ReSOLUTION

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Falling foul of "normal" business practice: are arrangements based on "cultural factors" really that unusual in New Zealand today?

Motivations, influences & mutual value: what Nixon's dog can teach us about negotiating performance

Evidence of money laundering leads French Supreme Court to uphold setting aside of $15 million award

NZDRC

From the Editor
Catherine Green

Welcome to the 33rd issue of ReSolution®. As we head into spring, our latest issue of ReSolution provides our readers with a wealth of interesting information and articles to explore.

In this issue, Maria Cole looks at a Supreme Court Decision which considers whether arrangements based on cultural factors are really that unusual in New Zealand today and alerts us to the need to remember we are a multi-cultural society where cultural factors are alive and well requiring consideration when scrutinising party behaviour.

David Ferguson provides some important insights on negotiation and reminds us to consider the underlying motivations which will impact on performance.

In Case in Brief, Sam Dorne takes us through the recent case of *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* in which the Supreme Court of New South Wales again usefully enforced the position that there is a high bar for a party to reach to circumvent an agreed contractual dispute resolution process.

Further contributions touching on the set aside of an arbitral award for a glaringly obvious accounting error, the recent move by the US Supreme Court to restrict discovery for international arbitrations, cyber disputes, arbitration of iwi disputes and much more round out this issue of ReSolution

I would like to take this opportunity to thank all those that have contributed to this issue of ReSolution®. We are grateful for the ongoing support we receive from dispute resolution professionals, law firms and authors. We are delighted to be able to share world-class articles and papers, to bring a more comprehensive understanding of law and evolving trends in domestic and international dispute resolution.

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

Ngā mihi nui

Nā Catherine Green
Editor

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Contents

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ReSolution in Brief

Kazakhstan ratifies Singapore Convention on Mediation

Kazakhstan has become the 10th country to ratify the United Nations Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**), and it will enter into force there on 23 November 2022.

Kazakhstan was one of the Singapore Convention's original signatories when it opened for signature in August 2019. It now joins Georgia, Belarus, Turkey, Qatar, Saudi Arabia, Ecuador, Honduras, Fiji, and Singapore as the latest state party.

The Singapore Convention is one of the most successful multilateral treaties prepared by the United Nations Commission on International Trade Law (UNCITRAL), with a current total of 55 signatory countries. The world's three largest economies – the United States, China and India, have signed up but not yet implemented domestic legislation to ratify the treaty.

The Singapore Convention aims to promote mediation as a tool for resolution in international disputes by providing easier recognition and enforcement of mediated settlements between its state parties, much like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) does for arbitral awards.

Australia signed in September 2021 but is yet to ratify. Earlier this year, the UK government conducted a consultation on whether it should also sign - the results of this consultation are expected in the upcoming months. If the UK does decide to sign, this may encourage further uptake among jurisdictions such as Canada, New Zealand, and the European Union.

You can find more information about the Singapore Convention and the New York Convention on the UNCITRAL website.

New ICSID rules for investment dispute arbitrations enter into effect

In our May 2022 issue of ReSolution we outlined recent amendments to the International Centre for Settlement of Investment Disputes (**ICSID**) arbitration rules. The rules govern procedures in investment dispute arbitrations between businesses and nations under the ICSID Convention.

You can find the revised rules at https://icsid.worldbank.org/. The amendments aim to increase transparency, modernise and simplify proceedings, and embrace technology to make the arbitration process more time and cost-effective.

The new rules came into effect on 1 July 2022 and ICSID has now also published guidance notes to the rules on its website. The guidance notes include useful explanations, visual aids and instructions for practitioners both on the overall procedure as well as the new rules specifically, such as electronic filing, time limits, expedited procedure, bifurcation, consolidation, public access and consent to publication, CMCs and security for costs.

ICSID has also recently published its latest caseload statistics report for the 2022 financial year which analyses overall trends, types of new cases, geographic, distributions, economic sectors, case outcomes and arbitrator gender.

English High Court clarifies interplay between court-ordered arbitration and ability of a non-participant to contest jurisdiction

In *National Investment Bank Ltd v Eland International (Thailand) Co Ltd and Eland International Ghana Limited* [2022] EWHC 1168 (Comm) the High Court of England and Wales considered the interplay between section 18 and section 72 of the Arbitration Act 1996 (the **Act**).

Eland International Thailand Ltd commenced court proceedings against National Investment Bank Ltd (**NIB**) in Ghana. After initially involving itself in the Ghana court proceedings, Eland Ghana Limited (**EG**) later sought to commence arbitration in the UK instead. NIB did not agree to arbitration.

EG successfully asked the English High Court to appoint an arbitrator under section 18 of the Act. Section 18 allows a party to a dispute to ask the court to appoint an arbitrator, where the other party does not agree to arbitration. Such court-ordered appointment has effect as if made by agreement of the parties.

NIB, in turn, applied to the High Court for a declaration under section 72 of the Act that the (court-appointed) arbitrator did not have jurisdiction. Section 72 allows a person alleged to be a party to arbitral proceedings, but *who takes no part in the proceedings*, to question matters such as the jurisdiction of the arbitral tribunal.

EG tried to argue that the effect of the section 18 appointment was that the parties were deemed to have appointed the arbitrator themselves, and therefore NIB no longer met the section 72 requirement of being a person 'who takes no part in the proceedings'.

The Court held that as ingenious as EG's argument was, the language of section 18 did not suggest that it was intended to have this effect, nor was there any evidence of such legislative intent. It held that section 18 deems the *outcome or effect* of the appointment but does not deem the non-participating party's participation in the appointment process for any other purpose. It held that section 72 provides *vital protection* to those who do not accept the jurisdiction of the arbitral tribunal and take no part in the arbitral process and that protection is not eroded or lost where a party obtains a section 18 order.

The importance of being purposive when seeking a subpoena in arbitration

In *Mountain View Productions LLC v Keri Lee Charters Pty Ltd* [2022] FCA 161 the Australian Federal Court provided some useful guidance for successfully applying for a subpoena in support of arbitration.

It concerned an international arbitration seated in Queensland between the Australian owners of a super yacht (Kerri Lee), who were claiming $12.85m for alleged damage to their vessel by the Californian respondent who had chartered it (**Mountain View**).

Mountain View sought permission from the arbitrator to apply to the Court for a subpoena compelling two Australian non-parties to provide documents about the yacht's repair and damage history under section 23(3) of the International Arbitration Act 1974 (the **Act**). The arbitrator was satisfied that the documents were sufficiently relevant to the determination of the dispute and granted permission.

The Court stated that it was not its place to second guess the arbitrator's view as to relevance, but that Mountain View's request for 'all documents' without any time limits was too wide-ranging and therefore unreasonable. It considered that the absence of a specific time period would require the non-parties to produce documents stretching back more than a decade prior, without any legitimate forensic purpose. The Court granted the subpoena but narrowed its scope to only documents created in the two years before the charter.

The decision provides a useful summary of the requirements for a successful application for subpoena under the Act, the respective roles of the arbitral tribunal and the court in the process and underlines the importance of ensuring that subpoenas are sufficiently purposive and do not go beyond what is necessary to determine the issues in dispute.

Alberta Court of Appeal reinforces judicial non-intervention in arbitral matters

In Esfahani v Samimi, 2022 ABCA 178 the Alberta Court of Appeal clarified the procedure to be undertaken when a party wishes to appeal an arbitral award under section 44(2) of Alberta's Arbitration Act, RSA 2000, c-A-43 (the **Act**).

The case concerned a family law arbitration regarding child support. However, the decision will apply equally to any arbitration falling within the scope of the Act and is a reminder of the Alberta courts' non-interventionist approach to arbitration.

The parties had signed a standard form arbitration agreement but had omitted to incorporate any terms regarding rights of appeal. Under the Act, where an arbitral agreement is silent as to appeal, a party must request the court's permission to appeal; and appeals are restricted only to issues of law (and excluding any issues of law that were expressly referred to arbitration).

Samimi wished to appeal the arbitral award. A hearing was set to deal with both the permission to appeal and the merits of the appeal contemporaneously. The Court of Appeal rejected this combined hearing on the basis that it undermined the legislative intent of the Act – that of minimum judicial involvement in arbitration.

In its decision, the Court pointed out that the statutory permission requirement was intended as a gatekeeping function to restrict judicial involvement in arbitration and preserve the finality of arbitral awards (unless parties have elected to include rights of appeal as part of their arbitration agreement). Hearing the application for permission to appeal together with the merits of the appeal conflicts with this intention.

The Court stressed that *resort to the courts detrimentally affects the well-recognized benefits of arbitration: speed, efficiency and cost*. It held that the mandated legislative procedure is a bifurcated process - permission to appeal must be sought before and separately to any hearing of the substantive merits.

Onerous clauses 'buried away' inside detailed T&Cs not properly incorporated into contract

A recent decision of the English High Court has reinforced that where a contract contains onerous or unusual terms, they must be fairly and reasonably drawn to the signing party's attention.

