

# Re**SO**LUTION

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**NZ High Court orders former spouses to ADR**

**New Contractual Adjudication service  
launched by NZDRC and NZIAC**

**Busting ghostwriters – expert witnesses beware!**

**What does the Inaugural Aotearoa New  
Zealand Arbitration Survey reveal about  
domestic arbitrations in New Zealand?**

# From the Editor

## Catherine Green



Tēnā koutou katoa

**Welcome to the 34th issue of ReSolution.** As we move into summer, our latest edition of ReSolution® provides our readers with a wealth of interesting information and articles to explore.

In this issue, Sam Dorne looks at an interesting case that demonstrates the increasing acceptance by courts of alternative dispute resolution where the High Court exercised powers under section 145 of the Trusts Act 2019 for the first time, compelling former spouses to attend mediation.

Maria Cole takes us through a Canadian decision that discusses the voluntary resignation of an arbitrator and the implications this has on the arbitration.

In Case in Brief, Adrian Sharma takes us through *Sully v Englisch*, a case out of Victoria, Australia that emphasises the importance of having clear and concise terms at the outset of negotiations.

We are also grateful to Barrister, Arbitrator and Mediator, Peter Davey, for his piece on the inaugural Aotearoa New Zealand Arbitration Survey, as well as his co-write with Sam Dorne on the contractual adjudication service recently launched by NZDRC and NZIAC.

Further contributions touching on the high threshold to set aside an arbitral award, the test for determining the validity of arbitrator appointments, a pro-arbitration ruling out of the English Commercial Court and many more round out the final issue of ReSolution for 2022.

You may also notice some new logos starting to appear as we work toward a complete refresh of our NZDRC and NZIAC branding.

As always, I wish to take this opportunity to thank all those that have contributed to this issue of ReSolution. We are grateful for the support we receive from dispute resolution professionals, law firms, authors and publishers. 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

A handwritten signature in blue ink, appearing to read 'Catherine Green'.

Catherine Green



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ReSolution is the quarterly journal of [NZDRC](#) and [NZIAC](#), published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

Copies of our previous editions can be found on our websites:

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# ReSolution in Brief

## English abuse of process law applicable before English tribunals

In *Union of India v Reliance Industries Limited and another* [2022] EWHC 1407, the High Court of England and Wales considered the degree to which an English seated arbitral tribunal could still apply English principles of abuse of process to preclude a party from raising arguments which it should have raised earlier. The parties' contracts were governed by Indian law but were referred to the London-seated UNCITRAL arbitration. The Union of India sought to introduce a late defence to one of the claims but the tribunal dismissed this as an abuse of process as the arguments should have been raised at an earlier stage. The Union appealed the decision to the High Court on the basis that the tribunal had committed an error in law in that the English law principle had no application to an Indian law governed dispute.

In dismissing the appeal the High Court held that an abuse of process is a matter of procedure and follows the law of the seat, not the substantive law of the dispute, and its power was rooted in the Court's wider jurisdiction to protect its process from wasteful and duplicative litigation.

## Pro-arbitration ruling out of the English Commercial Court

In *NDK Ltd v HUO Holding Ltd and another* [2022] EWHC 1682 (Comm), a dispute arose in regard to the operation of a Russian coalmine with three investors, the largest of which, NDK, was based in Cyprus. The agreement provided for English

law and arbitration to be conducted at the LCIA (London Court of International Arbitration). The Articles of Association were governed by Cypriot law but did not contain a jurisdiction clause.

Disputes arose and NDK initiated proceedings in Cyprus. The other shareholders saw this as a breach of the arbitration agreement and commenced LCIA arbitration. The tribunal granted anti-suit relief against the ongoing claim in Cyprus. NDK appealed to the English Commercial Court on the basis that the tribunal lacked substantive jurisdiction, arguing that any claim brought under the Articles did not fall within the LCIA arbitration agreement. In dismissing the appeal the Court held that *any rational businessperson could only have intended that the LCIA Arbitration Agreement would apply to any disputes between the parties*. The Court was also satisfied that the matters raised in the Cyprus proceedings related to the agreement so as to fall within the LCIA arbitration agreement.

## Canadian court clarifies when arbitral award may be set aside for unfairness

In *ENMAX Energy Corporation v TransAlter Generation Partnership*, 2022 ABCA 206, the appellants were arguing before the Alberta Court of Appeal that, in the course of a lengthy and complex commercial arbitration, they were treated *manifestly unfairly and unequally* by the arbitral panel and were not given the opportunity to present their case. The issues on appeal revolved around whether the arbitral panel had denied the appellants document disclosure and whether the absence of those records denied the appellants the opportunity to present their case or resulted in *manifest unfairness* so as to

allow the award to be set aside under [section 45\(1\)\(f\)](#) of the Arbitration Act, RSA 2000. The Court confirmed that the duty to comply with the rules of natural justice and procedural fairness was fundamental to a hearing. However, the Court emphasised procedural choices in an arbitration are made at the arbitrator's discretion and not every procedural breach will result in obvious or clear unfairness. Judicial intervention is reserved for instances where there is a fundamental or fatal flaw that goes to the heart of the process. The Court found the failure to order production of the records didn't render the entire arbitral process manifestly unfair or deprive the appellants of the opportunity to present their case or respond to the other party's case.

## Rule of Law Index: New Zealand maintains high international ranking, with ADR lifting the overall Civil Justice score

The World Justice Project has recently released the 2022 [Rule of Law Index](#). New Zealand has maintained its ranking of seventh (out of 140 countries) with an overall score of 0.83. This is despite the rule of law declining in most countries (61%) for a fifth year in a row. The Index scores countries on constraints of government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

The [Civil Justice](#) factor of the Index explains that it *measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. To do this, it measures whether civil justice systems are accessible and affordable as well as free of discrimination, corruption, and improper influence by public officials. In relation to the civil courts, it examines whether court proceedings are conducted without unreasonable delays and whether decisions are enforced effectively. ADR is an important part of the provision of civil justice in a society, and accordingly, it also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms. Under the Civil Justice factor, New Zealand ranked 10/140 with an overall score of 0.78. The subfactor Civil Justice is not subject to unreasonable delay had an overall score of 0.71, while the subfactor Alternative Dispute Resolution Mechanisms are Accessible, Impartial, and Effective achieved an overall score of 0.80.*

## Incorporated Societies Act 2022 – societies must act to ensure their constitutions include dispute resolution procedures

The new [Incorporated Societies Act 2022](#) (the "new Act") received Royal Assent in April 2022. Starting from October 2023, New Zealand's 24,000 incorporated societies will need to re-register. In order to re-register, every society will need to have a constitution which complies with the requirements of new Act.

One requirement is that a society's constitution must include procedures for making and dealing with complaints, disputes and grievances ([section 26\(1\)\(j\)](#) and sections [38 to 44](#)). The [previous legislation](#) (which dates to 1908) was silent on dispute resolution, with the result that many societies have no internal procedures in place, leaving members with no option other than costly proceedings in the High Court.

Under the new Act, societies will be free to adopt their own internal dispute resolution procedures, provided that they are consistent with the requirements of natural justice. If the constitution does not provide dispute resolution procedures, then the default procedures in [Schedule 2](#) of the Act will apply.

