



Arbitration Guide
IBA Arbitration Committee

NEW ZEALAND

(Updated February 2018)

Daniel Kalderimis

Chapman Tripp
10 Customhouse Quay, Wellington /
23 Albert Street, Auckland
New Zealand

daniel.kalderimis@chapmantripp.com

Table of Contents

	Page
I. Background	3
II. Arbitration Laws.....	4
III. Arbitration Agreements	5
IV. Arbitrability and Jurisdiction	9
V. Selection of Arbitrators.....	11
VI. Interim Measures	12
VII. Disclosure/Discovery.....	14
VIII. Confidentiality.....	16
IX. Evidence and Hearings	16
X. Awards	19
XI. Costs	21
XII. Challenges to Awards	22
XIII. Recognition and Enforcement of Awards.....	25
XIV. Sovereign Immunity	26
XV. Investment Treaty Arbitration.....	27
XVI. Resources	28
XVII. Trends and Developments.....	28

I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Arbitration is widely used and understood in New Zealand, which was an early adopter of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law'). Arbitration is increasingly selected for the resolution of significant contractual disputes. Its principal advantages are perceived to be:

- a robust confidentiality regime, which is preserved by an express code;
- a single Arbitration Act 1996 ('the Act') based on the Model Law, applicable to both domestic and international arbitration, and now well tested through the courts;
- the ability to choose a tribunal, tailor the arbitration procedure, and exclude (or permit, if so desired) appeals on questions of law;
- a straightforward and effective enforcement mechanism, both within and beyond New Zealand; and
- the support of an experienced, consistent and able judiciary, with respect to court supervision and applications for ancillary relief.

Its major disadvantages are perceived to be the inherent difficulties in addressing disputes involving multiple parties and a variability of procedure, given that the use of dedicated arbitration rules and international standards, such as the IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules'), is still developing and becoming established.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitration is ad hoc, and often conducted solely under the auspices of the Act. The use of ad hoc procedural rules, such as the UNCITRAL Arbitration Rules, is still relatively rare. Many users rely solely on the procedural rules and guidance provided by the Act – which includes: (a) a mandatory Schedule 1, which incorporates the Model Law (including its 2006 amendments); and (b) an optional Schedule 2 containing useful default rules, including for the appointment of arbitrators without court or institutional intervention and an optional appeal on a question of law.

New Zealand has a local arbitration institution, the New Zealand Dispute Resolution Centre (NZDRC), which offers a variety of arbitration rules. The most popular international institutional rules would appear to be those of the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC).

(iii) What types of disputes are typically arbitrated?

Energy, construction and infrastructure disputes are common. Because of the enforcement advantages enjoyed by arbitration, disputes are being arbitrated in a variety of sectors arising under agreements with foreign parties, or which involve performance in foreign countries; for instance, film financing and production agreements and export agreements.

(iv) How long do arbitral proceedings usually last in your country?

The nature and length of arbitral proceedings is not fixed. Straightforward disputes, especially where counsel are experienced and cooperative, can be resolved in a matter of months. For complex commercial disputes, between 12 and 24 months is typical.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

No.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The Act is closely based on the Model Law, which is incorporated (including the 2006 amendments) into Schedule 1, with only minor modifications. The Act governs all arbitrations in New Zealand, whether domestic or international. Indeed, the express purposes of the Act include the promotion of consistency of arbitral regimes based on the Model Law, and between the international and domestic arbitral regimes in New Zealand. New Zealand courts and arbitral tribunals are expressly empowered to refer to the *travaux préparatoires* of the Model Law in interpreting the Act.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

The Act contains two primary schedules: a mandatory Schedule 1, closely based upon the Model Law; and an optional Schedule 2, incorporating additional procedural rules – including the possibility of an appeal on a question of law. By virtue of s 6 of the Act, Schedule 2 applies to a domestic arbitration unless the parties agree otherwise; and to an international arbitration only if the parties so agree.

This means that a simple arbitration clause selecting the seat of arbitration as New Zealand, will, by default, be conducted under the Model Law. Whether additional

procedural rules will also apply will further depend upon whether the arbitration is domestic or international.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

New Zealand is party to:

- the 1958 New York Convention;
- the 1923 Geneva Protocol on Arbitration Clauses;
the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards;
and
- the 1966 Washington Convention.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Yes. Article 28 of Schedule 1 (which is closely based upon its Model Law counterpart) provides that the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules. Where an arbitral tribunal is given the power to decide a dispute *ex aequo et bono*, this will result in the modification of the strict language of the written contract to the extent of any inconsistency with a fair and equitable result.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Article 7 of Schedule 1 provides that an arbitration agreement may be made orally or in writing. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. There are no known examples in New Zealand case law of any oral arbitration agreement having been proved where its existence was disputed by the parties.

While arbitration agreements may be made orally, they should ideally be made in writing. Reducing the arbitration agreement to writing eliminates (or at least substantially reduces) the possibility that one party might renege by claiming that

no agreement to arbitrate had been reached. It also provides parties with the opportunity to establish, in advance, the optimal procedure for the arbitration.

Section 11(1) of the Act contains special provisions in respect of consumer arbitration agreements. These apply where a person enters into a contract as a consumer and the contract contains an arbitration agreement. In this situation, the arbitration agreement is enforceable against the consumer only if the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen, certifies that the consumer agrees to be bound by the arbitration agreement.

