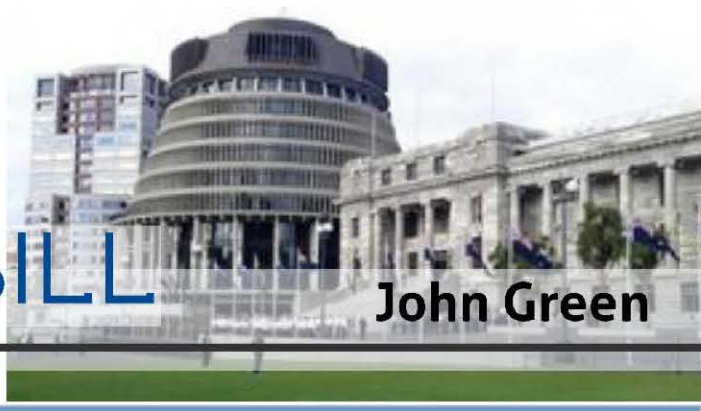
ARBITRATION AMENDMENT BILL



John Green

On 9 March 2017, the Arbitration Amendment Bill (the Bill) was introduced to Parliament. The purpose of the bill is to amend the Arbitration Act 1996 (the Act) to:

- ensure arbitration clauses in trust deeds are given effect;
- extend the presumption of confidentiality in arbitration to a rebuttable presumption of confidentiality in related court proceedings under the Act;
- clearly define the grounds for setting aside an arbitral award and bring New Zealand's approach into line with foreign arbitration legislation; and
- confirm the consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction.

Trust related arbitration

Trusts and their civil law equivalents contribute significantly to the global economy generating billions of dollars of revenue and trustee's fees. In recent decades, the increasing use of onshore and offshore trusts has led to increased litigation as arbitration has been viewed by many as too risky due to uncertainty about the enforceability of arbitration agreements in trust deeds.

Arbitration can be a most appropriate and suitable process for resolving disputes relating to trusts and in particular, it has in the international context, the added advantage of enforceability of awards under the New York Convention. However, the nature of trusts has resulted in uncertainty as to whether an arbitration conducted pursuant to an arbitration clause in a trust deed would be binding under the Act for reasons, including that trust deeds incorporating arbitration agreements are not contracts, that there may be a lack of privity to bind non-signatory beneficiaries, and that the interests of certain beneficiaries of a trust *i.e.* minors/those lacking capacity and unnamed and unascertained beneficiaries may not be represented.

This uncertainty has tended to limit the effective use of arbitration in trust disputes. Nevertheless, it can be removed by ensuring that arbitration clauses in trust deeds are treated as arbitration agreements for the purposes of the Act. By clarifying that arbitral tribunals have 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), those who are unable to represent themselves will be effectively represented ensuring that any decision of an arbitral tribunal will bind all interested parties. Arbitration can be a suitable mechanism for resolving disputes involving trusts as its inherent privacy is more suited to the private nature of most trusts.

Support for trust arbitration is spreading. In recent years, other jurisdictions have moved to reform legislation to expressly provide for arbitration of trust disputes including five states in the USA, the Supreme Court in Texas upheld an arbitration provision in a trust in the absence of specific legislation, Guernsey and the Bahamas enacted reforms in 2007 and 2011 respectively to allow for arbitration of trust disputes, and Switzerland will enforce arbitral awards in respect of trust arbitrations under its conflict of laws provisions.