Blu-Sky Solutions Limited v Be Caring Limited [2021] EWHC 2619 (Comm) concerned a £23,000 contract between a telecommunications company (**Blu-Sky**) and a social care provider for the connection of 800 mobile phones. Blu-Sky's order form referred to its standard terms and conditions on its website. Among those detailed T&Cs was a clause imposing a £225 administration charge per mobile phone for cancellation before connection.

Be Caring signed the online order form but cancelled two weeks later. Blu-Sky claimed the cancellation administration charge for each mobile phone, totaling £180,000, and sued for payment.

The Court found that Blu-Sky had incorporated its website terms and conditions into the contract by referring to them on the order form. However, it agreed that the cancellation clause itself had not been properly incorporated because it was an unduly onerous term that Blu-Sky had failed to highlight and fairly and reasonably draw to Be Caring's attention.

The Court found that the case came very close to misrepresentation because the onerous clauses were hidden within terms and conditions which were so detailed that it was *difficult to tell the important from the unimportant* and…*the offending clause itself…was cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate…*

The decision serves as a double reminder to businesses to carefully check all the T&Cs before signing an order and to also ensure that any onerous terms in their own standard T&Cs are clearly highlighted and brought to the other party's attention.

New Zealand's new rules on unfair contract terms and unconscionable conduct in trade now in force

In August 2021 the New Zealand Parliament passed the [Fair Trading Amendment Act 2021](), which amends the [Fair Trading Act 1986]() (the **Act**). The new rules came into force on 16 August 2022.

The new sections 7 and 8 introduce a general prohibition against unconscionable conduct in all trade (both in consumer and business-to-business relationships). The amendments also extend the existing protection against unfair contract terms in standard form consumer contracts to standard form 'small trade contracts' between businesses (trade relationships under $250,000 annual value).

Broadly speaking, a contract will be presumed to be 'standard form' if it has not been subject to effective negotiation between the parties, such as a business's standard terms and conditions. A contract term may be found by a court to be 'unfair' if it would cause a significant imbalance between the parties, is not reasonably necessary to protect the legitimate interests of the benefitting party and if it would cause detriment to a party. The court will take into account the context of the term within the contract as a whole and the extent to which the term is transparent.

The Commerce Commission has published guidance for businesses on unfair contract terms and unconscionable conduct on the amendments here. Businesses are encouraged to review their practices and their standard terms and conditions and identify any terms or practices that could be considered unfair or unconscionable under the Act. There is a list of example unfair contract terms at section 46M.

First UK Covid rent arrears scheme arbitration award published

The Commercial Rent (Coronavirus) Act 2022 (the **Act**) came into force in England and Wales in March, introducing a six-month arbitration scheme for resolving rent arrears disputes. Commercial landlords and tenants who cannot agree over rent arrears attributable to periods of mandatory business closures during the pandemic can refer their dispute to the scheme for determination by an arbitrator empowered to award relief from payment.

The first such arbitral award to be published came as bad news for office tenants seeking relief from rent arrears under the scheme.

The tenant in this case was Signet Trading Limited (the **Tenant**) – a jewellery retailer with hundreds of retail stores. All 300 of its shops were forced to shut under the Government's mandatory closure of business premises carrying on the sale or rental of goods. However, the rent arrears dispute in question was not for one of its shops but its registered office. The office had been open but empty during the lockdown, with just a mailroom clerk and a security guard.

The Tenant's case failed at a preliminary hearing on jurisdiction. The arbitrator found that the rent arrears were not a 'protected rent' for the purposes of the Act and therefore, the dispute did not fall within the scope for referral to the arbitration scheme.

The arbitrator applied a strict interpretation of the wording of the Act and the business closure mandate and found that the lockdown rules did not force the Tenant to close its registered office, only its retail stores. The arbitrator rejected the Tenant's argument that the office was ancillary to its retail business, reasoning that to find otherwise would impose a two-tier system for tenants of offices connected to retail and those unconnected to retail. The statutory arbitration scheme will close on 23 September 2022.

About the author

Kate is a research clerk in NZDRC's Knowledge Management team. She has recently joined us after working in trust law and succession planning. Previously, she has practised as a solicitor in the UK with an international commercial firm.

Falling foul of "normal" business practice: are arrangements based on "cultural factors" really that unusual in New Zealand today?

By Maria Cole

What is "normal" business practice?

"My word is my bond" is a phrase familiar to many. Historically, breaking your word carried significant consequences at both a personal and societal level. For many of us, that remains true. However, the ability for people to be less "visible" and more mobile has meant that damage to one's reputation often no longer carries the same consequences. Social ostracism either doesn't matter or can be avoided. And Hollywood has created legends of "smooth operators" who are to be admired. They are portrayed as clever people who are sharp enough to take advantage of business opportunities presented to them on a platter by those seen as "gullible", with not an ethical or moral qualm in sight.

Over time societal changes have seen people protecting their contractual rights when conducting business, leading to another familiar saying: "get it in writing". Written agreements documenting business arrangements are intended to safeguard the parties by providing certainty and enabling contracts to be enforced. But having business contracts recorded in writing isn't a requirement for them to be legal, other than a select few.[1] Most of us will have either been involved in or heard of business deals sealed with a handshake. Warren Buffett is apparently famous for them!

Two drivers behind informal arrangements are personal honour and trust, and not wanting to cause offence and consequential damage to relationships by asking for agreements to be documented. Whether this is called "old fashioned" business practice, or behaviour based on "cultural factors", nothing about it sounds out of keeping with everyday business in New Zealand.

According to MBIE, *New Zealand is a nation of small and micro-business… [T]here are approximately 546,000 small businesses representing 97% of all firms... Small businesses are represented in every industry, have many different operating models and interact with government and the economy in a range of ways.*[2]

Cultural considerations and a caution about preconceptions of normal business practice

A recent Supreme Court decision has looked at what have been described as Chinese *cultural considerations* at play in the context of two businessmen who had a working relationship for over 15 years.[3] Their relationships with each other and third parties were conducted under two quite different "operating models". When their relationship went sour, they went to court and the loser ended up being granted leave to appeal to the Supreme Court. Leave was granted because:

> *…The appeal raise[d] potential issues about the interpretation of documents translated from Mandarin and the cultural setting in an arrangement between two Chinese parties whose business relationship appears to have been conducted in Mandarin. The Court of Appeal noted that it was conscious that language is used in a broader linguistic and cultural setting, by reference to background assumptions about personal and*

1 The exceptions in New Zealand relate to consumer contracts, such as door-to-door sales contracts, guarantees, and agreements for the sale and purchase of property.

2 Ministry of Business, Innovation & Employment website, *Small business*: https://www.mbie.govt.nz/business-and-employment/business/support-for-business/small-business/

3 *Deng v Zheng* [2022] NZSC 76.

business relationships and the ways in which dealings are normally structured, that were shared by the parties, but which the Court may not be aware of or understand. The Court referred to the need to be sensitive to the social and cultural context and to be cautious about drawing inferences based on preconceptions about business dealings.

In the High Court, the Judge had found the internal accounts kept by the parties did not accord with normal business or accounting practices. He placed significant weight upon inconsistencies between these internal accounts and the signed-off external accounts. One side argued that the discrepancies were evidence that the two men operated internally as partners, while to the outside world they carried out particular projects through particular companies. The other maintained the existence and content of the internal accounts confirmed that there was an additional relationship between the two men that operated as an overlay for the various corporate vehicles they used. The Judge found there was no partnership arrangement. He considered that the parties had presented themselves to the world as operating through incorporated companies, including to the Inland Revenue Department, and that was the true situation.

The Court of Appeal disagreed. It found that the rules under which the protagonists were operating were well established between themselves. One set applied to their internal relationship (their partnership – based on Chinese cultural factors called guānxi) and another applied to their external relationships with third parties (the incorporated companies each had established to do business with the outside world – based on an understood western business model). The Court stated:[4]

In this case there was no expert evidence about relevant cultural factors to assist the Court. We have done the best we can to be sensitive to the importance of social and cultural context and, in particular, to be cautious about drawing inferences based on our preconceptions about "normal" or "appropriate" ways of structuring and recording business dealings. Rather, we focus on the substance of the parties' arrangements as revealed by their conduct over time.