The Act explicitly allows societies to adopt alternative dispute resolution procedures, including mediation, facilitation, arbitration, and adjudication. [Section 43](#) clarifies that if a society's constitution provides that a dispute must or may be submitted to arbitration, then this will be treated as a binding arbitration agreement for the society, members and officers.

You can find further information and advice on preparing for the upcoming changes on the [New Zealand Companies Office website](#).

## England and Wales Business and Property Courts' disclosure pilot scheme becomes permanent

As of 1 October 2022, the disclosure pilot scheme, which has been operating in the Business and Property Courts in England and Wales over the past three years, has become permanent.

The mandatory pilot was introduced in January

2019. It was aimed at bringing about a culture change in the disclosure process and making litigation less costly for parties, by narrowing disclosure to the issues in dispute and reducing the volume of unnecessary documentation.

Under the scheme, the previous standard disclosure practices have been replaced with an Initial Disclosure procedure and requirement for parties to disclose any 'adverse documents'. Litigants seeking further disclosure need to obtain a court order, and must select from five Extended Disclosure Models (Models A-E), depending on the type of documents and search techniques required.

Originally scheduled to run for one year, the pilot scheme was extended twice and amended following consultation and feedback from litigants and legal professionals. Further minor amendments and clarifications have been incorporated into the permanent scheme. The final version, which replaces the pilot scheme, is set out in [Practice Direction 57AD](#).

## Hong Kong Court of Appeal confirms preconditions to arbitration are a question of admissibility to be resolved by arbitrators, not the courts

In a significant ruling, [C v D \[2022\] HKCA 729](#), the Hong Kong Court of Appeal (the "COA") has confirmed that compliance with a precondition to arbitration, such as an escalation clause, is a procedural matter of admissibility of the claim, and not a matter of jurisdiction of the arbitral tribunal. As a question of admissibility, it is to be determined by the arbitral tribunal, and there is no recourse to the court.

The case concerned company D's alleged failure to negotiate prior to commencing arbitration, under the escalation clause in its arbitral agreement with company C. The arbitral tribunal had found that company D had satisfied the requirements of the escalation clause and proceeded to make a partial award against company C.

Company C unsuccessfully applied for set aside at the Court of First Instance ("CFI") and then the Court of Appeal (the "COA"), on the basis that the failure to negotiate, as a condition precedent to arbitration, meant that the arbitral tribunal

lacked jurisdiction to hear the claim or make the award. At the COA, company C argued that it is incorrect for the courts in Hong Kong to make any distinction between admissibility and jurisdiction.

The COA dismissed C's challenge, upheld the CFI's ruling and confirmed that there is an important distinction between jurisdiction (the power of the arbitral tribunal to hear a claim) and admissibility (whether it is appropriate for the tribunal to hear it). The COA summarised and endorsed this approach in the recent case law of Hong Kong and other jurisdictions, including England and Wales, the USA, Singapore and Australia. It gave particular significance to the Fiona Trust presumption that rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal, and highlighted the trend for judicial non-interference in arbitration.

The COA noted that parties to arbitration are free to agree that any disputes on pre-arbitration conditions are excluded from the jurisdiction of the arbitral tribunal, but that this, being an exception to the 'rational businessmen' presumption, would need to be made clear and unequivocal in the arbitration agreement.

## English High Court considers test for determining validity of arbitrator appointment

In [ARI v WXJ \[2022\] EWHC 1543 \(Comm\)](#) the High Court in England considered whether an arbitrator had been validly appointed. Under the arbitration agreement, each party was required to appoint an arbitrator – with strict time limits. If the defendant failed to appoint their arbitrator within 14 days of receiving the claimant's notice of appointment, then the claimant was entitled to have their arbitrator designated sole arbitrator.

Upon receiving the claimant's notice, the defendant contacted JJJ, who confirmed it was willing to act as arbitrator, conditional on conflict checks. Just before the deadline, JJJ confirmed it was conflict free, and the defendant notified the claimant of JJJ's appointment.

However, several weeks later, JJJ declined to act because the remuneration was too low. The claimant sought to have their arbitrator designated sole arbitrator on the basis that the defendant had failed to validly appoint JJJ as arbitrator within the time limit.

In considering the case law, the Court held that the issue of appointment does not turn on whether a contract has been concluded between the arbitrator and the appointing party. The Court highlighted that arbitral appointments are often sought under significant time pressure and with only brief communications regarding availability and willingness to act. It noted that in such circumstances, in-depth negotiations and agreement as to all terms including the level of remuneration would be unrealistic.

The Court held that the correct test is whether there has been a clear and unconditional communication of acceptance of the appointment by the arbitrator, or communication of an unconditional willingness to accept the appointment, which the appointing party then acted upon.

Applying this test to the defendant's communications with JJJ, the Court noted that the only condition to appointment which JJJ had imposed at the relevant time was the conflict check. JJJ had removed this condition when it confirmed it was conflict free, and the defendant had acted on this by notifying the claimant of JJJ's appointment. The Court held therefore that all the requirements of a valid appointment had been met within the time limit, with the result that the claimant was unable to designate their arbitrator as sole arbitrator.

## Australian Federal Court finds Fuji used 38 unfair contract terms in contracts with small businesses

On 12 August 2022 the Federal Court of Australia (the "Court") issued its judgment in [Australia Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd \[2022\] FCA 928](#), declaring that Fuji had used 38 unfair contract terms in around 34,000 standard form contracts with small businesses for supplying and servicing printers, scanners, photocopiers and software.

The Australian Competition and Consumer Commission (the "ACCC") brought the action against Fuji after receiving complaints from small businesses and the Australian Small Business and Family Enterprise Ombudsman about standard form contracts in the printing industry.

The 38 terms were found to be unfair under Australia's [unfair contract regime](#) for standard form contracts with a small businesses. Fuji's unfair

terms included its ability to automatically renew contracts, terminate contracts, charge excessive termination fees, unilaterally increase prices and vary its terms, limit its liability and require customers to indemnify it and make payment before delivery.

Although the Court has no power to award penalties under the current legislation, it declared the unfair terms void and unenforceable, and made orders including that Fuji stop using and enforcing the terms. It ordered Fuji to publish a corrective notice on its website setting out the Court's orders, inform any customers who may be affected and ordered it to pay a contribution to the ACCC's legal costs.

On 9 November the new [Treasury Laws Amendment \(More Competition, Better Prices\) Act 2022](#) received Royal Assent. This introduces various reforms to the unfair contract terms regime, including, for the first time, the introduction of penalties for the use of unfair contract terms in standard form contracts with small businesses. You can find further information on the upcoming changes on the [ACCC website](#).

## Hong Kong court rules that high threshold needs to be met to set aside arbitral award

A recent ruling out of Hong Kong has provided clarification on how an award should be considered by courts when dealing with setting aside applications and the high threshold that needs to be met for such applications to succeed.

In [LY v HW \[2022\] HKCFI 2267](#), a Hong Kong company (LY) entered into an agreement with a Chinese company (HW) for the exclusive distribution of pharmaceutical products in China. The agreement required HW to meet a minimum annual sales value target (ASV).

