



Arbitration Amendment Bill

Interim report of the Justice Committee

April 2018

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Arbitration Amendment Bill

Recommendation

The Justice Committee is considering the Arbitration Amendment Bill and recommends that the House take note of its interim report on the bill.

Release of departmental report

We have received the departmental report on the Arbitration Amendment Bill. In order to allow further feedback from submitters on the contents of this report we have decided to make this interim report to the House, attaching a copy of the report.

Appendix A

Committee process

The Arbitration Amendment Bill was referred to the committee on 8 November 2017. The closing date for submissions was 22 June 2017. We received and considered 16 submissions from interested groups and individuals. We heard oral evidence from 4 submitters.

We received advice from the Ministry of Justice.

Committee members

Raymond Huo (chairperson)
Chris Bishop
Greg O'Connor
Ginny Anderson
Hon Maggie Barry
Hon Mark Mitchell
Hon Dr Nick Smith
Priyanca Rahakrishnan

Appendix B

Advice received from the Ministry of Justice

The Ministry's departmental report is attached.

Departmental Report for the Justice Committee

Arbitration Amendment Bill



New Zealand Government

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Introduction

The Bill and its scope

1. The Arbitration Amendment Bill (the Bill) is a Member's Bill in the name of Andrew Bayly, MP for Hunua. The Bill makes amendments to the Arbitration Act 1996 (the Act). The purpose of the Bill, as set out in the Explanatory Note, is to amend the Act to:
 - resolve uncertainty regarding whether an arbitration clause in a trust deed would be binding under the Act
 - make New Zealand consistent with other international legislative approaches by reversing the current rebuttable presumption of open proceedings which will make New Zealand a more attractive destination for international arbitration
 - limit the Court's scope to set aside or not recognise/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.

Submissions received on the Bill and our analysis

2. The Justice Committee received submissions from 10 submitters, with some submitters also providing supplementary information at the oral hearings. A list of submitters is set out in Annex One.
3. Seven submitters unconditionally supported the Bill. One submitter supported one purpose of the Bill without mentioning the others, and one submitter opposed one part of the Bill without mentioning the others. One submitter did not state whether or not they supported the Bill. Most submitters considered drafting amendments were required and several provided suggestions.
4. This report provides information on issues the Bill raises and an analysis of the submissions, and advice from the Ministry of Justice, by clause.

Nora Burghart
Policy Manager, Ministry of Justice

Summary of recommendations

#	Clause	Matter	Recommendation
1	2	Commencement	We recommend, if required, transitional provisions should be drafted that provide for arbitration proceedings that are in progress at the time the Bill comes into force.
2	4	Validity of arbitration clauses in trust deeds	We recommend clause 4 is removed from the Bill.
3	5	Restrictions on reporting of proceedings heard otherwise than in open court	We recommend clause 5 is removed from the Bill.
4	6(1)	Ensuring timely objections	We recommend clause 6(1) is removed from the Bill.
5	6(2)	Validity of an arbitration agreement	We recommend the amendments in clause 6(2) that substitute the meaning of “arbitration agreement” in article 34(2)(a)(i) are removed from the Bill.
6	6(4)		We recommend the amendments in clause 6(4) that substitute the meaning of “arbitration agreement” in article 36(1)(a)(i) are removed from the Bill.
7	6(3)	Widening the scope of article 34(2)(a)(iv)	We recommend clause 6(3) is removed from the Bill.
8	6(5)	Changing the application of article 36(1)(a)(iv)	We recommend the amendments in clause 6(5) that change the application of article 36(1)(a)(iv) are removed from the Bill.
9	6(5)	Adding a savings provision to article 36(1)(a)(iv)	We recommend the amendments in clause 6(5) that add a savings provision to article 36(1)(a)(iv) are removed from the Bill.
10	6(2)	Amendments to Schedule 1 that are not explained	We recommend the wording changes in clauses 6(2) that amend the concept of “incapacity” in article 34(2)(a)(i) are removed from the Bill.

#	Clause	Matter	Recommendation
11	6(4)		We recommend the wording changes in clause 6(4) that amend the concept of “incapacity” in article 36(1)(a)(i) are removed from the Bill.
12	6(4)		We recommend the wording changes in clauses clause 6(4) that narrow the application of article 36(1)(a)(i) are removed from the Bill.
13	-		We recommend, if required, the Parliamentary Counsel Office be authorised to make other minor drafting corrections or consequential amendments.
14	-		We recommend the Committee note recommendations made in this Report are subject to advice from the Parliamentary Counsel Office about the best approach to draft amendments.

Issues raised by the Bill

5. The Bill raises three substantive issues that are discussed in turn:
 - the relationship between the Bill and the Trusts Bill (clause 4)
 - whether the presumption of open justice should be reversed (clause 5)
 - whether the Model Law should be amended (clause 6).

Issue 1: Arbitration clauses in trust deeds

6. Clause 4 of the Bill amends the Act to ensure arbitration clauses in trust deeds are given effect. This is to resolve uncertainty as to whether an arbitration clause in a trust deed would be binding under the Act.
7. The Clause also provides arbitral tribunals with the power to appoint representatives to act on behalf of certain beneficiaries who are unable to represent themselves. Arbitral tribunals must approve any settlement with represented beneficiaries under this clause.

