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Different dispute resolution clauses in related contracts. Which one prevails?

Sign of the times: enforcing an arbitration agreement exchanged by electronic counterparts

Case in Brief: Court thwarts bad faith attempt to lift veil of confidentiality of international arbitration award

NZDRC

From the Editor

John Green

Welcome to the 31st issue of ReSolution® complacency in top-ranking countries, human rights abuses, and how the New Zealand government is ensuring transparency and stability in these uncertain times.

In this issue we also look at the recent judgment of the UK Court of Appeal in CDE v NOP which concerned the tension between open justice and arbitral confidentiality. The Court upheld, in part, an order made by the Commercial Court stipulating that, owing to conflicts of confidentiality relating to an LCIA arbitral award, a case management conference in related Court proceedings should be held in private, as an exception to the general principle that such hearings are to be held in public. As Lord Justice Males observed, open justice exists in the public interest in order to ensure the proper administration of justice regardless of the wishes or motives of the parties.

In Case in Brief, Maria Cole talks about the judgment of the Federal Court of Australia in *EBJ21 v EBO21*. The case involved an attempt by the applicant to lift the veil of confidentiality from an international arbitral proceeding. It concerned whether an arbitral award creditor was entitled to recognition or enforcement of a money award under the International Arbitration Act 1974 and UNCITRAL Model Law when the award had been paid in full and in time and there was no dispute about the award.

As always, I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professionals, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world-class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution.

Contributions of articles, papers, and commentary for future issues of ReSolution® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute ReSolution® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Editor

Warmest regards,

John Green
Editor

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Contents

ReSolution is the quarterly journal of NZDRC and NZIAC, published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

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ReSolution in Brief

Review of the English Arbitration Act 1996

The United Kingdom anticipates the Law Commissioner's review of the English Arbitration Act 1996. The review is intended to ensure the Act remains effective in reflecting the current practices of international arbitration.

The precise scope of the review has yet to be determined, but the Law Commissioner has indicated possible issue areas include:

- the power to summarily dismiss unmeritorious claims or defences in arbitration proceedings
- the courts' powers exercisable in support of arbitration proceedings
- the procedure for challenging a jurisdiction award
- the availability of appeals on points of law
- the law concerning confidentiality and privacy in arbitration proceedings
- electronic service of documents, electronic arbitration awards, and virtual hearings
- the scope for introducing trust law arbitration

With ongoing institutional changes and legislative reforms enacted in many other jurisdictions, this review is eagerly anticipated. It is expected to modernise the Act, rather than rebuild it.

Georgia Ratifies Singapore Convention on Mediation

On 4 January 2022, Georgia became the ninth state to ratify the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). The Convention will enter into force in Georgia on 29 June 2022.

The Singapore Convention on Mediation was designed specifically to strengthen access to justice and the rule of law in international commercial mediation. The Convention facilitates *mediation as an alternative and effective method of resolving trade disputes* and guarantees the binding enforcement of international mediated settlement agreements. The addition of Georgia further diminishes the difficulty of cross-border mediation settlements.

Corruption Perception Index 2021 ranks New Zealand No. 1

Transparency International has newly released the 2021 Corruption Perception Index (CPI). New Zealand remains ranked number one alongside Denmark and Finland. The CPI illustrates the New Zealand Government's commitment to ensuring transparency and stability. It cautions about the ongoing wrestle with accountability and transparency faced by several countries in the face of a standstill of global CPI averages. With the ongoing global pandemic, corruption exacerbates threats to freedom and equal access to justice. The smokescreen of the pandemic can shield private interest and wrongdoings. This issue of ReSolution contains a further discussion of the matter, including the impact of COVID-19, complacency in some of the CPI top-ranking countries, human rights abuses, and New Zealand's response to corruption issues specific to it raised by the CPI.

UNCITRAL Working Group II: Dispute Settlement

The United Nations Commission on International Trade Law's Working Group II: Dispute Settlement will be holding its 75th session on 28 March 2022. This upcoming "Colloquium on Possible Future Work on Dispute Resolution" aims to *explore the legal issues relating to dispute resolution in the digital economy and to identify the scope and nature of possible legislative work*.

The Colloquium will discuss:

- developments in dispute resolution
- online platforms for dispute resolution
- technology-related dispute resolution
- adjudication

The focus will also be on steps to take in exploratory work to safeguard the effectiveness of dispute resolution in subsequent years. Previous sessions of the Working Group have addressed the impact of COVID-19. Various arbitration institutions shared measures taken to respond to the pandemic, including utilising digital technology to facilitate the hearing and proceedings. Also included have been discussions about the impact of technology on due process and fair conduct of remote proceedings. This can be as diverse as technical problems, environmental distractions, difficulties building rapport and connection with participants online, and power imbalance due to different technical skills. A notable suggestion was a proposal to "stock-take" by monitoring the changing landscape of dispute resolution and assessing evolving practices and relevant developments.

