

THE ROLE OF ARBITRATION IN DEVELOPING AND DEVELOPED
ECONOMIES AND THE IMPORTANCE OF ARBITRATION SYSTEMS IN
ATTRACTING FOREIGN DIRECT INVESTMENT

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by

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"Clash and conflict are present in every community. We have in truth the sturdy roots of a rule of law, including a few of the procedures which human ingenuity has devised for resolving disputes, including conciliation and mediation, arbitration, administrative settlement, and judicial determination. The rule of law is versatile and creative. It can devise new remedies to fit international needs as they may arise."

Justice William O Douglas
The Rule of Law in World Affairs, 1961

Introduction

- 1 This paper is divided into three sections:
 - (a) An historical perspective;
 - (b) The New Zealand experience;
 - (c) Some other examples.

An historical perspective

- 2 Thirteen years ago, almost to the day, I delivered a paper at the Sixth Annual *Journal of Contract Law* Conference held in Auckland, New Zealand, entitled "*A South Pacific Perspective on International Arbitration and Dispute Resolution Since 1961*"¹. In that paper I noted the change in the world scene between 1961 and 1995 and conducted a general review of developments since 1961 before dealing in more detail with:
 - (a) The UNCITRAL Model Law;

¹ This paper was subsequently published in (1995) 1 NZBLQ at 195-243.

- (b) The dispute resolution provisions of the World Trade Organization Agreement;
- (c) The World Intellectual Property Organisation (“WIPO”) Arbitration Centre; and
- (d) The North American Free Trade Agreement 1993.

3 I concluded my paper on that occasion by saying:

Was Justice Douglas right when he said :

"The rule of law is versatile and creative. It can devise new remedies to fit international needs as they may arise"?

Undoubtedly, in the thirty-four years since he wrote the passage quoted at the beginning of this paper a large number of new remedies have been devised both on the international and on the domestic scene. Internationally, these remedies have taken the form both of new institutions and of new or improved procedures. The period has seen the establishment of ICSID, MIGA, the dispute settlement structures of WTO, WIPO, NAFTA and the European and Inter-American Conventions on International Commercial Arbitration. It has also seen the establishment of the ICSID Additional Facility and the use of ICSID in the ASEAN and NAFTA investment dispute settlement procedures. Procedurally, the period has seen the increasing acceptance into municipal law of the New York Convention 1958 (in 1961 it had been ratified by 18 nations but by 1992 it had been ratified by 94 nations), the adoption of the UNCITRAL Arbitration Rules in 1976 and of the UNCITRAL Conciliation Rules in 1980 and their widespread incorporation in contracts or application by administering centres, and the adoption and widening acceptance of the UNCITRAL Model Law on International Commercial Arbitration. In addition to these United Nations initiatives, the ICC has established the International Centre for Technical Expertise, for the giving of non-binding opinions to parties in dispute, and the Rules for a Pre-arbitral Referee Procedure, designed to ensure that measures are taken immediately to limit the damage that may result from a dispute. The WIPO Arbitration Center has made provision for expedited arbitration. Similar innovations and adaptations have been made by other administering institutions. The same process, both in respect of institutions and procedures, has occurred domestically, with the impetus for this development coming originally from the United States and spreading internationally, round the Pacific Rim and to the United Kingdom. The techniques which have been developed or reformed include partnering, independent expert appraisal, conciliation or mediation, the mini-trial and arbitration, including expedited arbitration.

How effective are the present international institutions and procedures? It is difficult to answer this question authoritatively. The criteria for judging effectiveness, at least in the case of arbitration, must be the speed and cost of the proceeding (which are always relative to the complexity of the issues and the extent to which the parties co-operate) and enforceability. International arbitrators are conscious of their responsibilities to the parties in these respects, as are the administering institutions. As with any product or service, performance counts. International arbitrations can be disposed of very rapidly. So far as enforceability is concerned, it is obviously impossible to ascertain what proportion of the awards published are not enforced, but it is suggested that it is a very small proportion. So far as procedures other than arbitration are concerned, the measure of their effectiveness must be whether or not they result in a settlement and, once again, the time and expense involved in achieving a settlement.

