclusions, without further reference to the parties: Naumann v Nathan (1930) 37 Lloyd's Rep 249 at pp 250 and 251. Upholding such an award in Naumann, the Court of Appeal held per Scrutton LJ at p 250:

"... if the term is not contrary to public policy, and has the effect that business people have agreed that the best way to settle their disputes is a particular way which is not contrary to public policy, the Court does not interfere.

The difficulty, of course, was to ascertain the point at which the Courts would hold the agreed procedure to be "contrary to public policy". The task was made no easier by a seeming reluctance to recognise the fact that the difference between arbitration and expert determination was ultimately no more than one of degree. Nor was it easy to see how the same procedure could be treated as contrary to public policy if categorised as arbitration but acceptable to public policy if categorised as expert determination.

Fortunately apparent anomalies of that kind at common law appear to have been overtaken by the Act. At least in a case like the present one, the mandatory requirements of arts 18 and 24(3) supersede the common law boundaries of permissible contracting out. The expression "natural justice" in art 34 must import some room for contractual modification of prima facie natural justice requirements but arts 18 and 24 set minimum procedural standards beyond which the parties may not agree to go. Articles 18 and 24(3) (along with others not material to this case such as the right to notice under arts 24(2) and 34(2)(a)(ii)) represent minimum requirements if the process is still to be called an arbitration.

Mr Kos warned against inhibiting party autonomy in this way. He pointed out that art 19 leaves the parties free to determine their own procedure, within basic limits of fairness, or allow the arbitrator to do so. The UNCITRAL secretariat has described art 19 of the Model Law as the "Magna Carta of Arbitral Procedure" and as the "most important provision of the Model Law": Holtzmann & Neuhaus, A Guide to the UNCITRAL Model Law (Kluwer, Deventer, 1994) p 582. The result is a "liberal framework", to suit the great variety of needs and circumstances: Holtzmann & Neuhaus, p 583.

I have no difficulty with party autonomy as one of the Act's broad purposes. However there is no escaping the rigour of s 6 which makes certain procedural standards mandatory. The irreducible requirements of art 24(3) are that statements, documents, and other information supplied to the arbitrator by one party must be communicated to the other. Expert
reports and evidentiary documents on which the arbitrator may rely must be communicated to all the parties. In each case there is an associated right to respond under art 18. Subject to mandatory requirements of that nature, most of the broader features of natural justice which art 34 imports from the common law would seem to be excludable by contract.

[171] The more general reference to natural justice in art 34 might well import additional minimum requirements. For example Parliament might well have intended that under art 34 the disclosure requirements of art 24(3) would be extended by analogy to the arbitrator's receipt of oral evidentiary statements from third parties and non-documentary exhibits. Both fall outside the curiously selective reference to "evidentiary documents" in art 24(3). But it is unnecessary to take such matters further. I am not aware of any allegation in the present case that the independent expert failed to disclose relevant oral statements or non-documentary exhibits.

[172] A distinct question will be whether the parties have agreed to exclude those broader features of natural justice that would otherwise apply. Express contractual terms limiting procedural rights will usually present little difficulty. More challenging are cases in which limitations on procedural rights must be inferred. Each agreement will need to be individually construed. However, the purported exclusion of a right to review altogether would normally seem to be a sound reason for interpreting a party's procedural rights narrowly where the words of the agreement or statute defining those rights so permit. Such an approach would accord with the new respect for party autonomy and finality of awards.

[173] To summarise, if the procedure adopted by the parties is clearly intended to be an arbitration and not a mere expert determination:

   (a) It will not be possible to contract out of the right to respond to material provided to the arbitrator if it is: (i) evidence and argument provided by other parties to the arbitration; (ii) the report of an independent expert specific to the dispute in question; (iii) a document which may be used as proof of the truth of human assertions made therein with respect to the facts in issue or the credibility of a witness; or (iv) a document whose existence or nature represents a new source of information bearing upon the facts in issue or the credibility of a witness (arts 18 and 24(3)).

   (b) It will be possible to contract out of the prima facie right to respond to: (i) the personal observations and knowledge of arbitrators concerning the facts specific to the particular dispute; and (ii) fresh issues, ideas, methods, research, and/or investigations introduced or carried out by the arbitrator so long as these do not rely upon the undisclosed assertions of others specific to the particular dispute or documents whose existence or nature represents a new source of information bearing upon the facts in issue or the credibility of a witness.