Comment

8. The Trusts Bill covers the same broad concerns that are outlined in the Explanatory Note of the Bill. The Trusts Bill makes Alternative Dispute Resolution (ADR), which includes arbitration, more clearly available and effective in resolving trust disputes. Our view is that the Trusts Bill better and more comprehensively addresses the issues raised in this Bill.
9. The High Court currently has inherent jurisdiction over trust issues and this approach is retained in the Trusts Bill. The High Court oversees the proper administration of trusts due to the complex nature of trust issues and the history of case law that exists in this area. We consider it is inappropriate to give the arbitral tribunal the same responsibility as the High Court in these instances.
10. Clause 4 is discussed in more detail at paragraphs 28 to 47.

Issue 2: Making court proceedings private by default

11. Clause 5 of the Bill amends section 14F of the Act. It aims to extend the presumption of confidentiality in respect of arbitrations to cover related court proceedings and reverse the rebuttable presumption that arbitration related court proceedings will be heard in public.
12. 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, including the open justice principle and the private nature of arbitration.

Comment

13. Open justice is a fundamental part of New Zealand's justice system. It facilitates public scrutiny of the courts and acts as a safeguard for the proper administration of justice.
14. Most courts and court proceedings are open to the media and the public but there are some exceptions to this rule. For example, the public is excluded when complainants in sexual abuse cases give evidence. In addition, the Family Court is known as a closed court, meaning that the public is generally excluded. The rationale behind this is the private and personal nature of the disputes.
15. We consider that the current regime for arbitration related court proceedings strikes the appropriate balance between open justice and the private nature of arbitration. Arbitration is conducted in private to protect commercial confidentiality and allow parties to maintain business relationships. We do not consider that these reasons are sufficient to justify the reversal of the open justice principle for all arbitration related court proceedings. We note that in the commercial context, in cases concerning the Commerce Act 1986, the court retains its discretion to order proceedings to be heard in private.

Issue 3: Amending the Model Law

16. Clause 6 of the Bill proposes a number of changes to the Model Law, set out in Schedule 1 of the Act. The overall purpose of the amendments is to support the endurance of awards by further limiting the grounds for judicial involvement.

Comment

17. The Model Law was developed by the United Nations Commission on International Trade Law (UNCITRAL) and reflects worldwide consensus on the conduct of international arbitral practice. A total of 75 States have implemented legislation based on the Model Law. This has allowed the development of a Digest of Case Law which promotes international consistency and uniform interpretation, by providing references to decisions made in different jurisdictions.
18. States are encouraged to make as few changes as possible when incorporating the Model Law into their legal systems. However, the Model Law as set out in Schedule 1 of the Act has been amended to take into account New Zealand specific circumstances and needs.
19. The first of the changes was in response to the 1991 report of the Law Commission that recommended the introduction and enactment of a new Arbitration Act. Some substantive modifications were recommended. The Law Commission considered these



changes were necessary, but also consistent with the spirit and the structure of the Model Law.

20. The second set of changes to the Model Law in the Act was in response to the 2006 revisions recommended by UNCITRAL. The revisions ensured the Model Law conformed to current practices in international trade and contracting.
21. Amending the Model Law as set out in the Act creates New Zealand specific law and, over time, New Zealand specific jurisprudence. We consider the proposed amendments are not necessary and many are inconsistent with the spirit of the Model Law. We consider changes to the Model Law requires careful consideration. In the past, this consideration has been undertaken by the Law Commission.

Submissions and advice from the Ministry of Justice by clause

Clause 1 Title

22. No submissions were received on clause 1 and no changes are recommended.

Clause 2 Commencement

23. This Act comes into force on the day after the date it receives Royal assent.
24. No submissions were received on clause 2.

Comment

25. We note that there may be arbitration proceedings that are in progress on the date after the date on which the Bill receives Royal Assent.
26. We consider that transitional provisions should be made for those proceedings so that the previous Act continues to apply until those proceedings are terminated. This will avoid any uncertainty for parties of which law will apply to a particular arbitration.

Recommendation 1:

We recommend transitional provisions should be drafted that provide for arbitration proceedings that are in progress at the time the Bill comes into force.

Clause 3 Principal Act

27. No submissions were received on clause 3 and no changes are recommended.

Clause 4 New section 10A inserted

28. Clause 4(1) confirms the validity of arbitration clauses inserted into trust deeds by a settlor, and sets out that arbitration clauses in trust deeds will be valid and binding on all trustees, guardians and beneficiaries, as if it were an agreement under the Arbitration Act.

29. Clause 4(2) gives an arbitral tribunal the same power of the High Court to appoint representatives for any unascertained beneficiaries.¹
30. Clause 4(3)(a) states that where a representative is appointed, the arbitral tribunal must approve any settlement affecting those represented. Clause 4(3)(b) states the arbitral tribunal may approve a settlement where it is satisfied the settlement is in the benefit of the person represented.
31. Clause 4(3)(c) sets out that any award given in the arbitration will be binding. Clause 4(3)(d) states that costs of representation may be paid from trust property and that an arbitral tribunal may order payment from any party.