LY terminated the agreement in May 2019, claiming that HW failed to achieve the ASV target. HW subsequently initiated arbitration, alleging that LY was in breach of the agreement. The Tribunal awarded in favour of HW, finding that the termination of the agreement by LY was invalid.

LY then filed an application to set aside the award, claiming the following:

- the Tribunal failed to deal with key issues;
- it failed to provide sufficient reasons for its

- decision; and
- the award was contrary to the public policy of Hong Kong.

In its ruling, the Court stated that the aim of the [Hong Kong Arbitration Ordinance](#) is to ensure speedy dispute resolution without unnecessary costs or delays. The Court highlighted the following legal principles applicable to the issues before it:

- When considering whether a tribunal has dealt with an issue, the award needs to be read in a reasonable and commercial way, with a view to remedying only serious breaches of natural justice.
- The reasons provided by a Tribunal need not be detailed and lengthy.
- A Tribunal is not bound to structure its decision and reasons in accordance with the issues put to it or submissions made by the parties.
- As long as the Tribunal gives sufficient reasons for its decision, an award will be enforceable.
- Courts must be circumspect in their consideration of an award to avoid any attempt to review the correctness of the award, in law or on the facts.

The Court held that even if the Tribunal failed to consider and deal with the issues raised by LY, this was a matter that went to the substantive decision of the Tribunal. While this may amount to an error of law, it is not a ground for challenging the award.

The Court clarified that the grounds for setting aside and refusal of enforcement of an award should be construed narrowly, and that only an error that is too egregious to cause a substantial failure of justice would justify setting aside of an award.

## Mandatory mediation proposed for small claims disputes in the UK

In July, the UK government launched a public consultation on [increasing the use of mediation in the civil justice system](#), aimed at decreasing the time and money spent on civil disputes whilst resolving them fairly and proportionately.

The proposal sought to introduce compulsory mediation for parties in the County Court involved in civil disputes of a value below £10,000. This would mean that parties will be required

to participate in a free hour-long telephone mediation provided by His Majesty's Courts and Tribunals Service (HMCTS) as part of the court process before the matter is scheduled for a hearing.

Just as in a typical mediation, the parties will be required to speak to the mediator separately to determine whether there are any points of agreement. If a settlement is reached, the parties can agree to include the terms of settlement in an agreement that is legally binding, negating the need for court proceedings.

While the proposal covers various types of civil cases of a value less than £10,000, including personal injury and housing disrepair claims, the government sought consultation on whether certain types of cases should be exempt from the requirement to mediate.

The government has also sought the views of stakeholders on how it can support and strengthen the external civil mediation sector, particularly on whether there is a need for increased regulation and oversight of the mediation industry.

In another nod to mediation and its effectiveness in resolving disputes, the UK government has also signalled intentions to sign and ratify the [Singapore Convention on Mediated Settlements](#).

With consultations on [increasing the use of mediation in the civil justice system](#) now closed, if implemented, it would be the first instance of compulsory mediation being made a permanent feature of an entire area of the English courts.





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# NZ High Court orders former spouses to ADR

By Sam Dorne

**Courts worldwide have long seen the benefits of alternative dispute resolution (ADR) such as mediation. However, the courts have either been constrained or unwilling to force parties to participate in the ADR process.**

**The High Court in New Zealand has bucked the trend and ordered parties to mediate in the first case of its kind, in *Wright v Pitfield*, setting the scene for a potential future expanded use of ADR in disputes.<sup>1</sup>**

## Background

ADR is normally a consensual process. Anyone can take someone else to court but ADR has historically required parties to be willing to engage in the process from the outset. Despite studies proving the effectiveness of ADR, some parties are reluctant to engage in the process, leaving the courts as the only option whether they like it or not.

Under section 145 of the Trusts Act 2019, the High Court of New Zealand can order parties to attend mediation against their will.

The High Court exercised this power for the first time in *Wright v Pitfield*. *Wright* involved a run of the mill trust dispute between former spouses.

The former wife took her former husband to court seeking to remove him as a trustee of their family trust. The former husband counterclaimed seeking to remove his former wife but requested that mediation be attempted to resolve the dispute. His former wife declined the invitation.

Due to his former wife refusing mediation the husband made an application to the Court for an

order under section 145 of the Trusts Act 2019 to force the matter to mediation first, and requiring his former wife to participate in that mediation.

## The order

The High Court granted the order. Justice Geoffrey Venning found that this was *the type of case Parliament had in mind when providing jurisdiction for the Court to require parties to attend mediation.*<sup>2</sup>

Justice Venning remarked that requiring the wife to attend mediation would not deny her access to the Court but could avoid the costs of a hearing and resolve all issues between the parties. He held:<sup>3</sup>

...the issue before the Court concerns breach of duties as a trustee and the dysfunctional relationship between the three trustees. She says the removal of the trustee is a narrow issue, not one that lends itself to mediation. However, I consider the dispute between the parties raised on the pleadings is broader than just the issue of the ultimate relief sought. If the issues of control of the assets and sale of the principal asset can be resolved, the issue of whether one or both trustees should be removed will fall away. That supports the reference to mediation.

## The evolving application of ADR

Justice Venning noted the considerable changes in the courts' approach to mediation over the past 20 years, both in New Zealand and internationally. He argued that *Beadle v M & L A Moore Ltd must be seen as a case from its time. It was decided over 20 years ago. The Court's approach to mediation has changed considerably since then.*<sup>4</sup> In *Beadle*, the Court of Appeal held that a mere failure to resort to ADR was not sufficient to lead to an award of adverse costs absent any particularly compelling circumstance.

In considering judgments from England and Wales, Justice Venning was similarly dismissive in their relevance to the facts of this case and the modern approach to encouraging settlement by ADR.

<sup>1</sup> *Wright v Pitfield* [2022] NZHC 385.

<sup>2</sup> At [41].

<sup>3</sup> At [27].

<sup>4</sup> At [35].

In discussing the tension between mediation as a voluntary process and ordering a party to mediation against their will, Justice Venning commented:<sup>5</sup>

*Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity? 'You can take a horse to water, but you cannot make it drink'. To which those in favour of compulsory mediation reply, 'yes, but if you take a horse to water it usually does drink.' Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition.*

His analysis was wholly justified as the former spouses subsequently attended a successful mediation resolving all trust and relationship property issues, thereby helping to avoid years of further litigation.

## Conclusion

Section 145 of the Trusts Act 2019 is evidence that the courts should be actively encouraging unwilling parties to participate in ADR in the trust context and, where appropriate, ordering an unwilling party to the ADR table. It will be interesting to see if compulsory court ordered ADR will make its way into other civil disputes in New Zealand. The ability of ADR to release some of the strain from the under-pressure court system is reason enough to encourage its continued use, let alone the well-known benefits to the parties of cost-effective, early resolution to the case.



## 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.

<sup>5</sup> At [35], citing Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales "Alternative Dispute Resolution: an English Viewpoint" (India, 29 March 2008).

