Arbitration Amendment Bill

Government Bill

Explanatory note

General policy statement

The purpose of this Bill is to improve the operation of the Arbitration Act 1996. It implements the principal recommendations of the Law Commission's 2003 report, *Improving the Arbitration Act 1996* (NZLC R 83).

The improvements to the Arbitration Act 1996 that the Bill seeks to make are aimed at encouraging the use of arbitration as a means of resolving disputes privately in New Zealand. They reflect the underlying themes of the Arbitration Act 1996, namely—

- party autonomy:
- reduced judicial involvement in the arbitral process:
- consistency with laws in other jurisdictions:
- increased powers for the arbitral tribunal.

Consumer protection

The Arbitration Act 1996 recognises that consumers are often at a disadvantage when entering into contracts with a business. To lessen that disadvantage, the Act places agreements between consumers and traders that contain arbitration agreements in a special category.

This Bill improves the level of protection provided to consumers who enter into consumer arbitration agreements. Arbitration agreements will no longer need to be signed at the same time as entering into a contract with a business. The Bill proposes that an arbitration agreement between a consumer and a business only takes effect if arbitration has been specifically agreed to as a means of resolving a

dispute after the dispute has arisen. The Bill also limits the definition of consumer to individuals.

In addition, the Bill amends the Disputes Tribunals Act 1988 to remove the jurisdiction of disputes tribunals in cases where a consumer and a business enterprise agree, after a dispute has arisen, that arbitration is the most appropriate form of dispute resolution. This amendment is consistent with providing increased protection to consumer arbitration agreements.

Disclosure of confidential information

The confidentiality of arbitral proceedings is considered to be one of the most attractive features of arbitration. However, the current exceptions to the confidentiality rules are extremely narrow and can create undesirable difficulties.

The Bill removes many of the limitations to confidentiality, whilst still retaining the principle of confidentiality. The Bill inserts a default provision into the Arbitration Act 1996 that provides that information and documentation relating to the arbitral process must be confidential. This requires hearings to take place in private. Exceptions to confidentiality include where disclosure is compelled by court order, subpoena, or where it is made to a professional or other adviser of any of the parties.

A general exception is also included, which allows arbitrating parties to apply to the arbitral tribunal for an order for permission to disclose confidential information. An automatic right of appeal to the High Court is provided for where an order is declined.

Appointment of arbitrator

The appointment of an arbitrator or members of an arbitral tribunal is a fundamental element of the arbitral process. It is desirable that the process be clear and predictable, especially in the situation where the parties cannot agree on a sole arbitrator or upon a panel of arbitrators. The Bill provides for parties to agree, in their arbitration agreement, on a default procedure if they are unable to agree upon the appointment of an arbitral tribunal. This differs from the current situation where the Arbitration Act 1996 sets out the default procedure to be followed.

Minor amendments

The Bill makes a number of minor amendments to improve the operation of the Arbitration Act 1996. These include providing that any request to the court to obtain a subpoena is not required to first go through, or have the consent of, the arbitral tribunal, and clarifying the interpretation of a provision of the Act.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that the Act is to come into force on the day after the date on which it receives the Royal assent.

Clause 3 states that the Bill amends the Arbitration Act 1996.

Part 1
Amendments to principal Act

References in *Part 1* of this analysis to provisions are references to provisions of the Arbitration Act 1996 (the **Act**), unless expressly stated to be references to provisions of another Act.

Clause 4 amends section 2 (interpretation). The amendment inserts new definitions of the terms **confidential information** and **disclose**. It also repeals section 2(2), which is no longer necessary in terms of current drafting practice.

The term **confidential information** is central to many of the amendments made by the Bill. It is defined—

- to mean information that relates to arbitral proceedings or to an award made in those proceedings; and
- to include—
    - the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party:
    - any evidence (whether documentary or otherwise) supplied to the arbitral tribunal:
    - any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal:
    - any transcript of oral evidence or submissions given before the arbitral tribunal:
    - any rulings of the arbitral tribunal:
    - any award of the arbitral tribunal.

