IN THE COURT OF APPEAL OF NEW ZEALAND

CA26/2011
[2014] NZCA 507

BETWEEN	TODD PETROLEUM MINING COMPANY LIMITED Appellant
AND	SHELL (PETROLEUM MINING) COMPANY LIMITED Respondent

Hearing:	25 September 2014
Court:	Stevens, Wild and Cooper JJ
Counsel:	D J Cooper and R A Rose for Appellant J E Hodder QC and K E Yesberg for Respondent
Judgment:	17 October 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The question of law for which special leave was granted, namely, "whether Todd's application for leave to the High Court was out of time", is answered "no".

C As a consequence of the above answer, Question 7 (as described at [17] of the judgment) is remitted to the High Court for determination on the merits, together with the other questions of law for which leave has already been granted by the High Court.

D The respondent must pay the appellant costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] The sole issue in this appeal concerns the determination of the time frame within which an application for leave to appeal may be brought under the Arbitration Act 1996 (the Act).[1] It requires the interpretation of arts 33(3) and 34(3) of sch 1 of the Act. Together these govern the time within which a party to an arbitral award, who has sought an additional award on a matter not resolved by the original award under art 33(3), may seek recourse against that award under art 34(3). It seems there is no case law directly addressing the issues as framed before us.

[2] Todd Petroleum Mining Company Ltd (Todd) seeks to appeal on a question of law, which we will refer to as Question 7. This question was the subject of an application for leave to the High Court that the respondent, Shell (Petroleum Mining) Co Ltd (Shell) challenged on the ground it was outside the time limit in art 34(3).[2] Shell's challenge was upheld by the High Court (Judgment No 1).[3] Despite concluding that Question 7 was "seriously arguable", Dobson J declined leave to appeal because he found the appellant Todd's application was out of time.[4]

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1 The issue arises as a question of law for which special leave was granted by this Court: *Todd Petroleum (Mining) Company Ltd v Shell (Petroleum Mining) Co Ltd* [2010] NZCA 580 [Leave judgment] at [22].

2 This was the second application for leave filed by the appellant in the High Court. The first application was brought within the time allowed by art 34(3) seeking leave to appeal a number of other questions of law but did not include Question 7.

3 *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* HC Wellington CIV-2009-485-2024, 5 March 2010 [Judgment No 1].

4 At [137]–[139].

[3] Following a recall application, and the subsequent amendment and reissuing of the first judgment (Reissued Judgment), Dobson J again determined leave for Question 7 should be declined, on the different basis that it was not a "proper request".[5] In a second judgment issued at the same time (Judgment No 2), Dobson J set out his reasons for reissuing the judgment and also declined Todd's application for leave to appeal to this Court in relation to Question 7.[6]

[4] Todd sought and was granted special leave to appeal to this Court on Question 7, limited to the issue of whether the High Court correctly determined Todd's application for leave to appeal to the High Court was out of time.[7] It is common ground that, if this question is answered in the negative, Question 7 is to be remitted to the High Court for determination on the merits together with other questions of law for which leave has already been granted.

Background

[5] Todd and Shell are parties to a joint venture to which they agreed in 1955, involving the Kapuni oil and gas field in Taranaki. The agreement is known as JV55. This joint venture relationship is currently governed by:

(a) a Heads of Agreement, dated 1 March 2002 (contemplating a new joint venture agreement regarding Kapuni being entered into); and

(b) in the interim period until that new agreement is reached, certain provisions continued from JV55.

[6] Shell Todd Oil Services Ltd (STOS) is a services company incorporated by Todd and Shell and employed as the Kapuni field operator under these agreements.

[7] A dispute arose in 2006 between Todd and Shell in relation to the tariff STOS purported to charge Todd for the delivery of some of its share of Kapuni gas through

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5 *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* HC Wellington CIV-2009-485-2024, 5 March 2010 [Reissued Judgment] at [122] and [140].

6 *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* HC Wellington CIV-2009-485-2024, 8 June 2010 [Judgment No 2] at [41].