# CONTRACTUAL ADJUDICATION



## **A NEW RESOLUTION PROCESS DESIGNED BY NZDRC AND NZIAC WITH COST AND TIME EFFICIENCY IN MIND**

The ADR (Alternative Dispute Resolution Centre) is pleased to announce the introduction of a new alternative dispute resolution process, Contractual Adjudication. This process will be delivered domestically in New Zealand through the [New Zealand Dispute Resolution Centre](#) and internationally through the [New Zealand International Arbitration Centre](#).

## **WHAT IS CONTRACTUAL ADJUDICATION?**

Contractual Adjudication offers a proportionate and fast-track dispute resolution process with the primary purpose of improving cashflow, whilst providing quick and relatively inexpensive access to justice, alleviating pressure on the Courts.

Importantly it also provides parties with a procedural option that is effective and efficient, allowing them to find a resolution to their dispute and move forward as quickly as possible. Based on the successful statutory adjudication scheme which has become the predominant forum for dispute resolution in the construction industry over the last 20 years, contractual adjudication provides a private, proportionate, effective and efficient alternative dispute resolution process, for a wide range of disputes.

## **FIND OUT MORE**

You can download a copy of the Contractual Adjudication rules by completing the form [here](#).

If you are interested in hearing more about Contractual Adjudication, please email [registrar@nzdrc.co.nz](mailto:registrar@nzdrc.co.nz) or [registrar@nziac.com](mailto:registrar@nziac.com).

# NZDRC and NZIAC launch Contractual Adjudication service

By Sam Dorne and Peter Davey

**NZDRC and NZIAC have now officially launched their Contractual Adjudication process. The aim is simple – increase access to justice by introducing a quick and relatively inexpensive procedure to settle most civil disputes in a proportionate manner.**

## Why now?

### *Litigation through the courts*

There are significant delays in the District Court and the High Court in dealing with ordinary civil proceedings. The Ministry of Justice has advised that in 2021 the average time from the date of filing to disposal for ordinary court proceedings was 877 days for the District Court and 836 days for the High Court.

The waiting time is frustrating for parties, and increases the costs for everyone involved. Most people and businesses want to resolve their dispute in as timely and cost-effective manner as possible. This is why NZDRC and NZIAC have launched their Contractual Adjudication services.

In November, [the Rules Committee released a report on "Improving Access to Justice"](#) which recognised the significant problems with access to civil justice in New Zealand. Quite simply, there are a broad range of disputes that cannot be litigated by the average person due to the cost of litigation and the risk of adverse costs awards for unsuccessful claims. Even if a claimant can afford to pay those costs, they are often disproportionately high compared to the amount of the claim. Parties often have to pay considerable legal costs for a lengthy period, without achieving any resolution. The Rules Committee report also noted a decrease in confidence amongst practitioners in the District Court's ability to deal with civil claims, due in part to the length of time it takes to resolve a defended case.

One of the Committee's recommendations is that the Disputes Tribunal's jurisdiction be increased to hear claims up to \$70,000 (currently \$30,000), or up to \$100,000 with the agreement of the

parties. However, this proposed change will require a legislative amendment to the Disputes Tribunal Act 1988. Further, under the increased jurisdiction proposals, lawyers will still be generally excluded from attending the Disputes Tribunal, meaning parties would be unable to have legal representation at hearings. The Committee is not recommending any changes to the District Court Rules but it is proposing some changes to the resourcing of the District Court, such as appointing part-time judges.

### *Adjudication as an alternative*

The adjudication process under the Construction Contracts Act 2002 was introduced to address the problem of dispute-related delays affecting cashflows in the construction industry. It has proved to be an effective way to resolve most construction disputes. However, individuals and businesses outside of the construction sector can also have their cashflows badly affected by delays because of disputes over payment for goods and services.

Adjudication under [NZDRC's Adjudication Rules 2022](#) (domestic) or [NZIAC's Arbitration Rules 2002](#) (international) offers parties to a dispute a cost-effective and robust dispute resolution process that results in a determination by an independent adjudicator, **typically within 35 working days**.

## Who can use it?

Almost every person or business involved in a dispute can use the NZDRC and NZIAC Contractual Adjudication processes. For example:

- disputes arising in relation to a contract;
- disputes arising in relation to a non-contractual legal relationship (such as a trust); and
- disputes arising in relation to a cause of action in tort (such as a negligence or nuisance claim).

There are limited exceptions, such as matters of public policy or where the dispute is not capable of determination by adjudication under any law. However, most disputes that could be subject to



arbitration or legal proceedings can also be resolved by adjudication.

## How it works

### Overview

The adjudication is conducted on the papers. This means there is no costly formal hearing for the parties to attend. Parties simply put their arguments in writing and exchange evidence, and the Adjudicator makes a decision based on what is presented. The parties can choose to be legally represented or they can choose to draft their own arguments. Importantly, adjudication is a confidential process, unlike open court.

NZDRC's and NZIAC's Adjudication Rules 2022 are written in plain language so that people from all walks of life can understand the process and what is required. Contractual Adjudication offers parties access to a simple and effective procedure that is convenient and certain, and provides a determination that is provisionally binding and enforceable within 35 working days.

If a party fails to pay an amount due under a determination, then the party who is owed the money can recover the unpaid portion as a debt in any court of competent jurisdiction, as well as the reasonable costs and expenses incurred in recovering that debt.

### Agreeing to adjudicate

Unlike litigation through the courts (where the parties can be dragged into proceedings), adjudication is a consensual process. It is desirable for businesses to agree to use adjudication at the contractual stage, to avoid disagreements as to process if/when disputes arise. Businesses should consider updating their standard contractual terms to include a [clause](#) on this.

However, adjudication can be started whether or not the parties have an existing adjudication agreement in relation to the dispute. If there is an existing adjudication agreement, one party can start adjudication themselves by serving a Notice of Adjudication. If there is no adjudication agreement already in place when the dispute arises, then the parties must agree to adjudicate and enter into an adjudication agreement. NZDRC and NZIAC offer [Model Agreements](#) that parties can use at any stage if necessary.

### Procedure

The process is similar to construction contract adjudications, which are well-established and have been reviewed and refined by decisions from the High

Court. The claimant serves a claim with supporting documents and evidence. The respondent then serves a response with its supporting documents. The claimant can reply to the matters raised by the respondent, and the respondent can provide a rejoinder. No counterclaims can be raised, but set-offs are permitted. If a respondent wants any additional relief, then it can either obtain the agreement of the other parties or start a separate adjudication.

### Costs

The aim is to provide a service that is both proportionate and cost effective. The overall cost of the adjudication is generally met between the parties, and each party bears their own costs. The parties will need to provide a payment by way of security at the start of the process.

NZDRC and NZIAC offer a fixed-fee option for disputes that are relatively low value (under \$100,000) and of low complexity. This fixed-fee scheme provides the parties with the certainty of a transparent cost and allows them to make an informed decision about whether adjudication is right for them from the outset.

If the fixed-fee service is not an option, parties can still take advantage of adjudication by

proceeding as a General Claim. The fees for this are calculated based on the time spent by the Adjudicator at their hourly rate – however, NZDRC and NZIAC handles all the administrative and support work to ensure that the Adjudicator's time is only spent on dealing with the technical aspects of the case.

