DELOS
dispute resolution

GUIDE TO ARBITRATION PLACES (GAP)

NEW ZEALAND

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

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IN-HOUSE AND CORPORATE COUNSEL SUMMARY

New Zealand is an arbitration-friendly jurisdiction.

New Zealand arbitral proceedings, whether 'domestic' or 'international' (generally, where at least one of the parties has its place of business in any state other than New Zealand, or the place where the subject matter of the dispute is most closely connected is outside the state in which the parties have their place of business), are governed by the Arbitration Act 1996 (the "**NZ Act**"). Arbitral proceedings are based on the principles of party autonomy, fairness and limited judicial intervention. The NZ Act recognises the confidentiality of arbitral proceedings, subject to limited exceptions. The presumption is reversed for arbitration-related court proceedings, which are public unless the court orders them private.

The NZ Act contains a set of 20 basic provisions applying to all arbitrations. These cover core matters such as arbitrability, confidentiality, and the tribunal's powers. These are complemented by a regime of Schedules. Schedule 1 is based closely on the Model Law. Schedule 1 applies to all arbitrations where the place of arbitration is New Zealand (whether domestic or international arbitrations) save to the extent that the parties choose to opt-out of certain non-mandatory provisions. The clauses of Schedule 2 are additional and, in some cases, optional. The clauses of Schedule 2 apply to all domestic arbitrations unless the parties opt-out and to international arbitrations if the parties opt-in. Notably, clause 5 of Schedule 2, when applicable, provides for appeals to the High Court on questions of law. A decision of the High Court may only be appealed to the Court of Appeal if leave is granted by the High Court, or special leave is granted by the Court of Appeal. Further appeal from the Court of Appeal to the Supreme Court is not precluded, but any such appeal would first require leave from the Supreme Court, which is a relatively high bar and not a mere formality. A 'question of law' 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 does not include any question as to whether (i) the award or any part of it 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.

The NZ Act confers wide powers on the arbitral tribunal, including power to decide on matters relating to its jurisdiction, the conduct of the arbitral proceedings, evidentiary and procedural matters, and the remedies it may award. New Zealand courts readily enforce arbitral awards, both New Zealand awards rendered under the NZ Act and foreign awards enforceable pursuant to the New York Convention, with limited exceptions. The grounds for refusing recognition or enforcement are set out in Art 36 of Schedule 1 and mirror the grounds in the New York Convention. Art 36(3) provides that, without limiting the generality of the public policy exception, an award is contrary to the public policy of New Zealand if the award was induced or affected by fraud or corruption or a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

New Zealand is a party to the New York Convention (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which New Zealand ratified subject to the reservation that it will "*apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State*"), the Washington Convention (Convention on the Settlement of Investment Disputes between States and National of Other States (1965)), and the two earlier Geneva Conventions on arbitration (Geneva Protocol on Arbitration Clauses (1923) and Geneva Convention on the Execution of Foreign Arbitral Awards (1927).).

Key places of arbitration in the jurisdiction?	Auckland and Wellington.
Civil law / Common law environment? (if mixed or other, specify)	Common law.
Confidentiality of arbitrations?	Yes. Arbitral proceedings are conducted confidentially unless the parties agree otherwise. The NZ Act contains comprehensive rules on privacy and confidentiality (ss 14A – 14I of the NZ Act). The parties may, however, agree in writing to contract out of these provisions, whether in their arbitration agreement or otherwise. Section 14A provides that arbitral proceedings must be conducted in private. Section 14B provides that arbitration agreements are deemed to provide that the parties and the arbitral tribunal must not disclose 'confidential information', which means information that relates to the arbitral proceedings or to an award made in those proceedings, and includes a non-exhaustive list of such information including pleadings, submissions, evidence, transcripts, rulings and awards. Sections 14C and 14D provide some limits and exceptions to confidentiality. Under section 14E, the High Court may allow or prohibit disclosure of confidential information if the arbitral proceedings have been terminated or a party lodges an appeal concerning confidentiality. The position is different for court proceedings under the NZ Act. Section 14F provides that these must be conducted in public, unless the court makes an order that the whole or any part of the proceedings must be conducted in private. A court may make an order for a private hearing on the application of any party to the proceedings made under section 14G, and only if satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party having the whole or part of the proceedings conducted in private. In determining an application for an order under section 14F, section 14H requires that the court must consider the open justice principle and any other public interest considerations, the importance of privacy and confidentiality of arbitral proceedings, the terms of an arbitration agreement between the parties to the proceedings, and the reasons stated by the applicant for the order. If an order is made, the court file is kept private (section 14I).
Requirement to retain (local) counsel?	There is no requirement to retain local counsel for arbitral proceedings, although local counsel must be retained to appear before the New Zealand courts for court proceedings in support of arbitration.
Ability to present party employee witness testimony?	Tribunals have wide powers to decide on evidentiary matters, including the exchange of evidence and conduct of hearings for oral evidence (Arts 19 and 24, Sch 1). The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request court assistance in taking evidence. When