We are witnessing a paradigm shift in dispute resolution triggered by the COVID-19 pandemic and the developing digitalised commercial industry. The accelerated use of online mediation means technology needs to be an advantage and not a distraction.

NZDRC's complete guide to Model Clauses

Have you checked your model dispute resolution clause lately? Our revised Model Clauses Guide may assist in helping resolving disputes. Successful dispute resolution can preserve relationships and prevent parties from ending up in court. At the beginning of another busy year there is little room for the unoptimistic event of a dispute in your contractual relationship. Should a dispute arise, it is important that there are dispute resolution clauses within the contract to address this. This may help you stay ahead of the game and get back on track in a timely and cost-effective manner.

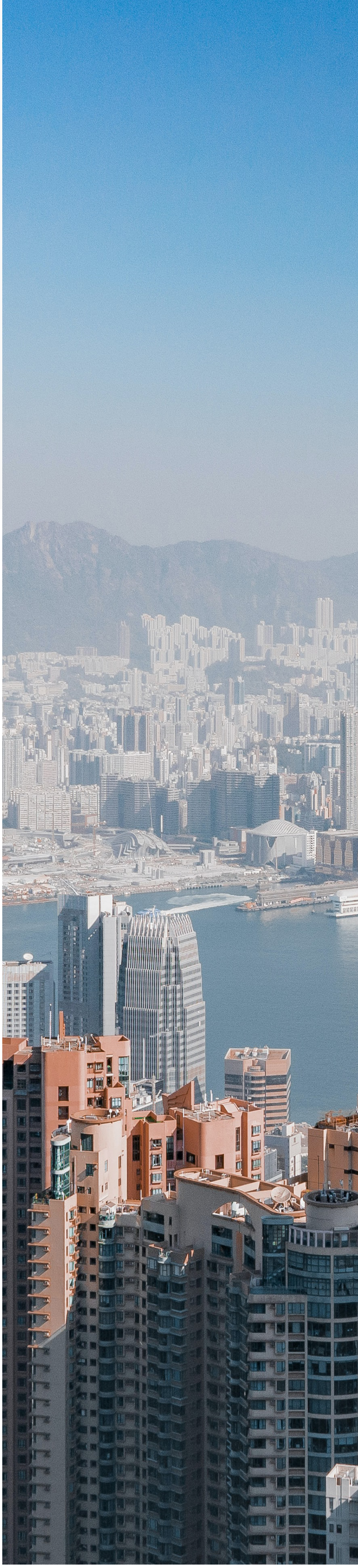
Our Guide provides insight on what makes an effective model cause and how this may assist in resolving disputes promptly. Rather than waterfall and multi-tiered clauses, NZDRC's approach is to include agreed rules for arbitration and mediation. Arbitration, mediation, Arb-Med, expert determinations, and early neutral evaluation are recommended model clauses that may be incorporated into your agreement.

About the author

Jackie Li is a law clerk working in NZDRC's Knowledge Management team. She is currently studying toward her Bachelor of Laws at Victoria University and she is expanding her interest in alternative dispute resolution.

Different dispute resolution clauses in related contracts. Which one prevails?

By Jo O'Dea



If you have a number of related contracts between different parties and they have different dispute resolution clauses, which one do you use?

Summary

In *ZPMC- Red Box Energy Services Ltd v Adkins* [2021] HKCFI 3501, there were three related contracts between the parties. Two of the contracts provided for dispute resolution through arbitration and the third through the Hong Kong courts. A payment dispute between the parties forced them to ask the Court to decide which clause prevailed. The Court found that the clause which was *at the centre of gravity* of the argument was the *winning* clause.

The facts

ZPMC is a joint venture company involved in ocean-going vessels and oil and gas projects. The defendants were:

1 the former CEO and a director of ZMPC (Adkins);
2 an advisory company that provided consulting services to ZPMC (Fathomless Advisory Services Ltd) (FSA); and
3 a shareholder of ZPMC (RBF HK Ltd) (RBK).

At all material times, Adkins controlled FSA and RBK.

The three contracts containing the conflicting clauses were:

1 a CEO agreement between ZPMC and Adkins with a clause referring disputes to the Hong Kong courts (CEO Contract); and
2 a service agreement between ZPMC and FSA with a clause referring disputes to HKIAC arbitration (FSA agreement); and
3 a shareholder's agreement between RBF and ZPMC

also a clause referring disputes to HKIAC arbitration (RBF agreement).

At some point Adkins made payments of over USD3.5 million from ZPMC to FSA and RBF which ZPMC alleged were not authorised. ZPMC brought court proceedings against him in Hong Kong, alleging breach of fiduciary duties, contractual duties and breach of trust by Adkins. ZPMC also made claims against FSA and RBF as constructive trustees for knowing receipt of payments from ZPMC.

