

# **Arbitration Amendment Bill**

Member's Bill

## **Explanatory note**

### **General policy statement**

The purpose of this Bill is to amend the Arbitration Act 1996 (the **Act**) to ensure arbitration clauses in trust deeds are given effect to extend the presumption of confidentiality in arbitration to a rebuttable presumption of confidentiality in related court proceedings under the Act, to clearly define the grounds for setting aside an arbitral award and bring New Zealand's approach into line with foreign arbitration legislation, and to confirm the consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction.

The nature of trusts has resulted in uncertainty as to whether an arbitration conducted pursuant to an arbitration clause in a trust deed would be binding under the Act. This uncertainty limits the effective use of arbitration in trust disputes and it can be removed by ensuring that arbitration clauses in trust deeds are treated as arbitration agreements for the purposes of the Act. By clarifying that arbitral tribunals have the same power as the High Court to appoint persons to conduct litigation on the part of minor, unborn, or unascertained beneficiaries (or classes of beneficiaries), those who are unable to represent themselves will be effectively represented ensuring that any decision of an arbitral tribunal will bind all interested parties. Arbitration can be a suitable mechanism for resolving disputes involving trusts as its inherent privacy is more suited to the private nature of most trusts.

The current default position under section 14F is that court proceedings on arbitral matters are to be public. This approach is inconsistent with the confidentiality normally afforded to arbitral proceedings and with other international legislative approaches that seek to preserve such confidentiality. Other jurisdictions have struck the balance between open justice and confidentiality of arbitral proceedings in a way that preserves confidentiality by default. Section 14F is also inconsistent with the move to preserving the privacy of arbitral proceedings in the Arbitration Amendment Act 2007. Reforming section 14F by introducing a rebuttable presumption of confidential-

ity will support the existing principles under section 5 by making New Zealand a more attractive destination for international arbitration.

Articles 34 and 36 of Schedule 1, concerning the enforceability of an arbitral award, were in issue in the Supreme Court of New Zealand decision of *Carr v Gallaway Cook Allan* [2014] NZSC 75 where the definition of “arbitration agreement” was disputed. The Supreme Court decision highlighted the need for amendment to these articles to move in line with the foreign approaches to the adoption of the Model Law provisions. The narrowing of articles 34(2)(a)(i) and 36(1)(a)(i) will limit the Court’s scope to set aside or not recognise/enforce an arbitral award which might otherwise be unenforceable due to procedural provisions being in conflict with the Act in circumstances where there is clear agreement of the parties to submit a dispute to arbitration. The proposed amendment adopts language different from the Model Law but is the minimum change necessary to correct the problem raised in *Carr*.

Amendments to articles 34(2)(a)(iv) and 36(1)(a)(iv) would address the views of the majority in *Carr* that the language regarding non-derogation in article 34(2)(a)(iv) has no wider application beyond Schedule 1, and would bring New Zealand law into line with foreign legislation. The article 34(2)(a)(iv) equivalents in Australian legislation (International Arbitration Act 1974 and the Commercial Arbitration Acts in each State), Hong Kong’s Arbitration Ordinance 2011, and the Singapore International Arbitration Act 1994 apply to the entire Act, not only the Model Law parts of it like our Act. The current limitation under the Act to derogation under Schedule 1 only is flawed and the amendment would ensure that the principle of non-derogation is given proper effect in setting aside and enforcement proceedings.

Clearly defining the consequence of not raising an objection to an arbitral tribunal’s jurisdiction to hear and determine a dispute in accordance with article 16(3) of Schedule 1 will ensure that objections are raised in a timely manner and cannot be heard or given effect to out of time.

### Clause by clause analysis

*Clause 1* is the Title clause

*Clause 2* is the commencement clause. The Bill comes into force on the day after the date on which it receives the Royal assent.

*Clause 3* provides that the Bill amends the Arbitration Act 1996 (the **principal Act**).

