NEW ZEALAND LAW SOCIETY

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Arbitration Amendment Bill

22/06/2017

Arbitration Amendment Bill

1. The New Zealand Law Society welcomes the opportunity to comment on the Arbitration Amendment Bill (Bill). The Law Society has identified some issues that warrant further consideration, regarding the scope, clarity and workability of provisions relating to arbitration clauses in trust deeds and the confidentiality of court proceedings in arbitrations.

Validity of arbitration clauses in trust deeds

2. The Law Society supports the Bill's objective of clarifying the validity of arbitration clauses in trust deeds. Arbitration is a well-established part of our legal system. There is no obvious reason in principle why arbitration should not be available as a means of resolving trust disputes.

3. The Bill would declare valid and binding an arbitration clause inserted in a deed of trust by a settlor. It is not uncommon, however, for private trusts to confer on persons other than the original settlor a power to vary the trust deed (for example, where the original settlor is deceased or incapacitated). The High Court also has the power to authorise variations to a deed of trust under section 64A of the Trustee Act 1956.

4. The proposed new section 10A would not apply where an arbitration clause has been inserted in a deed of trust by someone other than the "settlor". If the primary policy underpinning the Bill is to give effect to the original settlor's intention, the Bill appears to go far enough to achieve this.

5. However, if the objective is, more broadly, to give effect to arbitration clauses in trust deeds, the Bill will need to provide for the validity of such clauses inserted in a deed of trust by someone other than the original settlor.

6. The Law Society recommends that consideration be given to whether there should be any check on the power of a settlor or any other person with the requisite power to amend a trust deed to insert an arbitration clause, particularly once a dispute has arisen. While there may well be sound reasons to amend a trust deed to provide for arbitration once a dispute has arisen (including efficiency of resolution and privacy), the power could be open to abuse. (For example, the person holding the power of amendment might be embroiled in the dispute and prefer for his or her own reasons to keep the dispute out of the courts.) One way to address this risk might be to provide that any amendment to a trust deed permitting the insertion of an arbitration clause must be approved by a court under section 64A of the Trustee Act 1956.

7. The Bill does not extend the new measures to ad hoc arbitrations of trust disputes (i.e. where the trust deed does not contain an arbitration provision but the parties involved in the dispute agree to submit their dispute to arbitration). While interested parties with capacity are free to make such ad hoc arrangements, the provisions of new section 10A would not apply and consequently any award would not be binding on all interested parties, including any minor, unborn or unascertained beneficiaries.

8. If the Bill were to be extended to cover ad hoc arbitrations, it would be necessary to define carefully the nature and extent of any ad hoc agreement that would trigger the statutory provisions (for example, that all trustees and ascertained beneficiaries of full capacity who are or may be affected by the dispute consent).

Should the bill apply to all trusts?

9. The Bill appears to be driven by concerns that arise in relation to private trusts, but its provisions apply to all trusts. Different considerations may well apply to trusts created by statute and to charitable trusts. The Law Society considers that the application of the Bill to statutory and charitable trusts requires further examination.

10. While there may be some attraction to statutory and charitable trusts being able to resolve disputes confidentially through arbitration, the public character of these trusts raises different issues, including as to public accountability, to those raised by arbitrating disputes over private trusts.

Confidentiality

11. The proposed new section 14F (clause 5) appears to be intended to reverse the presumption in the current section 14F that all proceedings under the Act must be conducted in public unless the court orders otherwise. Balancing the confidentiality of arbitrations against the principles of open justice raises difficult questions of policy.

12. The Law Society considers that any derogation from the principle of open justice requires a compelling justification and should be limited to the least derogation necessary to achieve the objective.

13. While the Explanatory Note states that the Bill creates a new rebuttable presumption of confidentiality, the Bill does not expressly do so. Instead of containing an overarching principle, it set out actions that a court must take in response to applications by a party.