Clause 5 amends section 11 (consumer arbitration agreements). Section 11 currently provides that an arbitration agreement contained in a contract that is entered into by a consumer is enforceable against the consumer only if the consumer, by separate written agreement, agrees to be bound by it. Under section 11, the parties to a contract enter into the separate written agreement to arbitrate at the same time as they enter into the main contract. Under this amendment, the separate written agreement by which the consumer certifies that the consumer agrees to be bound by an arbitration agreement must be entered into by the consumer and the other party after a dispute has arisen out of or in relation to the contract between them. The effect of the amendment, therefore, is that an arbitration agreement between a consumer and another party only takes effect if arbitration had been agreed as a method of dispute resolution after a dispute had actually arisen between them.

The amendments in *clause 5* also change the scope of section 11 in 2 respects. First, the amendment limits the application of section 11 to arbitration agreements that are entered into by consumers who are individuals. Secondly, the amendment excludes leases from the ambit of section 11.

Clause 6 replaces section 14 (disclosure of information relating to arbitral proceedings and awards prohibited) with *new sections 14 to 14I*, which deal with the confidentiality of arbitral proceedings.

New section 14 is an application provision. It provides that, except as the parties to an arbitration agreement may otherwise agree in writing (whether in the arbitration agreement or otherwise), *new sections 14A to 14I* apply to every arbitration for which the place of arbitration is, or would be, in New Zealand. The intention is that *new sections 14A to 14I* act as default provisions, which apply unless the parties to an arbitration agreement decide expressly how to handle issues of confidentiality of information that arise out of an arbitration. If the parties have specifically turned their minds to those issues and have set out their agreement on them in writing, then *new sections 14A to 14I* would not apply.

New section 14A provides that an arbitral tribunal must conduct the arbitral proceedings in private. This is consistent with traditional domestic practice. Arbitral proceedings are usually held in private in New Zealand. Only persons who have some connection with the arbitral proceedings are normally allowed to attend the hearing, unless the parties express a contrary intention.

New section 14B states that every arbitration agreement to which that section applies is deemed to provide that the parties to the agreement and the arbitral tribunal must not disclose confidential information. *New section 14B* is subject to *new section 14C*.

New section 14C sets out the limits to the prohibition on disclosure of confidential information contained in *new section 14B*. It provides that a party to an arbitration agreement or an arbitral tribunal may disclose confidential information in certain specified circumstances. For example, confidential information may be disclosed to a professional or other adviser of any of the parties. It may also be disclosed when required by court order or subpoena. Alternatively, it may be disclosed in accordance with an order made by an arbitral tribunal under *new section 14D* or an order made by the High Court under *new section 14E*.

New section 14D enables an arbitral tribunal to make or refuse to make an order allowing all or any of the parties to disclose confidential information if—

- a question arises in the arbitral proceedings as to whether confidential information should be disclosed other than as authorised under *new section 14C(a) to (d)*; and
- at least 1 of the parties agrees to refer the question to the arbitral tribunal.

The arbitral tribunal must give each of the parties an opportunity to be heard before determining whether to make or refuse to make the order.

New section 14E enables the High Court to make an order—

- allowing a party to disclose confidential information; or
- prohibiting a party from disclosing confidential information.

The High Court may make an order allowing disclosure of confidential information on the application of a party only if the mandate of the arbitral tribunal has been terminated in accordance with article 32 of Schedule 1 or on an appeal by a party against the refusal of the arbitral tribunal to make an order allowing that party to disclose the confidential information. The High Court may make an order of this kind only if it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable for the confidential information to be disclosed, and if the disclosure is no more than what is reasonably required to serve those other considerations.

The High Court may make an order prohibiting a party from disclosing confidential information on an appeal by a party who unsuccessfully opposed the making of an order by the arbitral tribunal allowing another party to disclose confidential information.

New section 14F provides that a Court must conduct proceedings under the Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private. This provision is a restatement of what is commonly referred to as "the open justice principle".

The Court may make the order on the application of any party to the proceedings and may do so only if satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

New section 14G provides that an applicant for an order under *new section 14F* must state in the application for the order the applicant's reasons for seeking the order.

New section 14H sets out the matters that the Court must consider in determining an application for an order under *new section 14F.*

New section 14I states the effect of an order under *new section 14F.* If the order is made, no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings, and the Court must not include in the Court's decision on those proceedings any particulars that could identify the parties involved.