7 Leave judgment, above n 1, at [18].

the Whareroa pipeline. This pipeline runs from the Kapuni field to a co-generation plant near Hawera, where heat and electricity are produced simultaneously in the course of industrial milk production facilities.

[8] The delivery of gas through the Whareroa pipeline is governed by JV55. Todd claimed cl 11 applied to the question in dispute. Shell disputed the relevance of the clause to delivery by the pipeline, and the amount of any tariff payable under it. Clause 11 is one of the certain provisions remaining in force until a new agreement is reached between the parties, noted at [5](b) above.

[9] Clause 11 deals with delivery as follows:[8]

> **11 DELIVERY OF PETROLEUM**
>
> (1) Any petroleum shall be delivered by [STOS] at main field storage or (subject to the payment of transport charges by the recipient) at some other place reasonably required by the recipient at which [STOS] can conveniently deliver the same.

[10] In July 2007 the parties referred this dispute to arbitration, along with other disputes relating to the control, use of, and charges for a number of assets. Todd claimed cl 11(1) required STOS to deliver to the parties either:

(a) at "main field storage" in which case no charge is payable; or

(b) at some other place, in which case "transport charges" are payable.

The arbitral award

[11] The arbitrator, Hon B J Paterson QC, ruled (in respect of the issues before us) in an Award dated 10 July 2009 that the Whareroa pipeline was outside "main field storage" for the purposes of cl 11(1) and it was not necessary to determine the meaning of transport charges, because cl 11(1) did not apply. The arbitrator also held in the Award that no more than "reasonable charges" could be charged for the use of the pipeline and that such a tariff should be fundamentally commercial. Finally the arbitrator concluded at [199] of the Award that, subject to any additional order that may be made, all other claims for relief were dismissed.

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[8] Gas is encompassed within the JV55's definition of petroleum for the purposes of this clause.

[12] Todd considered its second claim under cl 11(1) had not been addressed – that if delivery to Whareroa was outside main field storage, it was nonetheless entitled to such delivery on payment of transport charges. Todd subsequently filed a request on 12 August 2009 pursuant to art 33(3) of sch 1 to the Act seeking an additional award ruling on that claim. Article 33(3) provides:

> **33 Correction and interpretation of award; additional award**
>
> (…)
>
> (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may within 30 days of the receipt of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request justified, it shall make the additional award within 60 days.

[13] The related article 34(3) provides:

> **34 Application for setting aside as exclusive recourse against arbitral award**
>
> (…)
>
> (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 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.

[14] Shell opposed Todd's request under art 33(3).

[15] While Todd's request for an additional award was before the arbitrator, both parties filed applications in the High Court seeking leave to appeal a number of other questions arising from the Award. Todd sought to appeal a number of other findings in respect of cl 11(1), but because the arbitrator's determination of that request was still pending, did not seek leave on the specific question forming the substance of the request under art 33(3).[9]

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[9] These other requests included the arbitrator's interpretation of the term "main field storage" (Question 4) and the application of that term to the Whareroa pipeline (Question 5). The High Court granted leave to appeal these two questions of law: Judgment No 1, above n 3, at [105] and [109] respectively.

[16] The arbitrator held a hearing to consider Todd's request for an additional award. On 18 November 2009, the arbitrator declined that request. The arbitrator's reasons for doing so appeared to be based on a misinterpretation of cl 11(1), namely, failing to recognise it provided for two different delivery options, as well as conflating the question of main field storage and the quantum of transport charges. Todd accordingly filed in the High Court a further application for leave to appeal on 27 November 2009, in addition to those filed previously by both parties.

[17] Question 7 on which Todd sought leave is as follows:

> Does clause 11(1) of the Kapuni joint venture agreement dated 13 September 1955 ("JV55") entitle a [Kapuni Mining Company] to delivery of its product from the Kapuni field by STOS outside main field storage upon the payment of transport charges only; and if so, do "transport charges" mean STOS' operating costs plus any third party charges necessarily incurred by STOS?

