ReSolution *in Brief*

New Zealand places strongly in WJP Rule of Law Index – highest in Asia

The World Justice Project (WJP) has released its Rule of Law Index for 2023, and New Zealand's placing remains strong. The report, released annually, assesses 142 countries with the goal of assessing how they rank on overall civil fairness. Denmark has been ranked best in the globe but New Zealand scores best outside of Europe.

In a year with a decline in the overall score of the globe, New Zealand can be happy with its steady score of 0.83. Since 2015, it has scored 0.83 with the exception of 2019 where it scored 0.82. The report, released annually, uses eight factors to influence the ranking:

1. Constraints on government powers
2. Absence of corruption
3. Open government
4. Fundamental rights
5. Order and security
6. Regulatory enforcement
7. Civil justice
8. Criminal justice

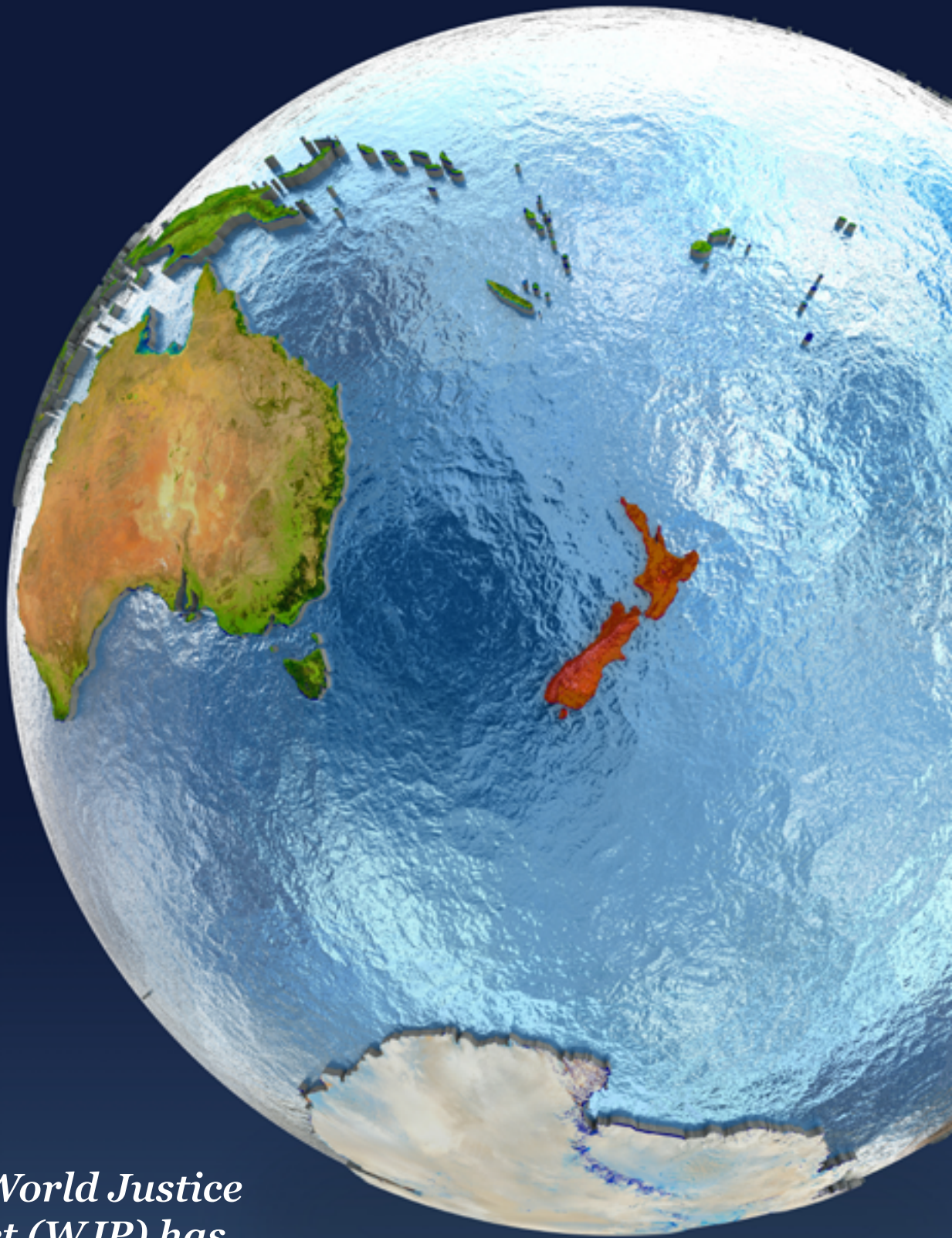
On these factors, New Zealand did best in Order and Security (0.88) and worst in Criminal Justice (0.73).

The rankings further confirm New Zealand's status as a country worth doing business in. Its success in the order and security category especially should indicate to overseas investors that New Zealand is a place where their investment can expect a fair degree of certainty.