Clause 7 amends section 19 (transitional provisions). Section 19(3) currently provides for the Arbitration Act 1908 to continue to apply in cases where arbitral proceedings are commenced after the commencement of the Act under an arbitration agreement that was made before that commencement. Under section 19(3), if the arbitration agreement provides for the appointment of 2 arbitrators then, unless a contrary intention is expressed in the agreement, the 2 arbitrators must, immediately after they are appointed, appoint an umpire. The arbitration must then be governed by the Arbitration Act 1908. The effect of section 19(3) has been to preserve the arbitration system under the Arbitration Act 1908 in parallel with the system under the Act for an overly extended transitional period.

The amendment to section 19 makes 2 changes. First, it provides an end date for the application of section 19(3). That section will apply only to the period beginning on the date of commencement of the

Act and ending with the close of the day before the date of commencement of this Bill. Secondly, it provides that the Act will govern any arbitral proceedings under an arbitration agreement that was made before the commencement of the Act and that provides for the appointment of an arbitrator by each of the 2 parties, or an arbitrator by each of the 2 parties and an umpire. Under the amendment, the arbitration agreement must be read as if it provides for the appointment, by the arbitrators appointed by each party, of a third arbitrator under the Act, rather than under the Arbitration Act 1908.

Clause 8 amends article 35 of Schedule 1 (recognition and enforcement of arbitral awards). The amendment re-enacts article 35 in a more modern form, but also confers jurisdiction on a District Court to enforce arbitral awards of a sum that is within the civil jurisdiction of the District Courts. Article 35 currently confers jurisdiction to enforce arbitral awards only on the High Court.

Clause 9 amends clause 1 of Schedule 2 (default appointment of arbitrators). The amendment provides a mechanism for resolving any difficulties in securing the appointment of an arbitrator.

Part 2
Related amendment to Disputes Tribunals Act 1988

Clause 11 amends section 16 of the Disputes Tribunals Act 1988. The amendment clarifies that a disputes tribunal does not have jurisdiction on a claim if section 11(1) of the Arbitration Act 1996 applies. Section 11(1) relates to contracts that contain consumer arbitration agreements.

Regulatory impact statement

Statement of nature and magnitude of problem and need for Government action

A Law Commission review of the Arbitration Act 1996 (the **1996 Act**) concluded that there are a number of specific and important problems with how the Act works. These problems are—

- definition of consumer: the current definition of consumer provides that a person enters into a contract as a consumer if he or she enters into the contract otherwise than in trade, and the other party to the contract enters into that contract in trade. The definition is too wide and includes bodies that are not categorised as genuinely requiring legislative protection (for example, schools, churches, and local authorities). These

bodies are not usually considered consumers and do not require protection to the extent that consumers do:

- consumer arbitration agreements: current provisions in the 1996 Act require a consumer to sign an arbitration agreement at the same time as entering into a contract for the arbitration agreement to be enforceable. This requires consumers to agree to arbitration before a dispute has arisen. At the time of entering into a contract, a consumer does not generally turn his or her mind to which dispute resolution process he or she would prefer if a dispute arose in relation to the transaction. Normally, the trader says "sign here, here, and here" and the consumer does so. The approach in the 1996 Act does not sufficiently safeguard consumers. Arbitration works best when both parties are satisfied that it is the most appropriate dispute resolution forum. The Disputes Tribunals Act 1988 provides that an arbitration agreement cannot oust the jurisdiction of a disputes tribunal. This is not consistent with the changes to consumer arbitration agreements. At the moment, the Disputes Tribunals Act 1988 would not enable those disputes that fall within the jurisdiction of a disputes tribunal to proceed to arbitration even if both parties agree that arbitration is the most appropriate forum:
- disclosure of confidential information: confidential information is not defined in the 1996 Act. This lack of definition makes it unclear to parties which documents will be subject to the prohibition against disclosing information under the 1996 Act. The current prohibition on the disclosure of confidential information relating to arbitral proceedings and awards, and the 2 limited exceptions, do not reflect the theme of the 1996 Act, namely greater party autonomy. The first exception is where the parties otherwise agree. The second exception permits disclosure of confidential information to a professional or other advisor of any party or, otherwise, if the publication, disclosure, or communication is contemplated by the 1996 Act. The exceptions are very narrow and do not permit disclosure to interested parties (ie, a professional or other advisor of 1 of the parties), disclosures required by law or required by a competent regulatory body but not contemplated by the 1996 Act (ie, the New Zealand Stock Exchange), and disclosures for other legitimate reasons (ie, filing and prosecution of any application to a District Court or the High Court):

