THE CENTRALITY OF PROPORTIONALITY IN DISPUTE RESOLUTION

By Catherine Green

"Proportion is the heart of beauty" - Ken Follett (The Pillars of the Earth)

In an ideal world the time and cost investment in adopting private dispute resolution processes would always be directly proportional to the value and importance of the matters at stake.

Regrettably, private dispute resolution services have not always lived up to this objective – most particularly when it comes to arbitration and other determinative processes.

In our view, proportionality is best achieved by the adoption of a fiscally sensible and balanced approach.

This year saw the launch of a new suite of arbitration, arb-med, and mediation rules across our four dispute resolution registry businesses.[1] A key driver underlying this revision of our process rules was a desire to proactively promote a proportionate but effective approach to resolving disputes, from the lowest value to the highest. In its most basic terms, it is after all a question of access to justice. This is particularly so in the context of international arbitration where, despite significant growth in recent times as a result of unprecedented technological development, increased global trade, expansion of financial markets, and perceived inadequacies of national courts to provide effective redress in relation to international commercial transactions, delays in obtaining awards and the cost of international arbitration have unfortunately made many cross-border disputes uneconomic, or at least too uncertain for parties to pursue.

The importance of this focus was underscored in real terms when we were invited to attend the inaugural South Pacific Regional International Arbitration Conference which was convened in February this year by the Government of Fiji in collaboration with ADB and the United Nations Commission on International Trade Law (UNCITRAL) Regional Centre for Asia and the Pacific.

The purpose of this conference was to raise awareness and to discuss the development of international arbitration reform in the South Pacific. In attendance were key government officials, legal practitioners, judges, and private sector participants from across the region.

The presentations were focussed on extolling the benefits of adopting arbitration as a process option to resolve international disputes – of which there are of course many – and encouraging the various Trans-Pacific jurisdictions to endorse and support the use of arbitration through legislative change and education of key individuals and organisations within those jurisdictions. However, in almost every session the same concern was raised – and, in our view, unsatisfactorily answered: *but how can this possibly be considered a financially viable option for us?*

Where the attendees were being told that arbitration could easily cost $30,000 a day when in hearing, it is no wonder this voice of concern carried so clearly.

In designing and providing private dispute resolution services, whether facilitative or determinative, in the international or domestic arena, and whether for purely commercial matters or to meet the particular needs of environmental, societal and relationship disputes, any provider of such services must bear in mind the need to provide a service that meets the needs and demands of the target

user, which demands will always include the unavoidable constraints (the twin evils) of time and cost.

It is pointless asking a potential user to adopt a dispute resolution process that does not provide a proportionate response to the underlying issues involved. Neither commercial enterprises nor individuals have limitless resources and the failure to provide access to proportionate dispute resolution options simply ignores the primary objective of modern private dispute resolution, namely to provide the fair, prompt, and cost effective resolution of any dispute, in a manner that is proportionate to the amounts in dispute, the complexity of the issues involved, and the importance of the issues to the parties.

So how do we address this issue?

Our 2018 Rules seek to build on existing initiatives to provide additional mechanisms and controls to give parties certainty in terms of time and cost, whilst ensuring the services we deliver remain first class.

1. Administered Services

a. All of our processes are fully administered, giving users and their advisers access to professional registry staff and case managers who are able to provide professional advice as to processes and procedures. This significantly cuts down the cost involved in users and advisers getting up to speed with process options.

b. Our Registry staff and case managers also take responsibility for the administrative tasks which would otherwise be undertaken by the mediator or arbitrator. This means the time cost for the mediator or arbitrator can be significantly reduced, keeping the cost of the process to a minimum and providing structure and certainty to the process.

2. Mediation

a. The cost of all mediation services is proportionate to the amount in dispute with the fees based on the amount at issue.

b. We will always appoint the most appropriate available person to act as a mediator in terms of experience, availability and cost (subject to any agreement by the parties as to who the mediator ought to be).

3. Arbitration

a. We continue to provide fixed fee arbitration services for disputes under $50,000 (domestically) and $100,000 (internationally). All other arbitral processes are now also subject to capped fees giving parties certainty as to cost.

b. Our expedited arbitration rules also provide parties with certainty as to time and procedure with domestic processes starting from 45 working days and international starting from 60 working days (on the documents).

c. Again, we will only appoint an arbitrator who is appropriate both from an experience and cost perspective (subject to any agreement by the parties as to who the arbitrator ought to be).

4. Arb-Med

a. Arb-Med is a hybrid process that combines the benefits of arbitration and mediation, including: speed, procedural flexibility, confidentiality, choice of decision maker, ease of access to the tribunal, continuity, finality, and enforceability of the outcome. If full settlement is not reached in the mediation, the arbitrator who was acting as mediator will have been informed as to the issues in dispute and the facts of the case which can be carried over into the arbitration with potentially significant time and cost savings for the parties.

b. Our Arb-Med rules are robust and certain, yet innovative in their commercial commonsense approach to the challenge of combining arbitration and mediation in a single unified process that ensures the principles of natural justice are observed and a just, final, and binding decision is made.

The Rules are fundamentally and purposively directed to ensuring the resolution of disputes in a manner that is private, efficient, flexible, cost effective, and certain. Ultimately, a balance always needs to be struck. There is a cost involved to obtain private dispute resolution services. That cost must take account of the specialist skills of our colleagues and peers who provide the services – there is nothing to be gained in underselling our services – but this must be counterbalanced against what is a reasonable response to the demands of the case.

We believe our latest iteration of process rules strikes a measured balance providing an optimal approach for providers and users of private dispute resolution alike. Nevertheless, we will always continue to invest in research and development to refine and improve our offerings and would suggest that each and every one of us involved in the practice of dispute resolution ensures that proportionality be recognised and retained as a central pillar of what we do.

End Notes

1 New Zealand International Arbitration Centre (NZIAC), New Zealand Dispute Resolution Centre (NZDRC), Building Disputes Tribunal (BDT), and the FDR Centre.

Catherine Green

Catherine graduated with a BA and LLB from the University of Auckland in 2005. She also holds a Graduate Diploma of Business Studies (dispute resolution), a Postgraduate Diploma of Business Administration (dispute resolution), and is an Associate of the Arbitrators' and Mediators' Institute of New Zealand.

ABOUT THE AUTHOR

Prior to starting her dispute resolution practice, Catherine gained a wide range of experience in commercial litigation matters both onshore and offshore, including four years in the litigation team at Russell McVeagh (Auckland), two years in the dispute resolution team at Field Fisher Waterhouse LLP (London), and four years in the litigation team at Mourant Ozannes (Cayman Islands).

Whilst working in leading law firms both onshore and offshore, Catherine has gained extensive experience in a wide range of commercial litigation matters, including fraud, insolvency, contractual, financial services, tax avoidance and regulatory issues.

Catherine has also contributed to a number of publications.

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