## Summary

With the increasing delays and escalating legal costs within New Zealand's court system, businesses and individuals need an efficient alternative to lengthy and expensive litigation. It is expected that as time goes on adjudication will become the norm for businesses when disputes arise.

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## About the authors



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# Lessons from the Frontline where Negotiation is Life or Death

By David Ferguson

Earlier this month I joined an online conference on Frontline Humanitarian Negotiation with presentations from those brave individuals who negotiate with armed groups to get food and medicine to civilians in conflict areas. In such situations, advanced negotiation skills are literally a matter of life and death. The best negotiators tend to be those with the least obvious power (think Nelson Mandela) as they are forced to develop smarter techniques. It was only in 2016 that the Centre of Competence on Humanitarian Negotiation (**CCHN**) was formed, and already there are many lessons for all negotiators seeking to reach better quality agreements.

## Lesson #1 – Know who your stakeholders are

We often focus on who is across the table in a negotiation and fail to consider other parties that may be indirectly involved. The CCHN recognises that negotiations 'never take place in a vacuum' and recommends mapping out networks and then working to leverage influence among

stakeholders in that network. One multinational software company I know of does this for all major contracts. While they may be negotiating with the CIO or CFO, they work to understand the perspective of board members who will have to approve any deal. I have also been involved in negotiations for the purchase of a business, where gaining the support of those not at the negotiation table was key to getting a deal.

## Lesson #2 – Consider the unintended consequences of compromise

Compromise is essential in negotiation. However, one conference presenter recommended first considering the long-term impact and potential unintended consequences of making certain compromises. This highlights the importance of communicating early any 'non-negotiable' issues. I have worked with negotiation teams that bring in a more senior representative to deliver the non-negotiable issues, and in so doing protect the negotiation team's relationship with the other side. Typical non-negotiables may relate to contract liability limits, dispute resolution clauses, or sensitive precedents for future negotiations.

## Lesson #3 – Establish virtual trust-building mechanisms

Building trust is more challenging in virtual negotiations than in person. One presentation proposed finding virtual equivalents for creating rapport, protocols such as handshakes, a common physical environment, and informal moments in the corridor. These included short



personal opening statements, not blurring your camera background, but rather emphasising your physical environment and using less formal communications tools, such as phone or WhatsApp, in setting the agenda ahead of a video conference negotiation. Appropriate techniques will differ depending on the

circumstances, but the intention is to replicate how trust is established at in-person negotiations. In short, seeking to reach agreement through negotiation is a constantly evolving discipline, and lessons from frontline negotiations provide valuable lessons for all negotiators.

## About the author



### David Ferguson | Commercial Negotiator and Mediator

David Ferguson is a commercial negotiator and mediator (AMINZ Associate member). He was previously NZ Trade Commissioner in Japan and Korea, and held sales leadership roles for multinationals in the food and mining sectors in New Zealand, Australia and Singapore. David has degrees in business (Doctor of Business Administration) and law (Juris Doctor).



# When can an arbitrator voluntarily resign and what are the implications for the arbitration?

By Maria Cole



Circumstances can arise when an arbitrator in a domestic arbitration needs to voluntarily resign their appointment. But what is the status of the arbitration if this occurs? Does the court have jurisdiction to step in? This article looks at a recent Canadian decision which addresses these questions and provides guidance on the factors an arbitrator should consider before voluntarily resigning.

## The background

The case in question, *SZ v JZ*,<sup>1</sup> out of the Court of King's Bench of Alberta, involved a complex, delicate, and high-conflict family dispute. The parties had agreed to submit 12 issues to arbitration by a mutually agreed sole arbitrator under the terms of an Arbitration Agreement. The terms included the following:<sup>2</sup>

### REMOVAL OF THE ARBITRATOR

43. *The parties may apply to have the arbitrator disqualified, or the Arbitrator may remove himself,*

<sup>1</sup> 2022 ABQB 493.

<sup>2</sup> At [83].

<sup>3</sup> Under the New Zealand Arbitration Act 1996, these provisions are contained in articles 12–15 of [Schedule 1](#) to the Act but are not a direct equivalent.

<sup>4</sup> At [38].

pursuant to Sections 13, 14, 15 and 16 of the [\[Arbitration\] Act \[RSA 2000\]](#) (the Arbitration Act).<sup>3</sup>

### TERMINATION BY THE ARBITRATOR

44. *The Arbitrator may terminate the arbitration process unilaterally if, in his opinion:*
- a. *it is unnecessary, or likely not possible, to complete the arbitration; or*
  - b. *his fees are not paid or secured in a satisfactory manner.*

The parties originally contemplated the arbitration would be completed very quickly, but matters escalated. Six months after his appointment, the arbitrator unilaterally resigned. His reasoning for doing so was set out in a brief email as follows:<sup>4</sup>

*I am writing to advise as to my resignation as arbitrator. Looking to my current workload and scheduling into the summer*

*and fall it is difficult to accommodate the scheduling possibly required.*

Party SZ then brought an application before the Court to obtain the relief sought in the arbitration. However, party JZ argued that the Court did not have jurisdiction other than to enforce the Arbitration Agreement by appointing a new arbitrator, as the parties had agreed to resolve their dispute by arbitration.

## What was the status of the arbitration?

The Court noted that under the Arbitration Act an arbitrator's mandate terminates when the arbitrator resigns, but it also provides that a court may intervene to ensure an arbitration is carried on in accordance with the arbitration agreement. This meant therefore,<sup>5</sup>

*the terms of an arbitration agreement, and what an arbitrator agrees to in it, are relevant. An arbitrator may not be able to unilaterally end his or her mandate or an arbitration process if doing so would be in breach of the terms of the arbitration agreement freely entered into by the arbitrator.*

In considering the wording of terms 43 and 44 of the Arbitration Agreement and the actions of the Arbitrator, the Court found that the Arbitrator's mandate terminated when he sent the resignation email. The Judge indicated that if the parties had wanted to restrict situations in which the Arbitrator could unilaterally end his own mandate, they could have used different language in the Arbitration Agreement.

What then of the arbitration itself? Was it terminated? The Arbitration Act provides that an arbitration is terminated when the arbitrator's mandate is terminated, if the arbitration agreement provides it is to be conducted only by that arbitrator (and can only be revived in specific circumstances, which were not applicable). Further, there is no ability to appoint a new arbitrator if the arbitration agreement provides the arbitration is to be conducted only by a named arbitrator. The Judge considered the terms of the Arbitration Agreement and concluded they showed the intention of the parties was that the

arbitration be conducted only by the named Arbitrator, and accordingly the Arbitration Agreement had terminated.

## Did the Court have jurisdiction to step in?

No. The Judge considered in detail the surrounding circumstances (including a Consent Order which reflected the parties' agreement to mediate/arbitrate) and found that the parties had expressly provided that they would mutually choose the arbitrator; and the Court must recognise the parties' intention, respect their autonomy, and refrain from imposing something on them that was not agreed. In coming to this conclusion, the Judge indicated that had the parties intended for a court to intervene to appoint an arbitrator if the parties could not reach agreement, they could have been silent on the process of appointment (which would have then given the Court discretion to intervene under the Arbitration Act).