The Supreme Court found that the case actually turned on inferences to be drawn from the contemporaneous written material, which meant that the cultural issues it had heard submissions on

4 *Zheng v Deng* [2020] NZCA 614 at [89].

weren't determinative. However, it noted that in other cases the social and cultural framework within which one or more of the parties operate may be of greater significance. It observed that in cases where it is appropriate that a judge receive information as to social and cultural framework:[5]

a. *It is open to witnesses to explain their own conduct by reference to their own social and cultural background. It would thus have been open to either of Messrs Zheng or Deng to have referred to guānxi by way of explanation for their own actions…*

b. *Where parties have been in a relationship (business or otherwise), they may explain the way in which the relationship played out by reference to the social and cultural framework in which they operated. By way of example, and coming back to this case, Mr Zheng could have referred to guānxi by way of explanation for the way in which his relationship with Mr Deng operated.*

c. *In the circumstances just mentioned, there can be no objection to such evidence being supported by expert evidence or by resort to ss 128 and 129 of the Evidence Act. These sections published documents in relation to matters of public history, literature, science or art.*

d. *Rather more difficulty may arise where a litigant wishes to introduce social and cultural framework information to explain not their own or joint conduct but rather that of another party. In this situation, the information as to cultural background is likely to be best provided by an expert or under ss 128 and/or 129.*

Final thoughts

New Zealand is a multi-cultural society with all cultures influencing the way life is conducted here. The decision in *Deng v Zheng* has sent a clear message to the dispute resolution world that cultural factors are alive and well in the New Zealand business landscape and need to be given due consideration when parties' behaviour is being scrutinised. If expert assistance to understand those factors is required, it should be sought using the Supreme Court's guidance. But given that the basis of these cultural factors is rooted in a common history of being bound by one's word and the importance of maintaining relationships, the essence of those factors does not really seem to be that foreign a concept to come to grips with.

5 *Deng v Zheng* [2022] NZSC 76 at [79] citations omitted.

About the author

Maria works as a Knowledge Manager in NZDRC's Knowledge Management Team.

She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

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Motivations, Influence & Mutual Value: What Nixon's Dog Can Teach Us About Negotiating Performance

By David Ferguson

Celebration of a high-value commercial deal between a Chinese supplier and Indian buyer was short-lived when one side failed to perform. Working for the Singaporean intermediary that had brokered the deal, our attempts at resolution failed and the contract was simply abandoned. Neither side wanted litigation due to the cost involved as well as the distraction from future business opportunities. Pursuing contract non-performance in New Zealand faces similar challenges, raising the question of the true value of some contracts.

By contrast, a decade earlier during the GFC we had successfully negotiated resolution of onerous contracts with customers from multiple jurisdictions. Solutions included deferred performance and reduced contract volumes; and valuable relationships were maintained while avoiding dangerous precedents. So why the very different outcomes? Causes will differ according to the circumstances, but I think key factors include underlying motivations, networks of influence and mutual value.

Modern negotiation is taught as being 'interest-based', but our view of interests or motivations ahead of a negotiation is often relatively shallow and static. We often fail to recognize that a change in context impacts the relative importance of various motivating factors. In the case of the failed deal described above, alternative spot-priced opportunities led to one side defaulting. Had we more deeply considered the likely response to motivations under various scenarios, we may have structured the deal very differently. There is a story of Kissinger discussing foreign policy with Nixon and illustrating this point by reference to Nixon's dog behaving badly because he was being rewarded for it. In short, if you set up a deal with given motivations, then you shouldn't be surprised by how your counterpart responds.

Networks of influence are sometimes considered in reaching an agreement, but also play a part in ensuring performance. The Centre of Competence in Humanitarian Negotiation has produced an excellent manual describing how

to map networks of influence,[1] but commercial negotiators often overlook this area and focus solely on their negotiation counterpart. A key factor in successfully securing performance during the GFC was that my predecessors had wisely developed customers that were part of networks where non-performance would seriously damage their reputation in the industry. By contrast in the failed deal, we had not adequately considered how to use networks of influence in the structure to encourage performance.

While contracts may be 'onerous' in the short-term, performance is far more likely where the relationship creates mutual value in the long-term. This is akin to a 'prisoner's dilemma' situation and whether a party will 'keep faith' with the agreement for mutual benefit. In the GFC negotiations, contract performance reflected the fact that the balance of short and long term benefits from performing outweighed those of defaulting. For those who enjoy interactive online games, I'd suggest 'The evolution of trust', which explores this decision to 'cheat' or 'cooperate' further.

Creating 'self-performing' contracts has been recommended for countries with less-developed legal systems. However, structuring a deal to encourage performance has value regardless of jurisdiction and beyond the actual contract. Ensuring performance of commercial agreements should be a key consideration in the overall negotiation strategy design, including consideration of motivations, networks of influence and mutual value.

1 https://frontline-negotiations.org/home/resources/.

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Te Mana Kaiwhakatau, Takawaenga o Aotearoa

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The United States Supreme Court Restricts Discovery for International Arbitrations

By Sarah Vasani and Peter Bekker

In a landmark decision issued on 13 June 2022,[1] the US Supreme Court ("SCOTUS"), America's highest court, ruled that the scope of Section 1782 of the United States Code ("U.S.C.") does not extend to evidence gathering, including discovery, in aid of international arbitrations. The decision creates a level playing field between foreign and domestic arbitrations in the United States and brings much needed clarity in the US courts' role in relation to foreign arbitrations.

Background

Pursuant to Section 1782(a) U.S.C., "*[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.*" This provision allows a party to obtain US-style discovery, including document production, which is relatively broad compared to numerous other jurisdictions, even in advance of a proceeding. A prior version of Section 1782 covered "*any judicial proceeding*" in "*any court in a foreign country*" and, in 1964, the US Congress expanded the provision to cover proceedings in a "*foreign or international tribunal.*" In 2004, SCOTUS interpreted this expansion as creating "*the possibility of U. S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.*"[2] In turn, this interpretation raised the question of whether the scope of the statute expands to evidence gathering in assistance of international arbitrations. This resulted in a split among US appellate courts interpreting the phrase "*foreign or international tribunal*". SCOTUS agreed to consider the matter by granting certiorari (leave for appeal to SCOTUS) and consolidating *ZF Automotive US, Inc., et al. v. Luxshare, Ltd., No. 21-401*, a case concerning an international commercial arbitration that was to be conducted under the Arbitration Rules of the German Institution of Arbitration ("DIS"), and *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States, No. 21-518*, a case arising from an investment treaty arbitration conducted under the UNCITRAL Arbitration Rules.

SCOTUS Limits the Ability of Parties in Private Foreign and International Arbitration Proceedings to Seek Discovery

SCOTUS noted that the relevant question was "*whether the phrase 'foreign or international tribunal' in Section 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies.*" If the phrase excluded private adjudicative bodies, the second question was whether the DIS and UNCITRAL arbitral tribunals qualified as governmental or intergovernmental bodies.

SCOTUS adopted a contextual interpretation in answering this question. It noted that the modifiers "*foreign or international*" attached to "*tribunal*" *meant that "'tribunal' is best understood as an adjudicative body that exercises governmental authority.*" It observed that "*'Tribunal' is a word with potential governmental or sovereign connotations, so 'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation.*" Similarly, it noted that "*[a] tribunal is 'international' when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.*" SCOTUS observed that its contextual interpretation was supported by the drafting history of the statute in question: "*the animating purpose of §1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.*" Finally, SCOTUS noted that Section 1782 permits much broader discovery than the Federal Arbitration Act ("FAA") allows in respect of domestic arbitrations. Among other

1 https://www.supremecourt.gov/opinions/21pdf/21-401_2cp3.pdf

2 https://www.supremecourt.gov/opinions/03pdf/02-572.pdf

differences, the FAA does not allow pre-arbitration discovery. SCOTUS observed that *"[i]nterpreting §1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration."* Holding that private adjudicatory bodies do not fall within Section 1782, SCOTUS then determined that the DIS and UNCITRAL panels in the consolidated cases before it were not governmental or intergovernmental bodies. In relation to the DIS panel, SCOTUS noted that no government was involved in creating it or prescribing its procedures. In relation to the UNCITRAL panel, SCOTUS noted that neither the presence of an investment treaty party in the dispute nor the existence of the investment treaty is dispositive, because the treaty parties *"are free to structure investor-state dispute resolution as they see fit."* SCOTUS recounted the forum options available to the investor and noted that the chosen UNCITRAL panel *"is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes. And nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority."* It pointed out that *"[i]n a private arbitration, the panel derives its authority from the parties' consent to arbitrate"* and the UNCITRAL panel *"derives its authority in essentially the same way."*

Implications

The Court's unanimous decision forecloses the availability of US court assistance in evidence gathering in aid of foreign arbitrations. Whether or not one agrees with the decision, it establishes a level playing field in the US courts' assistance of domestic and foreign arbitrations. Undoubtedly, foreign seated commercial arbitration cases are now excluded from the scope of Section 1782 U.S.C., which will limit parties' ability to develop evidence in private arbitration proceedings abroad. A similar fate is in store for investment treaty arbitrations conducted under the UNCITRAL Arbitration Rules. It remains to be seen if the decision will affect investment treaty arbitrations conducted under the World Bank's ICSID Convention or before the EU Multilateral Investment Court and other similar standing bodies to be established under international investment agreements. ICSID tribunals, while deriving their authority from the ICSID Convention, a multilateral treaty, are still *ad-hoc* arbitration panels. In its dicta, SCOTUS indicated that the relevant question is whether the treaty parties intended that the *ad-hoc* panel exercise governmental authority. While such tribunals were unquestionably formed to resolve international disputes between private parties and host States, whether this entails the delegation of government authority is unlikely. Nevertheless, discovery under Section 1782 may still be available in relation to certain special arbitral bodies imbued with sufficient governmental authority (e.g., state-to-state arbitrations) or for use in aid of arbitration-related foreign court litigation, including proceedings to recognise and enforce arbitral awards or proceedings to set aside an arbitral award.