The High Court judgments

[18] Dobson J delivered Judgment No 1 on 5 March 2010, but this was recalled in the Reissued Judgment, alongside a minute delivered on 8 June 2010 and Judgment No 2, which described the reasons for allowing the recall. The effect of the three decisions was to decline leave on Question 7. The outcome was maintained across both decisions, but the grounds for doing so changed slightly. In the Reissued Judgement the key reason for declining leave was that the request was not a qualitatively "proper" one coming within art 33(3) and was accordingly out of time in terms of art 34(3).

[19] In respect of the test for art 33(3), Dobson J held in the Reissued Judgment:[10]

> Shell also argued that any art 33 request has to be "proper", in the sense that it must relate to matters that the terms of art 33 contemplate are open to a party seeking to vary the outcome of the award. Here, Shell argued that aspects of Todd's requests went beyond the permitted scope for such requests, such that the requests lacked status as proper requests and could not be the basis for an extension of time under art 34(3). Conceptually this point is also valid because some limit on the resort to art 33 is necessary to prevent such applications being used improperly as a pretext for extending time in which to seek leave to appeal. Consistently with the previous point, the validity of a challenging party's resort to art 33 should be measured prospectively. Accordingly, the question for determination is: at the time

[10] At [122].

> when the request was pursued, was there a reasonable basis for the challenging party to pursue such request as coming within the defined categories of request in art 33?

[20] In Judgment No 2, setting out reasons for the recall, Dobson J expressed the test in slightly different terms, as follows:[11]

> … the question is whether, at the time Todd made its request of the arbitrator to deliver a further award addressing the scope of "transport charges" in clause 11(1) of JV55, Todd could reasonably treat it as a proper application in the sense of being within the arbitrator's jurisdiction to consider, and tenable on the evidence and outcomes to that point.

[21] Dobson J applied this test to Todd's request relating to Question 7. He summarised Shell's argument as follows:[12]

> Shell argued that if anything could be made of the omission, then it would be an error arising from the arbitrator's approach to interpretation of clause 11(1). After setting out in paragraph 198 of the award all the declarations and orders he made in reliance on his reasoning, in paragraph 199 the arbitrator said, with one defined exception, that "all other claims for relief are dismissed". Because Todd had sought a declaration as to the meaning of "transport charges", that request for a determination had been dealt with. Accordingly, Todd's post-award application to the arbitrator to revisit the dismissal of the request could not be a proper one in terms of Article 33(3).

[22] The Judge upheld Shell's opposition concluding that the application to the arbitrator for an additional award did not operate to extend time to seek recourse against the arbitral award under art 34(3). Todd ought to have sought leave to appeal on that question.[13]

Submissions of the parties

Shell submissions

[23] On the appeal Shell seeks to uphold Dobson J's approach to art 33(3).[14] At a policy level, Mr Hodder QC argued that the decisions of this Court in *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* and *Opotiki Packing &*

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11 At [16].
12 Reissued Judgment, above n 5, at [140]B.
13 At [140]C.
14 In so doing Shell advanced somewhat different grounds than those set out in the Reissued Judgment. Although no notice to support the judgment on different grounds had been filed by Shell, there was no objection from Todd.

Coolstorage Ltd v Opotiki Fruitgrowers Co-operative Ltd (in rec) provide powerful authority for a limited role for judicial challenge or review of arbitral awards.[15] This reinforces the statutory purpose of promoting arbitration as a dispute resolution mechanism and preserving finality in arbitral awards.

[24] Shell submits art 33 provides a limited exception to the termination of the arbitral tribunal's mandate once an award has been issued. In order to defer time in which to appeal from running under article 34(3), it requires that a "request had been made under article 33". Mr Hodder contends the natural and ordinary meaning of the phrase is that the request must objectively satisfy the requirements for the exercise of jurisdiction under art 33. If it does not, the request is not "made under article 33" and art 34(3) cannot be invoked.

[25] Shell argues that applying the natural and ordinary meaning "made under" means "pursuant to" or "authorised by". Therefore, art 33 requires an assessment of whether a request meets the jurisdictional requirements it prescribes, including as to the grounds on which that request is made. A request under art 33(3) must seek an additional award on a claim which the arbitral tribunal had omitted to deal with in its award.

