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A Guide to New Zealand Arbitration

Hesketh Henry
Simon Cartwright, *Partner*
Richard Belcher, *Associate*
Lydia Sharpe, *Solicitor*

Introduction

New Zealand is a pro-arbitration jurisdiction. Its legal arbitration framework supports the principles of party autonomy and procedural flexibility, and both domestic and international arbitral awards are enforceable through the New Zealand courts.

Most arbitrations in New Zealand relate to construction or commercial disputes. Maritime arbitrations are not common, as most commercial maritime contracts provide for arbitration in England or Singapore.

Overview of New Zealand Arbitration Law

Arbitrations are conducted pursuant to the New Zealand Arbitration Act 1996 (**the Act**). The Act is partly based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (**UNCITRAL**) in 1985.

Rules

Schedule 1 of the Act, which largely reproduces the Model Law, sets out the rules that apply to all arbitrations held in New Zealand, whether domestic or international.

Schedule 2 sets out various provisions which are designed specifically to apply to domestic arbitrations. Under section 6 of the Act, these automatically apply to domestic arbitrations unless the parties agree otherwise, but do not apply to international arbitrations held in New Zealand unless the parties expressly agree. This is because other national laws may apply to various aspects of the arbitration as well. Parties to international arbitration may elect to hold the arbitration in one particular country while applying the law of another country. For this reason, Schedule 1 of the Act, which largely reproduces the Model Law applies automatically, parties to international arbitrations conducted in New Zealand have the choice to opt into the more specific provisions contained within Schedule 2.

An arbitration is regarded as international if one or more of the following criteria applies:

a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

b) One of the following places is situated outside the state in which the parties have their places of business:

   i. The place of arbitration if determined in, or pursuant to, the arbitration agreement; or
   ii. Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Procedure

The Act reflects the principle of party autonomy by providing that an arbitral tribunal must conduct the arbitration in accordance with the procedure agreed by the parties.[1] However, many arbitrations will follow procedures that reflect, to varying degrees, the procedures already established in litigation. The procedural structure for a typical domestic arbitration may include some or all of the following steps:

- Request for arbitration
- Establishing the arbitral tribunal
- Establishment of applicable procedure
- Exchange of statement of claim, statement of defence and counterclaim, and reply to counterclaim
- Exchange of documents: requests for and objections to disclosure of additional documents, tribunal's ruling, and preparation of agreed bundle
- Witness administration: exchange of witness statements and reply witness statements of non-expert and expert witnesses, as well as a joint conferral for experts
- Pre-hearing administrative conference
- Filing of pre-hearing submissions and draft hearing schedule;
- Hearing
- Awards: substantive and costs

Separability

Article 16(1), Schedule 1 of the Act provides for separability of arbitration clause. In other words, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

Interim orders

The Act enables arbitral tribunals to make orders for interim measures while the proceedings are ongoing. These cover a broad range of orders which require a party to do any or all of the following:

- Take action which would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings.
- Provide a means of preserving assets out of which a subsequent award may be satisfied.
- Preserve evidence that may be relevant and material to the resolution of the dispute.
- Give security for costs.

Interim orders may include, for example, orders requiring a party to continue performing its obligations under the contract; orders for inspection of goods, property or documents; anti-suit injunctions; freezing orders / Mareva injunctions, and so on.

Confidentiality

Arbitrations are usually confidential. Sections 14 – 14I of the Act provide a comprehensive set of rules on privacy and confidentiality.

Challenging an award

After an award is made in the arbitration, the dispute may continue in two ways.

First, a party may apply to the High Court to have the award set aside on specified grounds set out in Article 34 of Schedule 1 to the Act. The majority of applications to set aside an award are alleged procedural failures of a tribunal or of a party. Some substantive errors by a tribunal may be covered by the ground that the award is in

conflict with public policy, while claims relating to the adjudicability of a dispute by arbitration may be made under the grounds of incapacity of a party, jurisdiction or arbitrability.