- transitional provisions: under the Arbitration Act 1908, the 2 appointed arbitrators could appoint an umpire. The 1996 Act makes no provision for umpires and hence conflict has arisen as to the correct interpretation of section 19(3) of the 1996 Act when agreements or statutes refer to umpires. Section 19(3) provides that in a limited number of situations the Arbitration Act 1908 will continue to apply to arbitrations started after the commencement of the 1996 Act:
- Schedule 1: under the 1996 Act, any request to the court to obtain a subpoena is made through, or with the consent of, the arbitral tribunal. This requires 2 applications and does not fit with the idea of greater party autonomy. The requirement is based on the perceived need for arbitrators, rather than the parties, to control the arbitral proceedings:
- Schedule 2: under the current provisions of the 1996 Act, a party who does not agree to the other party's choice of arbitrator, for valid reasons, may find themselves forced to accept that choice, with no recourse to the High Court. A party whose suggested arbitrator is rejected may serve a default notice to the other party, stating that, unless the default is remedied within 7 days, then the suggested arbitrator will be appointed. If the party receiving the notice does nothing, the appointment will take effect. However, even if the party does respond, the first party's choice will still take effect:
- Perverse findings of fact: Schedule 2 of the 1996 Act currently provides that a party to arbitration may appeal to the High Court on any question of law. The 1996 Act is not clear as to whether a perverse finding of fact is regarded as a question of law. It is considered inappropriate in the context of an appeal from an arbitral award to include a perverse finding of fact within the term "question of law". This is because the person who has made the perverse finding is a person chosen by the parties to the dispute to decide the dispute of those parties. The advantages of arbitration in relation to cost and timeliness may be outweighed if, on an application for leave to appeal, it is necessary to transcribe all of the evidence heard by an arbitral tribunal in order to demonstrate to a High Court Judge that no evidence on a particular point existed:
- Employment Relations Act 2000: no statute applies to arbitration initiated under the Employment Relations Act 2000 and therefore the common law would apply. The common law is

often technical and inconsistent in this area. The common law is also inaccessible and does not accurately reflect that Act.

Statement of public policy objective

The purpose of the proposed legislation is to ensure that the operation of the law relating to arbitration is effective and efficient.

Statement of feasible options (regulatory and/or non-regulatory) that may constitute viable means for achieving desired objective

Status quo

The key features of the status quo are found in the problem section. The status quo is not preferred because it does not meet the public policy objective as well as the preferred option.

Preferred option

To amend the 1996 Act. The key substantive changes proposed to the existing legislative regime include—

- definition of consumer: the definition will be amended to ensure that it refers only to individuals:
- consumer arbitration agreements: these agreements will only take effect if arbitration has been agreed as a method of dispute resolution after the dispute has arisen. If a consumer and a business enterprise execute an arbitration agreement after a dispute has arisen then that agreement to arbitrate will oust the jurisdiction of a disputes tribunal:
- disclosure of confidential information: a more balanced approach to confidentiality issues that better recognises party autonomy and the private nature of arbitration proceedings is proposed. A definition of "confidential information" will be included that covers all information that relates to the arbitral proceedings or to an award made in those proceedings:
- transitional provisions: amendments to the 1996 Act will make clear that any reference to 2 arbitrators or to 2 arbitrators and an umpire would be deemed to be a reference to 3 arbitrators appointed under the 1996 Act:
- Schedule 1: prior approval of the arbitral tribunal will no longer be required before the court's assistance is sought to take evidence:

- Schedule 2: parties will be able to agree, in their arbitration agreement, upon a default procedure if they are unable to agree upon the appointment of an arbitrator:
- perverse finding of fact: the 1996 Act should expressly state that a question of law includes an "error of law", but that perverse findings of fact, or findings based on no evidence, do not constitute "errors of law" for the limited purpose of clause 5(1) of Schedule 2 of the 1996 Act.

Statement of net benefit of proposal, including total regulatory costs (administrative, compliance, and economic costs) and benefits (including non-quantifiable benefits) of proposal, and other feasible options

Government

The proposed changes could see an increase in parties choosing arbitration as the agreed form of dispute resolution. This would lead to a decrease in disputes being resolved through the courts.