[26] Although not endorsing the particular language of "proper" request employed by Dobson J, Shell argues his broad approach is correct, representing no more than a shorthand for the ordinary meaning of the statutory requirement that a request be made under art 33. This is not a statutory gloss, but rather the correct interpretation using the ordinary language of the statute. Mr Hodder submits New Zealand and international authority supports that interpretation.[16]

[27] Accordingly, Shell submits Todd's request did not relate to a claim omitted from the award (because it had been dismissed), there was therefore no jurisdiction and the arbitral tribunal's mandate was not extended upon receiving the application.

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15 *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [13]; *Opotiki Packing & Coolstorage Ltd v Opotiki Fruitgrowers Co-operative Ltd (in rec)* [2003] 1 NZLR 205 (CA) at [19].

16 *Opotiki Packing and Coolstorage,* above n 15, at [16]–[28]; *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512 (QB) at [66]–[68]; and *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] SGHC 193, [2009] 4 SLR(R) 1043 at [14].

Thus time continued to run from the date of the award, and was not deferred by art 34(3). Dobson J was correct to find Todd's request was out of time.

Todd submissions

[28] Todd challenges Shell's approach. It says time is automatically extended under art 34(3) whenever a party to an arbitral award makes a request for an additional award under art 33(3). There is no additional qualitative requirement for the request to meet any merit-based threshold. Todd's request extended time and the application to the High Court in respect of Question 7 was not time-barred.

[29] Todd also submits that, even if art 34(3) is restricted to requests which meet a standard of "proper" request, its request under art 33(3) was proper. In the award the arbitrator expressly declined to deal with, and therefore omitted to determine, Todd's alternative claim regarding delivery "at some other place" on payment of reasonable transport charges. The arbitrator did not say why he was not prepared to determine this claim under cl 11(1). It was therefore reasonable and "proper" for Todd to request an additional award to determine the claim omitted.

Analysis

[30] The purposes of the Act are described in s 5 as follows:

> (a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
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> (b) to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21 June 1985; and
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> (c) to promote consistency between the international and domestic arbitral regimes in New Zealand; and
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> (d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
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> (e) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; …

[31] Implementing the United Nations Commission on International Trade Law (UNCITRAL) Model Law, the Act was "designed to substantially overhaul and modernise" New Zealand arbitration law and bring the statutory provisions "into line with the international regime".[17] Importantly both arts 33 and 34 follow the Model Law.[18]

[32] As submitted by Shell some key themes to emerge from the introduction of the Act in New Zealand include the confirmation of finality and certainty of arbitration, party autonomy over the choice of arbitration as the chosen dispute resolution mechanism, restricting the review of arbitral awards with regard to grounds and time and limiting the involvement of the High Court in setting aside those awards. We agree with these principles, previously endorsed by this Court in *Gold & Resource Developments* and *Opotiki Packing & Coolstorage Ltd*.[19]

[33] The meaning of the Act is to be interpreted from its text considered in the light of its purpose and statutory context.[20] The immediate drafting histories of the Model Law and the New Zealand Act are also relevant.[21] We also accept Mr Cooper's submission that, as the Act is derived from an international model, it should be consistent with the goal of that model to enhance accessibility for lawyers and lay people alike seeking recourse to arbitration. Lord Steyn made similar observations when commenting on the Arbitration Act 1996 (the UK Act), stating:[22]

> One of the major purposes of the Arbitration Act 1996 was to set out most of the important principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from

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17 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2003] 2 NZLR 92 (HC) at [18] per Harrison J.

18 Article 34 contains three additional clarifying paragraphs: 34(4) provides the High Court may suspend setting aside proceedings before it to allow the arbitral tribunal an opportunity to resume its proceedings or take other actions the tribunal sees fit to eliminate the grounds for setting aside before the High Court; 34(5) provides money payable under an arbitral award shall be brought into the court or otherwise secured pending determination; and 34(6) setting out when an award will be in conflict with public policy in New Zealand. These are not material to the issues on this appeal.