	such request is made, the High Court may make an order of subpoena or the District Court may issue a witness summons to compel attendance before an arbitral tribunal to give evidence or produce documents. The High Court or District Court may order a witness to submit to examination on oath or affirmation before the arbitral tribunal or other person for the use of the tribunal (Art 27, Sch 1).
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes. The parties are free to agree on the location for the hearing of the arbitration or any relevant meetings. In the absence of agreement, the location of the arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (Art 20(1), Sch 1). Notwithstanding the above, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents (Art 20(2), Sch 1).
Availability of interest as a remedy?	Yes. Section 12(1) provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court. This includes interest.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Section 12(1) confers power on the tribunal to award costs, unless the parties agree otherwise. Costs will usually follow the event and there is an expectation that costs and expenses will be reasonable, and will have actually been incurred. Clause 6 of Sch 2, when it applies, further provides that the parties can either agree on how to allocate costs or, failing agreement, the tribunal may determine costs or, failing the tribunal determining costs, each party shall bear its own legal and other expenses and an equal share of the tribunal's fees and related expenses.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no statutory restrictions on third-party funding. Arbitral tribunals are generally not concerned with the sources of litigation funding. Art 17, Sch 1 affords the tribunal the power to grant an order for security for costs as an interim measure. In court proceedings, however, courts may impose disclosure requirements in non-representative cases, such as disclosure of the identity of the funder, its amenability to the jurisdiction of the New Zealand courts, and details of its financial standing.
Party to the New York Convention?	Yes.
Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	Yes

Default time-limitation period for civil actions (including contractual)?	Six years, per s 11(1) of the Limitation Act 2010.
Other key points to note?	New Zealand has been a member state of the New York Convention since 1983.
World Bank, Enforcing Contracts: *Doing Business* score for 2020, if available?	New Zealand ranks 23rd out of 190 countries with a score of 71.5.
World Justice Project, Rule of Law Index: *Civil Justice* score for 2023, if available?	New Zealand ranks 11th out of 142 jurisdictions with a score of 0.76.

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a widely used and well understood form of dispute resolution in New Zealand.

The Arbitration Act 1996 (the "**NZ Act**") governs arbitrations in New Zealand, whether domestic or international, commercial or consumer. One of the central purposes of the NZ Act was to promote the use of arbitration as a method of resolving commercial and other disputes. The NZ Act is closely based on the Model Law, which is incorporated (including the 2006 amendments) into Schedule 1 with minor modifications.

The clauses of Schedule 2 apply to all domestic arbitrations unless the parties opt-out and to international arbitrations if the parties opt-in. Notably, clause 5 of Schedule 2, where applicable, allows for arbitral awards to be appealed to the High Court on questions of law.

Date of arbitration law?	1996 (into force on 1 July 1997) with latest amendment in 2019.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	Schedule 1 of the NZ Act is closely based on the UNCITRAL Model Law and New Zealand courts and arbitral tribunals may refer to the preparatory works of the Model Law in interpreting Schedule 1 of the NZ Act. Schedule 1 of the Arbitration Act 1996 was amended in 2007, chiefly to incorporate the key changes to interim measures introduced in the 2006 Model Law. For domestic arbitrations, Schedule 1 generally applies and Schedule 2 applies unless the parties have agreed otherwise. For international arbitrations (defined art 1(3) of Sch 1), Schedule 2 only applies if the parties so agree. For foreign-seated arbitrations, only certain provisions of Schedule 1 apply (arts 8, 9, 35 and 36) (s 7). The responses in this table apply primarily to domestic arbitrations. Certain notable differences between Schedule 1 of the Act and the 2006 Model Law are as follows: - an arbitration agreement may be made orally (Art 7(1) of Sched. 1) - the High Court may refuse to issue an anti-suit injunction is where it determines there is not in fact any relevant dispute between the parties (Art 8(1) of Sched. 1) - for domestic arbitrations, the default number of arbitrators is 1 rather than 3 (Art 10(2) of Sched. 1) - parties may apply to the High Court in certain limited circumstances to assist in the appointment of the tribunal (Art 11(6) – (8) of Sched. 1 - witnesses and counsel have certain privileges and immunities (Art 19(3) of Sched. 1) - the tribunal may make an award dismissing the claim if the claimant fails to prosecute the claim (Art 25 of Sched 1)