Relying on the arbitration clauses in the FSA and RBF agreements, Adkins, FSA and RBF applied for a stay of court proceedings. They wanted the dispute to be referred to the HKIAC (Hong Kong International Arbitration Centre) for arbitration (as set out in the RBF and RBF agreements).

Decision

When determining which clauses take priority in interrelated agreements, the starting point for the Court was set out in *Houtai Investment Holdings Ltd v Leung Yat Tung & Others* [2021] HKCFI 1504:

1. First it is presumed that the parties intend all disputes from the relationship to be decided by the same tribunal - the "one stop" presumption (*Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40).

2. BUT the "one stop presumption" is refutable and each arbitration clause must be considered in its own context.

3. In particular, the "one stop" presumption is not applicable, where there are multiple related commercial agreements (each dealing with different aspects of the parties' relationship) and each containing its own dispute resolution clause. The Court should instead identify *the nature of the claim* and *the agreement that has the closest connection with such dispute* (also referred to as the agreement *at the centre of gravity of the dispute*).

Keeping the original claim in mind, the Court held that the sub-stance of the dispute was ZPMC's claims against Adkins for breaches of fiduciary duties, contractual duties and trust. These were personal duties that Adkins owed due to his position as a former director and CEO of ZPMC. The CEO agreement was at the *at the centre of gravity* of the dispute, and in this agreement, the parties agreed to the jurisdiction of the Hong Kong courts.

For the claims against FSA and RBF, there was no allegation that they had committed any breaches of their respective agree-ments. Their liability was secondary (knowing receipt of funds), which was (or would be) determined by Adkins' liability.

The Court dismissed the defendant's application.

It is interesting that the Court noted that ZPMC had made a deliberate decision not to include arbitration as a dispute resolution forum. It had wanted the Court to be the determining body in any dispute with their (former) CEO. Also of note was the arbitration clauses in the RBF and FSA agreements. These stated that they would only cover disputes between the parties that came from that agreement.

Conclusion

In this case, the Court was easily able to establish what was *at the centre of gravity of the dispute* and determine that the ZPMC claims against Adkins, the CEO, were the main claims. This case serves as a reminder that:

1. Parties should consider what dispute resolution provisions they have in related, or linked contracts. They should also consider what dispute resolution forum is appropriate, depending on the nature of the contract.

2. It is also important that any dispute resolution clause accurately sets out the scope of the clause. That is, is the dispute resolution clause intended to settle all disputes between the parties?

About the author

Jo O'Dea is a member of NZDRC's Knowledge Management team and provides technical support to the NZDRC/ NZIAC TEAM.

She has recently joined us from UNICEF, where she worked as a contracts specialist, assisting the Corporate Partnerships team to enter into international partnerships. Prior to this, Jo worked as a solicitor in New Zealand and the United States.

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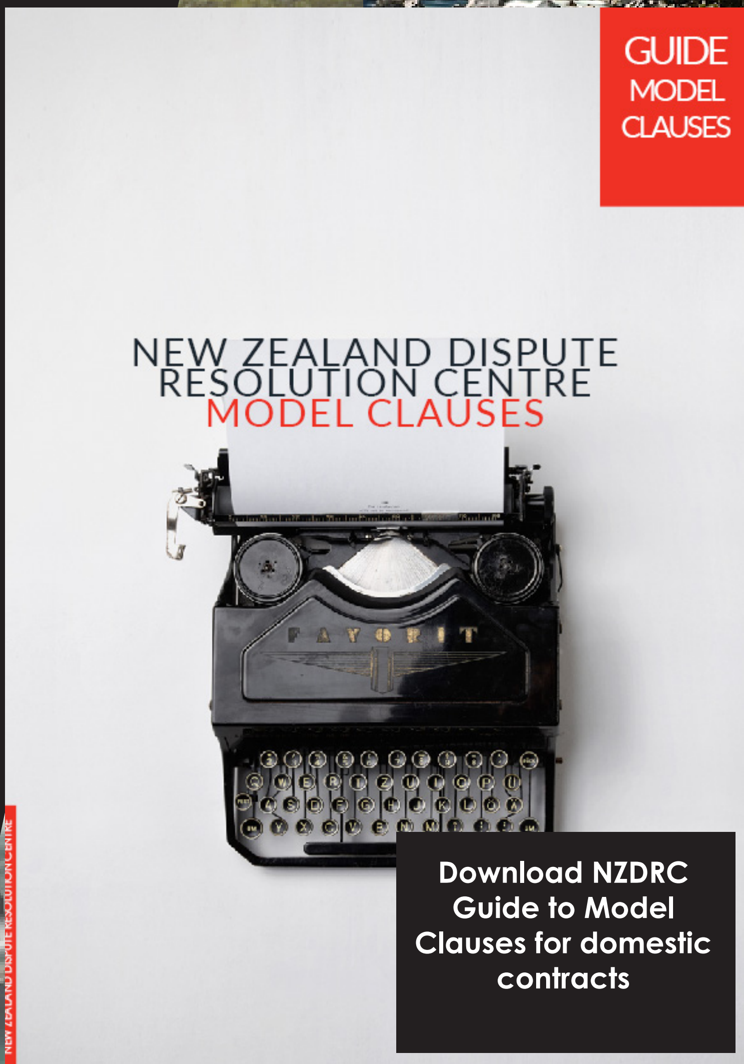