Confidentiality of arbitration related court proceedings

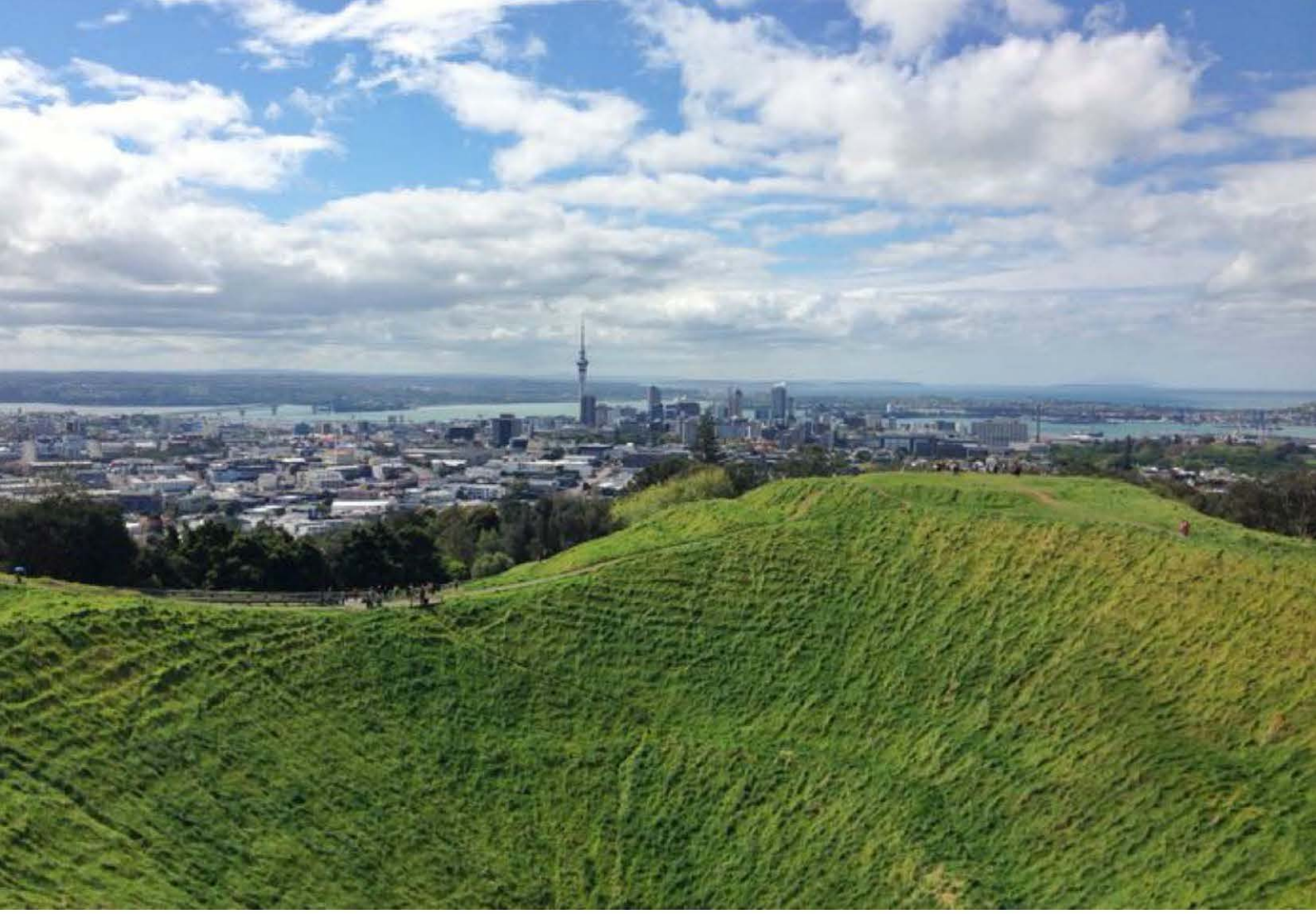
The current default position under section 14F of the Act is that court proceedings on arbitral matters are to be public. This approach is inconsistent with the confidentiality normally afforded to arbitral proceedings and with other international legislative approaches that seek to preserve such confidentiality. Other jurisdictions have struck the balance between open justice and confidentiality of arbitral proceedings in a way that preserves confidentiality by default. Section 14F is also inconsistent with the move to preserving the privacy of arbitral proceedings in the Arbitration Amendment Act 2007. Reforming section 14F by introducing a rebuttable presumption of confidentiality will support the existing principles under section 5 by making New Zealand a more attractive destination for international arbitration.