The Arbitration Amendment Bill 2017 seeks to clarify the validity of arbitration agreements in trust deeds and confirms that such agreements will be treated as arbitration agreements for the purposes of the Arbitration Act. Such agreements would need to meet the usual requirements of form and content to be enforceable.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Following the Model Law approach, the New Zealand courts generally require parties to submit to arbitration where the courts are satisfied that the parties have agreed to arbitrate. See Section III(i), above, for special conditions regarding consumer arbitration agreements.

Accordingly, article 8 of Schedule 1 provides that, with very limited exceptions, the courts will stay any proceedings brought in court where the subject matter is the subject of an arbitration agreement. No significant exceptions to this rule exist; summary judgment will be granted only where the agreement is void, or where the dispute in question is not bona fide. See further Section XVII(iii) below.

New Zealand generally adopts a pro-enforcement approach, preferring to allow parties to submit to arbitration where they have agreed to do so. However, where unenforceable or illegal provisions go to the heart of an agreement, the courts have been willing to set awards aside.

The Supreme Court's decision in *Carr v Gallaway Cook Allan* [2014] NZSC 75 provides important guidance as to what can invalidate an arbitration agreement and when the Court will set aside an arbitral award on the basis of invalidity of the arbitration agreement.

In that case, the parties' arbitration agreement provided that the parties undertook to carry out any award without delay subject to, inter alia, the right of appeal provided by clause 5 of Second Schedule to the Act, but as amended to apply to

“*questions of law and fact (emphasis added)*” (the Act only provides for a right of appeal on a question of law).

As a result, the Court considered whether it should exercise its discretion under s 34(2) of Schedule 1 of the Act to set aside the arbitral award on the grounds of invalidity of the arbitration agreement. While acknowledging that article 34 provides for a limited exception to the finality of arbitral awards, the Court found that in the present case the defect in the arbitration agreement went to the jurisdiction of the arbitrator and the legitimacy of the award, which justified the setting aside of the arbitral award.

Arnold J, in dissent, emphasised the importance of the principle of limited judicial intervention. Arnold J was of the view that the “*principle behind art 34(2)(a)(iv) is that the parties will not be entitled to have an award set aside for failure to follow an agreed procedure where that procedure is in conflict with a non-derogable provision in sch 1, no matter how important that agreed procedure was to them*” (at [117]). Arnold J found that a provision in conflict with a non-derogable duty in the Act should not permit a court to set aside the award on the basis of procedural error, but that the arbitrator should follow the correct procedure “*in preference to any inconsistent agreed procedure*”. Accordingly, Arnold J would not have set aside the arbitration award on the basis that the procedure agreed by the parties breached a non-derogable provision and thus fell under art 34(2)(a)(iv).

In response to this decision, and following the reasoning in Arnold J’s dissent, the Arbitration Amendment Bill 2017 seeks to clarify arts 34 (2)(a)(i) and (iv) and 36(1)(a)(i) and (iv) to set clear limits on when a court may set aside an arbitration award on the basis of a procedural provision being in conflict with the Act. This is to support the enforcement of arbitral awards and to avoid post-facto attacks on the basis of procedural issues that otherwise should not have affected the legitimacy of the award itself.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses requiring parties to go through a series of dispute resolution mechanisms (eg, negotiations, mediation then arbitration) are becoming increasingly common in commercial agreements in New Zealand and particularly in those involving long-term relationships (sometimes referred to as ‘relational contracts’).

As a matter of contract law, the traditional position was that parties could not be compelled to negotiate or mediate because obligations of that nature were

unenforceable as mere ‘agreements to agree’ or too uncertain to enforce. However, the current position is that the courts will likely require parties to participate in the negotiation or mediation processes contemplated by such clauses, at least where the clause is clear about the process required. But even where the negotiation and mediation aspects of a multi-tier clause are too uncertain to enforce, the courts will enforce the arbitration aspect of such an agreement.

(iv) What are the requirements for a valid multi-party arbitration agreement?

A valid multi-party arbitration agreement must meet the same requirements as to form and content as a two-party arbitration agreement.

In *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA), the Court of Appeal confirmed that, since arbitration requires a dispute in respect of a ‘defined legal relationship’ (often a contract), it is not possible for two parties by agreement to submit to arbitration a dispute regarding the liability of one of those parties to a third party arising out of a separate legal relationship.

By contrast, where parties to a number of legal relationships in respect of which disputes have arisen all agree to submit the various disputes to a single arbitration process, the multi-party arbitration agreement will be valid and will bind all parties agreeing to arbitrate.

Where Schedule 2 applies, there is provision under clause 2 for arbitral proceedings to be consolidated by order of the High Court (whether or not each arbitral proceeding has the same arbitral tribunal).

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

There does not appear to be any New Zealand law on the validity of sole option clauses but it is hard to see why they would not be enforceable. Such agreements are subject only to the same enforceability rules as agreements conferring mutual rights to arbitrate.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Arbitration agreements bind only those who are party to the agreement. Since arbitration agreements may be made orally, it is conceivable that a person who has not signed a written arbitration agreement could be found to have agreed orally to be bound. It is also conceivable that a party may become bound to an agreement through the agency of another party or through that party’s implied consent to the agreement.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

There are very few disputes that cannot be arbitrated. The term ‘arbitration agreement’ is defined in section 2(1) of the Act as meaning ‘an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’. Virtually all disputes between parties involving alleged breach of civil obligations will meet this definition, and the obligation need not be contractual in nature. For instance, disputes involving anti-trust and consumer protection legislation have been held amenable to arbitration.