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Sign of the times: enforcing an arbitration agreement exchanged by electronic counterparts

By Belinda Green

In the electronic era, documents often do not exist in physical form. Does this affect their enforceability? Recent decisions from Australia and New Zealand show that our mindset about what an original or duly certified copy is might need to change when it comes to enforcing foreign arbitral awards.

Electronic signatures, counterparts and modern contracts

Let's get nostalgic for a moment: Many of us will remember the days when the signing of contracts was a big production. For "important" transactions, there might be a signing ceremony. Directors gathered from both sides to sign the contract, a favourite pen in hand, junior colleagues or lawyers hovering in the background ready to act as witnesses.

More commonly, multiple copies of the contract might be signed by Party A and then couriered, posted or delivered over to Party B. Party B then dutifully countersigned and couriered back one or two pristine copies to Party A, and then everyone had a beautifully executed version of the contract that could sit in a filing cabinet to gather dust. The common law worked to catch up, with innovations such as the "postal acceptance rule" helping the law to keep up with practice on the ground.

From there, we began to innovate.

Rather than having parties sign the same document one by one, we saved time by using physical counterparts. Signatures on separate documents were then joined in the happy union of a staple – two sets of the contract bundled together and often stretching the staple to the limits of its ability.

We also incorporated electronic approaches. For a brief yet glorious moment, the fax machine reigned supreme, and counterparts appeared on silky thermal paper, the ink a never-quite-black and pages forever curling up at the corners. But as scanning technology became easier to own and use, the PDF file became the fashion. Contracts are scanned and fired off in a PDF, often never to be printed at all. More recently, some of us have abandoned all traces of the physical: documents are issued electronically and signed electronically.

"Wet ink" is out, electronic is in

When our electronic habits became too much for them to ignore, Parliament introduced statutory rules to give some certainty around electronic contract formation, by passing the Electronic Transactions Act 2002. Those provisions are now found in the Contract and Commercial Law Act 2017 (some practitioners may say "buried"), but they remain in force.

As a result, New Zealanders can now routinely engage in electronic activity that formerly had to be done in paper format. Information can be provided by electronic communication, and notices can be received. Electronic signatures can be used for contract formation, and even witnesses for signatures and seals can occur digitally. People will routinely enter into contracts by exchanging electronic counterparts – although the more conservative of us will go to pains to ensure an appropriate counterparts clause is included in the documentation.

But does this acceptance of electronic documents work in the international context? The 1958 UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards anticipates that an *original* or *certified copy* of documents will be produced. Can this 1950s concept be reconciled with 2020s habits?

Requirement for original or certified copy to enforce foreign arbitral awards

A key feature of arbitral awards is that they should be easy to enforce – not only in your home territory but also in jurisdictions abroad. As a result, a simple regime for enforcement of foreign arbitral awards has been adopted by the 1958 UN Convention signatories such as Australia and New Zealand.[1] Here in New Zealand, the enforcement regime is found in article 35 of Schedule 1 to the Arbitration Act 1996.

The threshold for enforcement is low. The enforcing party must produce:

- an *original* or *duly certified copy* of the authenticated arbitral award; and
- an *original* or *duly certified copy* of the arbitration agreement.[2]

Once produced to the court, the award is enforceable unless one of the grounds in article 36 applies (grounds which are quite limited in nature).

> *There is a low threshold for the recognition and enforcement of arbitral awards under the Arbitration Act. This reflects the purposes of the Arbitration Act, which include facilitating the recognition and enforcement of arbitration agreements and arbitral awards* – Justice Courtney, *Navaratnam v HG Metal Manufacturing Limited* [2021] NZCA 704.

The 1958 UN Convention presumably anticipated that physical copies of the award and agreement would exist. Arguably in 1996 the NZ Parliament also anticipated the same – certainly no one thought to update the original language of the Convention. So does a physically signed copy of the award and agreement need to be produced? And what does it mean to produce an *original* or *duly certified copy* of a document that never existed in physical form?