   (c) Each agreement will need to be interpreted individually but a term purporting to exclude a right to review the award for breach of natural justice altogether will usually justify a restrictive construction of a party's procedural rights to the extent that the definition of those rights in the statute or agreement so permits.

**What effect did this agreement have on Methanex's notice and response rights?**

[174] I previously concluded that pursuant to this agreement Methanex was entitled to notice of, and an opportunity to respond to, the data and information that Seller was required to provide to the independent expert as part of the initial disclosure process. The same applied to such statements, documents, and other information as Seller chose to provide to the independent expert as part of its case. Methanex was also entitled, within appropriate limits, to an opportunity to respond to the facts, considerations, and issues perceived by the independent expert. This included an opportunity to make submissions in response to a draft determination by the independent expert which was to include "brief reasons".

[175] In addition to those contractual terms, Methanex had statutory rights under arts 18, 24(3) and 34 of the First Schedule to the Act. But several features of the agreement served to limit Methanex's right to more.

[176] To begin with, the very title "Independent Expert" conveyed the notion that the independent expert was to draw upon his "expertise", and in an "independent" way. Even without more, that would have placed the independent expert squarely within the category of arbitrators for whom relative freedom of action was intended.

[177] Secondly, cl 5.1.6 reinforced this, providing as it did that so long as the independent expert took into account the experts' submissions, and had regard to the data and information supplied to him, he was free to use his own expertise and judgment in arriving at his decision.
Thirdly, and to similar effect, cl 5.1.10 provided that in making a draft of his decision available for comment, the independent expert was required to include only "brief reasons". "Brief reasons" impliedly represented the limits of the parties' entitlement to prior notice of the independent expert's methodology, assumptions and reasoning.

Finally, and importantly, there was the purported exclusion of review rights in cls 6 and 10. Although I previously concluded that the attempt to exclude review altogether was unsuccessful, these clauses remain an important guide to the parties' intentions with respect to the scope of enforceable procedural rights.

In my view those contractual provisions together reveal a contractual intention that Methanex's enforceable notice and response rights were to be confined to the minimum required to keep the process arbitration rather than expert determination. In the present context the minimum was to be found in arts 18 and 24(3). Under the first limb of art 24(3) Methanex had the right to respond to all material provided to the independent expert by Seller and the other parties. But when it came to the second limb of art 24(3), Methanex's notice and response rights were limited to fresh "expert reports" or "evidentiary documents" received by the independent expert.

In practice, "expert reports" and "evidentiary documents" in this case meant undisclosed reports from other experts with respect to the Maui ERR, documents which could be used as proof of the truth of assertions by others with respect to the Maui ERR, or documents whose existence or nature represented a new source of independent information bearing upon the Maui ERR. Relevance to the Maui ERR could be indirect but had to be specific to this particular field. Reports and documents bearing upon the credibility of the experts, and others who had made statements on behalf of parties in the course of the arbitration, were also disclosable.

Disclosure requirements under art 24(3) did not extend to expert or academic sources and propositions having application to gas fields and ERR in general; factual findings and assumptions based on the independent expert's general experience or his own inspections, investigations, and experiments not founded upon undisclosed information supplied by others; and the independent expert's own models, ideas, methods, research, and/or studies so long as these represented the independent expert's own work. No allegations have been made purporting to distinguish between the independent expert and his own staff, but staff would appear to be included in the expression "Independent Expert" for present purposes.

In the result Methanex's challenge to the award must be confined to the wrongful denial of notice of, and an opportunity to respond to: (a) information and arguments advanced on behalf of one of the other parties; and (b) expert reports and evidentiary documents in the senses discussed.

Is there an arguable case based on material provided to the independent expert by other parties?

Methanex was entitled to the opportunity to present its evidence and argument in response to all statements, documents, and information supplied to the independent expert by other parties. It has not been pleaded or argued that there was a breach in respect of material from any party other than Seller. The question is whether Methanex has a pleaded or arguable case that it was denied its rights in that regard.

