

# Kluwer Arbitration Blog

## Arbitration Law Reform in New Zealand: A Lesson in Competing Values

Jack Wass (Stout Street Chambers) · Tuesday, May 21st, 2019

### Introduction: the Arbitration Amendment Act 2019

Arbitration law reform is often portrayed in terms of relentless progress towards enlightenment: towards greater party autonomy, increased efficiency, reduced judicial interference, and more certain enforcement. In important areas of arbitral law and practice, that is an accurate narrative: the acceptance of the principles of Kompetenz-Kompetenz and separability, for example, or the adoption of the New York Convention and the resulting robust obligation to recognise and enforce foreign arbitral awards, have done much to contribute to the vitality and effectiveness of arbitration as a method for dispute resolution.

But relentless attempts to bolster and entrench the role of arbitration can conceal competing values and perspectives, particularly when law reform is conceived and pursued from the viewpoint of arbitration practice. New Zealand's latest attempt in the [Arbitration Amendment Act 2019](#), which came into force on 8 May 2019, demonstrates both the potential and the limitations of arbitral law reform.

### The Proposed Reforms in the Arbitration Amendment Bill

The Amendment Act was introduced as a Member's Bill in 2017 to amend four aspects of arbitration law in New Zealand: (1) to give effect to arbitration clauses in trust deeds, (2) to extend the confidentiality that applies in arbitral proceedings to a rebuttable presumption that any court proceedings arising out of the arbitration will also be confidential, (3) to correct what was seen as a troublesome precedent from the New Zealand Supreme Court on the setting-aside provisions of the Act, and (4) to require that challenges to a tribunal's decision on jurisdiction must be brought immediately (and not at the end of the proceedings), to forestall the adoption in New Zealand of the Singapore Court of Appeal decision in *PT First Media TBK v Astro Nusantara International BV [2013] SGCA 57*.

A stated purpose of the reforms was to make New Zealand a more attractive venue for international arbitration.

### Majority of the Bill Rejected

The Amendment Act had a rocky journey through the House. Despite a number of submissions in support of the Bill, the [Ministry of Justice Report to the Select Committee](#) was overwhelmingly

negative and recommended that the Select Committee reject all of the proposed amendments.

After taking the unusual step of seeking further submissions on the Departmental Report, and seeking specialist advice from a former High Court Judge, the Select Committee agreed with the Ministry of Justice on major elements of the Bill. It found that provision for arbitration of trust disputes should be left out of the Bill (to be addressed in the Trusts Bill currently before Parliament) and that the current presumption in favour of open justice in cases arising out of arbitration should remain.

What was left were more modest reforms to the setting-aside rules and the waiver provision.

### **The Challenges of Law Reform**

The confidentiality issue is a classic example of a contest in policy values. The explanatory note to the Bill, as introduced, recorded that other jurisdictions had struck the balance between confidentiality and open justice by requiring confidentiality by default; the Bill intended that by following this approach New Zealand would become a more attractive venue for international arbitration.

The Select Committee noted<sup>1)</sup> that open justice was a ‘fundamental part of New Zealand’s justice system as it facilitates public scrutiny of the courts and acts as a safeguard for the proper administration of justice.’ Although the Select Committee considered a more modest compromise, it was not satisfied that abrogating this principle could be justified in the hope of attracting more parties to arbitrate in New Zealand.

This proposed amendment demonstrates the challenges and tensions produced by regulatory competition between countries that wish to develop a reputation as a place to host international arbitrations. It is assumed – with some justification – that any attempt to challenge the pre-eminence of Singapore and Hong Kong in this part of the world must include giving the users what they want, and what they want is said to include confidentiality.

While concerns about provision for investor-state dispute resolution provisions in the (now) Comprehensive and Progressive Agreement for Trans-Pacific Partnership did not prevent its adoption, there remains anxiety in many quarters about the relationship between international arbitration and democratic values which is likely to have weighed on the Select Committee in considering how to balance the policy considerations raised by the Bill.