NZDRC and NZIAC have long advocated for a presumption of confidentiality in Court proceedings in relation to arbitral matters. Our arbitration rules expressly provide, in terms of s14H(d) of the Act, that the parties agree that any Court proceedings related to the arbitration must, to the full extent permitted by the law, be conducted in private. However, the present default position is that a Court must conduct proceedings under the Act in public and any agreement that proceedings be conducted in private such as that provided for in our rules is just one of the matters that the Court must consider in coming to a determination.

Narrowed grounds for setting aside an arbitral award

Articles 34 and 36 of Schedule 1, concerning the enforceability of an arbitral award, were in issue in the Supreme Court of New Zealand decision of *Carr v Gallaway Cook Allan* [2014] NZSC 75 where the definition of "arbitration agreement" was disputed.

In that case, the Supreme Court held that an arbitration agreement providing for invalid recourse against an arbitral award (appeal on a question of fact) is not a valid arbitration agreement.



The decision in *Carr* highlighted the need for amendment to these articles to move in line with the foreign approaches to the adoption of the Model Law provisions. The narrowing of articles 34(2)(a)(i) and 36(1)(a)(i) will limit the Court's scope to set aside or not recognise/enforce an arbitral award which might otherwise be unenforceable due to procedural provisions being in conflict with the Act in circumstances where there is clear agreement of the parties to submit a dispute to arbitration. The proposed amendment adopts language different from the Model Law but is the minimum change necessary to correct the problem raised in *Carr*.

Amendments to articles 34(2)(a)(iv) and 36(1)(a)(iv) would address the views of the majority in *Carr* that the language regarding non-derogation in article 34(2)(a)(iv) has no wider application beyond Schedule 1, and would bring New Zealand law into line with foreign legislation. The article 34(2)(a)(iv) equivalents in Australian legislation (International Arbitration Act 1974 and the Commercial Arbitration Acts in each State), Hong Kong's Arbitration Ordinance 2011, and the Singapore International Arbitration Act 1994 apply to the entire Act, not only the Model Law parts of it like our Act. The current limitation under the Act to derogation under Schedule 1 only is flawed and the amendment would ensure that the principle of non-derogation is protected and given proper effect in setting aside and enforcement proceedings.

The consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction

Clearly defining the consequence of not raising an objection to an arbitral tribunal's jurisdiction to hear and determine a dispute in accordance with article 16(3) of Schedule 1 will ensure that objections are raised in a timely manner and cannot be heard or given effect to out of time.

New Zealand – increased attractiveness as an international arbitral seat

When the Arbitration Act 1996 came into force on 1 July 1997 it fundamentally changed New Zealand's existing legal framework for arbitrations by incorporating the UNCITRAL Model Law into New Zealand Law.

When the Arbitration Amendment Act 2007 came into force on October 2007, New Zealand became the first country in the world to adopt the whole of the new United Nations Commission on International Trade Law (UNCITRAL) legislative provisions on interim measures and preliminary orders with only a few minor modifications. It also introduced a number of relatively technical amendments to the Arbitration Act 1996 to strengthen arbitration as a means of private dispute resolution in New Zealand and enhance the use of arbitration as an agreed method of resolving commercial and other disputes. It significantly improved the skeletal confidentiality provisions of the Arbitration Act 1996, eliminated appeals which attempt to "dress up" questions of fact as questions of law and enhanced consumer rights and improved consumer protection.