Section 10 provides that a dispute may not be determined by arbitration if the arbitration agreement is ‘contrary to public policy’ or if, under any other law, the dispute is not capable of determination by arbitration. The ‘public policy’ threshold is a very high bar.

The distinction between jurisdiction and admissibility is not one that has been addressed in any detail by the New Zealand courts. By article 16 of Schedule 1, the arbitral tribunal rules in the first instance on its own jurisdiction, including any objections with regard to the existence or validity of the arbitration agreement. The arbitral tribunal may rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits.

Where the arbitral tribunal rules on the plea as a preliminary question, any party may request the High Court to decide on the matter within 30 days of receiving notice of the ruling. The High Court’s decision on the matter is final. Where the arbitral tribunal rules on the plea in an award on the merits, the award is subject to the usual limited rights of judicial review under article 34 of Schedule 1.

As noted above, the Arbitration Amendment Bill 2017 seeks to confirm the validity of arbitration agreements in trust deeds. It also goes further to confirm that an arbitral tribunal has 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). This is to support the resolution of trust disputes in a more private forum.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

If court proceedings are initiated despite an arbitration agreement, a party asserting that the dispute must be determined by arbitration may apply to the court for the court proceedings to be stayed. By article 8 of Schedule 1, the court must stay the court proceedings so that the matter can go to arbitration, except in very limited circumstances (including where summary judgment may be granted for the plaintiff).

Any plea that the arbitral tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence. Similarly, where court proceedings are initiated despite an arbitration agreement, a party seeking to have the court stay those proceedings in favour of arbitration must file with the court an application seeking that stay within the time period allowed for filing any opposition to the plaintiff's court claim (usually 25 working days).

Applying to the court for a stay will not operate as a submission to the court's jurisdiction. However, a party will generally have waived its right to arbitrate if it files a statement of defence in the court proceeding because that step is regarded as a submission to the court's jurisdiction.

Applying to the court for summary judgment on a claim against a defendant will not, of itself, amount to a waiver by the plaintiff of its right to arbitrate. However, if the defendant chooses not to apply for a stay of the court proceeding under article 8 of Schedule 1 and to submit to the jurisdiction of the court, the plaintiff will not be able to insist upon arbitration after that point.

The Arbitration Amendment Bill 2017 seeks to amend the Act by including a 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.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The arbitral tribunal decides on its own jurisdiction in the first instance, and so the principle of competence-competence applies. The courts may review the decision, as discussed in Section IV(i), above.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The Act provides two procedures for the selection of arbitrators.

The first, based on the Model Law, is set out in article 11 of Schedule 1. This provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. Failing such agreement, the appointment rules are that, in an arbitration with three arbitrators and two parties, each party may appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator; and in an arbitration with a sole arbitrator, the parties shall agree, and if they do not, the appointment shall be made, upon request of a party, by the Arbitrators' and Mediators' Institute of New Zealand (AMINZ).

AMINZ is also empowered to make appointments where the parties' appointment machinery has failed (unless the parties' agreement on the appointment machinery provides other means for securing the appointment). A party may apply to the High Court if AMINZ is unable to or fail to appoint an arbitrator within 30 days of receiving a request to, or if a dispute arises in respect of the appointment process that AMINZ uses.

The second procedure is set out in clause 1 of the optional Schedule 2. This provides that, for the purposes of article 11 of Schedule 1, the parties shall be taken as having agreed on the procedure for appointing the arbitrator or arbitrators unless the parties agree otherwise. Clause 1 then sets out a default 'quick draw' procedure in the event of parties, including a third party institution, failing to appoint any required arbitrators. This permits a party to specify by written communication the details of the party's or institution's default in appointment and propose that, if the default is not remedied in a period of not less than 7 days, a person named in the written communication shall be appointed as arbitrator. This is a form of self-help remedy which permits the appointment of a tribunal without the intervention of an institution or the High Court.

It also creates opportunities for gamesmanship. The first party to serve a valid notice can seek in this way to insist upon the identity of the relevant appointment. The High Court has confirmed, however, that a 'quick draw' notice cannot be served unless and until a party has been given a reasonable time to make an appointment. If served too early, the notice will be ineffective. Nonetheless, this uncertainty creates potential scope for confusion over precisely when a quick draw notice will be valid and effective.

The Arbitration Amendment Act 2016 amended the definition of arbitral tribunal to include any emergency arbitrator appointed under the arbitration agreement, or the arbitration rules of any institution the parties have adopted.

- (ii) **What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

New Zealand has, through article 12 of Schedule 1, adopted the Model Law position which requires a person who is approached in connection with that person's possible appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.

The Supreme Court recently confirmed that apparent bias will be shown 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'.

- (iii) **Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

There are no express limitations on who may serve as an arbitrator in New Zealand. In particular, no person shall be precluded by reason of nationality from acting as an arbitrator unless otherwise agreed by the parties (Schedule 1, article 11(1)).

Arbitrators do have ethical duties of impartiality, independence and fairness, which arise from the terms of articles 12, 18, 24(2) and (3) and 34 of Schedule 1. These articles have been held by the High Court and Court of Appeal to provide a non-derogable foundation of natural justice, which is a requirement of arbitration in New Zealand.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

No specific rules or codes of conduct apply. The IBA Guidelines are known of in New Zealand, but are not universally invoked. In most cases, the applicable benchmark will be the apparent bias test as set out in Section V(ii) above.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Arbitrators have wide powers to issue interim measures and other forms of preliminary relief. Detailed provisions on interim measures and preliminary orders – corresponding to those now appearing in the Model Law – appear in

articles 17 to 17M of Schedule 1, which were inserted and came into force on 18 October 2007.