This article was written by CMS partners/ employees Sarah Vasani and Peter Bekker and was first published on CMS Law-Now on 20.06.2022 available here.

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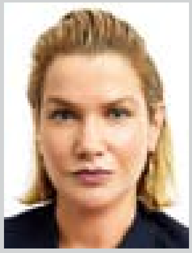

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Arbitral award set aside for 'glaringly obvious' accounting error amounting to 'serious irregularity'

By Kate Holland

Successful challenges to arbitral awards in the courts are rare. There is a balancing act when it comes to protecting parties from seriously flawed awards on the one hand, and upholding the principle of finality in arbitration on the other. In [Ducat Maritime Limited v Lavender Shipmanagement Incorporated [2022] EWHC 766 (Comm)](), the balance was tipped in favour of an applicant who successfully challenged an award in the English High Court on the basis that the arbitrator had made an 'obvious accounting error'. The case highlights the importance of querying any discrepancies *before* an award is made, and it's a cautionary tale for parties who stubbornly refuse to cooperate when errors come to light.

The parties' original dispute and referral to arbitration

Ducat Maritime Limited (the **Charterer**) chartered a vessel from the owners Lavender Shipmanagement Incorporated (the **Owner**). The charterparty contained an agreement to refer any disputes to arbitration.

The Owner's claims for USD $37,831.83

The Owner initiated arbitration for various claims. Its total amount claimed was $37,831.83. This figure included a $9,553.92 hull cleaning claim.

The Charterer counterclaims for USD $15,070

The Charterer disputed some of the Owner's claims, including the hull cleaning claim. It also made a counterclaim for vessel underperformance in the amount of $15,070.

The arbitrator's error and refusal to correct

The arbitrator's findings and what he should have awarded

The arbitrator found that the Charterer's $15,070 counterclaim failed.

He found that most of the Owner's claims were successful, but he rejected its $9,553.92 hull cleaning claim and deducted it.

These findings should have led to a total award of $28,277.91 against the Charterer.

The arbitrator's error and what he actually awarded

However, in his calculations, the arbitrator somehow mistakenly included the Charterer's failed $15,070 counterclaim (and interest thereon) with the amounts owing to the *Owner*, resulting in an inflated award of $53,692.66.

In his decision, the arbitrator pointed out that the sum of $53,692.66 was greater than the Owner's original claim of $37,831.83 and that the discrepancy was unexplained. However, instead of enquiring further or inviting the parties to comment on the discrepancy, he stated he could not award more than originally claimed and capped the award at the original claim amount. This resulted in an award against the Charterer for $37,831.83.

Based on the arbitrator's finding that the Owner's hull cleaning claim had failed, this award was $9,553.92 (or 33%) more than what the Charterer should have been ordered to pay.

Charterer's unsuccessful applications for correction of the award

The Charterer twice unsuccessfully applied to the arbitrator for correction of the award under section 57 of the Arbitration Act 1996 (the **Act**), but the Owner opposed it. The Charterer argued the award should be corrected on the grounds that there had been a clerical error because its unsuccessful counterclaim for $15,070 (and interest thereon) was not part of the Owner's claim. The arbitrator denied an error and refused to correct the award on both occasions.

The Charterer challenges the award in the High Court

The Charterer applied to the High Court for partial set aside on the ground of 'serious irregularity' under section 68 of the Act.

Section 68 challenge for serious irregularity

Section 68(1) provides that a party may apply to challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award. To qualify as '*serious irregularity*', it must fall within the list of irregularities in section 68(2) and have caused *substantial injustice* to the applicant.

Failure to comply with section 33 general duty

The Charterer argued that the irregularity here came within 68(2)(a) of the list - a failure by the tribunal to comply with the section 33 general duty. Section 33 says *the arbitral tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent...*

The Charterer put forward two alternative grounds of the arbitrator's failure to comply with this duty and claimed this had caused it substantial injustice:[1]

- First ground:

  The arbitrator had reached a conclusion that was contrary to the common position of the parties and for which neither party contended, without providing an opportunity for the parties to address him on the issue.

  The 'common position' between the parties, that the arbitrator departed from, was that the Charterer's counterclaim did not form part of the Owner's claim.

- Second ground:

  The arbitrator had made an obvious accounting mistake.

The Court's reasoning for allowing the challenge

The Charterer was successful on both grounds and in its claim that there had been substantial injustice. The Court held that *a serious irregularity affected the award*, and set aside the disputed amount of $9,553.92.

The first ground of challenge:

Concerning the Charterer's first ground of challenge, the Court agreed that the arbitrator's failure to adhere to the common ground without providing opportunity to comment was a failure to comply with section 33:[2]

> *I agree…that, in the present case, there was an irregularity, constituted by the Arbitrator's failing to adhere to the common ground between the parties, in deciding how much was owed on a basis which had not been argued by either party, without giving them the opportunity to comment on it…*
>
> *… while he did not realise he had made a mistake, the Arbitrator did realise that there seemed to be a problem…he thought that it had not been explained…Without asking for an explanation…he should not have proceeded to resolve the problem as he did, without giving the parties the opportunity of commenting on it. Had he done so, the error would have come to light.*

The second ground of challenge (obvious accounting error)

Concerning the arbitrator's 'obvious accounting mistake', the Owner's defence relied on

1 *Ducat Maritime Limited v Lavender Shipmanagement Incorporated* [2022] EWHC 766 (Comm) at [24].

2 Above at [28] and [30].

established authorities that an arbitrator's irrational or illogical reasoning is not a form of serious irregularity and that section 68 is about whether there has been a failure of due process, not whether the tribunal got it right. The Court agreed, but found that section 33 did apply because the error had arisen through a serious flaw in procedural fairness, not mere illogicality on its own:[3]

> *a gross and obvious accounting mistake … may well represent a failure to conduct proceedings fairly, not because it represents extreme illogicality but because it constitutes a departure from the cases put by both sides, without the parties having had an opportunity for addressing it … if a "glaringly obvious error" … can be said to arise in this way, section 68 can probably be regarded as applicable, without subverting its focus on process.*

Court's reasoning that there was substantial injustice

The Owner argued that in any event, there had been no substantial injustice because of the irregularity, emphasising that the amount in question ($9,553.92) was small. The Court disagreed on the basis that the sum was to be viewed within the context of the full claim value, adding:[4]

> *I regard it as substantially unjust that a party should … be ordered to pay about 33% more than was due by way of principal, and be ordered to pay interest on its own unsuccessful counterclaim.*

The Court also gave short shrift to the Owner's argument that the sum in dispute had been far exceeded by the legal cost of the proceedings and held it accountable for the arbitrator's refusal to correct the award in the first place:[5]

> *As to the comparison with the costs of putting the mistake right, I have no doubt that these would have been very much less had the mistake been accepted by the Owners earlier. This would doubtless have meant that the Arbitrator would have admitted his mistake, and … corrected the award.*

3 Above at [40-42].
4 Above at [47].
5 Above at [49].
6 *Kyburn Investments Limited v Beca Corporation Holdings Limited* [2015] NZSC 150

Challenging an arbitral award in New Zealand

The process and result may have been much the same, had the seat of the arbitration been New Zealand. The Charterer's first step would have been to apply to the arbitrator for correction of the error under rule 34 of Schedule 1 to New Zealand's Arbitration Act 1996 (the **NZ Act**).

If the arbitrator refused to correct it, the Charterer could have applied to challenge the award in the High Court under rule 34(2)(b)(ii) of the NZ Act, on the ground that the award was in conflict with the public policy of New Zealand (as a breach of natural justice under rule 34(6)) and that this breach had a 'material effect' on the outcome.[6]

Conclusion

As well as highlighting the merits of co-operation between parties when errors come to light, the case is a reminder of the importance of querying unexplained discrepancies before issuing a final award. Had the arbitrator gone back to cross-check the amounts when he noticed the discrepancy, or had his decision been peer reviewed, an obvious error such as this could have been picked up and resolved. At the ADR Centre, all awards are scrutinised by an independent peer reviewer to ensure awards are of the highest quality, minimising the risk of correction after the fact or challenge through the courts.

About the author

Kate is a research clerk in NZDRC's Knowledge Management team. She has recently joined us after working in trust law and succession planning. Previously, she has practised as a solicitor in the UK with an international commercial firm.

Inside arbitration: cyber disputes – are there borders in the blockchain?

