ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND INC
Te Mana Kaiwhakatau, Takawaenga o Aotearoa

About the Arbitration Act Amendments

Clarification of jurisdictional challenges

Jurisdictional issues have arisen in two cases, both during enforcement:

1. In Carr v Gallaway Cook Allen [2016] NZSC 75, the Supreme Court set aside the award on the basis that the agreement to arbitrate was fatally flawed (it provided for appeals on questions of fact).
2. The Singaporean Court of Appeal declined enforcement of an award in Astro v Lippo (PT First Media TBK v Astro Nusantara & Ors [2013] SGCA 57), on jurisdictional grounds on the unusual basis that a passive position (i.e. reserving jurisdictional issues during the arbitration), differed from an active position in resisting enforcement, the latter position not being caught by the time limits on jurisdictional challenges in the Model Law.

Article 16(2) of Schedule 1 provides that jurisdictional challenges must be raised with the tribunal not later than the submission of the statement of defence, and article 16(3) that any challenges to the tribunal's ruling must be made to the High Court within 30 days of that ruling.

What's new

The new article 16(4) provides that a failure to pursue a challenge to jurisdiction in the High Court "in a timely manner" acts as a waiver. "Timely manner" will be open to interpretation, but there can be little doubt that the opportunity to challenge the jurisdiction of the arbitral tribunal will be lost if a ruling on jurisdiction is not sought before the defence is submitted and a challenge to that ruling is not lodged in the High Court on time and actively pursued.

Setting aside and enforcement

The grounds for setting aside under article 34 include incapacity of a party, invalidity of the agreement to arbitrate, a failure in the composition of the tribunal or of the tribunal to follow procedure, or, more generally, on public policy grounds.

There is a saving in article 34(1)(a)(iv) where the composition of the tribunal, or the procedure it followed, was not in accordance with the agreement to arbitrate – ordinarily, the award would be set aside. However, if the provisions of the agreement were "in conflict with a provision of this Schedule from which the parties cannot derogate", then the award would not be set aside if the provisions of Schedule 1 were actually complied with.

As originally promulgated, the saving in the Model Law referred to "a provision of **this Law** from which the parties cannot derogate". It was logical, therefore, when the Model Law was incorporated into Schedule 1 of the Act, that "this Law" would be amended to "this Schedule". The problem with this, as shown in Carr v Gallaway is if the provision in the agreement to arbitrate offended a provision of Schedule 2 or some other provision in the Act.

Justice Arnold, in his minority judgment in Carr v Gallaway, sought to apply the saving to the invalidity of the agreement to arbitrate; the point being that there was nothing wrong with the arbitration as such, the only issue being providing for appeals on questions of fact which are prohibited by clause 5 of Schedule 2. This provision "from which the parties could not derogate" really only became a live issue on appeal, which left the majority of the Supreme Court with the only option to strike down the entire agreement to arbitrate if they were to set the award aside.

What's new

The amendments substitute "this Act" for "this Schedule" in article 34.

At first blush, this addresses the reservations over Justice Arnold's minority decision in Carr v Gallaway, however the saving in article 34(1)(a)(iv) does not address the fundamental invalidity of the agreement to refer the dispute to arbitration. That provision is limited to the arbitrator's appointment and the arbitral procedure, not the invalidity of the agreement itself. The issue is compounded by the fact that provisions and restrictions on rights of appeal have no bearing on the procedural invalidities giving rise to setting aside in article 34. It is really an issue for the High Court on appeal.

Ultimately, this is a narrow point. It was always open to the Court to rule that there were no grounds for the award to be set aside, and to simply disallow the attempt to appeal questions of fact. In Carr v Gallaway it was found, as a question of fact, that the ability to appeal on questions of fact was central to the parties agreement to arbitrate – without that right, the parties would not have agreed to arbitration.

Hopefully, this is unlikely to occur again.

Appointing the arbitral tribunal

There are two difficulties with what has become known as the "quick draw procedure" in clause 1 of Schedule 2:

1. The procedure has been used as a unilateral means of appointing arbitrators (often with conflicting notices crossing in the post); and
2. "default" does not sit well in the context of agreement; or at least failing to agree; and such default is incapable of rectification short of simply accepting the nominated arbitrator.

In the ordinary course, where the parties are unable to agree on an arbitral tribunal, the appointment would be made by AMINZ in terms of article 11 of Schedule 1. That

provision, however, is subject to agreement. Schedule 2, (which sets out those default provisions) includes in clause 1 deemed agreement to a default appointment procedure, which includes the quick draw procedure.

What's new

Clauses 1(4) & (5) have been repealed, doing away with the quick draw procedure altogether. Now it is clear that where there is no agreement on an arbitral tribunal, an appointment can be made by AMINZ.

Some thanks

AMINZ was the initial, and ongoing, promoter of the amendments. We are delighted to see them passed.

Our grateful thanks go to the working group of Sir David Williams QC, John Walton and Deborah Hart. Thanks also to Jeremy Johnson, Daniel Kalderimis, Hon. Paul Heath QC and Nicole Smith, all of whom worked on Bill.

We also gratefully acknowledge the support of former Attorney General Hon. Christopher Finlayson QC together with Bill sponsors Paul Foster-Bell and Andrew Bayly, all of whom did an outstanding job to get the Bill passed.