Second, under Clause 4 of Schedule 2 of the Act, a party may also appeal on a question of law to the High Court. Because this appears in Schedule 2, parties to domestic arbitration may appeal to the High Court unless they explicitly exclude this right. Parties to international arbitrations, however, must expressly provide for the court to be able to exercise this power. Clause 5(10) of Schedule 2 of the Act specifies the meaning of "question of law" and notes that it includes an error of law that involves an incorrect interpretation of the applicable law, but does not include any question as to whether the award was supported by any evidence or any sufficient or substantial evidence, and whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts. There is no general right of appeal on the facts, but in some cases the High Court has regarded a question of mixed fact and law as a question of law capable of founding an appeal under clause 5.

Overview of Maritime Law in New Zealand

New Zealand is a common law jurisdiction. Its legal framework is based on both legislation and case law. In the maritime context, legislation provides the broader framework and is supplemented by international conventions, domestic regulations, rules and standards.

Legislative Framework

The principal legislation is the Maritime Transport Act 1994 ("**MTA**"). The MTA regulates maritime activity (safety), the marine environment (prevention of pollution, etc.), the protection of seafarers, the international carriage of goods by sea, and liability for civil maritime claims and maritime offences (including the incorporation of international conventions).

International conventions ratified by New Zealand are usually implemented through the MTA. These include the International Convention on Salvage 1989 (the 1989 Salvage Convention), the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) (as amended by the 1996 Protocol) and the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules).

Other conventions are given effect by subordinate regulations; for example, the Maritime Rules (discussed below) give force to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) and the International Convention for the Safety of Life at Sea 1974 (SOLAS).

Other legislation focuses on specific matters, such as admiralty jurisdiction,[2] domestic carriage of goods,[3] biosecurity,[4] non-sector-specific employee safety,[5] security measures around ships and ports,[6] criminal provisions relating to maritime matters,[7] rights and liability under shipping documents and the delivery of goods, liens for freight and warehousing of cargo,[8] formation of port companies and management and operation of the commercial aspects of ports,[9] discharge from ships and offshore installation within 12 nautical miles,[10] ship registration, transfer of ownership and mortgages,[11] and outward shipping policy.[12]

Several different pieces of legislation apply to the maritime environment both in internal waters and New Zealand's territorial seas and exclusive economic zone: the MTA, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the Resource Management Act 1991.[13]

Carriage of Goods

The Hague-Visby Rules apply to every bill of lading ("**BOL**") relating to the international carriage of goods if:[14]

- the BOL is issued in a contracting state;[15]
- the carriage is from a port in a contracting state; or
- the contract contained in or evidenced by the BOL provides that the Hague-Visby Rules or the MTA are to govern the contract.

The MTA prevents parties from limiting the jurisdiction of New Zealand courts in respect of a:[16]

- BOL (or similar) relating to the international carriage of goods; or
- non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL (as provided for in Section 209 of the MTA).

However, the provisions of the MTA do not affect the enforceability of arbitration agreements and foreign choice-of-law clauses.[17]

Domestic carriage of goods by sea is governed by Part 5, Subpart 1 of the Contract and Commercial Law Act 2017 ("**CCLA"**).[18] The Act applies to all domestic carriage pursuant to a contract of carriage, even if the ship is simultaneously engaged in international carriage.[19]

The CCLA outlines the liability for all those involved in domestic carriage, including those who arrange carriage or provide incidental services to carriage.[20] The Act provides (subject to exceptions) for strict liability for carriers for loss or damage to goods. Loss caused by delay in delivery is not covered by the Act (common law principles apply).

The CCLA recognises four types of contracts of carriage:[21]

- 'at owner's risk': the carrier will be liable only where the loss or damage is intentionally caused by the carrier;
- 'at declared value risk': the carrier is liable for the loss or damage to the amount specified in the contract. If the contract is silent, Sections 256 to 260 will apply;
- 'on declared terms': the contracting parties may regulate the carrier's liability under the contract; and
- 'at limited carrier's risk': the carrier is liable for the loss or damage to any goods in accordance with Sections 256 to 260. Section 259 caps the liability for carriers at NZ$2,000 for each unit of goods lost or damaged.[22]

Subject to limited defences,[23] the default rule is that the contracting carrier is liable to the contracting party for loss or damage to any goods, whereas the contracting carrier is responsible for them, whether caused by the contracting carrier or by an actual carrier.[24]

The right to sue for freight arises when a carrier ceases to be responsible for the goods.[25] The right to sue is supported by a lien.[26] If the owner does not pay within two months' notice of the lien, the carrier may sell the goods by public auction.[27]

Enforceability of Foreign Awards in New Zealand

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), to which New Zealand is a party, provides for the recognition and enforcement of foreign arbitral awards.

