

# **Arbitration Amendment Bill**

Member's Bill

As reported from the Justice Committee

## **Commentary**

### **Recommendation**

The Justice Committee has examined the Arbitration Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

This Member's bill is in the name of Andrew Bayly MP. As introduced, it seeks to amend the Arbitration Act 1996 to:

- make New Zealand consistent with other international legislative approaches, and a more attractive destination for international arbitration, by reversing the current rebuttable presumption of open proceedings
- resolve uncertainty regarding whether an arbitration clause in a trust deed would be binding under the Act
- limit the Court's scope to set aside or not recognise and enforce an arbitral award where procedural provisions conflict with the Act
- ensure objections to an arbitral tribunal's jurisdiction are raised in a timely manner and cannot be heard or given effect to out of time.

### **Validity of arbitration clauses in trust deeds**

We recommend deleting clause 4 from the bill. We are currently considering the Trusts Bill, a Government bill, which addresses the same broad concerns as this bill. Our view is that the Trusts Bill is better suited to consider the form of protections for unascertained or legally incompetent beneficiaries and avoids a possible issue about access to justice.

A key difference between the two bills is how they consider the position of the arbitral tribunal. The High Court exercises jurisdiction to supervise and intervene in the

administration of trusts; this bill would allow an arbitral tribunal to fulfil an aspect of this role to appoint representatives to act on behalf of certain beneficiaries who are unable to represent themselves.

In our view, the bill would create an access-to-justice issue as a beneficiary could be bound by a private process without providing consent. Only the settlor (or in some cases the trustees) would have provided consent to the arbitration agreement. This issue is resolved by our recommendation to delete clause 4.

### **Court proceedings under the Act must be conducted with the presumption of open justice**

We also recommend deleting clause 5 from the bill. We consider that the current regime for arbitration-related court proceedings strikes the appropriate balance between open justice and the private nature of arbitration.

As introduced, clause 5 of the bill would amend section 14F of the principal Act. The purpose of the clause is described as extending the presumption of confidentiality to cover court proceedings related to arbitration, and reversing the rebuttable presumption that arbitration-related court proceedings are to be heard in public. As drafted, the clause would require the court to make a direction regarding what, and in what ways, information relating to the proceedings may be published, and allow the court to make directions on how certain information may be withheld in publications and preventing publication of information for a period of time.

The current section 14F provides that, when arbitration ends up in court (for example, to enforce or challenge the outcome of arbitration), the presumption is that the proceedings will be held in public. The court can order a private hearing if a party applies, and where the public interest in a public hearing is outweighed. Before making an order for a private hearing, the Court must consider a number of factors under section 14H, including the open justice principle and the private nature of arbitration.

We consider open justice to be 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. Most court proceedings are open to the public.

We heard arguments from a range of submitters that in order to facilitate New Zealand becoming an attractive jurisdiction for international arbitral proceedings (as have been established in Hong Kong and Singapore, and more recently as proposed by the Asian Development Bank) protecting the confidentiality of international arbitration proceedings is considered very important. In order to not overturn the presumption of confidentiality, the committee considered an option to insert a new clause 14H to give a judge additional discretion to consider the specific aspect when determining whether the matter should be held in public. The committee did not accept the proposed amendment.

Labour members are of the view that these considerations are insufficient to displace the presumption of open justice.

## **Avoiding a late jurisdictional objection**

We recommend amending clause 6(1) to make it consistent with the provisions in article 16(3) of Schedule 1 of the principal Act. We consider the clause to be inconsistent with articles currently in Schedule 1, as the phrasing used makes it unclear when a party to arbitration must have raised an objection to the jurisdiction of an arbitration tribunal.

As introduced, clause 6(1) would insert new article 16(4) into Schedule 1 of the principal Act. Schedule 1 sets out Model Law. The purpose of the amendment is to avoid the possibility that a party could raise a late procedural challenge on jurisdictional grounds which could invalidate an award that had taken a lot of time and expense to arrive at. This change would encourage parties to try to solve the substantive point at issue.