Submissions

32. Six submitters generally supported the inclusion of clause 4. Most comment was made about situations where there are ad hoc arbitrations, i.e. where the trust deed does not contain an arbitration provision but all parties agree to submit their dispute to arbitration.
33. Sam Maling supported clause 4 but believed it does not go far enough to resolve the problems of binding outcomes on incapacitated or unascertained beneficiaries. Mr Maling recommended that the Bill should not be restricted to cases where there is an arbitration clause in the trust agreement, but that arbitration should also be available for ad hoc arbitrations where the affected parties agree to submit to arbitration and are competent to do so. Mr Maling included revised wording to this part of the Bill.
34. Jeremy Johnson supported the clause and suggested that a clause be added that applies the provisions relating to minor, unborn and unascertained beneficiaries to ad hoc arbitrations.
35. Sir David Williams QC supported the clause and supported Mr Maling's submission.
36. The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) supported the submission of Mr Johnson and Mr Maling as, without the inclusion of Mr Maling's suggestion for ad hoc arbitrations, the clause will be of limited effect.
37. The New Zealand Law Society (NZLS) supported the objective of clarifying the validity of arbitration clauses in trust deeds. The NZLS submitted that the new section would not apply where an arbitration clause has been inserted in a trust deed by someone other than the settlor. If the objective were to broadly give effect to arbitration in trust

¹ An unascertained beneficiary is common in trusts as trusts can specify beneficiaries in a class. For example, a trust deed may state, "the trustees may apply the income to my brother's children, as they see fit". It is not guaranteed that all the children will receive a share of the estate so the beneficiaries are unascertained.

deeds, then the NZLS recommended that clause 4(1) is amended to provide for validity of such clauses by someone other than the settlor.

38. The NZLS noted that the Bill does not extend to ad hoc arbitrations, so awards would not be binding on all interested parties, including minor, unborn or unascertained beneficiaries.
39. The NZLS also noted that the Bill appears to be driven in relation to private trusts, but its provisions apply to all trusts. It noted there might be different considerations that apply to trusts created by statute and to charitable trusts, for example, regarding public accountability.
40. AJ Forbes QC supported the ability of the parties to a trust dispute to agree to arbitrate even if there is no arbitration clause in the trust agreement. Mr Forbes also agreed with the NZLS, Mr Johnson and Mr Malings' submissions.

Comment

41. The Explanatory Note of the Bill identifies two main objectives of the amendments relating to trusts and the use of arbitration. These are broadly summarised as:
 - supporting the effective use of arbitration in trust disputes; and
 - enabling those who are unable to represent themselves in trust disputes, specifically minor, unborn, or unascertained beneficiaries (or classes of beneficiaries), to be effectively represented during an arbitration, so that any decision of an arbitral tribunal will bind all interested parties.
42. The Trusts Bill, which is currently before the Justice Committee, provides an updated administrative statute for express trusts, and also clarifies and simplifies core trust principles.
43. The Trusts Bill is the result of a comprehensive review by the Law Commission of general trust law. Part 7 of the Trusts Bill makes ADR, which includes arbitration, more clearly available and effective in resolving trust disputes. The Trusts Bill responds to the same broad concerns and has the same objectives of the Bill in this respect.²
44. Our view is that the Trusts Bill better and more comprehensively addresses the issues that seek to be addressed in this Bill.

² The Law Commission recommended (R42) that the Trusts Bill should clarify that trustees have a power to use ADR to settle disputes; make enforceable any provisions in the terms of a trust that require settlement by ADR; and provide for the court to appoint representatives of unascertained and incapacitated beneficiaries who can agree to a binding ADR settlement on the beneficiaries' behalf, subject to approval of the court to the settlement.

45. The table below sets out the relevant aspects of the Bill and submitters' main concerns and describes how this is dealt with in the Trusts Bill. Annex Two provides Part 7 of the Trusts Bill for reference.
46. The table shows that most of the aspects of clause 4 and submitters' comments are addressed in the Trusts Bill. A key difference between this Bill and the Trusts Bill is the position of the arbitral tribunal. We do not support providing an arbitral tribunal with the power of the High Court to appoint representatives. Trusts are a creation of equity and common law developed over many centuries. The law of trusts is highly complex and specialised for this reason, and the High Court historically exercises an inherent jurisdiction to supervise and intervene in the administration of a trust. We consider that it is not appropriate for an arbitral tribunal to fulfil an aspect of this role.
47. We consider the clause 4 amendment is not necessary because of the Trusts Bill. If the Committee wishes to pursue the clause, there would need to be redrafting of the clause so it is consistent with the rest of the Arbitration Act and does not conflict with the Trusts Bill, as well as making improvements to some of the unclear terminology (for example, 'guardians', 'conduct litigation', 'arbitral tribunal/tribunal/arbitrator'), or removing redundant parts. If this provision is to be extended to "ad hoc arbitrations" of trust disputes, decisions will need to be made about when this can be done and who needs to give permission for arbitration to be used i.e. the agreement of all parties to the dispute.

Elements of clause 4 of this Bill (new 10A) and any submitter issues	Trusts Bill clauses and how it addresses this issue or comment
CI 4(1) – validity of arbitration clauses	Part 7 of the Trusts Bill applies to ADR processes, which includes arbitration. The implication is that ADR clauses in the terms of trust are valid because there are provisions of the Trusts Bill addressing ADR. The issue of validity is substantively about two issues. The first is the need to represent the interests of beneficiaries who are involved, and second is the enforceability of an arbitration clause. These issues are addressed below.
CI 4(1) – enforceability of arbitration clauses	CI 140(1) makes ADR clauses enforceable by the court in relation to internal matters, which are disputes between a trustee and beneficiary.
CI 4(2) – minor, unborn, or unascertained beneficiaries	CI 139 provides that any ADR process that involves a trust with unascertained or incapacitated beneficiaries must have court-appointed representatives for those beneficiaries.