Article 35(1), Schedule 1 of the Act provides that an arbitral award, irrespective of the country in which it was made, must be recognised as binding and, on application to the Court, must be enforced by entry as a judgment in terms of the award, or by action. There is no requirement of reciprocity; that is to say, there is no requirement that

the New Zealand courts will only recognise and enforce awards made in countries which also recognise and enforce awards made in New Zealand.

An arbitral award may be enforced in New Zealand by making an application for enforcement in the High Court. If the amount of the award is under NZ$350,000 an application may also be made in the District Court. The District Court does not have exclusive jurisdiction and a party may therefore apply for enforcement of an award in the High Court even if the amount of the award is lower than NZ$350,000.

Under Article 35(2) of Schedule 1 to the Act, the party seeking to enforce the award must supply the court with the duly authenticated original award, or a duly certified copy of the award, as well as the original or a duly certified copy of the arbitration agreement, as well as English translations of all documents, if needed. The applicant is not required to prove the validity of the arbitration agreement, although the party opposing enforcement may challenge the application under this ground.

The party seeking to enforce the award must serve notice of the application for entry of the award on the opposing party, although this requirement may be waived in exceptional circumstances (such as where there is a risk that assets will dissipate before the award can be enforced against the assets). The opposing party may oppose entry of the award as a judgment, by applying for an order for refusal of recognition and enforcement of the award.

Article 36(1), Schedule 1 of the Act sets out various grounds for refusing recognition or enforcement. These are as follows:

- A party to the arbitration agreement was under some incapacity;
- The arbitration agreement was invalid under the law to which the parties subjected it or the law of the country in which the award was made;
- The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was in some other way unable to present its case;
- The award relates to a dispute which does not fall within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission;
- The composition of the arbitral tribunal or procedure was not in accordance with the parties' agreement;
- The award is not yet binding on the parties or has been set aside or suspended by a court of the country in which (or under the law of which) the award was made;
- The subject matter of the dispute is not capable of settlement by arbitration under New Zealand law; or
- The recognition / enforcement of the award would be contrary to New Zealand public policy (i.e. when the making of the award was induced or affected by fraud / corruption, or a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award).

Institutional vs ad hoc Arbitration – New Zealand perspectives

The choice between institutional or ad hoc arbitration largely turns on whether the parties have a preference for the increased definition and certainty provided by institutional rules, versus the flexibility and often decreased formality provided by ad hoc arbitration.

Ad hoc arbitration

Parties in New Zealand have the option to decide their own rules for an ad hoc arbitration. Ad hoc arbitration is governed under the Act.

As discussed earlier in this article, Schedule 1 of the Act largely reproduces the UNCITRAL Model Law, thereby providing a basic framework which ad hoc arbitrations can use. Schedule 1 applies to both domestic arbitrations (i.e. where all parties to the arbitration have their principal place of business in New Zealand, per Article 1(3) of Schedule 1) and international arbitrations. Schedule 2 of the Act sets out a further set of rules specifically for domestic arbitrations.

The procedure for international arbitrations which take place in New Zealand will be governed by the applicable provisions of the Act (which, as noted above, largely reproduces the Model Law), in addition to any additional rules under Schedule 2 which the parties agree to utilise. However, these rules may be at a level of generality which could be considered inadequate for an international commercial arbitration, especially if the amount at stake is significant. Parties may thus choose to utilise other rules of procedure as well.

Institutional arbitration

The most prominent arbitration institution in New Zealand is the Arbitrators' and Mediators' Institute of New Zealand (**AMINZ**).

There are also two smaller arbitration institutes: the New Zealand Dispute Resolution Centre (**NZDRC**), and the New Zealand International Arbitration Centre (**NZIAC**).