Unless otherwise agreed by the parties, the arbitral tribunal may grant an ‘interim measure’ at the request of a party. An interim measure is defined as ‘a temporary measure (whether or not in the form of an award)’ by which a party is required ‘at any time before any award is made in relation to a dispute’.

Interim measures are applied for on notice to the other party and will be determined by the arbitral tribunal after hearing from both parties. However, there is also scope for the arbitral tribunal to grant a ‘preliminary order’ without notice to the respondent.

A ‘preliminary order’ is defined as ‘an order directing a party not to frustrate the purpose of an interim measure’. A claimant may, unless otherwise agreed by the parties, apply for a preliminary order without notice to any other party when making a request for the interim measure to be granted.

The arbitral tribunal may issue a preliminary order if it considers that prior disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the measure. The applicant for a preliminary order must satisfy the arbitral tribunal of the same matters (modified as necessary) of which the tribunal must be satisfied when granting an interim measure.

Immediately after the arbitral tribunal has determined an application for a preliminary order, it must give notice to all parties of the request for an interim measure and preliminary order, of any preliminary order made and of all communications between a party and the tribunal in respect of these matters. Each respondent may then present its case and the arbitral tribunal must decide promptly on any objection to the preliminary order.

A preliminary order expires 20 days after it was issued by the arbitral tribunal. But the arbitral tribunal may grant an interim measure adopting or modifying the preliminary order after each respondent has been given an opportunity to present its case.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

The courts have power to grant provisional relief in support of arbitrations. The High Court has held that this power includes the power to grant provisional relief without notice.

It is not incompatible with an arbitration agreement for a party to request from a court an interim measure, whether before or during arbitral proceedings. The courts have the same powers as the arbitral tribunal to grant an interim measure for the purposes of proceedings before the court.

The courts must apply the same thresholds for granting interim measures as an arbitral tribunal is required to apply.

There is no prohibition in the Act on the court granting interim measures after the constitution of the arbitral tribunal. That said, once an arbitral tribunal is constituted, it would be expected that the parties apply to the tribunal for interim measures, rather than to the courts. Where a party applies to a court for an interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court must treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application before the court.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Section VI(ii) has already discussed the extent to which courts may grant provisional relief. The courts also have express powers to grant evidentiary assistance in support of the arbitration. The court's assistance may be requested either by the arbitral tribunal itself or by a party, but only with the tribunal's approval.

In exercising their powers under this article, the courts may make an order of subpoena or issue a witness summons to compel the attendance of a witness either to give evidence or produce documents. The courts may also order a witness to submit to examination before an officer of the court or any other person for the use of the arbitral tribunal. The courts also have, for the purpose of the arbitral proceedings, the same powers as they would have in court proceedings to order discovery of documents and interrogatories, requesting the taking of evidence outside the jurisdiction and preserving any property or thing in issue in the arbitral proceedings. However, the courts' powers do not generally extend to ordering discovery of overseas non-parties.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Schedule 1 of the Act is silent on discovery and disclosure issues, stating that the parties are free to agree on the procedure to be followed by the arbitral tribunal, failing which the arbitral tribunal may conduct the arbitration in such manner as it

considers appropriate (in both cases, subject to the mandatory provisions of Schedule 1, such as the equal treatment guarantee in article 18).

The optional Schedule 2 provides that the parties shall be taken to have agreed that the powers conferred upon the arbitral tribunal include the power to '[o]rder the discovery and production of documents or materials within the possession or power of a party'. In practice, parties to a domestic arbitration in New Zealand will often have access to equivalent discovery as that available under the New Zealand High Court Rules.

To provide clarity on the method and limits of disclosure, international arbitrations in New Zealand are often conducted with non-binding reference to the IBA Rules on the Taking of Evidence in International Arbitration.

It is notable that the New Zealand High Court Rules have since 2012 been indirectly inspired by the IBA Rules. They now recognise the prospect of a 'tailored discovery' order by which the parties must identify the categories of documents required to be discovered (rather than having an entitlement to all relevant documents), and that each category may be crafted so as to limit discovery to what is reasonable and proportionate.

The Court of Appeal recently held that where a party seeks to circumvent the decision of an arbitral tribunal (in this case a decision on the relevance of documents in discovery) a court will be reluctant to allow a parallel application in court to undermine a decision of the tribunal; see *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZAR 1617, [2017] NZCA 490; discussed further at Section XVII(iii) below.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

The Act does not apply any express limits. As a matter of practice, disclosure requirements may be less onerous than, but should not usually exceed, those in equivalent High Court litigation (where discovery requirements are limited by principles of reasonableness and proportionality).

(iii) Are there special rules for handling electronically stored information?

The Act does not specify any such rules.

The New Zealand High Court Rules, to the extent they are applied by analogy, contain obligations for parties to endeavour to agree appropriate methods and strategies for locating documents stored electronically in the context of disclosure requests, including the use of appropriate keyword searches, automated methods for relevance and matching (such as clustering and document prioritisation technologies) and de-duplication procedures.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Yes, arbitrations are generally confidential. The Act contains a detailed code relating to confidentiality of arbitral proceedings and court proceedings involving arbitrations. Two general presumptions underpin the detailed confidentiality provisions. The first is that arbitrations are to be conducted in private and are to be subject to confidentiality. The second is that any court proceedings involving arbitral proceedings are generally to be conducted in public and are not subject to confidentiality obligations. Mechanisms to displace these presumptions in appropriate cases are provided.