It is fair to say that the needs of the international commercial community and the accumulated experience and understanding of their advisers and of the providers of dispute settlement services will result in a continuing review of, and improvement in, both institutions and procedures.

In the section of this paper headed "The object of this paper", reference was made to the cross-fertilisation between the international field and the domestic field. This is a very important factor in the overall development of dispute resolution as an art and as a service. We can, and should be prepared, to learn from each other. At the end of the day, all forms of dispute resolution are, or should be - just as systems of law should be - the product of common sense. Common wisdom is a useful adjunct to, and promoter of, common sense.

- 4 How have matters developed since August 1995? What further evidence is there of the role of arbitration in developing and developed economies and of the importance of arbitration systems in attracting foreign direct investment?
- 5 In answer to those questions I would point to the following facts:
 - (a) The increase from 107 to 142 in the number of countries which have become parties to the New York Convention;
 - (b) The continued growth in the number of countries which have adopted the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as the foundation of, or part of, their arbitration law;
 - (c) The increase from 118 to 143 in the number of countries which have become parties to the Washington Convention;
 - (d) The substantial increase in the number of bilateral investment treaties;
 - (e) The continued substantial caseload of the various arbitral institutions.
- 6 I have set out in Table 1 details of the countries that have become parties to the New York Convention or the Washington Convention or have adopted the Model Law as the foundation of, or part of, their law of arbitration. The table shows that:
 - (a) Of the 35 new parties to the New York Convention, 34 are developing economies (Iceland is the only developed economy);
 - (b) Of the 25 new parties to the Washington Convention, all are developing economies;
 - (c) Of the 11 new Model Law countries, six are developed economies and five developing economies.
- 7 There was a 150% increase in the number of bilateral investment treaties ("BITs") between 1995 and 2006, from slightly over 1,000 to more than

2,500.² As is the case with the New York and Washington Conventions, the vast majority of new BITs have involved developing economies. For example:

- (a) Of the 40 BITs listed on the US Government's Trade Compliance Center website³ 18 have been entered into since August 1995, all of them with developing economies;
- (b) Of the 22 BITs in force listed on the Canadian Government Treaty website⁴ 14 have been entered into since August 1995, all of them with developing economies;
- (c) Of the 59 BITs entered into by Germany since August 1995 and in force shown on the United Nations Conference of Trade and Development website⁵ all of them have been entered into with developing economies;
- (d) Of the 27 BITs entered into by the United Kingdom since August 1995 and in force shown on the United Nations Conference of Trade and Development website⁶ all of them have been entered into with developing economies.

8 Other examples (very different from the above and from each other) of recent trade treaties or negotiations are:

- (a) The New Zealand –China Free Trade Agreement signed on 7 April this year; and
- (b) The recently announced US-China negotiations on a bilateral investment treaty.

9 The significance of bilateral investment treaties in the present context is, of course, that they usually provide for arbitration as a dispute resolution process. The ICSID Annual Reports for 2005-2007 reveal that of the 76 new arbitration proceedings filed with ICSID during those three years 59 arose from ICSID arbitration provisions contained in BITs.

10 Because many international arbitrations are conducted on an ad hoc basis, it is impossible to obtain accurate details of the total number of international arbitrations commenced in any year. So far as international arbitrations administered by arbitral institutions are concerned, based on the figures available on the Singapore International Arbitration Centre website⁷ and on a

² UNCTAD Information Note N12/04/07 (UNCTAD/PRESS/In/2007/014)

³ www.tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002699.aspx

⁴ www.treaty-accord.gc.ca/TreatyResult.asp

⁵ www.unctad.org/templates/DocSearch.aspx?id=779

⁶ www.UNCTD.org/Templates/Page.asp? www.unctad.org/templates/DocSearch.aspx?id=779

⁷ www.siac.org.sg/facts_statistics.htm

personal communication from Mr Christopher To, Secretary General of the Hong Kong Arbitration Centre, the number of new cases filed since 2000 has been of the order of 2000 a year.