CI 4(3)(a) – approving a settlement on behalf of above beneficiaries	CI 139 provides that the court must approve a settlement.
CI 4(3)(b) – grounds for approving settlements (satisfied that the settlement is for the benefit of the represented beneficiary)	CI 139 has no restrictions for the court to consider in terms of the settlement. This is appropriate as the court can consider the settlement in terms of the overall purpose of the trust and all interests involved, including other beneficiaries that do not require an appointed representative.
CI 4(3)(d) – costs of representation	CI 140(2) provides that the court can order that the costs of the ADR process, or part of those costs (which would include the costs of representation for those beneficiaries) are paid out of trust property.
Bill should provide for ad hoc arbitrations	The Trusts Bill provides for ad hoc arbitrations in two ways: CI 138 allows a trustee to refer a dispute to an ADR process, with the agreement of each party. CI 140(1) allows a trustee or beneficiary to apply to court for an order submitting a dispute to an ADR process, unless the terms of the trust indicate a contrary intention.

Recommendation 2:

We recommend that clause 4 is removed from the Bill.

Clause 5 Section 14F replaced

48. Clause 5 intends to extend the presumption of confidentiality for arbitration to related court proceedings. As currently drafted, clause 5 would repeal section 14F of the Act and replace it with restrictions on reporting for proceedings heard in private.

Submissions

49. Four submitters supported the clause 5 amendment, this included AMINZ. One submitter, William Sommerville, opposed the amendment.
50. The Legislation Design and Advisory Committee (LDAC), and NZLS did not express a view for or against the amendment but submitted that further consideration is required.
51. All four submitters in support of clause 5 submitted that it would encourage the use of arbitration, which is one of the purposes listed in section 5 of the Act. In addition, it

would protect commercial confidentiality and make New Zealand a more attractive location to conduct international arbitration.

52. AMINZ and Sir David Williams QC also submitted that New Zealand's current regime is inconsistent with international jurisdictions. They submitted that New Zealand should follow the legislative regimes in Hong Kong and Singapore. AMINZ also submitted a re-drafted version of the Bill at its oral submission that more closely reflects the legislation of these jurisdictions.
53. William Sommerville submitted that arbitration is too weak to justify a privilege that is unavailable to other litigants. He noted that openness of courts preserves a constitutional principle that ensures transparency so that people can know what the law is, monitor its application, and pursue the need for change through democratic means. It was also submitted that private proceedings would enhance the risk of abuse of the law.
54. LDAC and NZLS did not express a view for or against the amendment but submitted that the scope and application of clause 5 is uncertain, and that the drafting does not achieve its intended purpose.
55. LDAC noted that it would not normally submit on matters of drafting but suggested that the Bill be amended or reconsidered in the light that it amended the openness of court proceedings and the freedom of expression guaranteed by section 14 of the Bill of Rights Act 1990. LDAC submitted that the areas of uncertainty regarding scope and application are undesirable. It submitted that new legislation should respect the basic constitutional principles of New Zealand law, and clear and unambiguous wording must be used if Parliament wishes to override fundamental rights and values.
56. NZLS submitted that any derogation from the principle of open justice requires a compelling justification and should be limited to the least derogation necessary to achieve the objective. They also submitted that clause 5 requires further consideration and that comparable provisions in other jurisdictions such as Australia and the UK should be considered. Lastly, they submitted that there are well-established protocols relating to the publication of sensitive personal information in Family Court proceedings that could serve as a model for preserving the confidentiality of arbitrations whilst permitting the reporting of business in courts.

International context

57. In Hong Kong, there is a presumption that arbitration related court proceedings will be heard in private.³ The provision allows the court to order that proceedings will be heard in public, either on the application of a party, or if the court is satisfied that the proceedings ought to be heard in public. There is no statutory test that must be satisfied

³ Section 16 of the Arbitration Ordinance (Cap. 609).

for proceedings to be heard in public. Where proceedings are heard in private, restrictions on reporting apply. These restrictions mirror the wording used in clause 5.

58. Singapore's Arbitration Act provides that the court must order that hearings be heard in private if requested by a party.⁴ The court has no discretion to order otherwise. Where proceedings are heard in private, restrictions on reporting apply, which mirror the restrictions in clause 5.
59. The UK position on arbitration related court proceedings is in the Civil Procedure Rules rather than the Arbitration Act. The Rules provide that there is a presumption that any determination of a preliminary point of law or appeal on a question of law is to be heard in public.⁵ All other arbitration claims are to be heard in private. However, the court has the discretion to order otherwise.
60. In Australia, there is no statutory process for a party to apply for a private hearing. We understand that it is up to the court to use their inherent jurisdiction to order a private hearing if it considers it necessary.

Comment

61. The current section 14F provides a process for a party to apply for a private hearing. Before ordering a private hearing the court must consider the public interest in the judgment, the private nature of arbitration and the open justice principle.
62. We are unable to advise the Committee of the number of cases where parties applied for a private hearing, and the types of issues that were raised to support their application. This is because the information is court information and is controlled by the Judiciary.
63. However, the case of *Telstraclear Ltd v Kordia Ltd* provides a useful analysis of the current section 14F process.⁶ In that case the parties had contracted to establish a fibre optic cable transmission network in New Zealand. Telstraclear applied for leave to appeal the arbitration award and applied for an order that the proceedings be conducted in private, the court files be sealed, and the court's decision did not identify the parties. Telstraclear submitted that the dispute and details of the transmission network were commercially sensitive. The court considered the mandatory factors in section 14H of the Act and concluded that the public has a very real interest in cases concerning national fibre optic transmission networks. Therefore, the public interest test

⁴ Section 56 of the Arbitration Act 2002 (Singapore).

⁵ Part 62 of the Civil Procedure Rules 1998 (United Kingdom).