The result was that the arbitration process was spent, and it was up to the parties to agree a new arbitration agreement and process.

## What factors should an arbitrator consider in deciding whether to resign?

When looking at the arbitrator's conduct up to his resignation, the Court set out a non-exhaustive list of factors for an arbitrator to consider when deciding whether to voluntarily resign:

[79] *In deciding whether to exercise a discretion to resign, an arbitrator should consider relevant factors, including whether resignation will undermine the underpinning purposes of arbitration agreements in the first place, namely expeditious, private, economical dispute resolution with allowance for more specialized expertise: ENMAX Energy Corporation v TransAlta Generation, 2022 ABCA 206 at paras 4 and 24.<sup>6</sup> As a corollary to this, the arbitrator should consider whether resignation will cause*

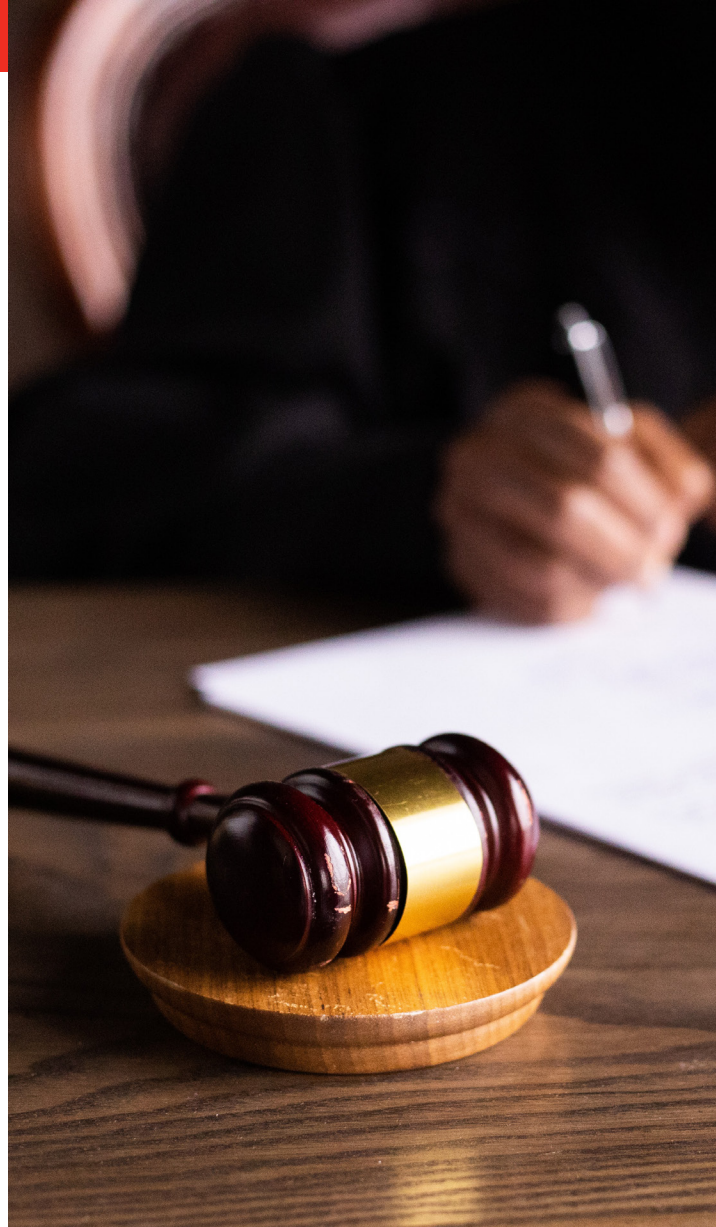
<sup>5</sup> At [77].

<sup>6</sup> The decision in *ENMAX Energy Corporation v TransAlta Generation* features in *ReSolution in Brief* earlier in this edition of *ReSolution* in relation to challenging an award due to "unfairness".

*unfairness, prejudice or harm to the parties. The arbitrator should also consider whether there are any matters that have arisen since his or her appointment that would preclude the arbitrator from continuing on, such as an emerging conflict of interest, lack of impartiality, bias, or a lack of qualifications the parties have agreed are necessary. This is not intended to be an exhaustive list of factors.*

## Conclusion

Despite this decision applying statutory provisions that differ to those in New Zealand, the lessons learned are relevant to this jurisdiction. When negotiating the terms of an arbitration agreement, parties need to ensure they deal with the “what ifs” that might arise, which include the possibility that their arbitrator might resign. Do they want to make provision for the appointment of a substitute arbitrator, or let the applicable statutory provisions kick in and possibly have to go to court? When an arbitrator is considering whether to exercise their discretion to voluntarily resign, they need to consider not only the bigger picture, but also the wording of the arbitration agreement, to ensure their actions are not in breach of the terms of the arbitration agreement they freely entered into.



## About the author



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

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# Case in Brief

## Negotiating settlements: agreement binding if substance of dispute is resolved

A recent decision out of the Australian state of Victoria is a reminder of the importance of engaging in best practices when negotiating settlements of disputes.

In *Sully v Englisch*<sup>1</sup>, the Applicant, Sully, brought proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) against the respondent, Englisch, for misleading and deceptive conduct. The VCAT ordered in favour of Sully, following which Englisch then filed a notice of appeal against the VCAT's decision.

The parties attended a mediation in relation to Englisch's appeal in September 2020. They reached an agreement to settle but did not prepare any written terms of settlement on the day of the mediation. The mediation was left "open" by the Judicial Registrar at its conclusion and the proceeding was listed for directions hearing at the end of the month. There was further correspondence between the parties after the mediation concerning the terms of settlement, but no written terms were signed.

Sully claimed that a binding settlement agreement was reached at the mediation, but Englisch disagreed. The trial judge ruled in favour of Englisch. Sully sought leave to appeal, arguing that the trial judge erred when finding that there was insufficient evidence that the parties intended the terms to be legally binding.

Both parties agreed on the following relevant legal principles to be applied to determine whether the parties had agreed to be immediately bound by the agreement:

- Whether an agreement reached is meant to be immediately binding should be determined objectively, taking into account the presumed or inferred intent of the parties. The ultimate question to answer is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe;

- A party's subjective intention or belief is not determinative, although it may be relevant; and
- For an agreement to be immediately binding, the original oral agreement must be complete, certain and enforceable on its terms. A written agreement may be executed later.

In its ruling, the Court of Appeal applied the "objective test", finding that a reasonable person observing the mediation would have concluded that the parties had reached a binding agreement by the end of the mediation, therefore, Sully had proven that the parties intended to be immediately bound by the agreement reached at the end of the mediation.

The Court of Appeal was of the view that by the end of the mediation, Sully and Englisch had obtained that which was of most concern to them. The fact that the settlement appears to have achieved a favourable outcome supports the contention that whatever further steps or documentation were contemplated, they were procedural or speculative in nature. The fact that the parties later found things to argue about does not change what had already occurred.