19 *Gold & Resource Developments (NZ) Ltd,* above n 15, at [13]; *Opotiki Packing and Coolstorage Ltd*, above n 15, at [19]. See also *Carr v Gallaway Cook Allan* [2014] NZSC 75 at [20]–[32].

20 Interpretation Act 1999, s 5 and *Casata Ltd v General Distributors Ltd* [2006] NZSC 8, [2006] 2 NZLR 721 at [112]–[117] per McGrath J.

21 *Casata Ltd*, above n 20, at [32] per Keith J.

22 *Lesotho Highlands Development Authority v Impreglio SpA & Ors* [2005] UKHL 43, [2006] 1 AC 221 at [19], quoting the speech of the then Thomas J (now Thomas LJ) in *Seabridge Shipping AB v AC Orssleffs Eftfs A/S* [1999] 2 Lloyd's Rep 685 (QB) at 690.

> technicalities to be readily comprehensible to the layman. It was to be "in user friendly language" … International users of London arbitration should, in my view, be able to rely on the clear "user-friendly language" of the Act and should not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues where the provisions of the Act set out the law. If international users of London arbitration are not able to act in that knowledge, then one of the main objectives of the reform will have been defeated.

[34] In the normal course the mandate of an arbitral tribunal comes to an end with the termination of the arbitral proceedings.[23] Usually this will be when the final award is made.[24] Article 33 operates to extend the mandate of the arbitral tribunal in three defined ways:

(a) correcting computational, clerical, typographical or other similar errors (effectively permitting corrections consistent only with the "slip rule");[25]

(b) interpreting (with all parties' consent) specific points or parts of the award;[26] and

(c) issuing an additional award to decide claims presented in the arbitration but omitted from the original award.[27]

[35] We agree with Mr Cooper's submission that these three categories are necessary in order to avoid the unacceptable possibility of a party finding itself bound by an award mistakenly granting or withholding relief that the tribunal did not intend.[28] In the case of omissions, for example, one reason for allowing additional awards is that this accords with the parties' intention that the arbitral tribunal should complete the mandate assigned to it to resolve the parties' dispute by arbitration rather than the matter proceeding to the courts.[29] Article 33(3) serves that purpose by allowing the tribunal to address omitted claims in an additional award. From a policy perspective art 33 contemplates that, if a defect (including an omission) can

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23 Arbitration Act 1996, sch 1, art 32.
24 Schedule 1, art 32(1).
25 Schedule 1 art 33(1)(a). Such an error may also be corrected by the arbitral tribunal on its own initiative within 30 days of the award: art 33(2).
26 Schedule 1, art 33(1)(b).
27 Schedule 1, art 33(3).
28 Relying on G Born *International Commercial Arbitration* (2nd ed, Kluwer International, The Netherlands, 2014) at 3124–3125.
29 At 3150.

be corrected by the arbitral tribunal without recourse to a court, it is desirable for that to occur.[30]

[36] Articles 34(3) and (4) address the applicable time limits for making an application to set aside an arbitral award. The application of these articles to appeals to the High Court on questions of law is confirmed by art 5(8) of sch 2, which specifically refers back to arts 34(3) and (4). We consider that, applying the plain meaning of art 34(3), unless made outside the 30 day time period, a request under art 33(3) for an additional award must be dealt with by the arbitral tribunal. This power exists, using the language of art 33(3), "if the arbitral tribunal considers the request to be justified". Once such a request is made, the three month time period fixed by art 34(3) for application to the High Court for leave to appeal runs from the date on which the request is "disposed of" by the arbitral tribunal.

[37] There is no support in the statutory language of either arts 33(3) or 34(3) for a qualitative gloss on the nature of the request for an additional award. We reject Shell's submission to the contrary. Adding a qualitative requirement that a request under art 33(3) be a "proper" request would mean that a party would not know whether it has made a request in terms of that article until the arbitral tribunal either grants or rejects its application. Moreover, the notion of a requirement for a proper request is inconsistent with the language of art 34(3) which speaks only of a request being "disposed of". It is not limited to cases where the request is "granted".[31]

[38] We agree with the submission by Mr Cooper that, if the drafters of art 34(3) had intended only to extend time for art 33 requests that were to be accepted by the arbitrator, it would have been easy to do so.