The proposed changes encourage greater party autonomy, which would see less involvement of the arbitral tribunal in disputes (eg, the arbitral tribunal will only have the power to impose procedural rules if the parties fail to agree).

Parties involved in arbitration

The proposed changes would benefit parties involved in arbitration in several ways. These include—

- definition of consumer: the benefit of amending the definition of consumer will ensure that the legislation is targeted at those who need the protection. The object of the consumer protection provision is to provide protection to consumers who may be vulnerable when dealing with businesses in a stronger bargaining position:
- consumer arbitration agreements: consumers will not be required to seek legal advice on minor transactions unless a dispute arises. The amendments may lead to arbitration being more successful as both parties will need to agree that it is appropriate:
- disclosure of confidential information: the amendments widen and clarify the exceptions whilst still retaining the principle of confidentiality that is considered to be one of the attractions of arbitration. The inclusion of a definition of

confidential information will add clarity and certainty for all parties involved in arbitration:

- transitional provisions: the amendments will the confusion surrounding the application of section 19(3) of the 1996 Act and references to umpires:
- Schedule 1: the amendment will reduce the number of steps required when seeking subpoenas and pass greater control to the parties, thereby ensuring greater consistency with the 1996 Act:
- Schedule 2: if parties are able to develop their own procedure, more disputes may proceed to arbitration rather than through the courts. This will keep costs down for all parties concerned:
- perverse findings of fact: since parties will not be able to appeal to the High Court in relation to perverse findings of fact, legal costs will be kept to the minimum and the process will be kept within a reasonable timeframe.

There should be a net benefit to all businesses and consumers who enter into contracts. Although those who choose to use arbitration will need to familiarise themselves with the new legislation, parties to disputes will have greater autonomy and control over the procedure the arbitration follows. It should be noted that the amendments are only technical in nature and are not complicated.

There may be greater legal costs incurred by parties in developing their own default procedure in the situation where the parties are unable to agree upon the appointment of an arbitrator to the arbitral tribunal. However, this cost should be outweighed by the benefit of being subject to a process that both parties agree to rather than being submitted to the default procedure in the legislation.

The benefits achieved though clarification of the law and improved operation of the 1996 Act should exceed the costs associated with the proposals. There is a need for familiarisation by firms and individuals involved in dispute resolution with the new requirements.

Society

There should be a net benefit to society. Consumers will not be required to seek external advice on dispute resolution clauses unless a dispute arises.

Statement of consultation undertaken

Stakeholder consultation

In developing its proposals, the Law Commission issued a preliminary paper for public consultation. The Law Commission received particular assistance from the Arbitrators' and Mediators' Institute of New Zealand Inc (**AMINZ**) and the New Zealand Law Society. The Law Society and AMINZ held a series of workshops on arbitration with a wider audience. In addition, the Law Commission considered submissions from several lawyers and from the Ministry of Consumer Affairs. The Parliamentary Counsel Office prepared a draft Bill for review by the Law Commission and by its arbitration advisers.

Consultation with government departments/agencies

The Bill has its origins in a Law Commission report. The Ministry of Justice, the Ministry of Consumer Affairs, and the Department of Labour have been consulted in the preparation of this Bill. No significant concerns were raised.

Business compliance cost statement

There may be greater legal costs incurred by parties (both businesses and consumers) in developing an agreed arbitration procedure if the parties are unable to agree upon the appointment of an arbitrator to the arbitral tribunal.

Parties involved in arbitration may also face extra legal costs with the availability of an appeal to the High Court following a decision by the arbitral tribunal to decline to make an order to disclose confidential information.

The magnitude of the compliance costs cannot be determined. However, it is expected that once a party to arbitration has designed an individual default procedure, subsequent arbitrations will follow a similar procedure and therefore compliance costs will be minimal. It is also not possible to determine the costs for parties to appeal to the High Court.

There is no suitable way to minimise legal costs. However, the ability to appeal to the High Court provides a fairer process for all parties concerned.

Hon Clayton Cosgrove

Arbitration Amendment Bill

Government Bill

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Part 2
Related amendment to Disputes Tribunals Act 1988

10 Amendment to Disputes Tribunals Act 1988 10
11 Section 16 amended 10

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Arbitration Amendment Act **2006**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act amended

This Act amends the Arbitration Act 1996.