*Clause 4* inserts *new section 10A*, which deems arbitration clauses in trust deeds are to be considered as arbitration agreements under the principal Act and which gives arbitral tribunals the power to appoint representatives to conduct litigation on the part of minor, unborn, or unascertained beneficiaries (or classes of beneficiaries).

*Clause 5* replaces section 14F (which provides that Court proceedings under the principal Act are, by default, to be conducted in public) with a *new section 14F* that extends the presumption of confidentiality in respect of arbitrations to cover related court proceedings under the principal Act.

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*Clause 6* amends Schedule 1 by inserting *new article 16(4)*, which clarifies that the consequence of failing to raise an objection under article 16(3) in a timely manner is that the right to later challenge jurisdiction is waived. It also amends *article 34(2)(a)(i) and (iv)* to avoid arbitration agreements being set aside or held unenforceable by reason of their procedural provisions conflicting with the Act. The amendments also make the principal Act more consistent with foreign arbitration legislation and ensure that the principle of non-derogation is given proper effect in setting-aside and enforcement proceedings. It also amends *article 36(1)(a)(i) and (iv)* to reflect the amendments to *article 34*.



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#### **The Parliament of New Zealand enacts as follows:**

##### **1 Title**

This Act is the Arbitration Amendment Act **2017**.

##### **2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent. 5

##### **3 Principal Act**

This Act amends the Arbitration Act 1996 (the **principal Act**).

##### **4 New section 10A inserted (Validity of arbitration clauses in trust deeds)**

After section 10, insert: 10

**10A Validity of arbitration clauses in trust deeds**

- (1) It is lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause will be binding on all trustees, guardians, and any beneficiaries, or anyone claiming to be a trustee, guardian, or beneficiary, under the trust in relation to matters arising under or in relation to the trust as if it was an agreement under the Arbitration Act 1996. 5
- (2) Any tribunal appointed pursuant to an arbitration clause in a deed of trust has the same power of the High Court to appoint representatives to conduct litigation on the part of any minor, unborn, or unascertained beneficiary or class of beneficiaries. 10
- (3) Where an appointment is made under **subsection (2)**—
- (a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented; and
  - (b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented; and 15
  - (c) any award given in the trust arbitration will be binding on the person or class represented; and
  - (d) the costs of representation may be paid from property held on the trust subject to the arbitration and, for the avoidance of doubt, an arbitrator may order the payment of those costs by another party in the proceeding. 20

**5 Section 14F replaced (Court proceedings under Act must be conducted in public except in certain circumstances)**

Replace section 14F with:

- 14F Restrictions on reporting of proceedings heard otherwise than in open court** 25
- (1) A court must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (2) A court must make directions permitting information to be published in law reports and professional publications if—
- (a) all parties agree that the information may be published and the court is satisfied that the information if published would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential; or 30
  - (b) the court considers that such a judgment is of major legal interest.
- (3) If any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party, make a direction as to the action to be taken to conceal that matter in those reports, and may direct that the report may not be published until after the end of a period (being not more than 10 years) that the court may direct. 35

**6 Schedule 1 amended**

- (1) In Schedule 1, after article 16(3), insert:
- (4) For the avoidance of doubt, it is declared that the failure to submit a timely request to the High Court under paragraph (3) to decide the jurisdictional matter must operate as a waiver of any right later to challenge or call into question the ruling of an arbitral tribunal as to its jurisdiction. 5
- (2) In Schedule 1, replace article 34(2)(a)(i) with:
- (i) a party to the arbitration lacked capacity to arbitrate the dispute, or the parties' agreement to submit the said dispute to arbitration is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or 10
- (3) In Schedule 1, replace article 34(2)(a)(iv) with:
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or 15
- (4) In Schedule 1, replace article 36(1)(a)(i) with:
- (i) a party to the arbitration lacked capacity to arbitrate the dispute, or the parties' agreement to submit the said dispute to arbitration is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or 20
- (5) In Schedule 1, replace article 36(1)(a)(iv) with:
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or 25 30