By Simon Chapman and Troy Song

With the cyber economy fast emerging, courts are struggling with drawing borders in a decentralised world. One recent case hints at the path ahead

In the 1997 book *Sovereign Individual*, the authors envisioned a global cyber economy where individuals base themselves wherever they desired. Over two decades later, a blockchain economy is emerging, partially realising that vision. In this new world, transactions and services are conducted in a borderless, decentralised manner. This poses fundamental questions for legal systems designed for conventional businesses with connections to physical locations. One recent case gives some indication on how the English courts are responding in a dispute about trading blockchain-based non-fungible tokens (NFTs) between a trading platform and its user (Soleymani v Nifty Gateway LLC [2022] EWHC 773 (Comm)). In essence, the court attempted to draw jurisdictional markers in this borderless dispute.

100 winners of one NFT auction

Mr S, an art collector in Liverpool, was an active user of US-based NFT trading platform Nifty. In April and May 2021, Mr S participated in an auction of digital art held by Nifty, placing a bid for an NFT associated with an artwork by Beeple titled "Abundance". His US$650,000 bid was the third highest. Nifty informed Mr S he was a winner in the auction and had to pay the amount of his bid. According to Nifty's rules, the highest 100 bidders were winners of a numbered edition of the artwork corresponding to the position of their respective bids.

Accordingly, Nifty claimed that Mr S was obliged to pay for the third edition of Abundance. Upon learning of Nifty's rules, Mr S refused to pay.

Arbitration in New York

Nifty commenced arbitration in New York against Mr S, relying on its terms and conditions, which it alleged Mr S agreed to after opening his account in February 2021. The terms require the parties to submit their disputes to JAMS, an arbitration service provider in New York.

Under the JAMS policy, in a consumer arbitration, additional standards of fairness are applied to the proceedings. The arbitrator determined Mr S met the definition of a consumer. Mr S applied to dismiss the arbitration, arguing Nifty's terms had not been properly brought to his attention. The arbitrator ordered an evidentiary hearing in September 2022.

English Court proceedings

While contesting Nifty's claims in the New York arbitration, Mr S launched proceedings in the English courts, arguing the New York governing law clause and the arbitration clause in Nifty's terms were unfair and should not be binding on him. Mr S relied on the Civil Jurisdiction and Judgments Act 1982 (CJJA), which states consumers are entitled to resolve disputes in their domestic courts. This mirrors the Recast Brussels Regulation (EU) No. 1215/2012 (Brussels Regulation), which regulates the recognition and enforcement of civil and commercial judgments in the European Union.

Nifty contested the English court's jurisdiction and applied for a stay of the court proceedings. Nifty argued the CJJA does not apply to arbitration-related claims. Despite acknowledging its business had global reach, Nifty also alleged it did not direct any marketing activity toward the UK. Thus, Mr S could not establish jurisdiction under the CJJA.

In light of the New York arbitration, the court had to decide on two issues:

1. Did the English court have jurisdiction under the CJJA?
2. Could Nifty stay the English court proceedings under the English Arbitration Act 1996?

Jurisdiction under the CJJA

The court considered that the CJJA provisions did not apply to Mr S's claim that the arbitration clause was unfair, because those provisions do not apply to arbitration. However, the arbitration exception did not apply to Mr S's other claims. Accordingly, the court needed to decide whether there was a consumer contract for the purposes of the CJJA. In particular, it had to rule on whether Nifty directed commercial activities in the UK.

Considering the parties' arguments, the court discussed the following factors in finding for Mr S:

1. The court disagreed with Nifty's argument that its business was "New York-centric" as some of its activities were directed at the UK. Applying the approach in *Bitar v Banque Libano-Francaise* [2021] EWHC 2787 (QB), this also shows gaining business in the UK was not entirely incidental or unimportant to Nifty's marketing strategy
2. Other activities were specifically directed at the UK. For example, Nifty had promoted an NFT-related webinar hosted by a group based in London. Nifty's founders had also featured in an interview published in the UK newspaper, *The Times*.
3. In light of the features of the NFT market (which was accepted by Nifty as borderless and global), some US-related factors were of limited weight. The evidence did not suggest Nifty's business activities were directed to US customers, as opposed to customers elsewhere.
4. The relevant case law (*Pammer v Reederei Karl Schluter GmbH & Co KG* [2011] 2 All ER (Comm) 888) related to businesses that provided services relating to a specific location. The factors explored in *Pammer* were not directed at businesses that are borderless and decentralised by nature. Accordingly, Pammer does not mean the CJJA must be construed as providing no protection to consumers of a global borderless business.

In these circumstances, the court found Mr S supplied plausible evidence to establish a jurisdictional gateway under the CJJA for his claims on the governing law clause and the English Gambling Act.

Stay in favour of arbitration

Under the Arbitration Act, the English courts must stay their proceedings where the dispute is subject to an arbitration clause, "unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". Mr S accepted he was a party to the arbitration clause but disputed its enforceability. Nevertheless, the court concluded that Mr S's claims should be stayed:

1. The arbitration clause covered validity and enforceability issues, even if the issues raised were ones of consumer protection based on English law.
2. A number of factual issues were raised. Mr S acknowledged the blockchain technology underlying the transaction gave rise to several novel points which required a careful factual investigation. Mr S did not have a strong case on these questions of fact or arbitrability which justified summary determination by the court.
3. Ultimately, the matters in dispute concerned points of fairness, rather than technical questions of English law. In the context of decentralised and borderless transactions, an English judge was not significantly better placed than a US judge or arbitrator to decide fairness.
4. There was no evidence to suggest any legitimate concern as to the tribunal's quality, the arbitral process, the supervision of the New York courts, the ability of New York law to protect consumers, or its ability to address English law questions.

"In the context of transactions that were acknowledged to be 'fundamentally de-centralised and borderless' an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness raised."

MS CLARE AMBROSE QC, THE DEPUTY HIGH COURT JUDGE

Significance

Despite being fact-specific, this case sheds light on the English courts' position on issues arising from blockchain-related transactions. For internet companies, especially those providing blockchain-related services (sometimes called Web3 companies), the following questions are worth considering:

Where is the business directed?

Although many Web3 companies offer services globally, the English courts may consider their commercial activities to be directed in one particular jurisdiction. Relevant factors include the service provider's statement on its geographical coverage, accessibility of the services, and any business campaign that has close connections with a certain jurisdiction, such as the NFT London webinar and The Times article in this case.

Who are your users?

Internet companies are often less clear about this. This is particularly the case for blockchain enterprises, where parties are often interacting with each other on a pseudo-anonymous basis.

Such transactions are pseudo-anonymous because a public blockchain address may be traced back to a personal identity. Accordingly, many businesses set out eligibility requirements for users in their standard terms. If users are considered consumers, relevant domestic law may afford them additional protections.

Who has jurisdiction?

The questions above are relevant to considering jurisdiction. While many Web3 institutions put arbitration clauses in their terms, users may still bring actions in their home courts. This is not the first time when the user relies on consumer protection laws to seek a more favourable forum. In *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), a user of a cryptocurrency platform relied on the Brussels Regulation, asking the English court to disregard the platform's standard terms that gave Cypriot courts exclusive jurisdiction. The court in that case concluded the user was a consumer under the Brussels Regulation and entitled to bring her claim in England.

Ultimately, we anticipate seeing more conflicts between the dispute resolution clause in Web3 companies' contracts and the local laws of their users' domiciles.

What do blockchain and cryptocurrency mean for arbitration?

The court in this case recognised the distinctive features of blockchain transactions and agreed many existing authorities on conventional contracts are not wholly helpful.

Accordingly, legal professionals and arbitrators should be prepared to deal with novel issues arising from this area. Examples include:

- Determining the governing law of on-chain activities where there is no express agreement.
- Deciding the relationship between an NFT (being an on-chain token) and its associated artwork. In Nifty's auction, one piece of artwork was linked to 100 NFTs.
- Considering whether a crypto-platform or blockchain protocol is centralised or decentralised. This leads to questions about whether liability can be attributed to certain individuals or entities.

New issues bring new opportunities. Many institutions in the cyber sector have adopted arbitration as their dispute resolution mechanism of choice. The usual advantages of the arbitration, including ease of enforcement, neutrality, and participating in choosing the tribunal, apply equally to the blockchain economy as to the traditional economy. Arbitration looks likely to become the most popular gateway to justice in this borderless world.

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Simon has worked in the Asia disputes team for over a decade, having previously been based in the firm's London and Paris offices.

He is dual-qualified in Hong Kong and England and Wales, with higher rights of audience in both jurisdictions. One of a small number of solicitors to have been appointed Queen's Counsel in England & Wales

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Troy Song is an associate at the Hong Kong office of Herbert Smith Freehills, and a member of the firm's Digital Law Group. His practice covers international arbitration, commercial litigation, and corporate crimes & investigation.

Case in Brief

Australian Supreme Court rejects arguments to circumvent ADR clause

In *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* (No 2) [2022] NSWSC 505 the Supreme Court of New South Wales dealt with an application from a party who no longer wished to proceed with the contractual dispute resolution process.