The New Zealand Experience

- 11 Arbitration has been an integral part of the New Zealand legal and commercial scene since the earliest days.
- 12 The current Act, the Arbitration Act 1996, came into force on 1 July 1997. It is substantially based on the UNCITRAL Model Law. In 2007 the principal Act was amended by the Arbitration Amendment Act 2007, which came into force on 18 October 2007. One of the amendments made by this Act was the incorporation into the principal Act of the new interim measures regime adopted by UNCITRAL in 2006. New Zealand was, to the best of my knowledge, the first (and is, possibly, still the only) country to have adopted the 2006 amendments.⁸
- 13 The text of the Act, as amended, can be downloaded from the New Zealand Government website www.legislation.govt.nz.
- 14 The purposes of the Act are stated in s 5 to be:
 - (a) *To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and*
 - (b) *To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and*
 - (c) *To promote consistency between the international and domestic arbitral regimes in New Zealand; and*
 - (d) *To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and*
 - (e) *To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and*
 - (f) *To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3).*

⁸ For the details of these amendments and comment on how they might operate see my paper “*Promised Land or Fire Swamp*”, a copy of which can be downloaded from the Recent Papers page of my website at www.kennedygrant.com

- 15 The Act as amended comprises 29 sections and 5 Schedules. The sections fall into the following groups:
- (a) Section 1 - Short title and commencement;
 - (b) Sections 2 and 3 - Interpretation;
 - (c) Section 4 - Act to bind the Crown;
 - (d) Section 5 - Purposes of Act;
 - (e) Sections 6-8 - Application of Act to arbitrations;
 - (f) Section 9 - Arbitration under other Acts;
 - (g) Section 10 - Arbitrability of disputes;
 - (h) Section 11 - Consumer arbitration agreements;
 - (i) Section 12 - Powers of arbitral tribunal in deciding disputes;
 - (j) Section 13 - Liability of arbitrators;
 - (k) Sections 14-14I – Privacy and confidentiality;
 - (l) Section 15 - Certificates concerning parties to the conventions;
 - (m) Sections 16-20 - Rules, Amendments to other Acts, Repeals, Transitional provisions, and Act passed in substitution for Arbitration Act 1908.

The Schedules are as follows:

- (i) Schedule 1 – Rules applying to arbitration generally (incorporating the Model Law with modifications);
- (ii) Schedule 2 – Additional optional rules applying to arbitration;
- (iii) Schedule 3 – Treaties relating to Arbitration (incorporating the Geneva Protocol, Geneva Convention and the New York Convention);
- (iv) Schedule 4 – Enactments amended;
- (v) Schedule 5 – Enactments repealed.

- 16 The key features of the regime established under the Act are as follows:
- (a) The only limitations on arbitrability are those imposed by public policy or by any other law (s 10(1));
 - (b) Special formalities must be met where a person enters into an arbitration agreement as a consumer if that agreement is to be enforceable against that person (s 11);

- (c) Unless otherwise agreed by the parties, an arbitration agreement is deemed to provide that an arbitral tribunal may “*award any remedy or relief that could have been ordered by the High Court*” (s 12(1)(a)) and may award interest (s 12(1)(b));
 - (d) An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator (s 13);
 - (e) There are provisions regarding privacy and confidentiality of arbitral proceedings and related Court proceedings (ss 14-14I);
 - (f) The provisions of Schedule 1 (incorporating a modified version of the Model Law) apply to all arbitrations the place of which is, or would be, New Zealand, whether the arbitration is a domestic arbitration or an international one (s 6(1));
 - (g) The provisions of Schedule 2 (containing additional optional rules applying to arbitration) only apply to an international arbitration the place of which is, or would be, New Zealand if the parties to the arbitration agree (“the opt-in provision”) (s 6(1)(2));
 - (h) The provisions of Schedule 2 apply to a domestic arbitration unless the parties agree otherwise (“the opt-out provision”) (s 6(1)(2));
 - (i) If the place of arbitration is not in New Zealand, articles 8, 9, 35, 36 of Schedule 1 apply (s7);
 - (j) If it still has to be agreed or determined whether the place of arbitration will be in New Zealand, articles 8 and 9 of Schedule 1 apply to the arbitration (s8).
- 17 The principal modifications of the MAL in Schedule 1 to the Act are as follows:
- (a) Form of arbitration agreement (article 7) – the agreement may be oral;
 - (b) Stay of court proceedings (article 8) - there is an additional ground on which a stay may be refused, viz. “*that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*”;