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30 N Blackaby and others *Redfern & Hunter on International Arbitration* (5th ed, Oxford University Press, Oxford, 2009) at 590; *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 All ER 365 (QB) at [28]; *Casata Ltd*, above n 20, at [12] per Elias CJ.

31 The authors of *Williams & Kawharu on Arbitration* describe the judgment under appeal as introducing "a novel qualification to when a party may rely on art 33 to extend time for art 34(3) purposes". Although expressing the view this novel qualification may control "potential misuse of art 34", the authors say that "it also adds scope for further argument on threshold matters, and is not supported by the text of either art 33 (which has its own tight time frames) or art 34(3)": DAR Williams QC and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 472.

[39] One consequence of an interpretation adding this qualitative requirement is that the requesting party may be obliged to file in the High Court an application for leave to appeal to preserve its appeal rights. This is because if its request has not been disposed of by the arbitral tribunal within the three month time period allowed for seeking leave to appeal against an arbitral award, the party will lose its right to recourse from the High Court under art 34(4). Under Shell's interpretation, that party cannot be sure time will stop running under art 34(3). The party will not know whether the tribunal will consider its "request" to be a proper request until it has been determined.

[40] This would be inconsistent with the policy of maintaining the integrity of the arbitration process and placing limits on the role of domestic courts in private litigation. To require a requesting party to file both a request for an additional award and apply for leave to appeal to the High Court at the same time is not consistent with the policy of the Act.

[41] The legislative history of the Model Law says little about the inter-relationship between arts 33 and 34(3). On the question of time limits, the Fourth Report of the Working Group noted that the time periods under art 33 ought to be taken into account when ultimately fixing the time for bringing a setting aside or omission claim under art 34(3).[32] Including the reference to art 33 was a reasonable consequence of allowing applications. Its Fourth Report supports the proposition the Model Law intended all requests under art 33 should operate to stop time running for challenging an award under art 34(3) and pointed to those time-limits as a mechanism to prevent delay tactics.

[42] Mr Hodder raised the concern about the interests of certainty and the risks of dilatory tactics. He submitted that a party might deliberately file a request for an additional award in order to seek to extend the applicable time limit under art 34(3). We note that the reason given by Dobson J for reading words into art 34(3) to require that the request under art 33 must be "proper" was "to prevent such applications being used improperly as a pretext for extending time in which to seek leave to

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[32] H Holtzmann and J Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer International, The Netherlands, 1994) at 950.

appeal". We do not see this as a real concern. The time periods in art 33(3) operate to minimise the risk of delay tactics. There is a 60 day limit for the arbitral tribunal to make the additional award subject only to an extension, if necessary, under art 33(4). An arbitral tribunal will be well placed to discern whether an application for an additional award is unmeritorious. In such a case the application could be promptly rejected with an appropriate award of costs.

[43] There is no suggestion in the Law Commission Reports, the Arbitration Bill as reported back from the Government Administration Committee, or in the Parliamentary debates of any kind of gloss or requirement as advanced here being contemplated for arts 33 and 34(3).[33]

[44] In support of his argument for a qualitative gloss on art 33(3) requests for an additional award, Mr Hodder submitted there are three possibilities in respect of the exercise of discretionary power under art 33(3). First, a timely (made within the allowed 30 days) and proper request is made, which the arbitral tribunal considers, finds to be justified and grants. Second, a timely, proper request is made which the arbitral tribunal considers and finds is unjustified. Third, a timely request is made that is "qualitatively hopeless" and ought not to be considered by the arbitral tribunal because it is not "proper".[34]

[45] We consider this approach is unpersuasive because, when scrutinised, the latter two categories collapse into one. At hearing, Mr Hodder tried to support this differentiation by contending that a timely, proper request could at least possibly be refused, because once art 33 is invoked, the power to grant a request is discretionary. So there is a theoretical situation in which a proper request is nonetheless refused. Nonetheless, Shell accepted it was "unlikely" that the discretion would be exercised against making an additional award, but could be exercised in respect of art 33(1)(a) or (b).