### **Postscript – the Process for Appointing Arbitrators**

The reform process did allow Parliament to reform one particularly unfortunate provision of New Zealand’s former arbitration law.

As enacted, the Arbitration Act 1996 supplemented Article 11 of the UNCITRAL Model Law with a special procedure for appointing arbitrators in cases where the parties could not agree. (This provision applied on an opt-out basis for domestic arbitrations and an opt-in basis for international arbitrations).

This clause provided that where one party was in default (for example, by refusing to nominate an arbitrator) the other party could give a notice to remedy the default within 7 days failing which the arbitrator nominated by the notifying party would be appointed by default. That procedure was

adopted from the Australian Uniform Commercial Arbitration Acts.

However the New Zealand Parliament extended the application of that procedure beyond cases of true default to cases where the parties simply could not agree. This meant that a party who was discussing a choice of arbitrator in good faith could be gazumped by the other party. This ‘quick draw’ process was universally condemned and described by one judge as ‘bordering on repugnant’.<sup>2)</sup>

Although the Bill as introduced did not address this issue, the Select Committee was convinced by submissions that it needed to be confronted and a new clause was introduced late in the Parliamentary process to repeal it. The position is now that where the parties cannot agree on the appointment of an arbitrator, either can request that an independent body choose the arbitrator according to published criteria.

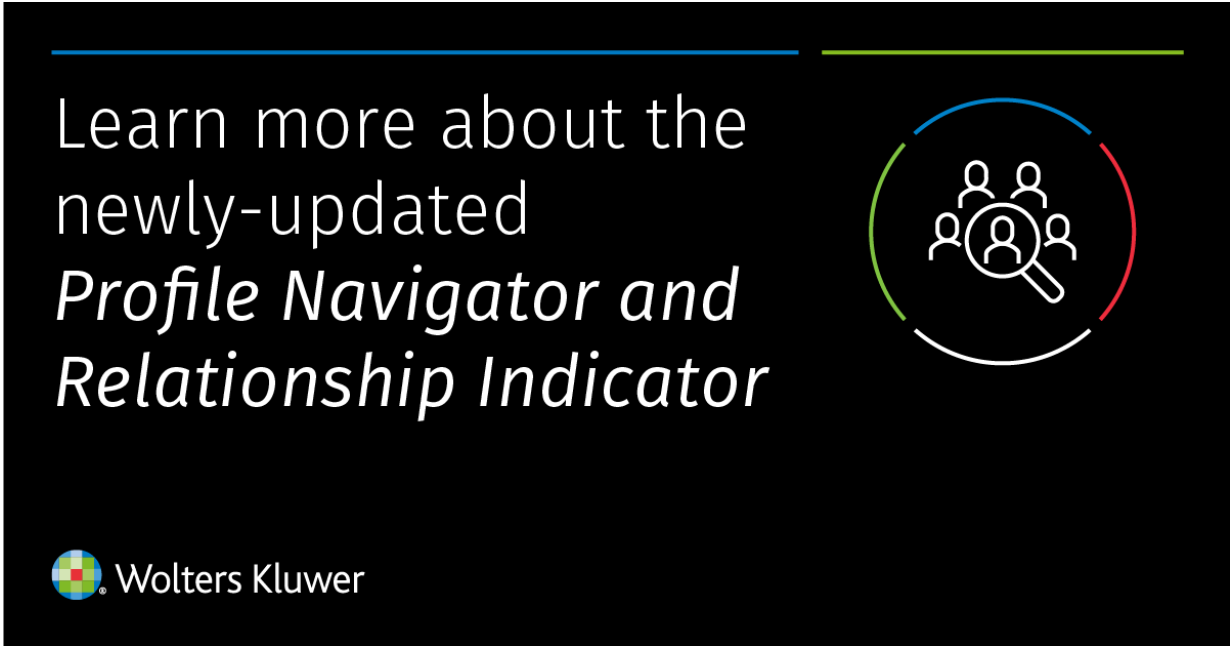
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References

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?1 At page 2 of its [report](#).

?2 Body Corporate 200012 v Naylor Love Construction Ltd, unreported, 26 April 2017.

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