This case has a wide application and serves as a reminder to all parties negotiating the settlement of claims that an agreement will be binding if the substance of the dispute is irrevocably resolved, with only procedural or non-essential matters outstanding. It also emphasises the importance of having clear and concise terms at the outset of negotiations, which ensures a greater deal of certainty.



1 *Sully v Englisch* [2022] VSCA 184

# Busting ghostwriters – expert witnesses beware!

By Ian Bloemendal, Joshua Keenan and Angus Fraser

## Maintaining the independence of an expert is critical.

Opinion evidence is not ordinarily admissible evidence before a court, but expert evidence is a particular exception, because it provides a court with information which is likely to be outside the experience of a judge or jury but is within the specialised knowledge of the expert. But although the expert is called by one side, that doesn't mean the expert can be an advocate for that party.

In *New Aim Pty Ltd v Leung* [2022] FCA 722, a failure to maintain the proper independence expected of an expert witness had catastrophic consequences for one party's case, but provided greater clarity about the scenarios that might offend this principle.

## The non-independent expert witness

In *New Aim Pty* the applicant engaged an expert witness to produce a report on the use and treatment of information relating to the identities and details of suppliers in China. The expert was engaged based on her relevant industry experience and knowledge.

After hearing the cross-examination of the applicant's expert, Justice McElwaine rejected all of her evidence, including her report and oral evidence. The result was devastating to the applicant as the lack of proof on this key issue was crucial to its case. This was in large part the result of the following sequence of events:

1. a letter of instruction from the applicant's lawyers to the expert was dated only one day prior to the date of the expert's report, but it conveyed the representation that the expert was engaged to prospectively consider a series of questions the subject of instruction;



2. the expert was asked in cross-examination whether she had drafted the entire report by herself within a space of 24 hours – she answered in the affirmative;
3. the expert later admitted that she had spoken to the applicant's lawyers prior to the date of the letter of instruction and had produced "about two or three" draft reports which were the subject of their comment and drafting;
4. it eventually emerged that the expert was unable to identify which portions of her expert report were drafted by her and which portions were drafted by the lawyers, though she accepted that certain conclusory statements were drafted by the lawyers (statements which were very similar to the witness statement of one of the applicant's other witnesses);
5. the expert also accepted that this drafting had selectively reproduced portions of a book she had written on the topic which were favourable to the applicant's case.

Accordingly, Justice McElwaine held that the expert's impartiality was substantially undermined by her failure to disclose how her expert report was prepared. He also found that the solicitors' conduct in preparing and delivering the expert's report was itself misleading because it gave the impression that they weren't substantively involved in preparing the report before that point.

Consequently, he was not satisfied that the opinions expressed in the report represented the expert's honest and independent opinions, nor that she had not withheld any matters of significance. Additionally, Justice McElwaine had no confidence that the expert's oral evidence was untainted by the factual material and the opinions expressed in her written report, as well as the manner of its preparation. As a result, he declined to make any factual findings based on any of her evidence.

This case shows that where it is unclear who is responsible for the drafting of any given portion of an expert report, there is a risk that all of the evidence in such a report may be held inadmissible as a consequence.

## Involvement of lawyers with report drafting

The court noted that, in some circumstances, the fact that an expert witness may agree with a form of words for the expression of the expert's opinion,

which are put to the expert in an admissible form, may not detract from the independence of the expert and the reliability of their opinion expressed. Indeed, Justice McElwaine observed that lawyers **should** be involved in the writing of reports by experts on matters of form. His Honour confirmed that it may be perfectly appropriate, such as in cases where an expert is unfamiliar with the form and content requirements for an expert opinion report, for that document to be settled in an admissible form by someone else provided that that fact is disclosed in the report.

There may even be circumstances where it is proper for lawyers to draft an independent expert witness statement under the directions of, or for consideration by, an expert, but that fact must be disclosed in the report.

The guiding principle is that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of an expert.

## Letters of instruction

Justice McElwaine noted that letters of instruction to an expert should not convey the representation that an expert will, upon receipt of instructions, set about preparing a report, if that is not in fact the case.

The fact that the author of a letter of instructions asks questions for which they already know the content and form of an expert's answers is relevant in this respect.

## Key take aways for expert reports

The role of an expert is an exceptional one, in that the court will allow opinion evidence from them on matters within the scope of their expertise. However, in doing so, the expert witness owes a paramount duty to the court to act impartially in providing objective unbiased opinion in relation to matters within their expertise.

An expert witness is not an advocate for a party.

Lawyers should be involved in the writing of reports by experts, including:

- liaising with the expert to ensure their report covers the issues before the court; identifying any obvious gaps or obscurities in the expert's reasoning;
- assisting the expert to understand the need to

explain how the opinion is substantially based on the expert's specialised knowledge;

- indicating whether the report fails to distinguish between the assumed facts and the opinion which is supposed to be based on them; and
- ensuring that the report is prepared in an admissible manner. (Experts cannot reasonably be expected to understand the applicable evidentiary requirements).

It is important to bear in mind that:

- the more inexperienced the expert, the greater the assistance that may be required from the lawyer;
- it is, however, improper and can be self-defeating for a lawyer to tell an expert what to say or to influence an expert's opinion. Lawyers should not write the body of the expert report;
- lawyers and experts need to exercise caution so that evidence of the expert is and is seen to be the independent product of the expert;

- care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert;
- if a lawyer prepares a first draft of an expert report based on instructions from the expert, it poses the serious risk of compromising the independence of the expert and of undermining the value of the opinion;
- the impartiality of an expert can be substantially undermined by a failure to disclose the methodology of preparation of their report (particularly if the court is left uncertain as to who was responsible for the drafting of portions of the report); and
- in the Federal Court, an expert report can be settled in an admissible form by a lawyer, but in Justice McElwaine's opinion "only if that fact is disclosed in the report".

We understand this decision is now the subject of appeal.

Click [here](#) to read the original article.

## About the author



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As a commercial litigator, Ian Bloemendal specialises in dispute resolution with particular expertise in joint venture litigation, trade practices and product liability disputes, intellectual property/technology-related litigation and regulatory investigations. Click [here](#) for his full biography.

*Disclaimer: Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this communication. Persons listed may not be admitted in all States and Territories.*



# What does the Inaugural Aotearoa New Zealand Arbitration Survey reveal about domestic arbitrations in New Zealand?

By Peter Davey

Royden Hindle, Dr Anna Kirk, the New Zealand Dispute Resolution Centre and Diana Qiu are to be highly commended for the significant work in undertaking and publishing the Inaugural Aotearoa New Zealand Arbitration Survey. The survey finally provides empirical data on current arbitration practice in New Zealand and establishes a sound foundation for analysing its future development.

In total, the survey obtained information from 56 arbitrators who had received 213 appointments between 1 January 2019 and 31 December 2020. It does not include arbitrations during that period where the arbitrators were appointed before 2019. There will also have undoubtedly been more appointments during the survey period that have not been captured by the survey. However, there was no evidence that the COVID-19 pandemic had any effect on the number of appointments based on the spread of appointments over both years.