The Arbitration Amendment Bill 2017 seeks to reverse the presumption in relation to ancillary court proceedings, making them private by default and only public if a party displaces this presumption.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

Section VIII(i), above, sets out the provisions relating to confidential information. Any trade secrets or particularly confidential information can be appropriately safeguarded within that regime, including in any court proceedings brought in respect of the arbitration.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The Act does not contain any rules relating to privilege. Article 19(3) of Schedule 1 confirms that every witness giving evidence has the same privileges and immunities as witnesses in proceedings before a court. These privileges include the right not to disclose communications in which the witness holds privilege.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Yes, it is common, especially for international arbitrations; although it is not universal practice. In most cases, the IBA Rules are used as a benchmark, and the tribunal retains a discretion to depart from them.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Yes. The arbitral tribunal's discretion to determine the arbitral procedure is circumscribed by the requirements of procedural fairness and equal treatment. An

award rendered in New Zealand may be set aside for conflict with public policy if a breach of the rules of natural justice occurred during the arbitral proceedings.

Specific rules of New Zealand court procedure (such as discovery rules) or evidence (such as the Evidence Act 2006) do not directly apply to arbitrations. However, in practice, such rules are often applied by analogy.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

In the vast majority of commercial arbitrations in New Zealand, witness statements are exchanged for all witnesses in advance of a hearing. At the hearing itself, limited direct examination (usually to confirm the contents of the witness statements and/or to provide updating information) and extensive cross-examination is permitted.

As a common law country founded on the adversarial civil justice system, New Zealand lawyers and arbitrators tend to put a premium on oral hearings and live examinations of witnesses by counsel. However, a tribunal is expressly permitted under the optional Schedule 2 to adopt inquisitorial processes.

Arbitrators in New Zealand commonly question witnesses. Usually this is done following cross-examination of a witness by counsel, with opposing counsel given a chance to re-examine the witness if they wish to do so.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

No and no. It is common, however, for witnesses in an arbitration held in New Zealand to be asked to swear or affirm their belief in the truth of the evidence they are about to give.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

There are no specific rules requiring different treatment. According to domestic code of conduct rules, New Zealand qualified barristers and solicitors must not act, or continue to act in a proceeding (which appears to include a New Zealand arbitration proceeding) if it becomes apparent that the lawyer, or a member of the lawyer's practice, is to give evidence of a contentious nature. Thus, while competent to appear as a witness, a lawyer so conflicted may be compelled to cease acting as counsel.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

The Act does not specifically regulate the presentation of expert testimony. Nor does it provide formal requirements regarding independence and/or impartiality of expert witnesses.

Frequently, however, the code of conduct for expert witnesses, which appears as Schedule 4 of the High Court Rules, is invoked or applied by analogy in a New Zealand arbitration. This requires an expert witness to confirm their understanding that: (a) their overriding duty is to assist the court impartially on all relevant matters within the expert's area or expertise; and (b) an expert witness is not to be an advocate for the party that engaged that witness.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

The appointment by tribunals of experts is expressly permitted. In practice, however, the power is rarely used. There are no requirements that experts (whether appointed by a party or by an arbitral tribunal) be selected from a particular list. Where an arbitral tribunal does appoint an expert, there will very usually be opportunities or directions for that expert to confer with relevant party-appointed experts. A tribunal-appointed expert must, if a party so requests, participate in a hearing for questioning by the parties.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Yes, this is a common method for taking expert evidence; as is the technique of asking experts to prepare a joint report isolating the points on which they agree and disagree. In most cases, witness conferencing will be combined with – rather than replace entirely – the conventional process of direct and cross-examination. Thus, typically, all relevant experts will give their evidence and answer questions from parties' counsel, before answering questions from the arbitral tribunal in a more informal process in which they may be invited to comment on other answers given and even discuss issues between themselves. Parties' counsel will invariably be given the opportunity of asking further questions during a witness conferencing process.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no express rules or requirements. The use of arbitral secretaries is common for international arbitrations held in New Zealand, and they are routinely used by some prominent New Zealand arbitrators, including for domestic arbitrations.

X. Awards

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Article 31 of Schedule 1 sets out the main requirements for the form and content of an award. Where there is more than one arbitrator, the award of the arbitral tribunal must be made by a majority of all its members. The award must be made in writing and must be signed by the arbitrator or, where there is more than one arbitrator, by the majority of all members of the arbitral tribunal, so long as the reason for any omitted signature is stated.

The award must state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms.

The award must state its date and the place of arbitration (which is the place agreed by the parties or, failing agreement, determined by the arbitrator). The award is deemed to have been made at that place. After the award is made, a copy of the award signed by the arbitrators must be delivered to each party.

Unless the parties agree otherwise, an arbitral tribunal is empowered to award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of domestic civil proceedings.

- (ii) **Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

Yes. Because arbitral tribunals have all the remedial powers of the High Court, and the High Court has power to award punitive or exemplary damages, it follows that arbitrators in a New Zealand arbitration also have this power.