- (c) Interim measures by courts (article 9) - the powers of courts to grant interim measures are assimilated to those of an arbitral tribunal (see subparagraph (e) below);
- (d) Appointment of substitute arbitrator (article 15) – additional, consequential, provisions;
- (e) Power of arbitral tribunal to order interim measures (article 17) - adopting the amendments to the Model Law made by UNCITRAL in 2006 (with some modifications);
- (f) Determination of rules of procedure (article 19) – provision conferring on counsel or expert or other person appearing before an arbitral tribunal “*the same privileges and immunities as witnesses and counsel in a proceeding before a court*”;
- (g) Hearings and written proceedings (article 24) – express provision for representation or appearance in person;
- (h) Default of a party (article 25) – additional provision;
- (i) Court assistance in taking evidence (article 27) – additional, ancillary, powers;
- (j) Form and contents of award (article 31) – express provision for award to carry interest;
- (k) Termination of proceedings (article 32) – additional provisions covering the death of a party;
- (l) Application for setting aside (article 34) – provision for the court hearing an application to set aside an award to order that “*any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application*” (sub-article 34(5)) and the addition of the following sub-article (sub-article 34(6)) identifying particular facts which will result in an award being in conflict with the public policy of New Zealand:

(6) *For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if-*

- (a) *The making of the award was induced or affected by fraud or corruption; or*
 - (b) *A breach of the rules of natural justice occurred-*
 - i. *During the arbitral proceedings; or*
 - ii. *In connection with the making of the award.*
 - (m) Grounds for refusing recognition or enforcement (article 36) – the second of the two provisions added to article 34.
- 18 Schedule 2 contains the following additional optional rules which apply to arbitration.
- (a) Clause 1 Default appointment of arbitrators
 - (b) Clause 2 Consolidation of arbitral proceedings
 - (c) Clause 3 Powers relating to conduct of arbitral proceedings
 - (d) Clause 4 Determination of preliminary point of law by Court
 - (e) Clause 5 Appeals on question of law
 - (f) Clause 6 Costs and expenses of an arbitration
 - (g) Clause 7 Extension of time for commencing arbitral proceedings
- 19 The additional optional rules apply to all domestic arbitrations unless the parties opt out of them. They do not apply to international arbitrations unless the parties opt into them. Parties may opt into or out of individual clauses of Schedule 2 or the whole Schedule.
- 20 The right to appeal on a question of law arising out of an award is possible only:
- (a) *If the parties have so agreed before the making of [the] award; or*
 - (b) *With the consent of every other party given after the making of [the] award; or*
 - (c) *With the leave of the High Court.*
- (Schedule 2, cl 5(1)). The High Court may not grant leave:
- “unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.” (cl 5(2)).*
- 21 Schedule 3 contains the texts of the Geneva Protocol (1923), the Geneva Convention (1927) and the New York Convention (1958).

- 22 Schedules 4 and 5 are simply lists of enactments amended or repealed by the Act.
- 23 For a review of the decisions on the New Zealand Act see my paper entitled “*The New Zealand Experience of the UNCITRAL Model Law: a review of the position as at 31 December 2007*”, a copy of which can be downloaded from the Recent Papers page of my website at www.kennedygrant.com.
- 24 In what circumstances is arbitration used in New Zealand?
- 25 The answer to that question is:
- (a) When parties choose to use it; and
 - (b) When legislation requires its use.
- 26 In considering how widely arbitration is used consensually in New Zealand, it is relevant to note that s 10 of the Act, which deals with the subject of arbitrability, places few limitations on the arbitrability of disputes. The section reads as follows:
- (1) *Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.*
 - (2) *The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.*
- 27 Consensual arbitration may be agreed to in any one of three ways:
- (a) By the adoption in an agreement of standard conditions of contract which provide for arbitration;
 - (b) By the inclusion otherwise in an agreement of an arbitration clause; and
 - (c) By entering into an arbitration agreement after a dispute has arisen.
- 28 The most obvious example of the first way in which parties can agree to arbitration is the construction industry, where all the standard conditions of contract provide for arbitration. In New Zealand, the relevant standard conditions are:
- (a) New Zealand Standard NZS 3910:2003 Conditions of Contract for Building and Civil Engineering Construction;
 - (b) New Zealand Standard NZS 3915:2005 Conditions of Contract for Building and Civil Engineering Construction (where no person is appointed to act as Engineer to the contract);

