# ReSolution *in Brief*

## New Zealand Law Commission: tikanga in arbitration

On 21 September 2023 the New Zealand Law Commission released He Poutama (Te Aka Matua o te Ture | Law Commission) NZLC SP24, a study paper which reviews tikanga in Aotearoa New Zealand law. At pages 251–253 the Commissioners considered *The use of arbitration to resolve tikanga disputes.*

At present the Arbitration Act 1996 is more suitable for commercial disputes. The Commissioners suggested that new, tailored default rules in the Arbitration Act 1996 might work well for tikanga disputes. Due to high party autonomy in arbitration, there is already the flexibility to conduct arbitrations in te reo Māori, or on a marae, and to adapt rules of evidence and procedure under the natural justice rubric. Arbitrators can be appointed for expertise in tikanga. Ideally parties will agree from the outset as to how to promote a dispute resolution process consistent with tikanga (see *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1). In keeping with specialisation, appeals on points of law (or points of tikanga) might be directed to a specialist tribunal or to the Māori Land Court or Māori Appellate Court.

## Wendy's arbitration

The franchisor of the Greenlane Wendy's Restaurant declined to renew the lease and declined to arbitrate the matter in *Wendco (NZ) Limited v Howley and Others* [2023] NZHC 2061 Justice van Bohemen ruled that there were insufficient prospects of success for interim orders to be granted, so as to support arbitration, so declined the application. The focus was on whether the parties had renewed the lease in 2018. The plaintiff had sought to institute arbitration but the defendant trustees had not agreed to it. Hon Raynor Asher KC was appointed arbitrator. Counsel for the defendants indicated his clients would attend the arbitration if the Judge directed that it occur. The arbitrator would take no steps until the Judge ruled on the application. The trustees undertook not to re-enter the premises pending the outcome of the litigation. Justice van Bohemen did not grant the interim orders sought, for the following factual reasons:

- There was no binding agreement in July 2018 to extend the lease and this was clear from the contemporaneous documents.

- In resolving whether there is a serious question to be tried, the courts will not look uncritically at the evidence. There was no serious question to be tried.
- No reasonable person, having the background knowledge of the key representatives of the parties, would interpret the key email correspondence as amounting to an agreement to extend the lease.
- By agreement in an *Addendum*, there was no serious question to be tried that the trust is precluded from using the Greenlane premises other than as a Wendy's Restaurant as long as a franchisee is willing to operate a Wendy's Restaurant from there.
- The plaintiff's lease had expired and it was bound to vacate the premises.
- The defendant trustees were of the view the plaintiffs could not succeed and would accordingly not agree to go to arbitration.

Orders declining the application were made accordingly as the plaintiffs had not satisfied the requirements of article 17B(1)(c) of Schedule 1 of the Arbitration Act 1996, that is, that *there is a reasonable possibility that the applicant will succeed on the merits of the claim*.

## Sign of the times

In *Lumo Digital Outdoor Limited v Sullivan* [2023] NZHC 2357 Justice Gwyn considered an application for interim relief pending arbitration. The dispute was over a licence to use two digital billboards in Wellington and Porirua. The licensor purported to terminate the licence without offering the licensee a first right of refusal. The licensee sought to act on the arbitration clause in the licence and sought an injunction restraining the licensor from dealing with a third party media company for use of the signs.

Justice Gwyn granted the injunction with a short, finite

timeframe for the licensee to file a notice of arbitration. Her Honour considered (a) whether there was a serious question to be tried, (b) the balance of convenience, and (c) the overall interests of justice. She maintained a right of first refusal was triggered as soon as the two-year trial licence expired and the legal issues were matters on which the applicant might succeed. As to whether damages would be an adequate remedy, this was connected to the conduct of the parties. The respondent could not create its own inconvenience, in contracting with the third party competitor of the applicant, and have it weighed on the scales of inconvenience. The overall interests of justice favoured the granting of the injunction. The respondent was restrained from dealing with the third party competitor. The status quo for the licensee remained until the arbitration concluded.

### Developer's arbitration

A developer of a retirement home sought an injunction against a subcontractor in *Foundation Village Limited and Anor v Growing Spaces* [2023] NZHC 2368, seeking interim orders (restraining the defendants from dealing with goods) prior to arbitration. The Court was called upon to see whether it had jurisdiction to grant the orders and if so, whether to grant them.

Justice Tahana held that the Court does not have jurisdiction to grant the orders sought by the plaintiffs because Schedule 1 of the Arbitration Act 1996 is prescriptive. The Court only has jurisdiction as limited to what is prescribed in Schedule 1. The relief sought was excluded and no general or residual powers to grant injunctive relief survived. The relief was sought by way of interlocutory injunction under rule 7.53 of the High Court Rules 2016 but could not *ride roughshod over the Act and the arbitration agreement*. The power to grant interim orders was focused on article 17 of Schedule 1, and this application did not align with


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that provision. The Court lacked jurisdiction and did not consider the merits.

### New Code of Conduct adopted for arbitrators in investor-state dispute arbitration

The United Nations Commission on International Trade Law (**UNCITRAL**) has adopted the Code of Conduct for Arbitrators in International Investment Disputes. The Code was in development since 2017 and applies to arbitrators in investment arbitration. It also sets standards relating to integral components of the work.

The Code contains a mixture of new and old rules. For example, at Article 7 there is a prohibition on ex parte communications save certain circumstances, such as during the initial appointment of the arbitrator. Older duties are reinforced, such as the need to be independent and impartial.

Article 4 contains rules against "double-hatting". This is a practice where one individual acts in two different roles simultaneously. Unless there is agreement by the parties, no arbitrator may simultaneously act as either a legal representative or expert witness in another case involving the same measures, the same or related parties, or the same provisions of the same instrument of consent. This prohibition will generally continue after the end of the arbitrator's tenure for three years from that point.