⁶ *Telstraclear Ltd v Kordia Ltd* HC Auckland CIV-2010-404-1168, 28 September 2010 at [45] – [58].

was not outweighed and the proceedings were held in public. However, the Court did order that the court files be sealed.

64. Where hearings are open to the public, the court can still order that information not be published if there is a compelling reason to do so. As noted by Jeremy Johnson during his oral submission, it is rare that the court will decline an application to anonymise their judgment. In the case of *Telstraclear Ltd v Kordia Ltd*, the court decided not to anonymise or redact the judgment as the industry was small and anonymisation may have casted doubt on the business relations of other transmitters in the industry.⁷
65. The Ministry does not support the objective of clause 5. We consider that the current section 14F strikes the appropriate balance between open justice and the private nature of arbitration. It is up to the court to determine which proceedings ought to be conducted in private and restrictions on reporting to be imposed. We do not consider that the private nature of arbitration is a compelling enough reason to reverse the rebuttable presumption of open court proceedings.
66. An independent and publicly trusted judiciary, together with accurate media reporting upholds the rule of law. The open justice principle aims to ensure that the public know what the law is and how it is being applied. Imposing a blanket presumption of private court proceedings and restrictions on reporting would displace this principle.
67. If the Committee decides to reverse the presumption of public hearings for all arbitration related court proceedings as the Bill proposes, clause 5 will need to be amended to provide a clear presumption that all arbitration related proceedings are to be conducted in private. As it is currently drafted, clause 5 applies restrictions on reporting that are triggered only on the application of a party. However, the clause does not clearly alter the existing default position of open court and publication. Amendments will also need to be made to sections 14G to 14I to ensure consistency with the new presumption of private proceedings. We note that it would be undesirable for the presumption of private proceedings to apply to charitable trusts given the public accountability associated with these trusts.
68. If the Committee decides to reverse the presumption of public hearings for procedural determinations only, the Committee may wish to follow the the UK position which is described at paragraph 59 of this report. The UK Civil Procedure Rules provide that the court may order that an arbitration claim be heard either in public or in private.⁸ Where the court does not make such an order, the default positions apply.

⁷ *Telstraclear Ltd v Kordia Ltd* HC Auckland CIV-2010-404-1168, 28 September 2010 at [54].

⁸ Part 62 of the Civil Procedure Rules 1998 (United Kingdom).

69. Either option should retain the mandatory considerations of the open justice principle, the privacy and confidentiality of arbitral proceedings, and any other public interest considerations.

Recommendation 3:

We recommend that clause 5 be removed from the Bill.

Clause 6 Schedule 1 amended

70. Clause 6 proposes amendments to the Model Law as set out in Schedule 1 of the Act.
71. Russell McVeagh, Jeremy Johnson and AMINZ commented on clause 6 in general and supported the amendments. Sir David Williams QC commented specifically on the amendments and also supported them all. Three of these submitters also gave oral submissions to the Committee and provided additional information.
72. The basis of support by submitters was that the decision by parties to arbitrate, and thus be bound by the arbitral tribunal decision, should be paramount. Submitters thought the losing party should not be permitted to raise technical grounds or later jurisdictional grounds in the courts so that the award is overturned. The amendments to clause 6 were largely seen by submitters to be minor and technical.
73. AMINZ felt the amendments to clause 6 closed the door on an anomaly. It thought the current framework in the Act allowed parties to circumvent the agreement to arbitrate and undermined New Zealand's reputation as a pro-arbitration jurisdiction. It felt that the courts refusing enforcement of awards where the parties had agreed to arbitrate had been hugely damaging.

Clause 6(1) Ensuring timely objections

74. The Explanatory Note sets out that clause 6(1) is intended to confirm the consequence of failing to raise timely objections i.e. that they cannot be heard or given effect to. The Bill adds a new sub-clause to article 16.
75. We understand the Bill responds to a Court of Appeal decision in Singapore⁹ that decided that not raising jurisdictional issues during the arbitration proceedings did not mean those issues could not be raised later. The amendment is intended to result in fewer objections and overturning of arbitral awards.

Submissions

76. Sir David Williams QC commented specifically in support of this clause. Sir David strongly disagreed with the decision of the Singapore court and felt that to not preclude the use of the tactics in that case would undermine section 5(a) of the Act. Section 5(a)

⁹ *PT First Media v Astro* (2013) SGCA 57.

of the Act sets out that a purpose of the Act is to encourage the use of arbitration as an agreed method of resolving commercial and other disputes.

International Context

77. Overseas jurisdictions into which we have looked have not made an amendment equivalent to clause 6(1) to their arbitration legislation. Australia, Hong Kong and Singapore all follow the Model Law wording of article 16. The United Kingdom has a section that is consistent with the wording of the Model Law.
78. We note for completeness that the Singapore decision for which this amendment is designed to avoid, was not followed by the High Court in Hong Kong i.e. the court did not overturn the award. This reflects international case law where an objection may or may not be permitted, depending on the facts of a particular case. This decision is being appealed to the Final Court of Appeal in Hong Kong. The hearing is set down for mid-March 2018.

