ReSolution: In Brief

Fiji's International Arbitration Act 2017

On 15 September 2017. Fiji passed the International Arbitration Act 2017 (the **Act**) implementing its commitments under the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **New York Convention**).

The Act only applies to international arbitrations, with the Fiji Arbitration Act 1965 continuing to apply to domestic arbitrations.

The enactment of this piece of legislation can only assist to raise the profile and credibility of arbitration in the Asia-Pacific region, which, given New Zealand's strong connections to the Pacific Island nations and the availability of NZIAC's administered arbitration services, may also lend itself to the promotion of New Zealand as a key seat of international arbitration in the region.

Scope to make Investor State Dispute Settlement claims narrowed in new iteration of TPP

The APEC summit in Da Nang, Vietnam, was the forum this month for negotiations between the remaining eleven-member countries of the TPP (after the departure of the United States) on the newly-renamed Comprehensive Progressive Trans Pacific Partnership (CPTPP) agreement.

Minister for Trade and Export Growth David Parker has welcomed the eleven-member Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) which incorporates the TPP. A Ministerial Statement issued by all eleven Ministers in Da Nang confirmed the core elements of the deal are now agreed, with just four issues requiring further technical work and discussion.

David Parker said one of the issues that has caused the Labour government concern was the Investor-State Dispute Settlement (ISDS) clauses as it could allow foreign corporates to sue the New Zealand government in an international tribunal if they felt they had been disadvantaged by New Zealand law or changes to those laws, and gave as an example, a tobacco company potentially suing New Zealand for lost income if tobacco became illegal.

The previous provision that would have allowed overseas investors to sue governments for breach of an investment agreement or an investment authorisation has been suspended.

Investors will only be able to sue governments for an alleged breach of the obligations set out in the Investment chapter itself. These are tightly circumscribed to the extent that it would be very difficult to mount a successful action in respect of regulations on matters of public interest such as health or the environment.

On TVNZ's 12 November 2017 Q&A programme, Mr Parker said "[A]s the text stood, if a big multinational was building a big infrastructure project in New Zealand under contract with the Government and they became dissatisfied and had a dispute, until the narrowing, they could have used these ISDS clauses to take that dispute to an international tribunal - they now no longer can."

"If they've got a breach of a contract like that, they've got to sue the New Zealand government in the New Zealand courts - just like a New Zealand company would have to," Mr Parker said.

Mr Parker said consensus around a considerable narrowing of the ISDS clauses has now been achieved, including a "side-deal" with Australia which completely eliminates ISDS clauses between Australia and New Zealand, which makes up 80 per cent of potential CPTPP trade. He says New Zealand will continue to seek similar agreements with the other countries in this new Agreement. In addition, the scope to make ISDS claims has also been narrowed.

Court of Appeal dismisses challenge from winery owners

In Resolution Issue No 12 (February 2017) we published an article by Timothy Lindsay and Jay Shaw titled 'Expert Determination: High Court takes a wine tour' in which expert determination was discussed in the context of High Court proceedings brought by the trustees of the Greg Hay Family Trust (the Trustees), seeking specific performance (by way of summary judgment) of Peregrine Estate Limited's (PEL) obligation to buy its shares in Peregrine Wines (PWL), pursuant to a standard form share transfer mechanism in PWL's constitution at the valuation fixed by the 'expert' in accordance with the valuation procedure in PWL's Constitution.

The High Court upheld the Trustee's application for summary judgment finding that PEL had no arguable defence and was bound by the valuer's valuation. His Honour accordingly granted summary judgment and ordered PEL to perform its obligation to buy the Trust's shares at the valuer's valuation of $2.62 million.

Associate Judge Mathews rejected PEL's argument that because the valuer's "fair value" was substantively wrong on an objective assessment, it could not be binding

for the purposes of s 149 of the Companies Act.

PEL's strongest criticism of the valuation report was that the valuer did not apply a minority shareholding discount to the value of the Trust's (minority) shareholding. However, the Court found that this amounted to no more than a challenge to the merits of the expert's conclusion, which was not a reviewable error.

His Honour found that the valuer had not exceeded her mandate and therefore there was no basis to conclude that the valuer had not determined the "fair value" of the Trust's shares. In turn, there was no basis not to enforce her valuation for the purposes of s 149.

That case had its sequel earlier this month when the Court of Appeal dismissed a challenge by PEL and upheld the earlier High Court decision. The issue arising on appeal was whether the parties were bound by the expert's independent assessment of "fair value" for the purposes of a transfer of shares in exercise of pre-emptive rights in accordance with the company's constitution.

The answer largely depends on whether the expert's assessment complied with the mandate in the constitution.

At [25] the Court noted in relation to the process of expert determination agreed to by the parties as the method for determining fair value for the purpose of shareholder buy-outs that:

> The process for fixing fair value if an expert is appointed is intended to be expeditious, final and binding. Unlike an arbitration, there is no right of recourse to the court for error of law in the event that either party is dissatisfied with the price fixed by the expert. However, because the expert undertakes his or her task as an expert, not as an arbitrator, he or she is not immune from suit for negligence. The plain intention is that the parties will be bound by the price fixed by the expert as the fair value of the shares for the purposes of the sale.

After analysing the relevant authorities, the Court observed at [33] that the critical question is always whether the valuation has been carried out in accordance with the terms of the particular contract. Errors on the part of the expert in carrying out the valuation assessment will not invalidate the determination unless the error was one the expert was not entrusted to make.