- (c) New Zealand Standard NZS 3902:2004 Housing, Alterations and Small Buildings Contract ;
 - (d) New Zealand Institute of Architects Standard Conditions of Contract SCC 2007:1st ed;
 - (e) New Zealand Institute of Architects National Building Contract General 2003;
 - (f) New Zealand Institute of Architects National Building Contract Small Works 2003.
- 29 The number of building arbitrations has diminished in the last few years because of the coming into force of the Construction Contracts Act 2002, which is similar in its nature and effect to the Housing Grants, Construction and Regeneration Act 1996 of the United Kingdom and the Building and Construction Industry Security of Payments Act, variants of which have been adopted in the Australian States and in Singapore
- 30 The inclusion of an arbitration clause is common, indeed normal, in the following types of contract where standard conditions of contract such as I have just mentioned do not exist:
- (a) Franchise agreements;
 - (b) Leases;
 - (c) Partnership agreements;
 - (d) Private company constitutions;
 - (e) Agreements for the sale and purchase of businesses;
 - (f) Other forms of commercial agreements.
- 31 It is common for the arbitration clauses in such agreements to be widely drawn, so that the full range of disputes which may arise under or in relation to the agreement come within the clause. However, it is not unknown for such clauses to be narrowly drawn. An example of the latter is the arbitration clause in a lease considered two years ago by the High Court of New Zealand in *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Ltd* [2006] NZHC 1228, which read as follows:

44.1 UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision then relating to arbitration.

...

44.3 THE procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the

rights and remedies in the event of such default prescribed in clauses 28 and 29 hereof.

32 A post-dispute arbitration agreement may be entered into in relation to any kind of dispute other than one which runs foul of the restriction on arbitrability contained in s 10 of the Act (see paragraph 26 of this paper). Arbitration is frequently used in relation to family or matrimonial property disputes or disputes between neighbours.

33 In addition to the wide use of arbitration by agreement between the parties, there are a number of New Zealand statutes which require or encourage the use of arbitration. To give just three examples:

- (a) The Public Bodies Leases Act 1969, s 7(1)(d)-(g) and s 11(b), each as read with Schedule 1 or Schedule 2 to the Act:

Section 7 reads as follows:

Where a leasing authority has power to let any land, it may let the land under the provisions of this Act on any of the following tenancies or leases:

...

- (d) *A tenancy with a right of renewal for one or more terms, the rent for the renewed terms to be determined by valuation in accordance with the provisions of Schedule 1 to this Act, but so that the aggregate duration of the original and of the renewed terms shall not exceed 50 years:*

- (e) *A tenancy for any term not exceeding 21 years, with a perpetual right of renewal for the same or any shorter period, at a rent to be determined by valuation in accordance with the provisions of Schedule 1 to this Act:*

- (f) *A tenancy for any term not exceeding 21 years, with a provision in accordance with Schedule 2 to this Act that on the expiration of the term a new lease for the same or any shorter term shall be offered for sale by auction, and so on from time to time in perpetuity:*

- (g) *A tenancy for any term not exceeding 21 years, with a provision that on the expiration of the term the lessee shall have an option either to accept a renewal lease in accordance with Schedule 1 to this Act or to have a new lease offered for sale by auction in accordance with Schedule 2 to this Act, and so on from time to time in perpetuity:*

...