Comment

79. We do not consider the amendment is necessary or desirable. The Model Law in Schedule 1 already sets out principles of waiver for delayed objections¹⁰. In addition, submitters advised the Committee that there are two New Zealand cases where the court has not permitted an objection and not overturned the award. While these two cases pre-date the Singapore case and do not appear to involve very similar contexts, it may well be that if a case arose again in New Zealand, the court would follow the New Zealand cases. The amendment may not convincingly add to the current framework.
80. The intention of the amendment is that non-timely objections cannot be heard or given effect to. This overrides the current tolerance in the Model Law where objections can later be raised for mandatory matters or where the arbitral tribunal considers the delay justified. The amendment proposed by the Bill raises issues of natural justice, would be inconsistent with the spirit of the Model Law, and would put New Zealand out of alignment with other jurisdictions where objections are still permitted in certain circumstances.
81. If the Committee wishes to pursue the amendment, the drafting needs to be made clearer to address:
 - what is meant by “timely” and “challenge or call into question”
 - whether the amendment intends to:
 - apply to awards on the merits as well as preliminary rulings (see article 16(3))

¹⁰ Article 4 outlines the waiver of right to object. A failure to raise a plea within the timeframes set out in article 16(2) would be considered a waiver of the right to later object in setting aside of enforcement proceedings.

- override the discretion of the arbitral tribunal in article 6(2)
- what the relationship of the amendment is with Article 4.

82. It would take further work to fully understand the implications of this amendment.

Recommendation 4:

We recommend that clause 6(1) is removed from the Bill.

Clause 6(2) to 6(5) Responding to Carr¹¹

83. Clause 6(2) to 6(5) respond to the 2014 New Zealand Supreme Court decision in *Carr* which held, by majority, that invalid procedural provisions in an arbitration agreement meant the entire arbitral process was invalid and could not be saved. The award was set aside.

Clause 6(2) and 6(4) Validity of an arbitration agreement

84. Article 34(2)(a)(i) and article 36(1)(a)(i) allow a party to apply for an award to be set aside or to be refused recognition or enforcement by the court if the arbitration agreement is not valid.
85. The Bill amends article 34(2)(a)(i) (clause 6(2)) and article 36(1)(a)(i) (clause 6(4)) by removing the phrase “arbitration agreement” and substituting the phrase “the parties’ agreement to submit the said dispute to arbitration”. This is intended to ensure that procedural provisions are not considered by the court when it is deciding on the validity of an arbitration agreement.

Submissions

86. Sir David Williams QC commented specifically in support of this clause. Sir David considers the Supreme Court adopted an inappropriately wide definition of “arbitration agreement”. He considers that the fundamental requirement for arbitration is the parties’ agreement or consent to arbitrate certain disputes between them, and nothing more. Sir David does not agree that awards may be set aside in cases where the parties consented to arbitration and their consent is clearly valid.

International Context

87. None of the overseas jurisdictions into which we have looked have made an amendment to their arbitration legislation as proposed by this Bill. The provisions regarding enforcement of an “arbitration agreement” either follow the Model Law directly (Australia) or are closely based on the Model Law (Singapore, Hong Kong,

¹¹ *Carr & Brookside Farm Trust Ltd v Gallaway Cook Allan* [2014] NZSC 75.

United Kingdom) and refer to definitions of “arbitration agreement” that also either follow the Model Law or have provisions based closely on the Model Law.

Comment

88. We do not consider the amendment necessary or desirable.
89. Commentary from the legal profession at the time of the decision in *Carr* expressed some unease that the decision would be viewed as not “pro-enforcement” and would have a negative impact on New Zealand’s reputation as an arbitration-friendly place to resolve disputes. However, the decision is also viewed as very fact specific with the situation unlikely to arise very often.
90. We can find no international discussion of the case and whether, in the intervening three years, the fears of the arbitration sector on the impact of this decision have in fact materialised. No evidence about this was presented by submitters to the Committee.
91. An essential requirement to any arbitration agreement is the existence of a binding commitment by the parties to refer to arbitration. However, we do not agree that the Bill is clarifying the definition of arbitration agreement. The Bill is narrowing the definition. The amendment could result in complications where the parties have intended that the arbitration agreement include procedural or other matters.
92. In addition, the Model Law and the Act both contain provisions that do not preclude an interpretation of “arbitration agreement” that does contain additional matters e.g. section 12, section 14, Article 4, 7(1) and 31(5). The Bill may therefore create inconsistencies.
93. Finally, amending the definition of “arbitration agreement” will put New Zealand out of alignment with other jurisdictions that retain or reflect the language of the Model Law. This could add uncertainty to arbitrations undertaken in New Zealand. The international case law indicates that there is no requirement for an arbitration agreement to contain clauses that address other issues, but that if they do, courts have both found for and against whether they are part of the arbitration agreement, depending on the facts of the case.
94. If the Committee wishes to pursue the amendment, we would suggest defining the term “agreement to submit the said dispute to arbitration” as the amendment may not be sufficiently clear to give rise to a different interpretation of “arbitration agreement”. We also suggest narrowing the application to article 34 only. This is to avoid inconsistencies with those other parts of the Act that do not preclude a wider interpretation.

Recommendation 5:

We recommend the amendments in clause 6(2) that substitute the meaning of “arbitration agreement” in article 34(2)(a)(i) are removed from the Bill.

Recommendation 6:

We recommend the amendments in clause 6(4) that substitute the meaning of “arbitration agreement” in article 36(1)(a)(i) are removed from the Bill.