Contractors were commissioned to design and build Sydney's M4-M5 Link Tunnels Project. This involved contracts with the state government and trustees appointed to manage the construction. A dispute arose out of the contract between the Asset Trustee (WCX M4-M5 Link AT Pty Ltd) and the Contractor (Acciona Infrastructure Projects Australia Pty Ltd). The dispute involved who was responsible for the infiltration of contaminated waste from a rubbish tip.

The mechanism for resolving any disputes was laid out under the contractual dispute resolution process. It was designed as a "tiered" process, which necessitated:

- negotiation;
- expert determination;
- arbitration; and
- appeals to the courts on points of law.

The dispute went to expert determination, which found in favour of the Asset Trustee.
The Contractor, unhappy with the outcome, later tried a different tactic. It alleged that two communications received from the Asset Trustee requiring it to carry out the remedial works constituted a variation which would require the Asset Trustee to bear the costs.

The Contractor sought to argue that the issue be looked at in isolation from the original dispute, and sought a second expert determination. The Asset Trustee felt that any new expert would lack jurisdiction to hear the matter as it overlapped with the original dispute, and so applied to the Supreme Court seeking to stop the matter proceeding to expert determination.

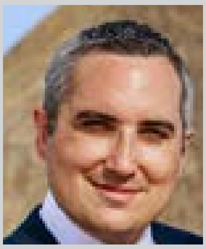
At Court, the Asset Trustee argued that the arbitration agreement was inoperative because neither party had issued a formal notice of dissatisfaction following the first expert determination which would then start the process for arbitration. The Asset Trustee advanced further

arguments claiming that the matter was urgent and that they would be prejudiced if the matter was sent back to the expert.
Conversely, the Contractor submitted that if the Court found that the agreement was "inoperative", it would mean it was "incapable of being performed". However, it submitted nothing was stopping the parties from fulfilling the contractual requirement, so the arbitration agreement could in no way be seen as "inoperative".

The Court agreed with the Contractor, holding that the Asset Trustee's argument would allow *a backdoor for a party wanting to escape the arbitration agreement*, and that a clause was not "inoperative" just because it had yet to be exercised. The Court also found that there was no urgency. The expert could determine jurisdiction and, whilst the parties would have to bear the costs regardless of whether the expert determined the issue correctly or not, this was envisaged by the parties in the contractually agreed process. Granting the injunction would permit the Asset Trustee to resile from the "contractual bargain", and therefore should not be granted.

The Court has once again asserted that there is a high bar that a party will need to reach to circumvent the agreed contractual dispute resolution process. The parties need to be aware of their obligations to follow the agreed process unless there is a clear justification to stray from the set path.

About the author



Sam works remotely as a Knowledge Manager in NZDRC's Knowledge Management Team.

He recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

Arbitration and iwi disputes: Te Rūnanga o Ngāi Tahu v Attorney-General

By Polly Pope

A High Court decision has highlighted the use of arbitration in disputes involving iwi, in the context of ongoing disputes between Te Rūnanga o Ngāi Tahu and the Crown relating to adjustments to Ngāi Tahu›s entitlements under its Deed of Settlement with the Crown.

The Deed of Settlement relates to certain historical Treaty of Waitangi claims and contains a mechanism to maintain the relativity of Ngāi Tahu's settlement to the total value of redress provided in all historical Treaty claims. Ngāi Tahu brought High Court proceedings seeking interest on amounts that, following arbitration between Ngāi Tahu and the Crown, have been found to be owing under that relativity mechanism.

The Crown sought to have aspects of Ngāi Tahu's claim for interest as damages dismissed at an early stage. The Crown did not succeed.

Although the issues in dispute turned on the interpretation of a bespoke arbitration agreement negotiated between the Crown and Ngāi Tahu, at least three points of interest arise from the decision of Associate Judge Paulsen. First, the decision, broadly speaking, upholds the autonomy of parties (and here, iwi) to design and agree on a dispute resolution process that involves both arbitration and the courts. Secondly, the Associate Judge effectively questioned whether "technical arguments" advanced by the Crown were consistent with Treaty principles. Finally, the decision casts some further light on the use of arbitration to resolve disputes involving iwi.

The relativity mechanism

The relativity mechanism in the Ngāi Tahu Deed of Settlement provides for the Crown to make further five-yearly payments to Ngāi Tahu in the event the aggregate value or redress paid or otherwise transferred by the Crown in respect of historical Treaty claims exceeds $1 billion, in 1994 dollars. The relativity mechanism is intended to maintain the relative value of Ngāi Tahu's settlement as a fixed percentage of the real value of all Treaty settlements until 2044.

Ngāi Tahu made its first claim under the relativity mechanism in 2012. Ngāi Tahu and the Crown agreed that the Crown would pay the amount the Crown had calculated was payable, but that the parties would enter into a dispute resolution process to determine any further amount payable. The Crown and Ngāi Tahu entered into an arbitration agreement on 8 August 2013.

The arbitration agreement provided that the arbitrator had no power to award interest unless agreed. However, the arbitration agreement recorded that in the event that any further amount is payable to Ngāi Tahu in light of a determination by the arbitrator, then the parties would at that time discuss whether the question of interest should be referred to the arbitrator or High Court. Failing agreement, the parties acknowledged that Ngāi Tahu could seek to have the question of interest determined by the High Court.

The arbitration

Ngāi Tahu originally pleaded over 280 individual settlement redress items that the iwi says should be included in the calculation of the Crown's aggregate Treaty settlement redress, for the purpose of determining Ngāi Tahu's entitlement under the relativity mechanism. Arbitration hearings commenced in December 2013 and to date the arbitrator, Sir Andrew Tipping, has issued six awards determining whether particular disputed items should or should not be taken into account.

Ngāi Tahu's claim for "interest as damages" in High Court proceedings

In the High Court proceedings, Ngāi Tahu is seeking interest as damages for breach of contract, or at statutory rates under the Judicature Act 1909 and the Interest on Money Claims Act 2016. The Crown applied to have Ngāi Tahu's claim for interest as damages either dismissed for lack of jurisdiction or struck out.

A claim for "interest as damages" is a claim for compensation for the deprivation of the use of money. The value of the loss is quantified by the interest that could have been earned by investing the money, or avoided by retiring debt (*Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590). The result of this preliminary decision simply means that Ngāi Tahu's claim for interest as damages can proceed – it has not yet been decided by the Court.

Themes emerging from the judgment

The Crown's application rested upon a series of technical arguments. Each was dismissed by Associate Judge Paulsen, who in doing so effectively recognised the ability of parties to limit the scope of an agreement to arbitrate, and to preserve the ability of a party to pursue a particular claim through the courts. Much of the judgment turns on the interpretation of a particular clause of the arbitration agreement between the Crown and Ngāi Tahu.

Notably, however, the Associate Judge held that it is plainly arguable that the parties effectively contracted out of the ordinary six-year limitation period for pursuing a money claim under the Limitation Act 2011. By the arbitration agreement, the parties effectively agreed to preserve the right of Ngāi Tahu to claim interest. It did not matter that the arbitration agreement did not expressly make reference to the Limitation Act.

Were the Crown's arguments consistent with Treaty principles?

In closing, the Associate Judge noted that it appeared that technical arguments advanced by the Crown challenging Ngāi Tahu's ability to have its claim substantively determined by the High Court did not reflect the basis upon which Ngāi Tahu and the Crown proceeded as active Treaty partners in the negotiation of the arbitration agreement. The Associate Judge was careful to remark that he was not required to and did not make a judgment about that point. Had the Associate Judge been in doubt as to the result of the application, the Associate Judge noted he may well have called upon counsel to address that aspect further.

The use of arbitration in disputes involving iwi

This decision highlights the use of arbitration in disputes involving iwi. Arbitrations are generally confidential and private in New Zealand, unless the courts become involved (for instance, in the context of an application for leave to appeal a decision of an arbitrator). However, it is generally ascertained that arbitration is used to resolve a range of disputes involving iwi in New Zealand. As Associate Professor Amokura Kawharu (now President of the Law Commission) highlighted at the Arbitrators and Mediators' Institute of New Zealand's 2021 annual conference, arbitration may provide a model for Māori dispute resolution, by providing for Māori procedural and substantive norms and Māori leadership. The principles of party autonomy and the resolution of disputes outside of the state court system may suggest that arbitration provides a way for Māori to exercise tino rangatiratanga.

However, the choice of arbitration to resolve disputes within and between iwi has arguably not always been fostered by the High Court. The earlier decision of *Ngawaka and Ors v Ngāti Rehua-Ngātiwai ki Aotea Trust Board and Ors* [2021] NZHC 291 cast doubt upon the arbitrability of matters of whakapapa.

No such doubt arose in the Ngāi Tahu case: concerning as it does the interpretation of a deed of settlement with the Crown, the underlying dispute is clearly amenable to arbitration. These facts show that arbitration is chosen by parties to a dispute to resolve some of the highest value, and widest ranging, disputes in New Zealand. In the context of the Ngāi Tahu Deed of Settlement, arbitration has provided a mechanism for a series of decisions resolving an apparently large volume of issues, of significant importance to the parties, by a decision maker selected by the parties.