Section 11 reads as follows:

Where a leasing authority has power to let any farm land, it may let the land under the provisions of this Act on either of the following tenancies:

- (a) *A tenancy for farming purposes for any term not exceeding 5 years, without right of renewal, in accordance with the provisions of section 12 of this Act:*

- (b) *A lease for a term of 21 years or 33 years, as the leasing authority*

decides, with a perpetual right of renewal for the same term as that of the original lease, at a rent to be determined by valuation in accordance with the provisions of Schedule 1 to this Act.

Schedule 2 to the Act (Schedule 1 has different wording) reads as follows:

A LEASE granted under section 7(1)(f) of this Act may contain the following provisions, or any provisions substantially to the same effect:

- 1. Not earlier than 9 calendar months and not later than 3 calendar months before the expiry by effluxion of time of the term hereby granted, the lessor shall cause 2 separate valuations to be made by a person whom the lessor reasonably believes to be competent to make the valuation—namely, a valuation of all the buildings and improvements then on the land hereby demised, whether erected or made during or before the commencement of the term hereby granted [or a valuation of any specified descriptions of buildings or improvements, as the leasing authority thinks fit], and another valuation of the fair annual ground rent of the said land, without the buildings or improvements so to be valued, for a further term of [the same period of years for which the lease is granted or any shorter period] from the expiration of the term hereby granted, so that the rent shall be an even annual sum payable (throughout the term without increase or diminution during the term) (or, where the rent is to be reviewed at periodic intervals, for the first [number] years of the term of the lease. The rent for subsequent periods of [number] years of the term of the lease shall be determined in accordance with section 22 of the Public Bodies Leases Act 1969).*
- 2. As soon as possible after the said valuations have been made, the lessor shall give to the lessee notice in writing informing him of the amount of those valuations and requiring him to notify the lessor in writing within 2 calendar months whether he agrees to the amount of those valuations or requires those valuations or either of them to be determined by arbitration in accordance with clause 3 hereof.*
- 3. Within 2 calendar months after the giving of that notice to the lessee, he shall give notice in writing to the lessor stating whether he agrees to the valuations specified in the notice given to him or requires those valuations or either of them to be determined by arbitration. If he so requires, those valuations or that valuation, as the case may be, shall be determined accordingly in accordance with the provisions of clauses 5 to 9 hereof.*
- 4. If the lessee fails to give to the lessor within the time specified in clause 3 hereof the notice referred in that clause, he shall be deemed to have agreed to the valuations set out in the notice given to him under clause 2 hereof.*
- 5. Where either or both of the said valuations are to be determined by arbitration, the valuation or valuations shall be made by 2 persons as arbitrators, each such person being reasonably believed by the party appointing him to be competent to make the valuation, one of whom shall be appointed by the lessor and the other by the lessee.*
- 6. The arbitrators shall, before commencing to make the valuation or valuations, together appoint a third person, who shall be an umpire as between them.*
- 7. The decision of the 2 arbitrators if they agree or in such respects as they agree, or of the umpire if the arbitrators do not agree or in such respects as they do not agree, shall be binding on all parties.*
- 8. The duty of the umpire, on reference to him of any question, shall be to*

consider the respective valuations of the 2 arbitrators in the matters in which their valuations do not agree, and then to make an independent and substantive valuation, and the last-mentioned valuation shall be the decision of the umpire; but in giving his decision on any question so referred to him the umpire shall in every case be bound to make a valuation not exceeding the higher and not less than the lower of the valuations made by the arbitrators respectively.

9. *The provisions herein contained for the making of a valuation or valuations shall be deemed to be a submission to arbitration under and within the meaning of the Arbitration Act 1908, or any enactment for the time being in force in substitution therefor or amendment thereof, and all the provisions of any such enactment shall, so far as applicable, apply accordingly.*

- (b) The Sharemilking Agreements Act 1937 s 3 and Schedule clauses 147-158:

Section 3 reads as follows:

Sharemilking agreements to which this section applies not to contain conditions less favourable to sharemilker than those specified in Schedule