Clause 6(3) and 6(5) Recognition and enforcement of awards

95. Article 34(2)(a)(iv) and article 36(1)(a)(iv) set out that a party may apply for an award to be refused to be recognised or enforced by the court if the arbitral procedure diverged from the agreement of the parties.
96. Article 34(2)(a)(iv) adds a savings provision so that a divergence will not be a ground to set aside the award if the procedural agreement conflicted with a provision of Schedule 1 that the parties must comply with.
97. The difference between article 34(2)(a)(iv) and article 36(1)(a)(iv) is that article 36 applies to international arbitrations as well as domestic arbitrations. An international arbitration is where the court considering the issue is not in the State where the arbitration took place.
98. Clause 6(3) of the Bill amends article 34(2)(a)(iv) to widen its application from “this schedule” i.e. Schedule 1 of the Act, to “this Act” i.e. including all parts and Schedules.
99. Clause 6(5) of the Bill amends article 36(1)(a)(iv) to:
 - change its application from “the law of the country where the arbitration took place” to “this Act”; and
 - add in the savings provision from article 34(2)(a)(iv).

Submissions

100. Sir David Williams QC commented specifically in support of clause 6(3). Sir David submits that the narrow application of article 34(2)(a)(iv) was the key reason for the Supreme Court decision in *Carr*. Sir David states that if the amendment proposed in the Bill had been in place in 2014, the award would not have been overturned. This would have saved much time and money. Sir David notes that this situation may have arisen because the Model Law is isolated in Schedule 1 of the Act when its principles are applicable to other parts of the Act.

International Context

101. The provisions equivalent to article 34(2)(a)(iv) in Australia, Singapore and Hong Kong are all amended in the manner proposed by the Bill. The United Kingdom has legislation based on the Model Law and the structure of its Act does not require an equivalent provision to the one the Bill proposes to amend.
102. None of the overseas jurisdictions into which we have looked have made either of the amendments to article 36(1)(a)(iv) to their arbitration legislation as proposed by the Bill.

Comment on Clause 6(3) – widening the scope of article 34(2)(a)(iv)

103. We do not consider the amendment is necessary or desirable. As detailed above in paragraphs 89 to 90, the factual circumstances of *Carr* mean it is unlikely that a similar situation will occur again.
104. However, if the Committee wishes to pursue the amendment, it appears minor and technical. It is not inconsistent with the spirit of the Model Law, rather, it responds to an issue with the way the Act is structured. Therefore, we note that this amendment could be suitable for a future Statutes Amendment Bill.

Recommendation 7:

We recommend that clause 6(3) is removed from the Bill.

Comment on clause 6(5) – changing the application of article 36(1)(a)(iv)

105. No submitter commented specifically on clause 6(5).
106. We do not consider the amendment is necessary or desirable. Clause 6(5) removes the possibility of a foreign law applying in appropriate circumstances and instead mandates that New Zealand law apply as the default law for international arbitrations.
107. We consider that limiting consideration of the court to New Zealand law only is inconsistent with the Model Law and potentially would hinder the facilitation of the recognition and enforcement of international arbitration agreements and arbitral awards.
108. We note that a re-drafted Bill supplied by AMINZ at its oral submission removes this amendment but provides no further explanation.
109. If the Committee wishes to pursue the amendment, the drafting is sufficiently clear to change the application of article 36(1)(a)(iv).

Recommendation 8:

We recommend the amendments in clause 6(5) that change the application of article 36(1)(a)(iv) are removed from the Bill.

Comment on clause 6(5) – adding a savings provision to article 36(1)(a)(iv)

110. No submitter commented specifically on clause 6(5).
111. We do not consider the amendment is necessary or desirable. The international case law indicates that courts, despite no savings provision in article 36(1)(a)(iv), tend to

require a high threshold before refusing to recognise or enforce an award, for example, the non-compliance must have affected the outcome of the proceedings.

112. The amendment would mean, for international arbitrations, that while the arbitral award was made based on the law in another State, only non-compliance with mandatory provisions in New Zealand law would save the award.
113. We note that a re-drafted Bill supplied by AMINZ at its oral submission removes this amendment but provides no further explanation.
114. If the Committee wishes to pursue the amendment, the drafting is sufficiently clear to add a savings provision to article 36(1)(a)(iv).

Recommendation 9:

We recommend the amendments in clause 6(5) that add a savings provision to article 36(1)(a)(iv) are removed from the Bill.

Amendments to Schedule 1 that are not explained

115. Clause 6(2), clause 6(4) and 6(5) contain additional wording changes where no explanation is given in the Bill. Further, no information or evidence has been provided to the Committee by the Member in charge or by submitters to detail what the issue is, or to assist in assessing the intent or implications.

Clause 6(2) and 6(4) - “incapacity”

116. Clause 6(2) and 6(4) change the first part of the first sentence in article 34(2)(a)(i) and article 36(1)(a)(i) respectively from “a party to the arbitration agreement was under some incapacity” to “a party to the arbitration lacked capacity to arbitrate the dispute”.

Clause 6(4) - amending article 36 to reflect an amendment to article 34

117. In addition, clause 6(4) replaces wording in article 36(1)(a)(i) from “under the law of the country where the award was made” with “under the law of New Zealand”.

International Context

118. None of the overseas jurisdictions into which we have looked have amended provisions equivalent to article 34 or article 36 in their arbitration legislation in the manner proposed in the Bill. All follow the Model Law or provisions based closely on the Model Law.

Comment

119. We do not consider that any of these amendments are necessary or desirable. The wording of the Model Law is deliberate and is intended to represent wording that is readily understandable across all legal systems. It should not be changed without explanation.
120. The amendments:
- change the concept of “incapacity” to “lacking capacity”, potentially introducing uncertainty into arbitrations undertaken in New Zealand; and
 - restrict international arbitrations to the application of New Zealand law, potentially hindering the facilitation of the recognition and enforcement of international arbitration agreements and arbitral awards.
121. If the Committee wishes to pursue the amendment, the drafting is sufficiently clear to achieve the outcomes set out above.