Certified copy of an arbitration agreement: The HongKong Henson case

The Australian Federal Court considered the certification requirement in *HongKong Henson Industrial Limited v Victorian Ferries Pty Ltd*.[3]

HongKong Henson contracted to buy mineral sands from Victoria Ferries. The contract contained an arbitration agreement. To execute the contract, Victoria Ferries' director signed a printed version of an offer sheet and affixed the company seal, then emailed a scanned copy to HongKong Henson. HongKong Henson printed the document, added its director's signature and seal, and then emailed the document back. At some point, HongKong Henson misplaced the physical original it had signed. And at no point did it ever receive a physical version of the counterpart that Victoria Ferries had signed.

A US$2 million dispute between the parties went to arbitration in Singapore, resulting in an award in favour of Victoria Ferries. Victoria Ferries attempted to enforce the award in Australia and HongKong Henson objected, saying the arbitration agreement was not properly certified.[4]

The Federal Court of Australia found that the arbitration agreement was properly certified, and therefore enforceable, on two bases.

1 UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958.

2 Article 35 of Schedule 1 of the Act. For completeness, it should be noted that a translated copy of the award is also required if the award or agreement is not in English.

3 HongKong Henson Industrial Limited v Victorian Ferries Pty Ltd [2021] FCA 1450.

4 As required by section 8(3) of the International Arbitration Act 1974 (Cth), which contains an equivalent requirement to NZ's article 35 and the UN Convention's Article IV.

Authentication by an arbitrator

The first option relied on was section 9(2) of the Australian legislation, which has no equivalent in the New Zealand Arbitration Act. Under that provision, an arbitration agreement is deemed to be an original or certified copy if it is contained in an arbitral award that is authenticated. The original award (which contained a full copy of the arbitration agreement) had been produced to the Court, so on that basis alone the certification requirements were met.

Certified as true copies in an affidavit

The employee who had been involved in the email exchange of the contract, Ms Ji, had provided an affidavit in support of the application to enforce. That affidavit attached printouts of the electronic counterparts and contained her confirmation that they were true copies. As a second option, the Court accepted the affidavit as providing a certified copy.

No preference between the two options was expressed, indicating that both were equally satisfactory.

The Court also hinted at a third option: Much like NZ's electronic transactions legislation, Australian legislation allows a person to produce an electronic contract in electronic form.[5] No finding on this was needed however, as the agreement hadn't been provided in electronic form.

Authenticated and certified copy of an arbitral award: The Navaratnam case

The New Zealand courts have also had to grapple with the certification rules.

In *HG Metal Manufacturing Limited v Navaratnam*, an unrepresented litigant who had relocated to New Zealand challenged the enforcement of a Singaporean arbitral award.[6] He argued that the award was not properly certified because it had been attached to an affidavit sworn by HG Metal's Singaporean solicitor, rather than an employee. He also argued that the award had not been *duly authenticated* in accordance with the Singaporean requirements, despite the award being sealed and recording the SIAC Registry information.

These arguments were given short shrift by the High Court, who commented that *there*

5 Section 11 of the Electronic Transactions Act 1999 (Cth), see section 232 of the Commercial and Contract Law Act 2017 for the NZ equivalent.

6 HG Metal Manufacturing Limited v Navaratnam [2021] NZHC 1920.

is a general presumption in favour of the enforcement of foreign awards.[7] The Court had no problem accepting the solicitor's affidavit, and expert evidence was provided to rebut the claim about authentication.

Enforcement of arbitral awards in the electronic era

These cases show that an electronic format is not a barrier to enforcement.

The Australian Federal Court hinted that an *original* of an electronic document might be provided in electronic form, but declined to make a finding on the application of the electronic transactions legislation and what it might mean for foreign arbitral awards. Could the NZ practice of providing electronic copies to the court satisfy this requirement? We also need not speculate, as the affidavit submitted to enforce a foreign arbitral award should satisfy the need for a *certified copy*.[8]

A physical document would typically be photocopied and attached to an affidavit as an exhibit. An electronic document is printed rather than photocopied. Neither of these options is "better" than the other. In either case, the underlying principles are the same: the certifying party should satisfy themselves as to the authenticity of the document they are certifying, and the other party can challenge that authenticity.

Further, the mere fact that a document is electronic in nature cannot be the basis of a challenge – as Mr Navaratnam discovered. Nor is a "better" source of certification needed (eg, an affidavit from an employee involved in the electronic exchange) just because a document is electronic.

As a result, we can easily reconcile our modern habits with enforcement requirements. It isn't the 1958 Convention wording that needs updating, it's our concept of what an "original" or "certified copy" is.

7 At [16]. The Court of Appeal similarly had little time for these arguments – see Navaratnam v HG Metal Manufacturing Limited [2021] NZCA 704 at [22].

8 An affidavit is filed as a matter of course when a single-party application to enforce a foreign arbitral award is made in NZ. See HCR 26.22 and 26.23, High Court Rules 2016.