- (1) *This section applies to every sharemilking agreement made between an employer and a sharemilker in any case where the dairy herd is owned or provided by the employer, but does not apply to any bona fide sharemilking agreement whereby the sharemilker receives one-half of the returns or profits derived from the dairy farming operations which are the subject-matter of the agreement, and the employer, for the purposes of the agreement, bails or leases the dairy herd or part of it to the sharemilker for an adequate consideration.*
- (2) *Notwithstanding anything to the contrary in any sharemilking agreement to which this section applies (whether such agreement has been entered into before or is entered into after the passing of this Act) the agreement shall, on and after the 1st day of August 1938, operate not less favourably to the sharemilker in any respect than if the terms and conditions specified in the Schedule hereto were incorporated in the agreement on that date.*
- (3) *Any terms and conditions included in the sharemilking agreement that are inconsistent with the terms and conditions specified in the Schedule hereto (in so far as they would operate to the disadvantage of the sharemilker) shall, on and after the 1st day of August 1938, or the date of the agreement (whichever is the later), be deemed to be null and void.*
- (4) *Notwithstanding any other provision of this section, the Limitation Act 1950 shall be read subject to the terms and conditions specified in the Schedule hereto.*

Clauses 147-158 of the Schedule read as follows:

- 147 *A dispute, difference, or question that arises between the parties or their respective representatives about the construction of this agreement or about any matter or thing connected with or arising out of this agreement that cannot be resolved by conciliation under clauses 140 to 146 must, in the absence of any provision to the contrary, be referred to arbitration in accordance with and subject to the*

Arbitration Act 1996. This clause operates as a submission to a sole arbitrator to be agreed upon by the parties or, if the parties are unable to agree on a sole arbitrator, then to 3 arbitrators; 1 appointed by each party and those arbitrators must appoint a third arbitrator. If the arbitrators are unable to agree upon a third arbitrator within 21 clear business working days of their appointment, the third arbitrator must be appointed by the president of the Arbitrators' and Mediators' Institute of New Zealand Incorporated or his/her nominee and otherwise under the Arbitration Act 1996. The arbitrators must not be persons who have participated in any conciliation procedure in respect of the dispute unless by consent of the parties. The arbitrators must proceed with maximum expedition to deliver an award within 2 months of their appointment, with the parties agreeing to co-operate fully.

148 *The parties must proceed to arbitration within 21 clear business working days of either party giving notice in writing to the other, and it is the responsibility of the arbitrators to nominate the date and venue of the arbitration.*

149 *The third arbitrator must act as chairman of the arbitration hearing unless the arbitrators decide otherwise.*

150 *The arbitrators must conduct the arbitration in such manner as they in their unfettered discretion decide.*

151 *If the farm owner withholds more money from the sharemilker than the amount that the farm owner is claiming, then, in the absence of extenuating circumstances, the arbitrators will award interest on that money at a rate of 8% per month or part thereof compounding.*

152 *If the farm owner withholds only the amount being claimed, and the farm owner's claims are subsequently not awarded in full, then, in the absence of extenuating circumstances, the arbitrators may award interest up to 5% per month or part thereof compounding, on the excess money withheld.*

153 *The arbitrators have the power to direct as to by whom, in what amounts, and in what manner any fees and charges must be met.*

154 *The arbitrators have the power to require the parties to lodge with them a sum of money as a deposit against their fees and charges.*

155 *In assessing any interest claims, the arbitrators are specifically permitted to set interest rates in excess of the judicature rate if they consider it appropriate to do so.*

156 *The arbitrators must give their award in writing within 1 month of the hearing, provided that the arbitrators may enlarge this time by a further month by giving notice to the parties.*

157 *If either party wishes to take any action whatsoever against the award, that action must be notified to the other party within 21 clear business working days of the publication of the award, time being of the essence.*

158 *If the party taking action against the award is directed by the award to pay a certain sum of money to the other party, that money must be paid into the solicitor's trust account of the party taking action at the same time that notice is given to the other party of the proposed action against the award. Failure by the party taking action to notify the other party within 21 business working days, or the failure of the party taking action against the award to pay the amount of money identified in the award into his or her solicitor's trust account, prevents that party taking any further action and the arbitration award must be settled promptly.*

- (c) The Employment Relations Act 2000, s 155(1):
- (1) *Nothing in this Act prevents the parties to an employment agreement from agreeing to submit an employment relationship problem to arbitration;*
 - (2) *If the parties to an employment agreement purport to submit an employment relationship problem to arbitration -*
 - (a) *nothing in the Arbitration Act 1996 applies in respect of that submission;*
 - (b) *the parties must determine the procedure for the arbitration.*

C Some other examples

34 I give five other examples of the importance placed on, and the use made of, arbitration in the field of international commercial activity.