The arbitration agreement is deemed to provide, unless the parties otherwise agree, that the arbitral tribunal may award interest. Interest may be awarded on the whole or any part of any sum that is awarded to any party, for the whole or any part of the period up to the date of the award. Where the whole or any part of a sum in issue in the arbitral proceedings is paid before the date of the award, the arbitral tribunal may award interest on the amount paid, for the whole or any part of the period up to the date of payment.

There is no prohibition under the Act on the awarding of compound interest. Since the High Court has power to award compound interest in particular situations, it follows that arbitrators in a New Zealand arbitration also have this power.

Article 31(5) of Schedule 1 provides that, unless the arbitration agreement or the award provide otherwise, a sum directed to be paid by an award carries interest as from the date of the award and at the same rate as a judgment debt.

(iii) Are interim or partial awards enforceable?

Yes. A partial award involves a final determination on some of the matters in dispute and so comes within the definition of ‘award’. Accordingly, such an award may be enforced in the same way as an award that finally determined all matters in dispute.

Interim measures must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to a competent court. The court may refuse recognition or enforcement of an interim measure on essentially the same limited grounds as for an award.

A provisional order (as opposed to an interim measure) is binding on the parties but is not enforceable by a court and does not constitute an award.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There is nothing expressly prohibiting arbitrators from issuing dissenting opinions to the award. Accordingly, a dissenting arbitrator may do so. There are no rules applying to the form and content of dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Yes. Where the parties settle the dispute during the arbitral proceedings, the arbitral tribunal must terminate the proceedings. If requested by the parties, and if the arbitral tribunal does not object, the arbitral tribunal must record the settlement in the form of an arbitral award on agreed terms.

An award on agreed terms must state that it is an award and must otherwise comply with the formal requirements for an award to be valid. It has the same status and effect as any other award on the merits.

The arbitral proceedings are terminated by the final award. Otherwise, the arbitral tribunal must issue an order for the termination of the arbitral proceedings in the following situations:

- (a) when the claimant withdraws the claim, unless the respondent objects to the withdrawal and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings; or
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The arbitrator tribunal has a limited power to correct or interpret an award.

A party may, on notice to the other party, request the arbitral tribunal to correct any computational, clerical or typographical errors (or other errors of a similar nature). Unless the parties otherwise agree, that request must be made within 30 days, unless the parties have agreed on another period of time. If the arbitral tribunal considers the request justified, it must make the correction within 30 days of receipt of the request. However, the arbitral tribunal may extend the period for making the correction, if necessary.

The arbitral tribunal may also correct computational, clerical, typographical or similar errors on its own initiative.

If agreed by the parties, one party may, on notice to the other party, request the arbitral tribunal to give an interpretation of a specific point or part of the award. Unless the parties otherwise agree, the request must be made within 30 days. If the arbitral tribunal considers the request justified, it must give the interpretation within 30 days of the request. However, the arbitral tribunal may extend the period for giving the interpretation, if necessary. The interpretation forms part of the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Unless the parties otherwise agree, the arbitral tribunal has a discretion regarding who bears the costs of the arbitration. It is usual for the unsuccessful party to be ordered to pay a reasonable contribution towards the successful party's costs.

In the absence of any award or additional award fixing and allocating costs and expenses, each party is responsible for its own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

However, in the only case on the Act decided by the Supreme Court, the majority held that, at least where the optional Schedule 2 applies, the arbitral tribunal had a duty to inquire into and make an award on costs, even where neither party expressly or impliedly claimed for costs.

(ii) What are the elements of costs that are typically awarded?

Typically, costs awards comprise a reasonable contribution towards the legal costs of the party entitled to costs. Reasonable disbursements incurred (including expert witness fees) are also allowed.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes, but subject in some cases to court revision. (See Section XI(v) below.)

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. The Act does not contain any general rules or principles setting out how the arbitral tribunal should apportion costs between the parties. However, in domestic arbitrations, it is usual for costs to be addressed by reference to the general principles set out in the New Zealand High Court Rules.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Yes. Where the optional Schedule 2 applies, the High Court may, on the application of a party, vary the amount or allocation of the costs or expenses of the arbitration if the court is satisfied that the amount or allocation of the costs and expenses is unreasonable in all the circumstances. The arbitral tribunal is entitled to appear and be heard on such an application. The High Court's decision is final. Such applications are, however, rare.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Unless the optional Schedule 2 (permitting the possibility of appeals on questions of law) applies, the only way an award may be challenged is by applying to have the award set aside under article 34 of Schedule 1. The application must be made within 3 months of the date on which the party making the application to have the award set aside received the award (although there is no time limit where the

application to set aside is made on the ground that the award was induced or affected by fraud or corruption).

The grounds on which an award may be set aside are limited and are essentially the same as those appearing in the Model Law. In particular, an award may be set aside where the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand or the award is in conflict with the public policy of New Zealand.

The courts have given some guidance on what is (or is not) in conflict with the public policy of New Zealand. The words ‘public policy’ require some fundamental principle of law and justice to be engaged. There must be some element of illegality or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the Court’s processes and powers.

An award may also be in conflict with the public policy of New Zealand if (among other things) the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award. There remains some uncertainty as to the scope of this requirement, which has not yet been definitively settled by appellate authority.