In paras 43 - 48 of the statement of claim Methanex pleads that Seller provided the supplementary information and data to the independent expert on 25 October 2002 and that Methanex's request for an opportunity to respond to it was rejected by the independent expert at the time that that request was made. However, it is not disputed that in forwarding the draft decision to the parties on 13 December 2002 the independent expert invited submissions on the draft and went on to note that the submission request provided an opportunity for all parties "to address any data or topic ... the parties wish the Independent Expert to consider prior to making the final ERR decision".

It was in response to that letter and draft decision that Methanex supplied its submission of 20 December 2002. In a covering letter Methanex noted that it was including as appendix I the further submission it had sought to make at the end of November 2002. That was the response that it had earlier sought to make to the further information and data that Seller had provided on 25 October 2002.

There is no answer to the point that the initial denial was overtaken by subsequent events. Indeed Methanex may have been of the same view. Nowhere in its correspondence between 20 December 2002 and 6 February 2003 did Methanex suggest any continuing denial of the opportunity to respond to the material from Seller of 25 October 2002. Nor is
there any pleaded allegation that the initial denial continued. I am unable to find any arguable case that Methanex was ultimately denied a proper opportunity to respond to Seller’s information of 25 October 2002.

Is there an arguable case based on undisclosed expert reports or evidentiary documents received by the independent expert?

[188] There is no allegation that the independent expert received reports or documents bearing upon the credibility of the experts and others who had made statements on behalf of parties in the course of the arbitration. The question is whether Methanex has a pleaded or arguable case that it was denied a proper opportunity to respond to undisclosed reports from other experts with respect to the Maui ERR, documents which could be used as proof of the truth of assertions by others with respect to the Maui ERR, or documents whose existence or nature represented a new source of independent information bearing upon the Maui ERR. Relevance to the Maui ERR could be indirect but had to be specific to this particular field.

[189] In para 57 of the statement of claim Methanex pleads:

"57. The draft and final determination made reference to the fact that the first defendant had generated independent interpretations and models on many of the technical and economic aspects of the Maui gas reserves redetermination. The extent of this work and/or the nature of the results of this work were not reasonably foreseeable by the plaintiffs in the circumstances, nor did the first defendant provide the plaintiffs with appropriate notice and opportunity to respond to that independent work by the first defendant, all of which led to the likelihood of significant and material errors in the first defendant's final arbitration award up to a total figure currently estimated at 378 PJ.

Particulars

(a) The first defendant created and ultimately relied on an independent reservoir model that incorporated many adjustments not proposed or commented upon by the participants in the arbitration, and that model was not provided to the plaintiffs;

(b) The first defendant generated and used (without proper explanation or opportunity for submission) a recovery factor significantly lower than the range of figures submitted by the participants and by the experts acting for the participants in the arbitration; and

(c) As to the likelihood and magnitude of the error the plaintiffs will adduce expert evidence as to this both at trial and following disclosure of the first defendant’s own reservoir model."

[190] By way of amplification, Mr Turner explained that the independent expert "relied on his expert knowledge in a specific way by creating his own C-Sands reservoir model with its undisclosed assumptions, interpretations, parameters and information"; formed "views as to the assumptions, parameters and other modelling methods which were different from those given in the parties' evidence"; and "carried out significant undisclosed research, modelling and investigations of his own initiative". Mr Turner identified "twelve key areas" in which he said there were "specific different assumptions, interpretations, parameters and information that [the independent expert] employed in his independent model [which] were not disclosed". In more detail he went on to submit:

"The final Independent Expert's model yielded a recovery factor of 53% of total 'OGIP' (First Affidavit of Watson, Exhibit 'A', p 17, para 5.2.2). This recovery factor was a full 10% lower than that determined by either Seller (60%) or that forecast by Methanex/GCA (also around 60%) (Second Affidavit of Taylor, Exhibit 'L', p 3). It was outside the range of the submissions made by the parties themselves. If the first defendant used a recovery factor of 60% as contained in the submissions of Seller and Methanex's expert (instead of a much lower figure arrived at by his undisclosed independent work), then this would almost double the remaining ERR."

... The nature of geological reservoir modelling is very technical and requires specialist expertise. As a result, it will be appropriate for the plaintiffs to adduce expert evidence on the issues referred to in this memorandum. This will develop and explain the specific areas in which the first defendant has made it clear, in his final determination, that he created and relied upon an independent model that used undisclosed assumptions, interpretations, parameters and information that went beyond the submissions put forward by the parties."

