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Recent Amendments to New Zealand's Arbitration Act

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Judicature modernisation reforms, which passed through New Zealand's Parliament in October, represent the most significant revamp of the country's court system since the Judicature Act 1908.

In addition to several changes to court structures and processes, the reforms made two modest amendments to New Zealand's Arbitration Act 1996 (the *Act*).

First, the definition of "*arbitral tribunal*" has been widened to include an emergency arbitrator.[1] The significance of this amendment remains to be seen. Emergency arbitrators have not yet been widely used in New Zealand, if they have yet been used at all. This is partly due to the fact that many New Zealand arbitrations are *ad hoc*, and hence not conducted pursuant to institutional rules providing for emergency arbitrator appointment and powers.

It is also due to the ready assistance offered to arbitration by New Zealand courts, including with respect to interim measures decisions. It will often be most practical to apply directly to a New Zealand court if urgent interim relief is required at or before the commencement of arbitration proceedings. In *Safe Kids v McNeill* [2012] 1 NZLR 714, the High Court held that a New Zealand court's power to order interim measures in support of an arbitration was (due to s 9 of the Act) co-extensive to that of an arbitrator (that is, confined to the powers in arts 17 to 17B of the Act's First Schedule). New Zealand courts have also confirmed their power to make *ex parte* interim orders in support of arbitration agreements: see *Discovery Geo v STP Energy Pte Ltd* [2013] 2 NZLR 122.

Secondly, by a new s 6A, the Minister of Justice is required to appoint a "*suitably qualified body*" in place of the High Court to resolve issues relating to arbitrator appointments under art 11(3) to (6) of Schedule 1 to the Act.[2] The Minister is yet to appoint the relevant body. The most suitably qualified body would, however, appear to be the Arbitrators' and Mediators' Institute of New Zealand (*AMINZ*), which has expressed its interest in the appointment.

The amendments come into force on 1 March 2017.

A question for New Zealand now is whether to make more decisive amendments to the Act. AMINZ has been advocating, and the New Zealand Ministry of Justice has been considering, other possible changes, including extending the presumption of confidentiality in arbitration to the conduct of related court proceedings (such as set aside applications and appeals on questions of law). To date, the New Zealand Law Commission has not been persuaded of the need for change, but New Zealand's otherwise commendable "confidentiality code" (ss 14 to 14I of the Act) is arguably out of step with jurisdictions such as Singapore, Hong Kong, and even England, which

provide greater assurance of arbitral confidentiality in the context of satellite litigation. No decision has yet been reached, but it is understood the issue is presently under active consideration.

Beyond this, the authors have suggested, including at a recent AMINZ conference to mark the 20th anniversary of the Act, that it might now been time to look again at the question of law appeal mechanism. This is contained in the optional Second Schedule to the Act, which applies on an opt-out basis to domestic arbitrations, and on an opt-in basis to international arbitrations. Where it does apply, parties frequently find that they have opted into (or failed to opt out of) the *possibility* of an appeal on a question of law, but with the need then to endure a leave to appeal process in order for the High Court to determine whether or not an actual appeal shall lie. This process can be lengthy, including due to overlapping applications (both to the High Court and Court of Appeal) for leave to appeal from refusals to grant leave to appeal on a question of law!

There are also signs, such as in the recent *Solarix* decisions ([2015] NZHC 1474 and [2016] NZHC 1303), that an arbitral tribunal's contractual interpretation decisions may be susceptible to characterisation as legal conclusions, which can then be appealed. The classic New Zealand authority remains *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA), which has worked well to prevent excessive recourse to the leave to appeal mechanism to collaterally attack an arbitral tribunal's conclusions. It is arguable, however, that further improvement is now desirable.

The next reform step for New Zealand arbitration law may accordingly be to consider whether the limited appeal mechanism can be made more targeted and refined, so that it reliably provides a concise and efficient avenue of recourse for parties which want it in respect of genuine legal questions.

[1] Arbitration Amendment Act 2016, s 4 (amending s 2(1) of the Arbitration Act).

[2] Arbitration Amendment Act 2016, ss 5 and 6.

This entry was posted on Monday, November 28th, 2016 at 3:50 pm and is filed under Arbitration, Arbitration Act, New Zealand
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