Article 16(1) of Schedule 1 provides that an arbitral tribunal may rule on its own jurisdiction, including about any objections to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which is part of a contract is to be treated as an agreement independent from the contract's other terms. Any decision by the tribunal that the contract is null and void would not necessarily invalidate the arbitration clause.

Article 16(2) addresses the need for a party to promptly challenge a tribunal's jurisdiction. Any challenge must be raised no later than the submission of a statement of defence. Any objection based on a claim that a tribunal is exceeding the scope of its authority must be raised as soon as a party alleges such a matter to have occurred. However, if a delay in the timing of the challenge is justified, the arbitral tribunal may admit a later objection. A challenge may be resolved either as a preliminary question, or in an award on the merits.

Article 16(3) provides that the arbitral tribunal may rule on a challenge to its jurisdiction as either a preliminary question or in an award on the merits. If the tribunal rules on a jurisdictional plea as a preliminary question, a party may request (within 30 days of receiving notice of the ruling) that the High Court determine the issue without the ability to appeal the decision. While the decision is pending, the arbitral tribunal may continue the proceeding and make an award.

As introduced, clause 6(1) proposes to insert new article 16(4), which would provide that a 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. The phrasing does not sit well with current article 16(3). If parties have 30 days to request that the High Court determine the issue, and article 16(4) would only apply after article 16(3) had been initiated, it would be inappropriate to suggest that a request should be submitted earlier. The article would not apply when a party does not participate in the arbitration at all and reserves any jurisdictional points for an opposition to enforcement of any award.

We recommend amending the phrasing to “pursue a request made under paragraph (3) in a timely manner” so that any request made within 30 days would be consistent.

We note that this amendment would only affect a late challenge to jurisdiction.

### **Application to set aside as recourse against an award**

We recommend deleting clause 6(2) from the bill. The clause seeks to amend article 34 of Schedule 1, which sets out the grounds on which a party may apply for an award to be set aside by the Court if the agreement to arbitrate is not valid.

We consider that clause 6(3) would provide the Court with the discretion to use the proposed provision in appropriate cases, making clause 6(2) unnecessary. We also consider clause 6(2) an unnecessary departure from the Model Law.

While parties have considerable freedom to adopt tailored procedures to suit the nature of their agreement, they must comply with the mandatory provisions of the principal Act and its Schedules. The Court can rule an arbitration agreement invalid if it contains a procedural provision that conflicts with a mandatory provision.

As introduced, clause 6(2) seeks to amend article 34(2)(a)(i) to alter the meaning given to the term “arbitration agreement” (for the purposes of article 34). Changing the term would limit the consideration of procedural provisions by the Court when deciding the validity of an arbitration agreement. This is intended to refocus the attention of the Court on the parties’ capacity to enter into an agreement to arbitrate. We note that previous cases have shown that the focus of the Court may be on some incapacity arising from the arbitration agreement.<sup>1</sup>

We agree with the provisions in clause 6(3), which would amend article 34(2)(a)(iv), to replace a reference to “the Schedule” with “the Act”, as in the bill as introduced. This amendment would alter the benchmark for determining when the provision would apply. The principal Act sets out the Model Law provisions in a schedule which is then referred to in the article. This is different to a number of other jurisdictions which have not used a schedule, and instead the article refers to “the Law”.

Currently, awards are protected from a challenge when an arbitral tribunal changes its procedures to avoid violating a mandatory provision in Schedule 1. However, if an arbitral tribunal changes its procedures to avoid violating a mandatory provision elsewhere in the principal Act, an award would not be protected.

### **Grounds for refusing recognition or enforcement**

We recommend removing clause 6(4) from the bill. The clause seeks to amend article 36 of Schedule 1, which sets out the grounds on which a party may apply for an award to be refused recognition or enforcement by the Court if the agreement to arbitrate is not valid.

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<sup>1</sup> *Carr v Gallaway Cook Allan*.

As introduced, the bill proposes the same amendments to article 36 as it proposes to article 34. We consider that clause 6(5) would provide the Court with the discretion to use the proposed provision in appropriate cases, making clause 6(4) unnecessary.

