ReSolution: In Brief

Arbitration Amendment Act 2016

On 17 October 2016, the Arbitration Amendment Act 2016 received Royal Assent. The Act comes into force on 1 March 2017 and amends the Arbitration Act 1996 by:

a. broadening the definition of 'arbitral tribunal' in section 2 to include arbitral institutions and emergency arbitrators which will allow awards rendered by emergency arbitrators to be enforced upon application to a court of competent jurisdiction; and

b. adding a new section 6A requiring the Minister of Justice to appoint a suitably qualified body to appoint arbitrators in accordance with article 11 of Schedule 1, instead of the High Court (article 1 of Schedule 1 provides a default appointment procedure for the appointment of domestic arbitral tribunals in the absence of agreement).

It remains to be seen which body will be instructed to assist with such appointments, but one obvious option would be the New Zealand Dispute Resolution Centre (NZDRC) as the amendments require the body to be 'suitably qualified' and NZDRC can certainly claim to have appropriate expertise, experience and resources.

These amendments are to be welcomed and will act to increase the attractiveness of New Zealand as an international arbitral seat.

Arbitration and the Olympic Games

The 2016 Rio Olympics saw two cases heard before the *Ad Hoc* division of the Court of Arbitration for Sport (**CAS**), regarding disputed nomination and team replacement. Sports related conflicts are resolved before CAS, and in 1996, the *Ad Hoc* division of CAS was created to deal specifically with sports disputes related to the Olympic Games expeditiously. The Arbitration Commission of the Rio de Janeiro Bar Association assembled a group of *pro bono* arbitration lawyers to represent athletes in any disputes referred to the *Ad Hoc* division of CAS during the 2016 Olympic Games. Representing athletes from South Sudan and Vanuatu, the pro bono team acted in two cases. The first dispute was regarding the nomination of a South Sudan athlete who was replaced by an athlete with allegedly inferior athletic performance, while the second dispute concerned a beach volleyball duo from Vanuatu who believed they should have replaced an Italian duo who tested positive for doping. While the cases were ultimately dismissed by CAS, both examples demonstrated the efficiency and effectiveness of the expedited *Ad Hoc* division and the proficiency of the *pro bono* team, with the second case submitted to CAS within less than seven hours from the first contact from the Vanuatu representative, and an award made by CAS within 13 hours from first contact.

UK Courts Reluctant to Intervene in Arbitrations

A recent UK case demonstrated the reluctance of UK Courts to intervene in arbitrations beyond what is expressly provided for in the Act, regardless of whether the parties have agreed to court involvement. In *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar)* Limited [2016] EWHC 1301 the court reinforced the finality of arbitral awards, and declined the right to appeal. The court distinguished awards from procedural orders, reinforcing that procedural orders carry no right of appeal under sections 68 or 69 of the UK Arbitration Act 1996 (the **Act**). The initial arbitration between Enterprise and U-Drive concerned a dispute over breach of a

distribution agreement. The arbitral tribunal issued two procedural orders during the arbitration, which Enterprise applied to the court to challenge on grounds alleging serious irregularity and error of law. The court dismissed the challenges and held it did not have jurisdiction on the ground that the parties' agreement to consent to the challenge was not enough to give the court jurisdiction where it otherwise did not exist under the Act.

Australian Case Clarifies Application of Penalties Doctrine

The Australian High Court recently clarified the test for application of the penalties doctrine in Australia. In *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, the court considered whether bank fees for late payment of credit card bills constituted penalties. The case was an appeal by Paciocco from the Full Federal Court which had held that the late fees were not in fact penalties. In a much anticipated decision, the High Court dismissed the appeal.

In making its decision, the court found that while the late fees were not genuine pre-estimates of damage to ANZ, and were disproportionate to any actual loss suffered by ANZ by the late payment of bills, these factors were not enough to invoke the penalties doctrine. The High Court's decision emphasised a cautious approach to invoking the penalties doctrine in commercial deals, where the doctrine will be invoked only if the relevant contract provision is totally disproportionate to the legitimate interests of the party its purpose is to protect. While the decision provides more certainty for Australia, the implications of the decision remain to be seen, and it remains open what stance New Zealand courts may take.

Swiss Court Hears Appeal on Russian Blanket Ban from Rio Paralympics

Following the state-sponsored Russian doping scandal at the 2016 Rio Olympics, many were not surprised at the decision of the Court of Arbitration for Sport (**CAS**) that the Paralympic Organisation was entitled under its Rules to place a blanket ban excluding all Russians from participation in the Rio Paralympics on the grounds of collective guilt for representing a country found to have sponsored and supported doping of athletes. However, the decision was distinctly different to the position taken by the International Olympic Committee, who left the decision up to individual federations to decide on participation. Naturally, the Russians were irate, and appealed the decision to the Swiss Federal Court, somewhat ironically on human rights grounds. The appeal to overturn CAS's decision was rejected by Switzerland's highest court which did not have jurisdiction to rule on the substance of the case, only on CAS's adherence to appropriate procedures in reaching its decision. The effect of the decision on Russia's Olympic preparation for and participation in the 2018 South Korea Olympics remains to be seen.

SIAC Award Set Aside

In the recent decision of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] SGHC 126, the High Court of Singapore set aside a Singapore International Arbitration Centre (**SIAC**) arbitral award on the grounds of breach of natural justice causing prejudice to the claimant, JVL. The parties had entered into 29

contracts for the sale and purchase of palm oil, which were subsequently altered by a price-averaging arrangement between the parties after a fall in the global palm oil price. A dispute arose when JVL accused Agritrade of breach of contract.

Agritrade raised two defences to the claim before the arbitral tribunal, however both defences related to what the court considered was a further subsidiary issue, which led to the court's consideration of the parol evidence rule. The rule provides that where a contract has been reduced into documentary form, a party cannot rely on extrinsic documents or evidence to vary the contract, except in the case of limited exceptions. The arbitral tribunal held that the price-averaging arrangement constituted a recognised exception to the parole evidence rule, and was therefore a valid variation to the contract and defence to the alleged breach. The tribunal's dismissal of the claim was based on the application of the parol evidence rule to the price-averaging arrangement, a ground which was not raised by Agritrade, and thus not responded to by JVL.

On this basis, JVL applied to the Singapore High Court to set aside the award for breach of natural justice. The court allowed the appeal and set aside the award, emphasising that the arbitral tribunal had erred in reversing the burden of proof and expecting JVL to disprove the applicability of the exception to the parol evidence rule, compounded by Agritrade's failure to raise it as a defence in the first instance.