The survey obtained detailed information relating to 113 appointments and the results showed that 96 of those were domestic arbitrations. The vast majority were conducted under the Arbitration Act 1996 by a single arbitrator, without resort to any institutional rules. It therefore seems that the schedules to the Arbitration Act 1996 are still providing a useful basis to conduct arbitrations.

Over 70% of the domestic arbitral tribunal appointments were made by the parties themselves. AMINZ (14) and the New Zealand Law Society (15) were responsible for most of the remaining institutional domestic appointments. Ten of the Law Society's appointments related to lease or property disputes. There was only one arbitral appointment made by court order. The basis for this court ordered appointment is unknown but it seems that the powers under the rules to refer disputes to arbitration are rarely used.

The survey also revealed that there were a wide

variety of disputes referred to arbitration. The main ones being company/commercial and contract matters (30%), lease and rent reviews (27%), building and construction (18%) and property (10%). There were two arbitrations each relating to joint ventures and cross-leases and one arbitration each for banking/finance, relationship property and share-milking.

There was also a large range of dollar values for arbitrations where ascertained amounts had been claimed. 48% of those domestic arbitrations were between \$30,000 and \$350,000, which would usually be within the civil jurisdiction of the District Court. 38% of them were between \$350,000 and \$3 million and 9% were for claims over \$3 million, both of which would fall within the High Court's civil jurisdiction. 30% of the arbitrations also included counterclaims.

The vast majority of arbitrations involved oral hearings with only 15% being heard on the papers. The length of time was provided for 29 completed arbitrations involving an oral hearing, which averaged approximately 11 months. This compares very favourably with the average times from the date of filing to disposal for general court proceedings. The Ministry of Justice advised the NZDRC that in 2021 the average disposal times were 877 days for the District Court and 836 days for the High Court. The length of hearing was provided for 46 arbitrations, which averaged under 3½ days. This again seems to show that oral hearings are generally conducted efficiently.

Overall, there is now empirical data to show that parties are currently using domestic arbitration in a wide range of commercial disputes and arbitrators are providing an efficient means to resolve them. It seems that one option to provide access to justice would be for parties involved in court proceedings to consider referring appropriate disputes to arbitration under the relevant court rules.

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## About the author



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Peter is a barrister and Fellow of the Arbitrators' and Mediators' Institute of New Zealand. He was the recipient of the Sir Ronald Davidson Award for excellence in arbitration award writing in 2020. He acts as counsel in civil and commercial disputes and also accepts appointments as a mediator and arbitrator.

# Australian court sets a high bar for challenges to arbitrators

By Leon Chung, Guillermo Garcia-Perrote and Samara Cassar

The Supreme Court of New South Wales has recently confirmed that, in Australia, the relevant test for challenges to the independence or impartiality of arbitrators is the 'real danger of bias' test, rather than the lower threshold of the 'reasonable apprehension of bias' test applicable at common law.

## Takeaway

Challenges to the independence or impartiality of arbitrators face a high bar in Australia. The relevant test requires a 'real danger of bias', which should be determined objectively based on existing circumstances (and not an evaluation of future matters or possibilities).

## The bias challenge

In *Hancock v Hancock Prospecting Pty Ltd* [2022] NSWSC 724, the applicants sought a declaration that there were justifiable doubts as to the impartiality and independence of one of the three arbitrators (the **bias challenge**). The arbitral tribunal had previously dismissed the challenge and the applicants applied to the Court under section 13 of the *Commercial Arbitration Act 2012* (WA) (**CCA**).

The bias challenge was based on three circumstances stemming from the fact that nearly twenty years prior, the arbitrator's wife worked for

a law firm which now represented the defendant. The three circumstances were as follows:

- i. First, the arbitrator's wife, then a solicitor, attended and took file notes of certain meetings involving the parties.
- ii. Secondly, the firm where the arbitrator's wife worked as a solicitor had allegedly given defective advice.
- iii. Thirdly, the arbitrator had been briefed by his wife (in her capacity as solicitor) in a related procedural aspect of the matter.

Essentially, the applicants argued that the arbitrator may consciously or subconsciously resist accepting the plaintiff's submissions because it would involve an implied criticism of his wife.

## The decision

The Court dismissed the bias challenge based on the following analysis of the 'real danger' test.

**The 'real danger' test imposes a high threshold for bias challenges.**

The CCA (and its identical iterations across Australia)<sup>[1]</sup> provides that:

- a potential arbitrator has an ongoing duty to disclose anything which is 'likely to give rise to justifiable doubts' as to their impartiality or independence;<sup>[2]</sup>
- 'justifiable doubts' is only reached if 'there is a real danger of bias'.<sup>[3]</sup>

In this case, the Court confirmed<sup>[4]</sup> that the relevant test for bias challenges is the 'real danger of bias' test adopted by the House of Lords in *R v Gough*,<sup>[5]</sup> which sets a higher threshold than the common law test of 'apprehend bias'.<sup>[6]</sup> In this regard, the Court referred to the notion that the higher threshold contributes to the promotion of arbitration in Australia, in the sense that the reasons for the adoption in the CCA of a higher threshold than the test applicable at common law, include the fact that bias challenges are often used as a tactical tool in international arbitration.<sup>[7]</sup>

[1] See, for example, *Commercial Arbitration Act 2010* (NSW) s 12(3); *Commercial Arbitration Act 2013* (Qld) s 12(3); *Commercial Arbitration Act 2011* (Tas) s 12(3).

[2] *Commercial Arbitration Act 2012* (WA) s 12(3).

[3] *Commercial Arbitration Act 2012* (WA) s 12(6).

[4] [2022] NSWSC 724 [20].

[5] *R v Gough* [1993] AC 646.

[6] The test is set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

[7] [2022] NSWSC 724 [16-20].

## The Court's analysis

In relation to the circumstances giving rise to the bias challenge, the Court found as follows:

- As a starting point, the standard for a successful challenge is a high one. In the case at hand, it was relevant that the conduct allegedly giving rise to a risk of bias occurred twenty years ago.
- As to the wife's role as a solicitor, there was no evidence that she had any material involvement in the preparation of the advice (indeed, the arbitrator's wife was not stated to be an author of the advice, and no time recordings were produced to demonstrate her specific involvement).
- As to the briefing of the arbitrator, there was no evidence of what the brief contained or what the arbitrator was told. The Court considered that it was significant that the arbitrator disclosed that he had no recollection of being briefed. In the absence of evidence of the brief, the risk of bias was small particularly given that the brief dated back to 1995.
- In concluding that there was no risk of actual bias, the Court explained that the test is concerned with the *'objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to (all of) the questions to be determined.'*<sup>[8]</sup> In particular, the Court rejected the submissions based on the *'negligible'* risk that the arbitrator's wife would give evidence in the case, explaining that challenges to the independence and

[8] [2022] NSWSC 724 [20].

impartiality of an arbitrator are adjudicated against existing circumstances, not hypothetical scenarios.

This article was first published on the Herbert Smith Freehills blog on 28 July 2022 available [here](#).

For more information, please contact Leon Chung, Partner, Guillermo García-Perrote, Executive Counsel, and Samara Cassar, Solicitor, or your usual Herbert Smith Freehills contact.

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Te Pokapū Whakataunga Taiao o Aotearoa

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