The *Ngāti Rehua-Ngātiwai ki Aotea Trust Board* decision remains controversial and is unlikely to be the final word on the ability of Māori to choose arbitration as a means to resolve matters of tikanga.

Authored by Russell McVeagh Litigation Partner and Partnership Chair Polly Pope. Click here *for original article.*

About the author

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Polly is a Fellow of the Arbitrators' and Mediators' Institute of New Zealand and of the Chartered Institute of Arbitrators (UK). In addition to appearing as counsel in arbitration proceedings, she accepts appointments as an arbitrator.

Australian Arbitration Week ACICA

MELBOURNE | 7-11 NOVEMBER 2022

LEAD EVENT:
CIArb/ACICA International Arbitration Conference

KEYNOTE SPEAKER:
The Honourable Chief Justice Susan Kiefel AC

SAVE THE DATES!

Calendar of Events

Please note that all event times noted are in Australian Eastern Daylight Time (UTC +11)

TIME	EVENT	HOST
MONDAY 7 NOVEMBER 2022		
8:30am–6:00pm followed by cocktails	2022 International Arbitration Conference	ACICA and CIArb Australia
TUESDAY 8 NOVEMBER 2022		
8:00am–9:00am	The Future of Diversity in Arbitration	Arbitral Women
9:00am for 9:15–10:15am	A cross-jurisdictional conversation among experienced arbitrators	Corrs Chambers Westgarth
11:00am–12:00pm	Hot Issues Involving Technology Arbitrations	DLA Piper
12:30pm–2:00 pm	AMTAC Seminar	AMTAC: An ACICA Commission
2:30pm–3:30pm	Advocacy in Arbitration in the Pacific	ACICA and Hemmant's List
5:00pm–6:00pm	CIArb Australia Annual International Arbitration Lecture	CIArb Australia
6:00pm for 6:30–8:30pm	Tracing a Construction Claim	Lighthouse Club Australia
WEDNESDAY 9 NOVEMBER 2022		
9:30am–10:30am	Future of Energy Disputes	Pinsent Masons
9:00am_1:00pm	ACICA Arbitrator Roundtable	ACICA
9:00am–12:30pm	ACICA45 workshop	ACICA45
11:00am–12:00pm	How are growing regulations and emerging data sources impacting arbitration disputes?	FTI Consulting
12:00pm–2:15pm	KWM Seminar	King & Wood Mallesons
2:30pm to 3:30pm	CIArb Young Members event	CIArb Young Members
4:30pm–5:30pm	With geopolitics igniting disputes, what is the role for arbitration?	Corrs Chambers Westgarth
5:15pm–6:15pm	Australia-France Entente Cordiale	Australian Disputes Centre
6:00pm for 6:30–7:30pm	Clayton Utz / University of Sydney International Arbitration Lecture	Clayton Utz
THURSDAY 10 NOVEMBER 2022		
8:00am–10:00am	Diversity and inclusion in arbitrations: the need for professional, cultural and gender diversity in ICC arbitrations	ICC Australia
10:00am for 10:30–11:30am	Pushing boundaries: energy project disputes in Australia and beyond	Three Crowns
12:30pm–13:30pm	Exploring the ACICA Expedited Rules 2021	ACICA
2:00pm–3:00pm	How to effectively present electronic evidence in Arbitration - in person, hybrid, and remote environments	FTI Consulting
3:30pm–4:30pm	Australia's IDS Reform Policy - six months into the election of the new Government	Experts Advisory Committee on Working Group III, UNCCA
5:00pm–6:00pm	A mock arbitration	Level 27 Chambers
6:00pm for 6:30–8:00pm	The Great Debate – Urgent applications in arbitration: emergency arbitration or court relief?	Corrs Chambers Westgarth
FRIDAY 11 NOVEMBER 2022		
9:00am–10:00am	A morning with Banco Chambers	Banco Chambers
10:30am–12:00pm	Arbitrator Workshop: Enhancing Your ACICA Experience	ACICA
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Evidence of Money Laundering Leads French Supreme Court to Uphold Setting Aside of $15 Million Award

By Adrian Sharma

Allegations of criminal activity are being increasingly used in France to argue for the setting aside of arbitral awards on the grounds of breach of public policy. In keeping with this trend, a recent ruling by the French Supreme Court affirmed a Court of Appeal decision to set aside an award due to evidence of money laundering.

In *Belokon v Kyrgyszstan*,[1] the French Supreme Court upheld the 2017 decision of the Court of Appeal to set aside a $15 million UNCITRAL[2] award in favour of Latvian investor Valeri Belokon (**Belokon**). In its decision, the Supreme Court found that the Court of Appeal acted within its powers when it made a decision that enforcing the award in France would lead to Belokon benefitting from the proceeds of money laundering, which would have been contrary to principles of international public policy.

Background

Belokon, a Latvian citizen, acquired a bank in Kyrgyzstan in 2007, and renamed it "Manas Bank". Three years later, political tension in Kyrgyzstan led to the downfall of its then President, resulting in Kyrgyz authorities placing Manas Bank into temporary administration, which was extended several times and eventually resulted in the bank being declared insolvent.

In 2011, Belokon initiated UNCITRAL arbitration proceedings, alleging breaches of the Kyrgyzstan-Latvia bilateral investment treaty. A tribunal seated in Paris found in favour of Belokon, deciding that the allegation of money laundering had not been sufficiently established, and ordered Kyrgyzstan to pay Belokon $15 million.

Given that the seat of the arbitration was in Paris, Kyrgyzstan applied to the French Court of Appeal to have the award set aside. Article 1520(5) of the French Code of Civil Procedure allows for a party to seek annulment of an award where its recognition or execution would be contrary to French principles of international public policy.

Kyrgyzstan argued that Manas Bank was being used to launder money and that a number of the bank's clients were offshore companies whose operations had no economic purpose. It also presented evidence that another bank owned by Belokon had been fined for breaching anti-money laundering laws in Latvia. Belokon sought dismissal of the application, arguing that Kyrgyzstan's attempt to have the award set aside would amount to a review of the merits of the case, which he argued, was not permitted under French law.

Court of Appeal ruling

In 2017, the French Court of Appeal delivered a ruling setting aside the award. The Court of Appeal disagreed with the tribunal's finding that there was insufficient evidence to support the allegations of money laundering, and held that there was strong evidence to suggest that Belokon purchased Manas Bank through corrupt means in order to facilitate money laundering. This was the first occasion in which the Court of Appeal in France had set aside an award on the grounds of money laundering.

In reaching its decision, the Court of Appeal considered that its decision-making power was not bound by the evidence presented before the arbitral tribunal. It carried out a comprehensive review of the evidence that was presented to the arbitral tribunal and took into consideration new evidence which became available after the arbitral award.

The Court of Appeal said that its task was to determine whether enforcement of the award would undermine the fight against money laundering by allowing a party to benefit from criminal activities. The Court was satisfied that Manas Bank's *tremendous success, in such a*

1 *Belokon v Kyrgyzstan* (Cass. Civ.1ère, 23 March 2022, No.17-17.981).

2 The United Nations Commission on International Trade Law is the core legal body of the United Nation's system in the field of international trade law. It has the general mandate to further the progressive harmonisa tion and unification of the law of international trade.

limited amount of time, in such a poor country, could not be explained by orthodox banking practices. It also found that the enforcement of the award would constitute a breach of international public policy.

Clearly unhappy with the Court of Appeal's decision, Belokon appealed to the Supreme Court, arguing that the Court of Appeal exceeded its powers under Article 1520(5) of the French Code of Civil Procedure by looking at the merits of the award afresh.

Supreme Court's findings

The matter was then taken up to the French Supreme Court, which endorsed the Court of Appeal's decision that it falls within a judge's role to consider whether the enforcement of an award is likely to breach internal public policy standards by allowing a party to benefit from illicit activities, in this case, money laundering.

The Supreme Court found that when asked to determine whether the enforcement of the award could lead to a breach of the international public policy of the prohibition of money laundering, the Court of Appeal adopted the correct approach in not limiting itself to the evidence that was before the arbitral tribunal. It agreed that the Court of Appeal could and was indeed correct to rely on evidence not put to the arbitral tribunal, as well as evidence obtained after the tribunal's award. The Supreme Court further stated that it is not necessary for an underlying criminal offence to be established in order to annul an award, as long as indications of fraudulent activities show a *characterised breach of international public policy*.

What are the implications of this case?

This decision raises issues that are topical in the world of international arbitration. The question of the type of control that domestic courts enjoy in proceedings where a party challenges an award, and whether new evidence that had not been put before an arbitral tribunal is admissible in a domestic court, is a hot topic of debate.