Part 1
Amendments to principal Act

4 Interpretation 10

(1) Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

"**confidential information**, in relation to arbitral proceedings,—

"(a) means information that relates to the arbitral proceedings or to an award made in those proceedings; and 15

"(b) includes—

"(i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party: 20

"(ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal:

"(iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal: 25

"(iv) any transcript of oral evidence or submissions given before the arbitral tribunal:

"(v) any rulings of the arbitral tribunal:

"(vi) any award of the arbitral tribunal 30

"**disclose**, in relation to confidential information, includes publishing or communicating or otherwise supplying the confidential information".

(2) Section 2(2) is repealed.

5 Consumer arbitration agreements 5

(1) Section 11(1) is amended by repealing paragraph (c) and substituting the following paragraph:

"(c) the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that 10 contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and".

(2) Section 11(2) is amended by inserting the following paragraph before paragraph (a): 15

"(aa) that person is an individual; and".

(3) Section 11 is amended by repealing subsection (6) and substituting the following subsection:

"(6) Nothing in this section applies to—

"(a) a lease; or 20

"(b) a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies."

6 New sections 14 to 14I substituted

Section 14 is repealed and the following sections are substituted: 25

"14 Application of sections 14A to 14I

Except as the parties may otherwise agree in writing (whether in the arbitration agreement or otherwise), **sections 14A to 14I** apply to every arbitration for which the place of arbitration is, or would be, New Zealand. 30

"14A Arbitral proceedings must be private

An arbitral tribunal must conduct the arbitral proceedings in private.

"14B Arbitration agreements deemed to prohibit disclosure of confidential information

"(1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information. 5

"(2) **Subsection (1)** is subject to **section 14C**.

"14C Limits on prohibition on disclosure of confidential information in section 14B

A party or an arbitral tribunal may disclose confidential information— 10

"(a) to a professional or other adviser of any of the parties; or

"(b) if both of the following matters apply:

"(i) the disclosure is necessary—

"(A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or 15

"(B) for the establishment or protection of a party's legal rights in relation to a third party; or 20

"(C) for the making and prosecution of an application to a court under this Act; and

"(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in **subparagraph (i)(A) to (C)**; or 25

"(c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or

"(d) if both of the following matters apply:

"(i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and 30

"(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or 35

"(e) if the disclosure is in accordance with an order made by— 40

"(i) an arbitral tribunal under **section 14D**; or
"(ii) the High Court under **section 14E**.

"14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances

"(1) This section applies if— 5
"(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under **section 14C(a) to (d)**); and
"(b) at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned. 10

"(2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

"14E High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality 15

"(1) The High Court may make an order allowing a party to disclose any confidential information— 20
"(a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with article 32 of Schedule 1; or
"(b) on an appeal by that party, after an order under **section 14D(2)** allowing that party to disclose the confidential information has been refused by an arbitral tribunal. 25

"(2) The High Court may make an order under **subsection (1)** only if—
"(a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and 30
"(b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in **paragraph (a)**. 35

"(3) The High Court may make an order prohibiting a party (**party A**) from disclosing confidential information on an appeal by

another party (**party B**) who unsuccessfully opposed an application by party A for an order under **section 14D(2)** allowing party A to disclose confidential information.

"(4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard. 5

"(5) The High Court may make an order under this section—

"(a) unconditionally; or

"(b) subject to any conditions it thinks fit.

"(6) To avoid doubt, the High Court may, in imposing any conditions under **subsection (5)(b)**, include a condition that the order ceases to have effect at a specified stage of the appeal proceedings. 10

"(7) The decision of the High Court under this section is final.

"14F Court proceedings under Act must be conducted in public except in certain circumstances 15

"(1) A Court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

"(2) A Court may make an order under **subsection (1)**—

"(a) on the application of any party to the proceedings; and 20

"(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private. 25

"(3) If an application is made for an order under **subsection (1)**, the fact that the application had been made and the contents of the application must not be made public until the application is determined.

"(4) In this section and **section 14I**,— 30

"**Court**—

"(a) means any court that has jurisdiction in regard to the matter in question; and

"(b) includes the High Court and the Court of Appeal; but

"(c) does not include an arbitral tribunal 35

"**proceedings** includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

"14G Applicant must state nature of, and reasons for, order sought under section 14F

An applicant for an order under **section 14F** must state in the application—

"(a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and 5

"(b) the applicant's reasons for seeking the order.