- (a) The Philippine Mining Act of 1995 provides, in section 2, that:

All mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State. It shall be the responsibility of the State to promote their rational exploration, development, utilisation and conservation through the combined efforts of government and the private sector in order to enhance national growth in a way that effectively safeguards the environment and protect [sic] the rights of affected communities.

In order to do this, the government is empowered to enter into mineral agreements with the private sector. Section 77 of the Act provides for disputes involving mineral agreements to be determined, in the first instance, by a panel of arbitrators. While there may be some question as to whether the provisions of the section as to the composition of the panel of arbitrators provides the necessary balance where the private sector party is a foreign entity, the provision is noteworthy for its adoption of arbitration as the preferred process of dispute resolution.

- (b) Section 2 of the Alternative Dispute Resolution Act of 2004 of the Philippines provides:

It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or any combination thereof as a means of achieving speedy and efficient means of resolving cases pending before

all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from time to time.

- (c) In its decision on 7 January 2008 in the case of *Korea Technologies Co., Ltd., v Hon Alberto A. Lerma and Pacific General Steel Manufacturing Corporation* (GR 143581 [2008] PHSC 1) the Court repeated the declaration it had made in the earlier case of *LM Power Engineering Corporation v Capitol Industrial Construction Group, Inc* (GR No 141833, [2003] PHSC 581, 26 March 2003) that:

Being an inexpensive, speedy and amicable method of settling disputes, arbitration – along with mediation, conciliation and negotiation – is encouraged by the Supreme Court. Aside from unclogging judicial dockets, arbitration also hastens the resolution of disputes especially of the commercial kind. It is thus regarded as the “wave of the future” in international civil and commercial disputes. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.

Consistent with the above-mentioned policy of encouraging alternative dispute resolution methods, the court should liberally construe arbitration clauses. Provided such clause is susceptible of an interpretation that covers the asserted dispute, an order to arbitrate should be granted. Any doubts should be resolved in favour of arbitration.

- (d) In *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at para 37 the Court of Appeal of Singapore stated:

The object and purpose of the [International Arbitration Act (Cap 143A)] was to implement the Model Law in Singapore because the Model Law, inter alia, provided “an internationally accepted framework for international arbitrations” and adopting it would promote “Singapore’s role as a growing centre for international legal services and international arbitrations (see Singapore Parliamentary Debates, Official Report (31 October 1994) vol 63 at col 627 (Assoc Prof Ho Peng Kee, Parliamentary Secretary to the Minister for Law)).

- (e) In Zimbabwe arbitration is used in relation to the sale of goods, agreement of lease, sport, labour, construction, and the interpretation of a variety of agreements. The choice of arbitration by the parties is made by way of arbitration clauses in their original agreements (usually providing for the Commercial Arbitration Centre in Harare to be the appointing authority) or by agreement after the dispute has arisen. In addition, courts have the power, with the consent of the parties, to refer matters to the Centre for resolution by way of arbitration as opposed to litigation.⁹

⁹ Personal communication from Mr Much Masunda, Chairman, Commercial Arbitration Centre (and, since a few weeks ago, Mayor of Harare!)

D Conclusion

- 35 It is clear from the foregoing that arbitration is a crucial element in the legal and commercial system of both developed and developing economies and is recognised as being important, because of its independence, impartiality and efficiency, in attracting direct investment. The work of the United National Commission on International Trade Law in drafting the New York Convention and the Model Law, together with the UNCITRAL Arbitration Rules, has been a major factor in this. It is to be hoped that the Model Law will continue to gain acceptance by both developed and developing countries so that the “*international consistency of arbitral regimes*” spoken of in s 5 of the New Zealand Arbitration Act 1996 may be achieved.

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