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[33] Law Commission *Arbitration* (NZLC R20, 1991) at [397]–[404]; Government Administration Committee *Arbitration Bill* (19 August 1996) at vii–ix and 33–34; and (21 August 1996) 557 NZPD 14245–14248.

[34] There is presumably a fourth category, in which a request is made out of time, and so fails at that first hurdle. It is irrelevant for present purposes and does not touch on the reasoning above.

[46] On Shell's submission, a request for an additional award can only be "proper" when it concerned a claim that the arbitral tribunal had in fact omitted to deal with its award. This would justify relief being granted. So, whether a request is proper, and whether a request is meritorious and ought to justify an award become the same question. We are satisfied the final two categories of Shell's submission noted above are not separate, but different labels for the same outcome.

[47] We reject this analysis and find no support for Shell's division into three categories. If the statutory language does not support the qualitative gloss, then the three categories become two. The second and third variations both form part of one category of request that, when considered by the arbitral tribunal, is found not to be justified.

[48] Counsel for both parties accepted there is no authority on the issue to be determined on appeal. But Mr Hodder relied on two overseas cases which he submitted supported an objective assessment of the art 33(3) request. The first is *Tay Eng Chuan v United Overseas Insurance Ltd* which concerned an application by a party to a Singaporean arbitral award to correct errors in computation, typographical or clerical errors in the award under the Singaporean equivalent of art 33(1)(a).[35] The application made no request for an additional award.[36] When the arbitral tribunal declined to correct all of the alleged errors, the applicant applied to the High Court for recourse against the award contending that time should run, for the purposes of the court application, from 10 February 2009 being the date when advice was received from the tribunal.

[49] Under the Arbitration Act (Cap. 10, 2002 Rev Ed) in Singapore, there is a provision in s 50(3) dealing with the running of time where there has been "any arbitral process of appeal or review". In such a case time runs from "the date when the applicant or appellant was notified of the result of that process". This provision is the equivalent of art 34(3) but is differently worded.[37] The High Court had to

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35 *Tay Eng Chuan*, above n 16.

36 As contemplated by s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed) (Sing), the equivalent of which in the Arbitration Act (NZ) is art 33(3).

37 Section 50(3) of the Singaporean Arbitration Act is in the same terms as the English law: Arbitration Act (UK) 1996. Note also Singapore's separate enactment of its International Arbitration Act (Cap. 143A, 2002 Rev Ed).

consider whether the request to correct errors in this case had the effect of triggering the time limit in s 50(3) or alternatively whether time ran from the date of the award.

[50] Prakash J held that the application was misconceived and should be dismissed. A critical issue was whether the request to correct errors was available to correct "alleged ambiguities" in the award. The Judge held this was not the case. She said: "From an objective standpoint, there was no inherent ambiguity in the award that could have caused genuine confusion and further, there was no real confusion that was actually created in the applicant's mind".[38] Mr Hodder pointed to this passage as a basis for contending that there should be read into art 33(3) a qualitative requirement allowing the Court to assess objectively whether the request for an additional award was "proper". We reject that submission.

[51] First, the Judge was considering the availability of a statutory provision concerning a different application, the equivalent of art 33(1)(a). Second, the Judge was examining, after the event, the content of the applicant's notice seeking correction for errors in the award. Third, in relation to the relevant time limit in s 50(3) of the Singaporean Act the Judge said it did not apply to a request for correction of errors. She added that, whether it might apply to a request for an additional award in respect of claims presented during the arbitration proceedings but omitted from the award, was not an issue on which she expressed a concluded view. For these reasons we are not assisted by the judgment in *Tay Eng Chuan*.

[52] The second case relied upon by Mr Hodder was *Al Hadha Trading Co v Tradigrain SA* where the High Court of England and Wales held that a purported request that an arbitral tribunal "correct an award to remove any clerical mistake or error" was not effective to extend the time for advancing a challenge to the award.[39] The Court held the request in question amounted to a request that the arbitral tribunal reconsider its conclusion about a matter decided by the award. It therefore fell outside the power of the tribunal to correct clerical errors under s 57(3) of the UK Act. That provision is broadly comparable to that under art 33(1)(a) of the Act.