Pay the rent: High Court considers when registration of arbitral award is necessary under Arbitration Act 1996

In *General Trust Board of the Diocese of Auckland v Van de Wiel* [2023] NZHC 3773, a lessor applied to the Court under section 224 of the Property Law Act 2007 for the purpose of cancelling a lease. The dispute concerned clauses in the lease regarding the payment of rent. The clauses provided timeframes for payment of rent as well as the option for an annual review, the sum to be determined by arbitration.

The first rent review was to occur in 2019. For months the lessor sought to progress the arbitration process but was unable to enjoy the co-operation of the lessee. In 2021, the arbitration conference was held and although the lessee was invited, they did not attend. The lessee ignored the tribunal's decision and paid rent at a significantly lower rate than the amount which the tribunal had determined. The lessee also refused to pay their share of the arbitration fee.



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The lessee argued in the High Court that the tribunal's award had not been registered in accordance with section 35(1)(b) of Schedule 1 to Article 35 of the Arbitration Act. It therefore could not be enforced. The Court found flaws in this argument. The lessor had not gone to the Court for enforcement of the award. It was making an application under section 224 of the Property Law Act and in doing so was simply asking the Court to recognise the award. This distinction between enforcement and recognition exists within Article 35 of the Arbitration Act. Furthermore, that the tribunal's decision was not registered did not mean the lessee could interfere with the contractual rights of the lessor.

The Court granted the lessor's application for cancellation.

English Court of Appeal reinstates arbitrator's award in insurance dispute

In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5, the English Court of Appeal considered a contractual interpretation matter previously decided by both an arbitral panel and the English High Court.

The dispute occurred after a contracting party to a sale and purchase agreement, Mitsui Bussan Aerospace Co. Ltd (**MBA**), transferred subrogation rights to its insurer, Mitsui Sumitomo Insurance Co (**MSI**). The other party to the contract, Dassault Aviation SA (**Dassault**), disagreed that transferral

could occur resulting from a non-assignment clause within their sale and purchase agreement.

The matter went to arbitration. The panel held that a no-assignment clause is limited to contractual assignments and does not encompass a transfer to insurer by way of law. The panel also looked at the transfer provisions in relation to third party damages, holding that no transferral had taken place in that respect.

Dassault applied to the High Court under section 67 of the Arbitration Act 1996 for the purpose of setting aside the award. The High Court agreed with Dassault that the panel of arbitrators did not have jurisdiction over the matter.

In MSI's appeal to the Court of Appeal, MSI recycled its arguments from the arbitral proceedings. Above all, that the assignment in this case could not contravene the non-assignment clause as the transferral of rights occurred by way of law, rather than assignment "by any Party". The Court agreed and reinstated the award of the arbitrators.

Hong Kong Court of First Instance warns against "repackaging"

In *X and YCo v ZCo* [2024] HKCFI 695, the Hong Kong Court of First Instance discussed a strategy that has been used with increasing frequency by parties looking to challenge the awards made against them.

The initial dispute arose in relation to a share subscription and purchase agreement that the parties had entered into. The dispute went to arbitration where the arbitrator had to decide:

- whether ZCo was entitled to exercise its exit right; and if so
- whether ZCo was entitled to specific performance/or damages in lieu.

The arbitrator issued an award in favour of ZCo on both counts.

X and YCo applied to the Court to set aside the award on the basis that they had not been able to present their case during proceedings. X and YCo highlighted that the shareholder agreement had contained a conditions precedent clause, which in their view had not been met.

The Count wasted no time in pointing out that the conditions precedent argument was not part of the list of issues for the tribunal. The Court explained that the significance of a list of issues is nuanced. If an issue is included on the list, and the arbitrator does not explicitly address it, that does not necessarily mean that the matter was not considered. However, where a party fails to include an issue in such a list, it suggests the party did not regard the issue as being key.

X and YCo argued that although the conditions precedent issue had not been put on the issues list, the importance of the issue had been made clear in the supporting documentation. The Court did not agree. In the Court's view, it was not the job of the tribunal to extensively comb through all the material supplied by the parties. That would an onerous obligation.

The events are a good lesson in efficiently preparing for arbitral proceedings. If there is a point that needs to be presented, then the arbitrator needs to know of that intention beforehand.

Hong Kong Court of First Instance pulls up arbitrator for lack of interest in key issue

In *A v B and Others* [2024] HKCFI 751, the Hong Kong Court of First Instance considered whether the mistakes of an arbitrator were serious enough to have undermined due process in arbitral proceedings.

Following a dispute over property licensing, the parties sought resolution through arbitral proceedings. At the centre of the dispute was a choice of law clause. The parties could not agree whether the contract was subject to the laws of the State of Maryland, USA or to the laws of Hong Kong.

When the award was issued, the claimant took issue with what they viewed as a lack of reasoning from the arbitrator. Although both parties had provided extensive submissions on the matter, the arbitrator referred to the matter in a sole paragraph. The paragraph did not contain any analysis of the dispute, or even mention that the point was in contention.

At [19], the Court summed up the issue with the arbitrator's approach:

> It is true that an arbitrator does not have to deal with each and every argument made by the parties but the lex loci contractus rule was an essential issue underpinning the decision on the enforceability of the Non-Compete Covenant… .

The Court held that this error was serious to the extent that it undermined the integrity of arbitration and severely restricted due process in doing so.