None of these institutions have specialist maritime expertise.

It is not common for maritime arbitrations involving a non-New Zealand party to be seated in New Zealand. Typically, parties to maritime contracts will choose arbitration in London or Singapore.

Status of SCMA awards in New Zealand

As New Zealand is a signatory to the New York Convention, SCMA awards are enforceable.

Conclusion

New Zealand is a pro-arbitration jurisdiction which provides various options for domestic or international arbitration.
Enforcement of arbitral awards through the New Zealand courts is also a relatively straightforward process.

While maritime-related disputes in New Zealand may proceed to arbitration, those with an international flavour will typically be seated outside of New Zealand, in jurisdictions such as Singapore or London.

[1] Article 19, Schedule 1, the Act.
[2] Admiralty Act 1973 (and Part 25 of the High Court Rules 2008).
[3] Contract and Commercial Law Act 2017, Part 5, Subpart 1.
[4] Biosecurity Act 1993.
[5] Health and Safety at Work Act 2015.
[6] Maritime Security Act 2004 and Maritime Security Regulations 2004, giving effect to aspects of the International Ship and Port Facility Security Code 2004.
[7] Maritime Crimes Act 1999.
[8] Contract and Commercial Law Act 2017, Part 5, Subpart 2.
[9] Port Companies Act 1988.
[10] Resource Management Act 1991 (and Resource Management (Marine Pollution) Regulations 1998).
[11] Ship Registration Act 1992.
[12] Shipping Act 1987.
[13] There is a further division in the safety context between local regulations of recreational boating and shipping under navigation safety by-laws, and national regulations under the MTA and the Maritime Rules.
[14] MTA, Schedule 5, Article 10. Section 209 of the MTA also extends the application of the Hague-Visby Rules to carriage of goods by sea evidenced by a non-negotiable document (other than a bill of lading or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a bill of lading.
[15] As to 'contracting states', see Section 211 of the MTA. Under that Section, if the Secretary of Foreign Affairs and Trade to certifies that, for the purposes of the Rules, a state specified in the certificate is a contracting state, it will be presumed to be until the contrary is proven.
[16] MTA, Section 210(1).
[17] MTA, Section 210(2); *Mobil Oil New Zealand Ltd v. The Ship 'Stolt Sincerity'* HC Auckland AD628/93, 14 March 1995.
[18] It applies to the carriage of goods performed or to be performed by as carrier under a contract (whether the carriage is by land, water, air or multimodal) unless an exception in Section 243 applies (namely international carriage). See CCLA, Section 242.
[19] CCLA, Section 243(2).
[20] CCLA, Section 246. 'Carriage' includes any 'incidental service' undertaken to facilitate carriage. For example, stevedores.
[21] CCLA, Section 248.
[22] Liability is limited to NZ$2,000 for each unit of goods or to the declared value. Pursuant to Section 260, liability is not limited if the loss of or damage to goods is caused intentionally by the carrier; liability for damages other than loss of or damage to goods; liability for damages that are consequential on the loss of or damage to the goods: CCLA, Section 259.
[23] A carrier will avoid liability if he or she can prove that the loss or damage resulted directly, without fault on his or her part, from: an inherent vice; breach of the contracting party's statutorily implied warranties relating to the condition, packing and lawfulness of the consignment; seizure under legal process; or saving or attempting to save life or property in peril: CCLA, Section 260(2) and (3).
[24] CCLA, Section 256.
[25] CCLA, Section 283. An action for recovery of freight may be brought against the consignee if property in the goods has passed to the consignee: CCLA, Section 284.
[26] CCLA, Section 285. The carrier's lien is active, which means there is a right to sell the goods in certain circumstances. The carrier's lien is also particular, which means that it is confined to the sum owing in relation to the goods held, and does not extend to a general balance of account.
[27] CCLA, Section 288.

Authors:

Simon Cartwright
Partner
simon.cartwright@heskethhenry.co.nz

Richard Belcher
Associate
richard.belcher@heskethhenry.co.nz

Lydia Sharpe
Solicitor
lydia.sharpe@heskethhenry.co.nz

Hesketh Henry

Website: https://www.heskethhenry.co.nz/

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