### **Appointment process for arbitrators**

We received strong representations from submitters that clause 1(4) of Schedule 2 of the principal Act should be repealed. We have considered the issue and agree this is desirable. We recommend that the House consider inserting a new clause during the Committee of the whole House stage to effect the repeal.

Clause 1 of Schedule 2 sets out a default procedure for the appointment of arbitrators where the parties have reached no agreement as to the appointment. Clause 1(4) gives rise to a problematic aspect involving what has been called the “quick-draw procedure”. One party could trigger a process to appoint an arbitrator if the other party failed to respond to a communication within seven days of receiving it. The Courts have expressed concern that this situation can result in the “task of appointing an arbitrator [becoming] nothing more than a race to issue the first default notice”. In one case, a Court described the quick-draw procedure as “bordering on repugnant that genuine disputes should be resolved by unilateral notices”.

The Law Commission recommended in 2003 that the procedure be abolished. This did not occur, because of concerns that there would not have been an alternative procedure to follow apart from court proceedings. However, following an amendment effected by the Arbitration Amendment Act 2016, appointments can now be made by the Arbitrators’ and Mediators’ Institute of New Zealand. Thus, a quick and independent means by which an arbitrator can be appointed now exists, removing the need for a quick-draw procedure.

### **Concern that the proposed repeal is out of the bill’s scope**

We are concerned, however, that repealing the provision would be outside the bill’s scope. We consider the bill’s provisions to be relatively narrow at introduction, and that the bill could not be described as a general amendment bill. If the House adopts our recommendations to remove a number of substantive provisions, the bill would be even more specific.

The bill does not currently deal with the process for appointing arbitrators, nor does it amend Schedule 2 of the Act in any other way. For this reason, the proposed repeal of clause 1(4) of Schedule 2 of the principal Act appears to be outside the scope of the bill.

We have asked the Business Committee (under Standing Order 301(1)(b)) to extend the powers of the Committee of the whole House in considering the Arbitration Amendment Bill. This would allow it to consider amendments relating to the repeal of clause 1(4) of Schedule 2 of the principal Act. The member in charge of the bill was present when we considered this matter, and supported our request.

The Business Committee determined on 25 September 2018 that such an amendment could be considered by the House.

## Appendix

### Committee process

The Arbitration Amendment Bill was referred to the Justice and Electoral Committee of the 51st Parliament on 10 May 2017. The committee called for submissions with a closing date of 22 June 2017.

The bill was reinstated with the Justice Committee in the current Parliament on 8 November 2017.

Initially we received and considered 16 submissions from interested groups and individuals and heard oral evidence from four submitters. We decided to seek further submissions and made an interim report to the House on 6 April 2018, releasing the departmental report to help inform these submissions. We received four extra submissions by the closing date of 26 April 2018 and heard from those submitters.

We received advice from the Ministry of Justice and from an independent adviser, Paul Heath QC.

### Committee membership

Raymond Huo (Chairperson)

Ginny Andersen

Hon Maggie Barry

Chris Bishop

Hon Mark Mitchell

Greg O'Connor

Priyanca Radhakrishnan (until 15 August 2018)

Hon Dr Nick Smith

Dr Duncan Webb (from 15 August 2018)

Andrew Bayly was present throughout consideration of this bill.

**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Andrew Bayly*

## **Arbitration Amendment Bill**

Member's Bill

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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**

- (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. 25
- (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
- (4) To avoid doubt, it is declared that the failure to pursue a request made under paragraph (3) in a timely manner operates as a waiver of any right to later object to a ruling of the arbitral tribunal as to its jurisdiction.
- (2) In Schedule 1, replace article 34(2)(a)(i) with: 10
  - (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~~ 15
- (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 20
- (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~~ 25
- (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 30

**Legislative history**

9 March 2017  
 10 May 2017  
 8 November 2017

Introduction (Bill 245–1)  
 First reading and referral to Justice and Electoral Committee  
 Reinstated and allocated to Justice Committee