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38 At [23].

39 *Al Hadha Trading Co,* above n 16, at [66]–[68].

[53] We do not find *Al Hadha* to be of direct application. The Court was called upon to decide whether the request to correct an award was appropriately invoked in the circumstances of that case. It does not assist us with the interpretation of arts 33(3) and 34(3).

[54] With reference to the UK Act, Mr Hodder referred to its s 70(2), which provides that a party to an arbitration proceeding must exhaust all remedies in the arbitral process before seeking to challenge or appeal the award. There is no equivalent in the New Zealand Act. He relied on that absence to inferentially support Shell's interpretation of arts 33 and 34.

[55] We do not consider the absence of such a provision impinges on the interpretation we have given to the nature and application of the time limit provisions in arts 33(3) and 34(3). It does not suggest statutory recognition of some greater scope for judicial review of arbitral proceedings. The concept that a party to an arbitration in New Zealand would not first exhaust available remedies in the arbitral process is inconsistent with the observations of Blanchard J in *Gold & Resource Developments (NZ) Ltd* when he suggested Parliament intended "a strict limitation on the involvement of the Courts where this choice [of arbitration] has been made.[40] Nor does it comport with the interests or conduct of actual parties to arbitration. Moreover, the legislative history of the UK Act's s 70(2) confirms our view that that provision merely makes express in the United Kingdom what is implicit in New Zealand's Act.[41] We do not consider this factor offers any valuable interpretative guidance.

[56] Approaching the matter from a policy perspective, we are satisfied that there are sound reasons favouring the plain and ordinary meaning noted earlier in this judgment. First, we agree with Mr Cooper that the Act is intended to be publicly accessible and user friendly so that it is comprehensible to both lawyers and lay persons alike. That goal would be defeated by the inevitable complexity introduced by the addition of a qualitative requirement which is not apparent or necessary on the words of the articles concerned.

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40 At [52].

41 See further Law Commission *Arbitration,* above n 33, at [397] and [401]–[404] and (21 August 1996) 557 NZPD, above n 33, at 14246 supporting this proposition.

[57] Second, the applicable time limits in art 34(3) are firm in the sense that there is no discretion to extend them. Moreover, the choice of the words "disposed of" in the same article provide clear guidance as to the parliamentary intention. Had any qualitative requirement to the nature of the request for an additional award been intended it would have been easily made clear on its terms. The addition of any qualifying requirement involves reading in additional words when there is no necessity to do so. Further, this factor answers Shell's submission that its interpretation better serves the imperatives of certainty and finality. Those policy goals are enhanced when the time limits in the relevant provisions function according to the interpretation this Court prefers.

[58] Third, the policy in favour of autonomy of the parties to choose the tribunal by which their dispute is determined is preserved by the interpretation we have upheld. Any interpretation that forces a premature or additional invocation of the jurisdiction of the court should be discouraged. It is inconsistent with the notion of limiting the role of the courts in the review of arbitral awards.

[59] For all the above reasons we see no basis to support a gloss on the statutory words requiring a qualitative requirement to requests for an additional award made under art 33(3).

[60] As we have reached a clear view concerning the interpretation of arts 33(3) and 34(3) there is no need for us to address Todd's second point, namely, that the request for an additional award was in any event proper.

[61] Finally we emphasise that nothing in this judgment should be seen as commenting in any way on the scope of Questions 4 and 5 for which leave has already been granted to Todd to appeal to the High Court.

Result

[62] For the above reasons the appeal is allowed.

[63] The question of law for which special leave was granted, namely, "whether Todd's application for leave to the High Court was out of time", is answered "no".

[64] As a consequence of the above answer, Question 7 (as described at [17] of this judgment) is remitted to the High Court for determination on the merits, together with the other questions of law for which leave has already been granted by the High Court.

[65] As agreed by counsel at the hearing, the respondent must pay the appellant costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

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