At [41] the Court observed:

> In the present case the expert's mandate under the constitution was to fix fair value as between the shareholders, not fair market value or current market value. No particular valuation approach was prescribed. Nor were any particular valuation principles specified. The only requirement in the mandate was for the expert to assess the fair value of the particular shares. The parties entrusted the expert to carry out the valuation and agreed to be bound for the purposes of the share transfer by the fair value assessed in the exercise of the expert's independent skill and judgment, acting honestly and in good faith. If the valuation was carried out incompetently, the affected party would have a remedy against the expert but no right to resist the share transfer at the price fixed.

The Court, while noting that PEL may have grounds to disagree with the valuer's analysis and conclusion, found that the valuer did not step outside her mandate under the constitution and that Associate Judge Mathews was correct to find that PEL had no arguable defence to the Trustee's claim. The appeal was dismissed accordingly.

The Peregrine judgments provide important guidance for both the lawyers drafting expert determination clauses in shareholder agreements, and experts themselves in discharging their valuation mandates. To quote the authors of the earlier article "Peregrine highlights the main feature of expert determination, which is its final and binding nature.

This means greater commercial certainty for the parties to the process; a faster process by reducing avenues of challenge to excess of mandate; lower costs; and flexibility and certainty over timing. However, it is precisely because of its binding nature that parties should be aware that once a share valuation process is underway, there is little way back—even if there is fundamental disagreement with the valuer's conclusions."

A cautionary tale

Once again, the English courts have confirmed that non-payment of an arbitrator's fees, delaying issue of the award, is not an acceptable excuse to justify missing the deadline to challenge the award under section 69 of the UK Arbitration Act 1996. In Squibb Group v Pole 2 Pole Scaffolding the Court declined to exercise its discretion to extend time for making an application for permission to appeal an award in circumstances where the delay was caused by no reason other than the parties' failure to pay the arbitrator's fee leading to a delay in the parties uplifting the award.

O'Farrell J referred to the principles applicable to the court's discretion to extend time identified by Popplewell J inTerna v Al Shamsi [2012] EWHC 3283(Comm), the primary factors being:1. the length of the delay;

2. whether the delaying party was acting reasonably in allowing the time limit to expire; and

3. whether others had contributed to the delay.

Ireland's Mediation Act

On 2 October 2017, Ireland signed its Mediation Act 2017 (the Act) [link to legislation on NZDRC website] into law, but it is yet to come into force.

The Act serves to reinforce existing provisions recognising mediation in the Irish High and Commercial Court, as well as in the Rules of the Superior Courts, providing a requirement for parties to litigation to consider mediation and to confirm to the Courts that they have done so.

A court may invite the parties to the proceedings to consider mediation, whether of its own motion, or on application of a party to the proceedings. The Act provides costs sanctions where parties unreasonably refuse or fail to engage in a mediation process following such an invitation.

The Act excludes disputes that are being investigated or mediated before the Workplace Relations Commission from its scope, however it will apply to other claims arising from the workplace, such as claims for personal injuries or breach of contract.

Family Dispute Resolution – it's not happening (much)

Nigel Dunlop, one of the FDR Centre's highly skilled family mediators working in the area of child care and contact disputes has written recently on the FDR mediation process and the reasons why it has seen limited uptake.

Read the article by Nigel xx in FDR Centre's website. You may read Nigel's full article in the Family Advocate, Volume 19, Issue 1 or read a copy in FDR Centre's website.

Family Mediation – Why would you try it?

Barbara McCulloch, another of FDR Centre's highly sought after mediators has also written on the topic of family mediation, setting out the reasons why the mediation process can be so effective for those individuals who find themselves embroiled in highly personal disputes.

You may read Barbara's full article here.

ReSolution: In Brief

English High Court removes arbitrator

In *Tonicstar Limited v Allianz Insurance and Sirius International Insurance Corporation* [2017] EWHC 2753, the English High Court considered an application under Section 24 of the UK Arbitration Act 1996 for the removal of an arbitrator where the question was whether a barrister was a person "with not less than 10 years' experience of insurance or reinsurance" for the purposes of a standard form arbitration clause in a reinsurance contract.

It was argued that the clause required experience in the business of insurance or reinsurance itself, and not experience of insurance or reinsurance law.

The Court decided to remove the arbitrator on the basis that he had experience of insurance and reinsurance law, rather than required experience in the business of insurance and reinsurance.

The Judge considered himself bound by the decision of Mr Justice Morison in *Company X v Company Y*, an unreported decision of July 2000, having found that it was not obviously wrong. He indicated however, that unless he had been so bound, he may well have decided that the ordinary and natural construction of the phrase did not limit the fields in which experience of insurance or reinsurance could be acquired.

The judgment is of particular interest given that questions of the removal of arbitrators do not often come before the courts because they are, in institutional arbitration, typically decided by arbitral institutions so are not usually public). The decision highlights the importance of the careful drafting of arbitration clauses which specify characteristics of an arbitrator. It also serves as a reminder of the importance of precedent in the English judicial system.

Astro v First Media: the next instalment

In the long-running Astro v First Media dispute, the Court of Final Appeal of Hong Kong has granted First Media leave to appeal (against the Court of Appeal's decision refusing an extension of time to apply to set aside orders for the enforcement of awards against it) on the following questions of law on the grounds of general or public importance:

- What is the proper test for determining whether an extension of time should be granted for the purposes of an application to resist enforcement of an arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

- In determining whether to extend time for the purposes of an application to resist enforcement of an arbitral award under the New York Convention, is the fact that the award has not been set aside by the courts of the seat of arbitration a relevant factor?

The appeal is to be heard 12 and 13 March 2018.