"14H Matters that Court must consider in determining application for order under section 14F 10

In determining an application for an order under **section 14F**, the Court must consider all of the following matters:

"(a) the open justice principle; and

"(b) the privacy and confidentiality of arbitral proceedings; and 15

"(c) any other public interest considerations; and

"(d) the terms of any arbitration agreement between the parties to the proceedings; and

"(e) the reasons stated by the applicant under **section 14G(b)**.

"14I Effect of order under section 14F 20

"(1) If an order is made under **section 14F**,—

"(a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and

"(b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings. 25

"(2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings." 30

7 Transitional provisions

(1) Section 19(3) is amended by omitting "after the commencement of this Act" and substituting "during the period beginning on the date of commencement of this Act and ending with the close of the day before the date of commencement of the Arbitration Amendment Act **2006**". 35

(2) Section 19 is amended by inserting the following subsections after subsection (3):

"(3A) **Subsection (3B)** applies to an arbitration agreement that—
"(a) is made before the commencement of this Act; and
"(b) provides for the appointment of—
"(i) an arbitrator by each of the 2 parties; or
"(ii) an arbitrator by each of the 2 parties and for those arbitrators to appoint an umpire; and 5
"(c) does not relate to arbitral proceedings that have been commenced during the period referred to in subsection (3).

"(3B) Every arbitration agreement to which this subsection applies must be read as if the arbitration agreement provides for the appointment, by the arbitrators appointed by each party, of a third arbitrator under this Act, and the provisions of this Act, subject to any modifications that may be necessary, apply accordingly to that arbitration agreement." 10 15

8 Schedule 1 amended

(1) Article 27(1) of Schedule 1 is amended by omitting "with the approval of the arbitral tribunal".

(2) Schedule 1 is amended by repealing article 35 and substituting the following article: 20

"35 Recognition and enforcement

"(1) An arbitral award, irrespective of the country in which it was made,—
"(a) must be recognised as binding; and
"(b) on application in writing to a Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36. 25

"(2) The party relying on an award or applying for its enforcement must supply— 30
"(a) the duly authenticated original award or a duly certified copy of the award; and
"(b) if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and 35
"(c) if the award or agreement is not made in the English language, a duly certified translation into the English language of either or both documents.

"(3) For the purposes of this article, **Court** means—
"(a) the High Court; or 40

"(b) a District Court in any case where the amount of any money made payable by the award does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases."

9 Schedule 2 amended 5

(1) Clause 1(1) of Schedule 2 is amended by omitting "subclauses (2) to (5)" and substituting "**subclauses (2) to (6)**".

(2) Clause 1 of Schedule 2 is amended by repealing subclauses (4) and (5) and substituting the following subclauses:

"(4) The parties are free to agree, under the arbitration agreement, 10 on a process for resolving any difficulties in securing the appointment of the arbitrator or arbitrators including, without limitation, difficulties that arise if, under subclause (2) or (3), or under any other appointment procedure agreed on by the parties,— 15

"(a) a party fails to act as required under that procedure; or

"(b) the parties, or the arbitrators, are unable to reach an agreement expected of them under that procedure; or

"(c) a third party, including an institution, fails to perform any function entrusted to it under that procedure. 20

"(5) The process referred to in **subclause (4)** may include a procedure that allows a party to serve on another party a notice that requires the other party to remedy a default in relation to the appointment of the arbitrator or arbitrators.

"(6) A party may request the High Court, in accordance with 25 article 11(3) of Schedule 1, to appoint the arbitrator or arbitrators if the other party fails to comply with the process referred to in **subclause (4)**."

(3) Clause 5 of Schedule 2 is amended by adding the following subclause: 30

"(10) For the purposes of this clause, **question of law**—

"(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but

"(b) does not include any question as to whether— 35

"(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and

"(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts."

Part 2
Related amendment to Disputes Tribunals Act 1988

5

10 Amendment to Disputes Tribunals Act 1988

This Part amends the Disputes Tribunals Act 1988.

11 Section 16 amended

Section 16 is amended by adding the following subsection:

"(4) Despite subsection (2), a Tribunal does not have jurisdiction in respect of a claim if section 11(1) of the Arbitration Act 1996 applies."

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