[191] Mr Turner also cited 20 extracts from the reasons given in the independent expert's final award referring to the independent analysis carried out by the independent expert. Typical was the independent expert's statement at para 3.1.6 that "as part of the independent reserve evaluation . . . the Independent Expert interprets the data differently from the parties. These
differences have been incorporated in the Independent Expert's model". At a more specific level the independent expert said at para 3.1.7: "The Independent Expert developed an independent estimate of the capital costs . . . ".

Nowhere in these pleadings and submissions is it alleged that Methanex was denied the opportunity to respond to undisclosed reports from other experts with respect to the Maui ERR, documents which could be used as proof of the truth of assertions by others with respect to the Maui ERR, or documents whose existence or nature represented a new source of independent information bearing upon the Maui ERR. There is no allegation that the independent expert received relevant material from anyone other than the parties. The allegations are confined to the independent expert's own modelling, estimates, work, methods and views.

I do not doubt that the independent expert created his own reservoir model and populated it with his own estimates and factual assumptions. He did not expose every detail of his work for comment by the parties. However, there is no allegation that he derived any of these details from an undisclosed expert report or evidentiary document. I conclude that there is no arguable case that Methanex was denied a proper opportunity to respond to undisclosed expert reports or evidentiary documents received by the independent expert.

Failure to provide adequate reasons

Methanex also pleads a breach of natural justice by failing to provide adequate reasons. In para 58 of its statement of claim it says:

"58. Further, the first defendant relied on the various matters referred to in paragraph 57 in the course of his final award, and these matters were not set out with sufficient particularity so as to constitute adequate reasons for the award itself as required by Article 31(2) of the Arbitration Act 1996 and by the terms of the first defendant's appointment as arbitrator."

Article 31(2) of the First Schedule, upon which Methanex relies, provides:

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

In my view there are three impediments to an arguable case under this heading. The first is that on any view of the matter the independent expert did provide reasons. They ran to 26 pages plus extensive appendices. The second is the parties' agreement that the independent expert's obligations in that regard were to be limited to "brief reasons" (cl 5.1.10). Given that art 31(2) expressly authorises agreement to completely dispense with reasons it is implied that the parties can agree to truncation of reasons. It is beyond argument that the reasons provided satisfied the "brief reasons" requirement. Thirdly, the sole criticism of the reasons provided is the alleged lack of detail regarding the independent expert's reservoir simulation model and its associated assumptions. The criticism in that respect does not add anything material to the principal grounds for review already discussed. The point of the disclosure sought was to allow Methanex the opportunity of presenting its own evidence and argument in response. It has not been suggested that if that ground for review fails, lack of the same details in the final award could have prejudiced Methanex.

Conclusions

A strike-out application is not the occasion for embarking upon questions of degree. In the words of Mr Turner "the issue of whether a breach of natural justice has occurred is a very fact specific matter". In the present case, however, the terms of the agreement between the parties confined Methanex to specific categories of natural justice as permissible grounds for setting aside the award. None of those categories has been pleaded or argued.

Methanex has advanced an arguable case that it has the party status necessary for the bringing of these proceedings. However it has not pleaded or alleged any arguable case that it was denied a proper opportunity to respond to the supplementary information and data provided by Seller on 25 October 2002. Nor has it pleaded or alleged that the reservoir simulation model independently adopted by the independent expert, and his associated assumptions, came from a source
which triggered an obligation to disclose these to Methanex with an opportunity to respond or to include the details in his reasons for decision.

Result

[199] The joint application by the second to ninth defendants for orders dismissing the proceeding is granted. The plaintiffs' proceedings are dismissed.

[200] In the absence of agreement to the contrary, the defendants are to file and serve memoranda as to costs within two weeks, the plaintiffs any memorandum in opposition within three weeks, and the defendants any memoranda in reply within four weeks, all periods to run from the date of delivery of this judgment. Proceeding dismissed.

Solicitors for Methanex: Buddle Findlay (Auckland).

Solicitors for the Attorney-General: Russell McVeagh (Wellington).

Solicitors for the third to seventh defendants: Bell Gully (Auckland).

Solicitors for NGC: Chapman Tripp (Wellington).

Solicitors for Contact Energy: Phillips Fox (Wellington).

Reported by: Duncan Webb, Barrister