About the author

Belinda is a part of the Knowledge Management team at NZDRC.

She previously worked in the Parliamentary Counsel Office, Bell Gully as a Senior Associate and a Lecturer at The University of Auckland, where she gained a great level of experience in commercial property law, leasing and publishing of various legal articles.

Case in Brief

Court thwarts bad faith attempt to lift veil of confidentiality of international arbitration award

By Maria Cole

The confidentiality of arbitral proceedings is important. It is protected by statute and model law. In *EBJ21 v EBO21*,[1] the Federal Court of Australia refused to have its processes used to erode or undermine the parties' agreement to, and the law's protection of, confidential information in relation to the parties' arbitral proceeding when no legitimate purpose could be identified for the orders sought.

What the application was about

The application involved an international arbitration. It concerned whether an arbitral award creditor was entitled to recognition or enforcement of a money award under the International Arbitration Act 1974 and UNCITRAL Model law when the award had been paid in full and in time.

Background

A dispute between the parties had gone to arbitration. It was resolved at mediation and a deed of settlement was entered into. The deed recorded the terms of the agreement were *strictly confidential and are not to be disclosed or permitted to be disclosed in any form, or any manner, either directly or indirectly, except ... for the purpose of enforcing this agreement*.[2] The arbitrator then made the award contemplated by the settlement deed.

The day the award was made the award creditors filed their application to enforce it, despite the due day for payment being 30 days away. Their actions came "out of the blue".

1 [2021] FCA 1406.

2 Ibid, at [10].

The award debtors argued that as the money had been paid, there was no entitlement to the recognition or enforcement of the award by orders of the Court. They said it was pointless – the award had been satisfied and the obligations in the award had been discharged.

They also said that the applicants' persistence in seeking recognition or enforcement was an abuse of process. They argued it was an indication of the applicants having an *improper predominant purpose*,[3] which was to circumvent the confidentiality obligations attached to the dispute by bringing it into the public arena of a court proceeding.

Recognition or enforcement of international arbitral awards

The award creditors' case relied on Article 35(1) of the UNCITRAL Model Law on International Commercial Arbitration. Article 35(1) provides that an arbitral award *shall be recognised* and *shall be enforced*. Their argument was that this gave them a right to recognition or enforcement that could only be defeated on one of the limited grounds set out in Article 36 of the Model Law, and prior payment of the award is not one of them. They said that that right meant their proceeding seeking recognition could not be an abuse of process or contrary to public policy.

The Court considered the distinction made in the Model Law between recognition and enforcement of awards. It indicated that recognition not only constitutes a necessary condition for enforcement but also may stand alone, for example, where an award is relied on in other proceedings. It also noted that by operation of Article 35(1), an award is recognised as binding between the parties from the date of the award, whereas enforcement occurs only after an application in writing is made to a competent court.

The Court held that the rights created by the award were fulfilled and discharged upon payment of the award. It accordingly found there were no rights or obligations left to be enforced from that moment.

In considering the position on recognition of an award, the Court noted that a money award that has been paid could still have legal effect. However, the only justification the award creditors could provide for requiring the orders was that if something occurred in the future, they would be better off with an order that recognised the award than without it. Unsurprisingly, the Court was not swayed by this argument. Given there was no dispute about the award, it found there was no justification to grant the application.

The veil of confidentiality remains

The mere fact that the proceedings had been brought meant information about the award and the parties involved was in the public domain. In considering whether to grant suppression orders, the Court stated that:[4]

> …to act as the applicants acted in commencing the proceeding when they did, without warning, thereby negating the efficacy of the confidentiality to which they had agreed only days before and rendering essentially pointless their agreement to the respondents having a month to pay the award, was to act in bad faith. It cannot reasonably be justified or explained other than as a strategy to lift the veil of confidentiality from the arbitral proceeding.

The Judge noted that *the proper administration of justice places a high value on its processes not being used other than for substantial legitimate purposes*.[5] The Court accordingly granted the application made by the award debtors for suppression orders.

The veil of confidentiality remains in place.

3 Ibid, at [2].

4 Ibid, at [76].

5 Ibid, at [86].

About the authors

Maria works as a Knowledge Manager in NZDRC's Knowledge Management Team.

She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

New Zealand still rated as global leader for public sector honesty and integrity

By Jackie Li and Maria Cole

Transparency International has just released the 2021 Corruption Perception Index (CPI). New Zealand has retained its joint number one ranking along with Denmark, as having one of the least corrupt public sectors in the world. This year Finland joins the top-slot as third equal.

New Zealand's score remains a "clean" 88/100, which is great news. However, the global average of 43/100 has also not moved. It has now been stagnant for 10 years in a row. Two-thirds of the countries have scored below 50, indicting serious corruption problems. Of them, 27 have obtained their lowest scores ever. The figures reveal a worrying standstill in all regions of the world in the fight against public sector corruption. A summary of some of the issues raised in the CPI is below. The full report and supporting data can be found here.