Article 8 contains rules on confidentiality. Unless the parties agree otherwise, an arbitrator cannot disclose any information relating to proceedings. This includes releasing the draft of any award. An arbitrator also cannot comment publicly on a decision unless that decision is already public. This prohibition extends to any period where the award is being subject to review or challenged in the courts.

The Code will apply to arbitration proceedings only when the parties have consented to their incorporation. The International Centre for Settlement of Investment Disputes (**ICSID**) have said they will consult further with member states on the extent of the Code's application in ICSID proceedings.

### English Law Commission publishes final review of Arbitration Act 1996

In ReSolution issues 35 and 36, we covered the English Law Commission's previous two portions of the review of the Arbitration Act. In September 2023, the English Law Commission released the report in full, in addition to draft legislation. In short, the report does not recommend full-scale changes to the Act, instead opting for *a few major initiatives, and a very small number of minor corrections*. In terms of the major initiatives, the Commission recommends:

- codification of an arbitrator's duty of disclosure;
- strengthening arbitrator immunity around resignation and applications for removal;
- introduction of a power of summary disposal;
- a revised framework for challenges under section 67 (substantive jurisdiction);
- a new rule on the governing law of an arbitration agreement; and
- clarification of court powers in support of arbitral proceedings and in support of emergency arbitrators.

The Commission also recommends these minor corrections:

- making appeals available from an application to stay legal proceedings;
- simplifying preliminary applications to court on jurisdiction and points of law;
- clarifying time limits for challenging awards; and
- repealing unused provisions on domestic arbitration agreements.

The report includes draft legislation, indicating how the Commission wishes the UK Government to implement the recommendations.

### France challenges arbitration award in English Commercial Court

In *London Steam-Ship Owners' Mutual Insurance Association Ltd v French State* [2023] EWHC 2474 (Comm), the English Commercial Court reaffirmed several factors constituting an award under the Arbitration Act 1996 (UK). The decision stems from arbitration proceedings from 2019 between the French state and the London P&I Club (the **Club**). In those proceedings, the arbitrator issued an award against the French state. The French state argued against its enforcement. In its submissions to the Court, it argued that the awards could not be considered as such for the purpose of the Arbitration Act.

The Court rejected this argument on several grounds:

1. The award called itself an award. It purported to be an award.
2. It complied with the formal requirements for an award under section 52 of the Arbitration Act.
3. It dealt with the substantive rights and liabilities of the parties, setting out the reasoning of the arbitrator in detail.
4. There were matters for which the arbitrator expressed a concluded view. It was clear that the arbitrator's authority in these matters had reached a definitive end. Having issued the award, the arbitrator could not reach a different conclusion. It was a final decision, not a "provisional view".
5. Matters where the arbitrator left issues for later determination were marked clearly as "partial awards" for the purpose of section 47.
6. In Justice Butcher's view, a *reasonable recipient* of the award would have regarded it as such.

Regarding matter (6), Justice Butcher noted the position at common law that a reasonable recipient is likely one who considers the objective attributes of the decision relevant. Justice Butcher also provided his own views, going beyond the explicit statements of the authorities. In his view, a reasonable recipient would also consider matters such as whether the decision complies with the formal requirements of an award. Crucially, a reasonable recipient is somebody who has all the information that would have been available to the parties and the tribunal when the decision was made.

## English Commercial Court considers whether appointment procedure failed

In *Global Aerospares Limited v Airest AS* [2023] EWHC 1430 (Comm), the Court was asked to determine a matter concerning an awkward attempt by two parties to appoint an arbitrator. The decision concerned Global Aerospares Ltd (the **claimant**) and Airest AS (the **respondent**), with the former supplying the latter with aircraft parts. When a dispute arose between the two, the matter was referred to arbitration. The arbitration clause was very brief, containing only the instruction that *this agreement is subject to English jurisdiction. If a dispute cannot be settled by negotiation it shall be settled by arbitration in London.* Crucially, this did not contain a provision for the appointment of arbitrators.

In the absence of a nomination, or specification of the number of arbitrators, sections 14(4) and 15(3) of the Arbitration Act 1996 (UK) will apply. As a result, the claimant used a Request for Arbitration document for the purpose of appointing an arbitrator. The document was sent to the respondent. At that time, the claimant also applied to the Court under section 18 of the Arbitration Act. Under this section, the Court will consider the merits of the claim put forward. In doing so, the Court held that the Notice met the requirements of the Act. However, the method of service did not meet the instructions in their broader contract that documents are to be in writing and served personally.

The Court declined to issue a section 18 direction. It was not satisfied that the procedure for appointing an arbitrator had failed. Specifically, the Court believed the appointment as a whole did not fail as it had not properly begun.

## English anti-suit injunction

*G v R* [2023] EWHC 2365 dealt with an urgent application for an anti-suit injunction in the English High Court. This type of application prevents claims in different jurisdictions from being filed so that the one jurisdiction might be focused on. This application was required to prevent a hearing in Russia the following week. The parties differed on whether the arbitration agreement was governed by English law. The arbitration clause provided for the seat to be Paris. The Judge ruled that French law operated as that law applies to international arbitration.

The next issue was the proper forum for the anti-suit application for an injunction. Here the Court ruled that France was the appropriate forum to grant coercive relief in aid of the arbitration agreement. The test was *where the case may be more suitably tried for the interests of all the parties and the ends of justice*. That England was the appropriate forum must be shown clearly and distinctly. It could not be so shown; and despite anti-suit injunctions not being available in France, *substantial justice can be done in the arbitration in France*. There was therefore no jurisdiction to consider the application and whether it would have been granted under the ordinary test.