A judge tasked with looking into the issue of whether an arbitral award conformed to international public policy was traditionally not expected to look into most factual and legal issues, as these would have been issues to be determined by the tribunal. The Supreme Court's decision in *Belokon v Kyrgyszstan*[3] and the reasons stated within it seems to have changed this approach. The Supreme Court's decision has broadened the scope of the review of arbitral awards by using the standard of *characterised breach of international public policy* instead of the narrower test of *manifest, concrete and effective breach of international public policy* that was previously adopted by French courts.

The Supreme Court's decision appears to establish the extent of review that courts may perform when dealing with allegations of a breach of international public policy in cases where issues of money laundering are at stake, as it follows a detailed review of facts that were put before the arbitral tribunal and the consideration of new evidence. It also reinforces the principle that when considering whether the enforcement of an award could hinder international public policy, domestic courts are not bound by the arbitral tribunal's findings as to the facts of the case in annulment proceedings.

While the Supreme Court's decision does not expressly say that arbitrators are duty bound to investigate money laundering allegations beyond the parties' submissions, the decision could serve as a warning for arbitrators to tread with caution when such allegations are made.

About the author

Adrian is the Head of the NZDRC's Knowledge Management Team. Originally from Fiji, his previous role was as a State Counsel at the Fiji Independent Commission Against Corruption where he successfully prosecuted a wide range of complex fraud and corruption cases.

3 Above n 1.

Singapore: Tribunal not bound by precise terms of parties' pleadings and submissions

By Nandakumar Ponniya, Richard Allen and Darrell Lee

It is trite that an arbitral tribunal has no jurisdiction to decide any issue that has not been submitted to arbitration, and that the parts of an arbitral award that relate to such issues may be set aside by the court. In *CJA v CIZ* [2022] SGCA 41 ("***CJA v CIZ***"), the Singapore Court of Appeal ("**SGCA**") held that a tribunal that made findings beyond the precise terms of the pleadings and submissions advanced by a party did not exceed its jurisdiction as the findings were premised on the fundamental point raised by the parties. Concomitantly, the making of such findings also did not breach the rules of natural justice as the parties had a reasonable opportunity to address the determinative issue.

Factual Background

By way of a Deed of Novation, the appellant took over a Consultancy Agreement to provide consultancy services to the respondent in relation to mergers and acquisitions of oil and gas fields. The respondent agreed to pay the appellant a Success Fee upon the appellant's presentation of an 'Opportunity' and the respondent's corresponding completion of an acquisition of an interest in an oil field. The appellant and respondent also entered into an Amended Agreement, which terms were in substance the same as those of the Consultancy Agreement. Both the Consultancy Agreement and the Amended Agreement were stated to expire on 31 December 2013.

A dispute arose as to whether the appellant was entitled to a Success Fee in respect of the respondent's acquisition in 2016 of shares in X Co, an operator and owner of oil fields ("**X Opportunity**"). The appellant commenced arbitration against the respondent. In its Statement of Claim, the appellant averred that the Consultancy Agreement had been extended by an oral agreement such that it subsisted at the time of the respondent's acquisition of the shares in X Co. The respondent denied this and averred in its defence that there was no subsisting agreement after 31 December 2013.

The Arbitral Tribunal hearing the matter ("**Tribunal**") awarded the appellant the Success Fee for the X Opportunity. The Tribunal rejected the appellant's assertion of a subsisting agreement after 31 December 2013. Instead, the Tribunal found that the Consultancy Agreement did not require the Opportunity to be completed before the expiration of the Consultancy Agreement and/or Amended Agreement, and that the subject of the X Opportunity (i.e., shares in X Co) was exactly the same as in an earlier transaction that the appellant had worked on.

The respondent applied to the Singapore High Court ("**SGHC**") to set aside the part of the award relating to the Success Fee for the X Opportunity on the grounds that (i) this was beyond the scope of the submission to arbitration and (ii) there had been a breach in the rules of natural justice in connection with the making of the award. The SGHC allowed the respondent's application on the first ground, and the appellant appealed.

Decision of the SGCA

The SGCA allowed the appeal. The SGCA held that the appellant's case in the arbitration was broader than what was found by the SGHC, and included the fundamental point upon which the Tribunal had found for the appellant — namely, that the Success Fee was payable upon completion of the Opportunity even if that took place after the Consultancy Agreement or Amended Agreement had expired ("**Fundamental Point**").

Whether the award involved a 'new difference'

The SGCA reiterated the two-stage inquiry in assessing whether an arbitral award should be set aside for an excess of jurisdiction: (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, or whether it involved a *"new difference … outside the scope of the submission to arbitration*".

In relation to the first stage, the court must look at matters in the round to determine what issues were live in the arbitration, including the following sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions. The SGCA held that the SGHC erred in holding that a tribunal is not entitled to depart from the pleadings to the extent of making a decision based on a ground that has not been pleaded at all or is not ancillary to the pleadings.

Having gone through the relevant sources, the SGCA found that it was 'apparent' that the Fundamental Point was present in the appellant's submissions and therefore did not amount to a 'new difference'. In this regard, although the Tribunal had gone further than the appellant in construing the effect of an article of the Amended Agreement, this did not involve a 'new difference' but was premised on the Fundamental Point.

Moreover, the respondent had also argued against the Fundamental Point in its closing submissions. Thus, the issue was clearly canvassed before the Tribunal even though the eventual reasoning of the Tribunal was not explicitly in the terms argued by the appellant.

Whether the Tribunal acted in breach of natural justice

The respondent also argued that the appeal should be dismissed on the additional ground that the Tribunal breached the rules of natural justice, i.e., by finding for the appellant based on a case that the appellant did not advance (i.e., the Fundamental Point), and that the Tribunal's findings did not reasonably follow from the disputed issue.

The SGCA found that the respondent's argument was unsustainable. The SGCA observed that a tribunal is entitled to arrive at conclusions that are different from the views adopted by parties, as long as the conclusions are based on evidence before the tribunal and the tribunal consults parties where the conclusions involve a 'dramatic departure' from what has been presented to it. Put differently, a tribunal is entitled to derive an alternative case from the parties' submissions as the basis for its award. Further, a tribunal is not limited to adopting a 'middle path' between the parties' positions — the focus was on whether the parties had been given a reasonable opportunity to address the determinative issue.

In the present case, the Tribunal specifically asked parties to consider the situation where an Opportunity was presented but the transaction was (through no fault of either party) only completed after the expiry of the Amended Agreement, and both parties had made their respective submissions in closing submissions.

Moreover, the SGCA noted that in a situation involving questions of fact, pleadings would assume greater significance in determining whether natural justice rules were breached. Conversely, the present situation involved a legal issue of contractual interpretation, and the SGCA was satisfied that the parties submitted on this and that the respondent had sufficient opportunity to canvass evidence on the contextual dimension and commercial purpose of the Amended Agreement. It was accordingly clear that the determinative issue was canvassed before the Tribunal, and it did not matter that the reasoning eventually adopted by the Tribunal had not been pleaded by the appellant in those precise terms.

Finally, the SGCA found that the chain of reasoning adopted by the Tribunal bore sufficient nexus to the parties' cases, in that it appears to have (a) arisen by reasonable implication on the parties' pleadings, or (b) at the very least been brought to the respondent's notice.

Conclusion

The SGCA's decision in *CJA v CIZ* is a welcome addition to the jurisprudence regarding curial intervention in international arbitration awards. It acknowledges two important realities in the practice of international arbitration and provides guidelines for their reconciliation with the cornerstones of party autonomy and procedural fairness:

1. First, a party's case can evolve over the course of the proceedings. Pleadings are the start, and not the end, of a party's case, and further issues could have been submitted to arbitration in the course of the proceedings. In determining the scope of the submission to arbitration, the court must therefore have regard to the totality of what was placed before the tribunal and cannot just fixate on pleadings.
2. Second, both parties' positions could be 'wrong' (in the tribunal's view). In that situation, the tribunal is not compelled to rubber stamp either position or to attempt to pave an artificial 'middle path' between the two positions. The tribunal is entitled to arrive at conclusions that are different from (or go further than) the views adopted by parties, provided that these conclusions are based on evidence and that the tribunal affords parties a reasonable opportunity to address the determinative issue. Doing so would not involve a 'new difference' insofar as the finding is premised on the fundamental point raised by parties' submissions.

Due to their hitherto broad ambit, challenges on the basis of excess of jurisdiction and breach of natural justice have been by far the most common ground of attempting to set aside Singapore-seated arbitral awards. It is hoped that this decision will help to weed out frivolous challenges where the matters sought to be impugned have in fact been put into issue by the parties and fully ventilated before the tribunal, leaving behind cases where there are real grievances as to the tribunal's conduct. This, in turn, will increase certainty and finality in Singapore-seated arbitral awards.

Key takeaways

- The court must look at matters in the round to determine what issues were live in the arbitration, including the following sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions.
- A tribunal is entitled to make findings that go further than the parties' arguments, provided that such findings are premised on the fundamental points raised by parties. Such findings would not amount to exceeding jurisdiction.

About the authors

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