The ongoing impact of COVID-19

The CPI indicates the COVID-19 pandemic is being used as an excuse to *curtail basic freedom and sidestep important checks and balances*. It delivers a powerful message on the harsh reality faced by people around the globe that private interests continue to overtake the public good. It is further proof that the continued inability of governments to uphold anti-corruption goals is contributing to a democratic crisis in the world.

While the Western Europe and European Union region still rates well, there are concerns. The report highlights that accountability and transparency measures rolled back during the pandemic are not being restored. This lack of progress threatens the region's "clean" image.

Complacency in some top-ranking countries

It appears complacency has become an issue with CPI top-ranking countries as they are seen to be back-sliding. Australia and Canada have *declined significantly over the past decade*, having respectively lost 10 and 12 points on their ratings since 2012. The United States has dropped 9 points since 2015, and for the first time for a decade does not rate among the 25 best performers.

Perception is important. The CPI states that in the [Global Corruption Barometer 2021] 50% of Germans think German companies commonly rely on money or connections to win government contracts. A recent scandal involving multiple parliamentarians suspected of enriching themselves through government contracts to purchase COVID-19 masks appears to have added fuel to the fire. It is an illustration of the need for independent checks on power.

Human Rights abuses

The role of corruption in human rights abuses and the decline of democracy is also covered. The report states that corruption weakens a government's ability to respect, protect and fulfil people's human rights. It illustrates how corruption in law enforcement jeopardises people's safety and victims' access to justice. This type of corruption may lead to ill-treatment, torture and wilfully slow investigations.

Corruption can also be an indicator of an unsafe environment for human rights defenders. The CPI sets out results of data examined by Transparency International collected by frontline human rights defenders. The data was disturbing as it showed 331 cases of murder of human rights defenders in 25 countries in 2020. In a worrying trend, 98% of the deaths occurred in 23 countries with high levels of public sector corruption. Further, *at least 20 of all cases were registered as killings of human rights defenders dealing with anti-corruption issues.*

New Zealand's response to issues previously raised

New Zealand has not rested on its laurels because of its top spot. For example, our Ministry of Justice initiated a review of Anti-Money Laundering and Counter Financing Terrorism legislation after the CPI has previously tagged this as a concern. The Government recently released a summary of the progress it has made on anti-corruption initiatives, which can be read [here]. These include new bribery offences and increased penalties for bribery and corruption.

A safe haven to conduct business

With ongoing instability encountered by anyone attempting to conduct business, the CPI once again shows that New Zealand is a safe and stable haven to do so. It is clear the New Zealand government is committed to ensuring transparency and stability in these uncertain times.

About the authors

Jackie Li is a law clerk working in NZDRC's Knowledge Management team. She is currently studying toward her Bachelor of Laws at Victoria University and she is expanding her interest in alternative dispute resolution.

Maria works as a Knowledge Manager in NZDRC's Knowledge Management Team.

She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

Court of Appeal affirms principle of arbitral confidentiality by endorsing decision to hold case management conference in private

By Richard Bamford

In a decision dated 15 December 2021 in *CDE v NOP* (full party names anonymised in the interests of maintaining confidentiality), the Court of Appeal upheld in part an order made by the Commercial Court. Specifically, it upheld the part of the order stipulating that, owing to conflicts of confidentiality relating to an LCIA arbitral award, a case management conference in related Court proceedings should be held in private, as an exception to the general principle under CPR 39.2 that such hearings are to be held in public.

Background

The claimants in this case had previously succeeded in an LCIA arbitration against companies said by the claimants to be connected to the defendants. The claimants commenced court proceedings against the defendants arising out of the same circumstances that gave rise to the arbitration. The claimants allege that the LCIA award was also binding on the defendants, because privity exists between the defendants and the companies that were party to the arbitration. The defendants deny that the LCIA award is binding on them and argued that the award was in any case inadmissible in the court proceedings. At the time of the Court of Appeal decision, this issue was intended to be determined at an impending summary judgment hearing and was referred to as the "privity application".

The claimants argue that it is in the public's interest that the arbitral award is made public. The defendants maintain that it should remain confidential, at the very least until the privity application is resolved. The defendants argue that if they are successful in rebuffing the privity application, there would be no need, nor authority, for the LCIA award to be used in the current proceedings, and no justification for it to be publicised.

This is the context in which the parties approached a case management conference before Mr Justice Knowles in July 2021. The claimants were of the position that the case management conference, as well as the privity application (at the time unissued), should both be held in public, in the usual way. However, the defendants disputed this – a hearing concerning the debated confidential nature of the arbitral award, if held in public, would inevitably reveal what the arbitrators had decided.