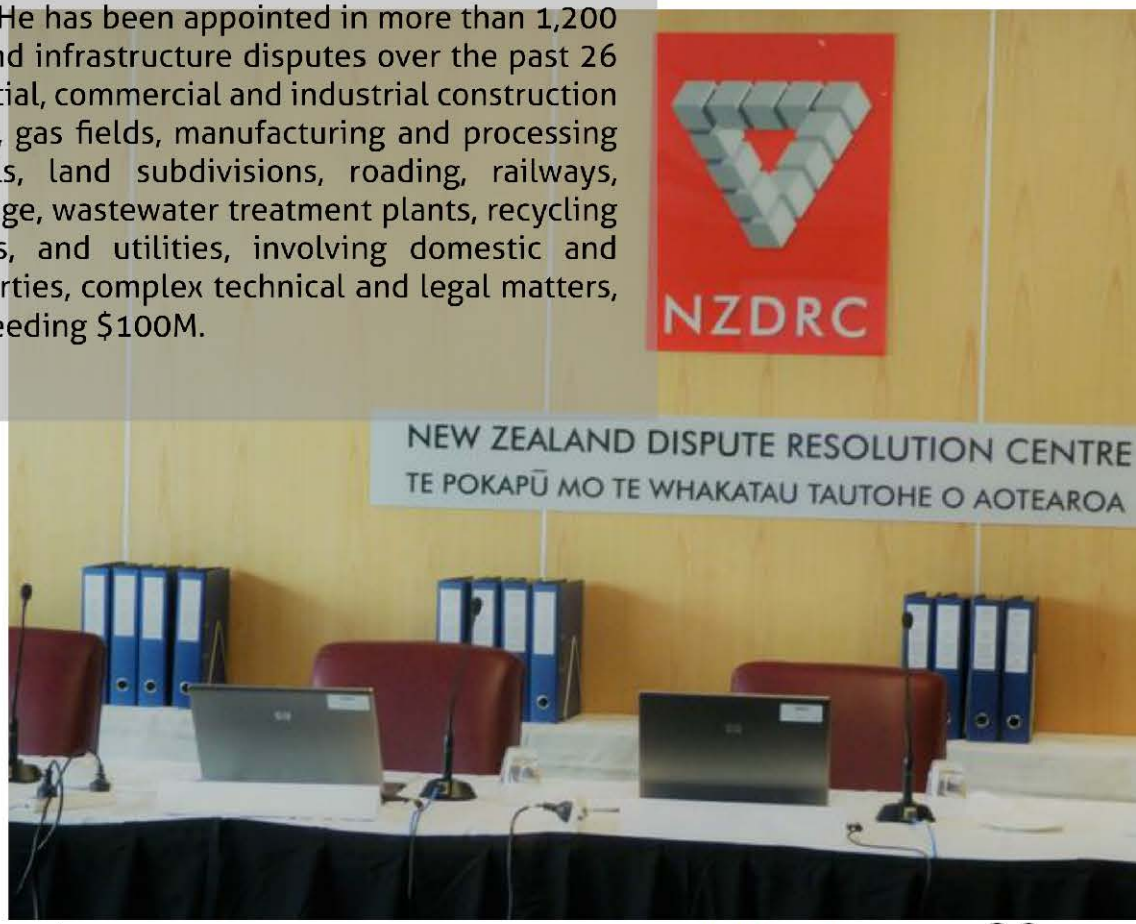
On 1 March 2017, further amendments to the Arbitration Act 1996 came into force broadening the definition of arbitral tribunal to include arbitral institutions and emergency arbitrators and creating a body to carry out appointment functions instead of the High Court where an appointment needs to be made under s11 of the Act.

These reforms and the further amendments proposed in the Bill are to be welcomed. They have, and will, improve the law, they will set New Zealand apart from other jurisdictions – in particular in relation to trust arbitration, and in doing so, will increase the attractiveness of, and define New Zealand as, an international arbitral seat for parties in the trans-Pacific – Australasian region.

** The Bill has passed its first Reading and is currently with the Select Committee*

JOHN GREEN

John is a professional arbitrator, adjudicator and mediator based in Auckland, New Zealand. He has been appointed in more than 1,200 building, construction and infrastructure disputes over the past 26 years relating to residential, commercial and industrial construction projects, power stations, gas fields, manufacturing and processing plants, stadiums, hotels, land subdivisions, roading, railways, wharves, marinas, drainage, wastewater treatment plants, recycling plants, mining, services, and utilities, involving domestic and internationally based parties, complex technical and legal matters, and sums in dispute exceeding $100M.



To request the appointment of John Green for adjudication, arbitration or mediation please contact the Registrar:

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