An application to set aside the award does not operate as a stay of any enforcement proceedings. However, where both the setting aside and enforcement proceeding are being heard in the New Zealand court, it would be usual for them to be heard together. Where an enforcement proceeding is brought in a New Zealand court and an application to set aside the award is brought in the courts of the seat of arbitration, the New Zealand court may adjourn the enforcement proceeding pending the outcome of the setting aside application. For a discussion of an occasion where the Supreme Court set aside an award due to invalidity of an arbitration agreement see the summary of *Carr v Gallaway Cook Allan* [2014] NZSC 75 at Section III(ii) above.

The duration of any challenge proceedings depends on the nature of the challenge. But the courts will generally try to expedite the hearing of such matters, and it is usual for them to be heard and determined within three to six months.

Where the optional Schedule 2 applies, it may also be possible for a party to the arbitration to appeal on a question of law to the High Court. See Section XII(iii) below.

- (ii) **May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

No. The right to apply under article 34 of Schedule 1 to set aside an arbitration award is part of the irreducible mandatory core of arbitration law that may not be waived by the parties.

- (iii) **Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Sometimes. Where Schedule 2 applies, a party may appeal to the High Court on any question of law arising out of the award if: (a) the parties agreed before the making of the award that an appeal as of right would lie; (b) every party gives consent to the appeal after the award is made; or (c) the High Court gives leave to appeal.

The High Court must not grant leave to appeal unless it considers, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties. The Court of Appeal has identified eight non-exhaustive factors that should be considered when deciding whether to grant leave: the strength of the challenge or the nature of the point of law sought to be raised is one of the factors to be considered.

An appeal may be on a question of law only. Clause 5(10), added in 2007, provides that a question of law for the purposes of an appeal against the arbitral award does not include any question about whether the award was supported by any or any sufficient evidence or whether the arbitral tribunal drew the correct factual inferences.

If leave to appeal is granted, the High Court may, in determining the appeal, confirm, vary or set aside the award or remit the award to the arbitral tribunal.

If the High Court refuses to grant leave, any party may appeal that refusal to the Court of Appeal, either with leave of the High Court or with special leave of the Court of Appeal.

The High Court's determination of the appeal may be subject to a further appeal to the Court of Appeal, with leave of the High Court or with special leave of the Court of Appeal.

The Court of Appeal's determination of the appeal is subject to further appeal to the Supreme Court. All appeals to the Supreme Court are only with leave of that court.

- (iv) **May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

Yes. On the determination of an appeal under clause 5 of Schedule 2, the High Court may remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration. The arbitral tribunal must then, unless the High Court otherwise directs, make the award no later than three months after the date of the High Court's decision.

Where an application to set aside an award under article 34 of Schedule 1 is made, the court may, where appropriate and where requested by a party to do so, suspend the setting aside proceedings to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.

XIII. Recognition and Enforcement of Awards

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Awards may be enforced by applying to the High Court for entry of judgment in terms of the award. Application is made by originating application and must be accompanied by an affidavit containing duly certified copies of the award and of the arbitration agreement (if recorded in writing). If the award or the arbitration agreement is not in English, the application must also be accompanied by a duly certified translation into English of those documents.

If the monetary amount ordered to be paid in the award does not exceed \$200,000, an application to enforce the award may be made to the District Court.

The grounds for opposing enforcement or recognition are limited and are essentially those identified in the Model Law. They largely mirror the grounds on which the award may be set aside.

Opposing the enforcement or recognition of the award does not operate as a stay per se. But enforcement or recognition by the High Court will not occur until any opposition has been determined.

- (ii) **If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

The Act does not contain any provisions dealing with enforcement of an award where an exequatur has been obtained.

(iii) Are conservatory measures available pending enforcement of the award?

Yes. The High Court has power, either under its inherent jurisdiction or under the High Court Rules, to make a freezing order to preserve assets. This power could be exercised, if necessary, in favour of a successful claimant seeking to enforce an arbitral award.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The New Zealand courts are keen to enforce arbitral awards and to uphold the parties' choice to have their dispute resolved by arbitration. However, if the party against whom the award is invoked proves to the court that the award has been set aside by a court of the country in which, or under the law of which, that award was made, the court may (and usually will) exercise its discretion to refuse to recognise or enforce the award.

If an application has been made to set aside the award in the courts at the place of arbitration, the New Zealand court may adjourn the proceedings for recognition or enforcement of the award, if it considers it proper to do so.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement is generally a streamlined procedure, which should take around three to five months. For awards made after 1 January 2011, the application to enforce the award must be made within six years of the date on which the arbitral award became enforceable by action in New Zealand (which is generally the date of the award).

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Yes. New Zealand's sovereign immunity doctrine derives from the common law. It recognises and applies the restrictive theory, making a distinction between *acta jure imperii* and *acta jure gestionis*.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

No. According to the restrictive theory of sovereign immunity recognised in New Zealand, absent a waiver, enforcement is available only against property which is being used for commercial purposes by a state or state entity.

The point has not been specifically tested in New Zealand, but there seems little doubt that signature of an arbitration agreement constitutes a waiver of immunity from jurisdiction in respect of those arbitral proceedings. This will not, however, constitute a waiver of immunity from execution or enforcement.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Yes. This treaty is incorporated into New Zealand law by the Arbitration (International Investment Disputes) Act 1979.

New Zealand has not entered into any other multilateral treaties specifically for the protection of investments. It did, however, enter in February 2009 into a multilateral free trade agreement with the ASEAN countries, and Australia, which extends to investment treaty arbitration between New Zealand and each of the ASEAN countries (but not Australia due to a reciprocal agreement).

(ii) Has your country entered into bilateral investment treaties with other countries?

