ARBITRATION IN NEW ZEALAND

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International arbitration is growing in importance as a dispute forum in New Zealand as it is around the world. Arbitration clauses in private contracts that cross borders, in international investment treaties, and as a forum for resolving other international disputes, including on climate change issues, have increased the prevalence of international arbitration. These trends, coupled with the fact that an increasing number of New Zealanders are practicing in the area both on and off-shore, make it timely to take a snapshot of the New Zealand environment for arbitration.

SNAPSHOT - TRENDS IN NEW ZEALAND

Arbitration is alive and well in New Zealand, and growing.

Preferred forum: Arbitration is favoured for dispute resolution for corporate clients, both for their domestic contracts and with counterparties based overseas.

Consistency of approach: New Zealand courts routinely promote consistency with international arbitral regimes; a trend endorsed by New Zealand's Arbitration Act 1996.

Investment treaty arbitration: New Zealand is gaining increasing exposure through free trade agreements.

An appealing venue: A growing number of international arbitrations are being held in New Zealand.

Overseas experience: Increasing numbers of New Zealand-based practitioners are working offshore and bringing home significant experience in international and institutional arbitral rules.

International trends: Some of the efficiencies and approaches taken in international arbitration are now being applied in domestic arbitrations conducted under New Zealand's Arbitration Act.

THE APPROACH OF COURTS TO ARBITRATION

New Zealand courts are highly supportive of and deferential to arbitrations. Foreign-based counterparties and their counsel should be confident about the prospect of holding an arbitration in New Zealand, or in seeking New Zealand court assistance in relation to international arbitrations. There are a number of recent examples.

OBTAINING ARBITRATION EVIDENCE

New Zealand courts will assist in obtaining evidence for arbitration. In *Dalian Deepwater Developer v Dybdahl* (2015), the High Court used its powers under the Evidence Act to issue a subpoena requiring an unwilling witness, based in New Zealand, to give evidence for the purposes of a LCIA arbitration in London. In doing so, the High Court recognised an international arbitral tribunal as a "requesting court" for the purposes of the Evidence Act. In another case, the High Court used its powers under the Arbitration Act to order non-party discovery of market pricing information for the purposes of a domestic arbitration of a gas contract dispute. (See: *Vector Gas Contracts v Contact Energy* (2014)).

PROCEDURAL DECISIONS

Courts will respect procedural decisions of international arbitral tribunals. In *Greymouth Petroleum Holdings v Empresa Nacional Del Petróleo* (2017), the Court of Appeal refused to allow a party to an international arbitration (being held before the International Court of Arbitration in Chile) to search the New Zealand court file for documents arguably relevant to the arbitral proceedings. A key factor influencing this decision was that the arbitral tribunal had declined a request for discovery of these documents for failure to establish relevance and materiality. The Court noted that a situation of comity exists between a New Zealand court and an international arbitral tribunal.

THE APPROACH OF COURTS TO ARBITRATION

ARBITRATION v COURT PROCEEDINGS

Stays of court proceedings in favour of arbitration are regularly ordered. For example, in *Danone Asia Pacific v Fonterra Co-operative Group* (2014), the Court of Appeal upheld a decision of the High Court ordering a stay of proceedings in favour of an international arbitration involving a different but related defendant, in circumstances where similar facts were at issue in the international arbitration. Another example is *Cranium Adspace v British American Tobacco (New Zealand)* (2016). In another case, the Supreme Court (New Zealand's highest court) held that the Arbitration Act generally requires courts to determine an application seeking a stay in favour of arbitration before determining an application for summary judgment (*Zurich Australian Insurance v Cognition Education* (2014)). The Supreme Court noted that this interpretation is consistent with New Zealand's international obligations under the New York Convention and with the statutory purpose of promoting consistency with international arbitral regimes.

REVIEW OF ARBITRAL AWARDS

New Zealand courts will not readily set aside awards for alleged breaches of natural justice or conflict with public policy. This approach invokes the Arbitration Act's purpose of ensuring finality of arbitral awards and limiting curial intervention in arbitrations.
In *Kyburn Investments v Beca Corporate Holdings* (2015), the Court of Appeal confirmed that a breach of natural justice does not automatically lead to the setting aside of an award. The Court has discretion, and will take into account the magnitude of the breach and the extent to which it might have affected the outcome.

BELL GULLY'S ARBITRATION TEAM

Our arbitration specialists sit within the broader Bell Gully litigation team, widely acknowledged as the strongest in New Zealand. The team deals with complex and contentious commercial disputes in all areas. Recently, the Bell Gully team acted for the Danone Group in its successful international arbitration against Fonterra held in Singapore under the UNCITRAL rules.

We routinely conduct both domestic and international arbitrations and have experience not only with our Arbitration Act (based on the UNCITRAL Model Law) but with arbitrations under the ICC Rules, UNCITRAL Arbitration Rules and LCIA Rules, amongst others.

Our team helps to facilitate the New Zealand end of international disputes including working alongside overseas counsel for the taking of evidence, enforcing discovery obligations, and advising on interim measures.

We frequently engage with our internationally based colleagues on issues and disputes involving New Zealand companies and/or New Zealand law.

We act in international arbitrations as lead or co-counsel, particularly where there are New Zealand parties or legal issues.

Our team have an extensive network of local and international contacts that we can use for both party appointed arbitrators and tribunal chairpersons.

We have an important and growing practice advising on investment treaty arbitration issues.

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