Recommendation 10:

We recommend the wording changes in clauses 6(2) that amend the concept of “incapacity” in article 34(2)(a)(i) are removed from the Bill.

Recommendation 11:

We recommend the wording changes in clause 6(4) that amend the concept of “incapacity” in article 36(1)(a)(i) are removed from the Bill.

Recommendation 12:

We recommend the wording changes in clauses clause 6(4) that narrow the application of article 36(1)(a)(i) are removed from the Bill.

Other matters

Drafting corrections and amendments

122. If the Committee decide to pursue one or more of the amendments proposed by the Bill, it is important for the Parliamentary Counsel Office to be able to ensure that references throughout the Bill are correct, and that other minor corrections and consequential amendments can be made. Therefore, we recommend that the Parliamentary Counsel Office be authorised to make other minor corrections or consequential amendments where it is required or necessary.
123. While preparing the revision-tracked (RT) version of the Bill, Parliamentary Counsel Office will provide advisors with advice on the optimal drafting approach based on the recommendations in this Report. We recommend that the Committee note recommendations made in this Report are subject to advice from the Parliamentary Counsel Office about the best approach to draft amendments.

Recommendation 12:

We recommend that the Parliamentary Counsel Office be authorised to make other minor drafting corrections or consequential amendments, if required.

Recommendation 13:

We recommend that the Committee note recommendations made in this Report are subject to advice from the Parliamentary Counsel Office about the best approach to draft amendments.

Issues out of scope of the Bill

Appointment of arbitrators

124. Jack Wass submitted that the Act should be amended to address an issue regarding operation of the mechanism of the appointment of arbitrators where the parties cannot agree. AMINZ supported this submission and provided additional information. The proposal involves repealing:
 - clause 1 of Schedule 2 of the Act
 - article 11(7)(b) of Schedule 1 of the Act.
125. This issue is out of scope of the policy of the Bill. The Explanatory Note sets out that the purpose of the Bill is to amend the Act in relation to arbitration clauses in trust deeds, the presumption of confidentiality in arbitration related court proceedings, to clearly define the grounds for setting aside awards, and to confirm the consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction.

Annex One: List of submitters

1.	A J Forbes
2.	Arbitrators' and Mediators' Institute of New Zealand (AMINZ)
3.	Jack Wass
4.	Jeremy Johnson (Wynn Williams)
5.	Legislation Design and Advisory Committee (LDAC)
6.	New Zealand Law Society (NZLS)
7.	Russell McVeagh
8.	Sam Maling
9.	Sir David AR Williams KNZM QC (Sir David)
10.	William Somerville

Annex Two: Part 7 of the Trusts Bill

Clauses 137 – 142: Alternative Dispute Resolution

137 Definitions for purposes of sections 138 to 142

In sections 138 to 142—

ADR process means an alternative dispute resolution process (for example, mediation or arbitration) designed to facilitate the resolution of a matter

ADR settlement, in relation to a matter, means an enforceable agreement reached through an ADR process that resolves the matter

external matter means a matter to which the parties are a trustee and 1 or more third parties

internal matter means a matter to which the parties are a trustee and 1 or more beneficiaries

matter—

(a) means—

- (i) a legal proceeding brought by or against a trustee in relation to the trust; or
- (ii) a dispute in relation to the trust between a trustee and a beneficiary, or between a trustee and a third party, or between 2 or more trustees, that may give rise to a legal proceeding; but

(b) does not include a legal proceeding or a dispute about the validity of all or part of a trust.

138 Power of trustee to refer matter to alternative dispute resolution process

- (1) A trustee may, with the agreement of each party to a matter, refer the matter to an ADR process.
- (2) For the purposes of this section, a beneficiary is not a party to an external matter.

139 ADR process for internal matter if trust has unascertained or incapacitated beneficiaries

- (1) If a trust has any unascertained or incapacitated beneficiaries, then, for a matter relating to that trust that is subject to an ADR process—
 - (a) the court must appoint representatives for those beneficiaries; and
 - (b) those representatives may agree to an ADR settlement on behalf of the unascertained or incapacitated beneficiaries; and
 - (c) any ADR settlement must be approved by the court.
- (2) This section applies only to internal matters.

140 Power of court to order ADR process for internal matter

- (1) The court may, at the request of a trustee or a beneficiary or on its own motion—
 - (a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or
 - (b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).
- (2) In exercising the power, the court may make any of the following orders:
 - (a) an order requiring each party to the matter, or specified parties, to participate in the ADR process in person or by a representative;
 - (b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property;
 - (c) an order appointing a particular person to act as a mediator, an arbitrator, or any other facilitator of the ADR process.
- (3) This section applies only in relation to internal matters.

141 Trustee may give undertakings for purposes of ADR settlement

Despite section 31 (duty not to bind or commit trustees to future exercise of discretion), a trustee may, for the purposes of an ADR settlement, give binding undertakings in relation to the trustee's future actions as trustee.

142 Trustee's liability in relation to ADR settlement limited

- (1) This section applies to a proceeding brought by or on behalf of a beneficiary and arising from or relating to an ADR settlement.
- (2) An ADR settlement is valid and a trustee is not liable in the proceeding unless, in relation to the ADR settlement, the trustee failed to comply with—

- 
- (a) the trustee's mandatory duty under section 24; or
 - (b) any duty specified in the terms of the trust for the purposes of establishing liability under this section.
 - (3) Despite subsection (2)(a), a trustee is not liable in the proceeding by reason only that the settlement was not consistent with the terms of the trust.



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