Yes, New Zealand has two historic bilateral investment treaties, with China (1994) and Hong Kong (1995) respectively (as well as 1999 treaties with Chile and Argentina, which have not come into force).

More recently, New Zealand has signed free trade agreements or closer economic partnerships with China (2008), Malaysia (2009), ASEAN (2012), Taiwan (2013) and Korea (2015) which each provide a modern framework for investment treaty arbitration between nationals of one country and the other country. New Zealand also has free trade agreements with Singapore (2001) and Thailand (2005), neither of which unequivocally provides for binding investor-state arbitration. In 2011, New Zealand and Australia signed an investment protocol to their Closer Economic Relations Agreement, which makes no provision for investor-state arbitration.

New Zealand is a signatory to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (*CPTPP*) – which evolved from the Trans-Pacific Partnership (*TPP*) and the P4 Agreement between New Zealand, Brunei Darussalam, Chile and Singapore. The *CPTPP* has now been signed by 11 countries in the Pacific region, being New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Vietnam. The *CPTPP* is not yet in force, but includes an investment chapter with certain features derived from the United States Model BIT. The chapter does not include the GATT or GATS general exceptions, but does have specific exceptions for certain

countries. Under the TPP New Zealand had included exceptions for national security, the Treaty of Waitangi, as well as a taxation exception. The CPTPP further narrowed the investor-state dispute mechanism that existed under the TPP and New Zealand has further exceptions for disputes relating to public education, health, and other social services, as well as decisions made under the Overseas Investment Act 2005. New Zealand also has a reciprocal agreement with Australia excluding the application of the ISDS chapter between the two countries.

XVI. Resources

- (i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The most comprehensive, and recent, text is DAR Williams QC and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington 2017), which featured contributing authors Daniel Kalderimis, Anna Kirk and Wendy Miles QC.

The two other main textbooks are AAP Willy *Arbitration* (Brookers, Wellington, 2010) and P Green and B Hunt *Green and Hunt on Arbitration Law and Practice* (looseleaf ed, ThomsonReuters, Wellington).

- (ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

The most important is the annual conference of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), which is usually held in a major New Zealand city in the first week of August.

XVII. Trends and Developments

- (i) Do you think that arbitration has become a real alternative to court proceedings in your country?**

Yes. Many significant commercial disputes are resolved by arbitration in New Zealand. A body of case law has now emerged, and is continuing to grow, adding further guidance as to the meaning and application of the Act in practice. New Zealand is cementing its reputation as an arbitration-friendly jurisdiction. One of the practical limitations is the relative scarcity of experienced senior arbitrators within the jurisdiction. As a result, parties often experience considerable difficulties in securing top-tier arbitrators for upcoming hearings.

- (ii) What are the trends in relation to other ADR procedures, such as mediation?**

Mediation is the most widely-used alternative dispute resolution mechanism in New Zealand. There are several mediation providers and a large number of independent mediators. Unlike for arbitrations, New Zealand has no legislative

confidentiality protection for mediations. A recent Court of Appeal decision has created some doubt over the scope of contractual confidentiality and without prejudice privilege in mediations where one party claims an oral settlement agreement was reached and seeks to demonstrate this in subsequent court proceedings.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

In late 2014, the Supreme Court overturned the previous line of authority on circumstances where the Court will grant summary judgment instead of a stay on proceedings, in cases where simultaneous applications to stay proceedings and for summary judgment are entered. Previously, where the Court believed that the defendant had no real defence to the plaintiff's claim, the application to stay proceedings would be rejected, and instead summary judgment would be granted in favour of the plaintiff.

After the Supreme Court's decision that rule no longer applies. Instead, the Court will grant summary judgment instead of a stay only where the dispute in question is not bona fide; even where there is no real defence to the plaintiff's action, a stay of proceedings and referral to arbitration will be appropriate. That decision closes one of the notable gaps between the New Zealand regime and the Model Law, bringing the jurisdiction more into line with international practice and obligations.

The Arbitration Amendment Bill 2017 (Member's Bill 245-1) is at the time of writing before the Justice Committee of New Zealand Parliament. A report from the Committee is due on 29 March 2018, following which the Bill will receive its second reading, most likely in mid-2018. Elements of the Bill's proposed changes are outlined in the relevant sections above, but broadly the Bill aims to do four things:

1. confirm the validity of arbitration clauses in trust deeds;
2. extend the presumption of confidentiality in arbitral proceedings to ancillary court proceedings;
3. clarify the grounds for setting aside an arbitral award (in light of the *Carr* decision discussed above at Section III(ii)); and
4. confirm the consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction.

A recent decision of the Court of Appeal in *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZAR 1617, [2017] NZCA 490, held that a party to an arbitral dispute (ENAP) has a reasonable and legitimate purpose in seeking documents relating to a parallel arbitral proceeding and it did not matter



whether that proceeding was in the courts or in an arbitral tribunal. The Court of Appeal confirmed that “*courts no longer exercise a general supervisory jurisdiction over arbitrations*” and the Arbitration Act 1996 encourages finality of decisions by arbitral tribunals and that the difference between courts and tribunals is a matter of judicial comity (at [36]-[47]). This being the case, a court will be reluctant to allow a decision of an arbitral tribunal to be circumvented by parallel applications in court. Ultimately ENAP was not permitted access to the documents it sought on the basis that to allow it to do so would circumvent a decision by the arbitral tribunal that determined the documents were not relevant.