14. The Bill's confidentiality provisions are triggered only on application by a party under proposed section 14F(1). The Bill does not retain the provisions of the current section 14F(3), which provides that the fact and content of any application for confidentiality must not be made public until the application is determined.

15. This means that, unless and until a direction has been made in response to an application under proposed section 14F(1), any proceedings under the Act will be in public (save to the extent that the court exercises its ordinary powers (outside the Act) on application by a party to prohibit search and publication of the court file without leave).

16. Proposed section 14F(2) provides that a court must make directions permitting "information" to be published in law reports and professional publications in two circumstances. The first, under subsection (a), would be where all parties agree and the court is satisfied that the "information" if published would not reveal any matter that a party reasonably wishes to remain confidential. The second, under subsection (b), would be where "the court considers that such a judgment is of major legal interest".

17. This clause contains some drafting anomalies. The words "such a judgment" in subsection (b) appear to refer to a court judgment, but the preceding sections refer to "information", not judgments. For the sake of consistency, subsection (b) should be amended to read: "the court considers that such information is of major legal interest".

18. Subsection (3) refers to a party wishing to "conceal any matter in those reports", which appears to be intended to refer to information published under subsection (2). If that is the case, subsection (3) should be amended to read: "If any party reasonably wishes to conceal any information to be published under subsection (2) […]". "Redact" might also be preferable to "conceal".

19. Subsection (3) effectively adds to subsection (2) but its relationship to subsection (2) is not clear. Information will only be published under subsection (2)(b) where the court considers that the "major legal interest" test has been met. The court's power under that section to make "directions" would include directions redacting parts of a judgment that are not to be published. It is not clear whether subsection (3) is intended to oblige the court to redact any information that a party wants redacted. If the court is satisfied that the party's wish to conceal the information is reasonable, must the court make directions prohibiting publication of that information or may the court take other considerations into account and permit the information to be published?

20. Proposed section 14F raises a number of other issues, including:

    a. Subsection (1) directs a court to make directions as to what information *may* be published. Absent a prohibition on publication, any information may be published about a proceeding by any person in any medium.

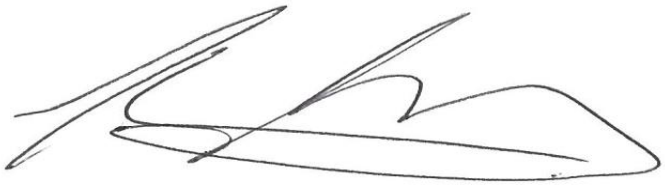
    b. The court's power to permit the publication of "information" relating to the proceedings in a law report and "professional publication" may be exercised when "the court considers that such a judgment is of major legal interest". "Major legal interest" is an ambiguous phrase. Is it intended to apply where the facts and the law are both of "major legal interest", or where only the legal issues in the case are "major", or is something else intended? Is "legal interest" intended to signify that publication is permitted only in professional publications directed towards the legal profession? Does publication in a legal professional publication permit re-publication in other media?

21. When the Bill was introduced to the House, reference was made to the *Danone v Fonterra* litigation that took place in the High Court in 2014. In that litigation, Danone brought civil proceedings in the High Court against Fonterra whilst also issuing an arbitration notice under its supply agreement with Fonterra. The High Court issued a temporary stay of the court proceeding pending the expeditious resolution of the arbitration. However, it is not obvious that directions prohibiting publication of the fact of those proceedings or of the judgments delivered in the High Court and Court of Appeal could be made under the proposed new section 14F.

22. The Law Society considers that proposed section 14F requires further consideration so that its objectives can be expressed more clearly. Comparable provisions in other jurisdictions, particularly in Australia and the UK, should be considered. There are also well-established protocols relating to the publication of sensitive personal information in Family Court proceedings that could serve as a model for preserving the confidentiality of arbitrations (including the identities of parties) whilst permitting the reporting of business in New Zealand courts.

Conclusion

23. The Law Society wishes to be heard.



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