The Commercial Court Order

In relation to the issues of whether: a) the case management conference and b) the privity application should be held in public, Mr Justice Knowles produced an *ex tempore* judgment, determining as follows:

1. The case management conference, which refers to the LCIA award, and any application heard that same day referring to the contents of the LCIA award, were to be heard in private. In his order, it was noted that this was simply the position at the early stage after the recent issue of the LCIA award, and was not an indication that the same position would necessarily hold in light of the privity application or otherwise.

2. As for the privity application, the judge did not make an assessment as to whether the hearing was to be heard in public or private. Rather, the order stipulated that all parties at any hearing in the proceedings not taking place in private (i.e. taking place in public), should for the time being refrain from relying or referring to any parts of the contents of the LCIA award without first seeking a determination from the court as to whether and to what extent those proceedings ought to be conducted in private.

Effectively, the judge therefore decided that the case management conference was to be held in private, and in the second part of the order postponed a determination of whether the privity application could be heard in public to a later point.

The Claimant's Appeal and Relevant Issues

The claimants appealed against the judge's order, submitting the following points:

1. The judge was incorrect in both his assessments that the case management conference should be held in private, and that a further determination was needed from the court to ascertain whether the privity application could be held in public. In addition to the reasons below, the claimants were opposed to this because requiring this further determination (specifically as phrased in the order) ignored the principle that a public hearing is the general rule to be excepted, and unfairly predisposed the court to ascertaining that the "privity application" should be held in private;

2. Additionally, the judge failed properly to apply the test in CPR 39.2 to give proper weight to the fundamental principle of open justice; and

3. He failed to take account of, or gave insufficient weight to, various factors, and he took into account or placed excessive weight on various irrelevant factors.

The Court of Appeal's Decision

In the leading judgment in the Court of Appeal, Lord Justice Males (with whom Lord Justices Popplewell and Warby agreed) identified the relevant sources and principles of law. He confirmed that CPR 39.2, containing the general principle that hearings are to be held in public, was indeed the relevant rule.

Amongst the various exceptions to CPR 39.2, such as publicity defeating the object of the hearing and national security, Lord Justice Males determined that the only relevant exception was CPR 39.2 (3)(c), which stipulates that a hearing may be exempt from the general rule where *it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality*.

CPR 62.1, which stipulates that those claims qualifying as "arbitral claims" are also exempt from the general rule, was not relevant to the case at hand. Nevertheless, Lord Justice Males acknowledged that the rule has contributed to a legislative and common law concept of arbitral confidentiality.

He also emphasised the express confidentiality agreement contained within Rule 30 of the LCIA rules which stipulates that:

> *The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.*

Was the judge wrong to hold the case management conference in private?

Lord Justice Males reaffirmed the well-established principle of open justice as enshrined in CPR 39.2, and the importance of limiting exceptions to that principle. He emphasised that any departure from that principle must both fall within the authorized exception (confidential information) and be necessary for the proper administration of justice; and necessity is a demanding test. Lord Justice Males accepted that the case management conference would inevitably contain confidential information, and reiterated that arbitral confidentiality is recognized by English law as *significant and worthy of protection*, and *engages the public interest as well as the private interests of the parties*. Considering the express obligation of confidence imposed by the LCIA rules, and the fact that the purpose of the case management conference was to give further instructions on the proceedings, thus unavoidably requiring reference to the LCIA award, *it was necessary for the judge to sit in private to secure the proper administration of justice*. Necessity was apparent in these circumstances because existing publicity about the proceedings would inextricably reveal confidential information even if precautions were taken in a public hearing.

Was the judge wrong to make orders to ensure that the award would not become public until the court had determined that it should?

However, Lord Justice Males agreed with the claimants' argument that the way the Commercial Court judge phrased the order in relation to the privity application *may suggest that the starting point for any further consideration of the matter should be the confidentiality of the award* and that was principally wrong. The starting point should be that the hearing is held in public, and the defendants must persuade the judge at the hearing for the privity application that a hearing in private is necessary; the default position cannot be a hearing in private. Lord Justice Males amended this part of the judgment accordingly.

Conclusion

This decision shows that the court is willing to respect and uphold the principle of arbitral confidentiality and will indeed dispense with the general rule that hearings must be held in public if the facts are such that a hearing in private is necessary. Nevertheless, Lord Justice Males did emphasise that the mere fact arbitral confidentiality is engaged does not necessarily equate to a hearing in private – it will still be vital to show necessity on the facts.

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About the author

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Richard Bamforth | Partner

Richard is a highly experienced commercial disputes lawyer. He has a pragmatic, commercial approach to the resolution of disputes and his clients benefit from his advice and experience in formulating creative strategies at all stages of their disputes. In his 25 year career, he has represented clients in disputes across a wide range of sectors and spanning all the major jurisdictions.

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