	- the High Court and District Court are specifically empowered to assist the tribunal in the taking of evidence (Art 27(2) of Sched. 1) - the default position is that any sum awarded shall carry interest (Art 31 of Sched. 1) - applications to set aside an award and to seek to refuse recognition or enforcement on the grounds of public policy include situations where the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred (Art 34(6) and 36(3) of Sched. 1)
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of *ex parte* pre-arbitration interim measures?	Pre-arbitration interim measures are available from the tribunal and the courts. Under article 9 of Sch 1, the High Court has the same powers as an arbitral tribunal to grant an interim measure (the tribunal's powers to grant interim measures are set out at article 17A of Sch 1). These measures can be *ex parte*, but only where it is essential to apply without notice, including where such notice would defeat the purpose of the order sought, or because the application is so urgent that it is not feasible to give notice. (*Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559, [94].) In the latter category, counsel should still attempt to provide even informal notice. Art 9(1) of Sch 1 of the Act makes no judgement as to whether the arbitral tribunal or the courts should have priority when it comes to issuing interim measures of protection. However, in practice, parties ordinarily apply first to the arbitral tribunal if it has been constituted. The Court of Appeal has held that Art 9 empowers the court to grant interim measures, including *ex parte* interim measures, in support of a foreign arbitration. Although this does not confer jurisdiction over a particular defendant, interim relief may still be available pending valid service. (*Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559, [69]-[76].)
Courts' attitude towards the competence-competence principle?	The "competence-competence" principle is enshrined in Art 16(1), Sch 1. A party may make a plea that the arbitral tribunal does not have jurisdiction no later than the submission of the statement of defence. The tribunal may rule on the plea either as a preliminary question or in an award on the merits. Where ruled on as a preliminary matter, any party may request, within 30 days of having received notice of the ruling, the High Court to decide the matter, and this decision is not subject to appeal. While such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes. The parties are taken as having agreed that an arbitral tribunal may make an interim, interlocutory or partial award unless they agree otherwise (Schedule 2, clause 3).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Articles 35 and 36 of Sch 1 are closely modelled on the criteria for recognition and enforcement of awards under the New York Convention. (Note that ICSID Awards are recognised and enforced through a separate Act with no set procedure: Arbitration (International Investment Disputes) Act 1979. An application for the recognition and enforcement of ICSID Awards, therefore, should be made by way of originating application under Part 19 of the High Court Rules 2016.) The NZ Act allows the courts to vacate an award where it has been successfully appealed on a point of law (clause 5 of Sch 2). Such appeals are made to the High Court, if the parties so agree or if the High Court grants leave. Schedule 2 automatically applies to domestic arbitrations unless the parties agree otherwise, and to international arbitrations only if the parties agree.
Do annulment proceedings typically suspend enforcement proceedings?	See answer below regarding Court's attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Article 36(1)(a)(v), Sch 1 provides grounds for a party to oppose the recognition or enforcement of an award on the basis it has is not yet binding, or has been set aside or suspended by a court of the country in which it was made. The courts retain a residual discretion under Art 36(1)(, Sch 1 to recognise and enforce a foreign award notwithstanding that it has been set aside or suspended by a court at the foreign seat. However, in the absence of clear and substantial injustice occurring in the seat, it is unlikely the New Zealand courts will do so.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	Conducting hearings remotely is not a ground in and of itself for refusing recognition or enforcement of an award under Art 36 to Schedule 1 or for setting aside an award under Article 34 to Schedule 1. Any application seeking to set aside the award or challenging enforcement on the basis that the remote hearing had prejudiced one party would depend on whether the party was "unable to present [its] case" (per Arts 34(2)(a)(ii) and 36(1)(a)(ii)) or the arbitral procedure was not in accordance with the Act (per Arts 34(2)(a)(iv) and 36(1)(a)(iv). In this regard, Art 18 requires that each party "shall be given a full opportunity of presenting that party's case".
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Practitioners should be aware of the Crown Proceedings Act which governs proceedings involving the Crown and public bodies.

Is the validity of blockchain-based evidence recognised?	There is no specific recognition of blockchain-based evidence (i.e. using blockchain to ensure the security and authenticity of electronic evidence) in New Zealand. Parties are entitled to determine their own rules and procedures, including determining the admissibility of any evidence.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	In New Zealand, an arbitration agreement may be made orally or in writing. There is no reason why an arbitration agreement recorded on a blockchain would not be regarded as valid. An award must be given in writing and delivered to the parties (Article 31(4) of Schedule 1 of the Arbitration Act), which usually requires service on the parties. A block-chain based award may satisfy the "in writing" requirement, but unless electronic service of an award recorded on a blockchain has been agreed by the parties, the delivery requirement is unlikely to have been met.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	This has not been tested in New Zealand.
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version? What key modifications if any have been made to it?

The Arbitration Act 1996 (the "**NZ Act**"), which applies to domestic and international arbitrations seated in New Zealand, is broadly based on the UNCITRAL Model Law. Schedule 1 is based very closely on the Model Law. Noteworthy differences are outlined below.

Unlike the UNCITRAL Model Law, the NZ Act is not limited to international commercial arbitration, but also extends to domestic arbitration.

The default position under the NZ Act is that, absent agreement between the parties, the tribunal will consist of a sole arbitrator for domestic arbitrations and three arbitrators for international arbitrations (Art 10, Sch 1).

Significantly, the NZ Act provides for arbitral awards to be appealed to the High Court on questions of law (clause 5, Sch 2). Questions of law include an error of law that involves an incorrect interpretation of the applicable law, but does not include any question as to whether the award or any part of it was supported by any evidence or whether the tribunal drew the correct factual inferences from the relevant primary facts. The clauses in Sch 2 apply to domestic arbitrations unless the parties opt-out, and to international arbitration if the parties opt-in. When clause 5 applies, any party may appeal to the High Court on any question of law arising out of an award if either (a) the parties have so agreed before the making of the award; or (b) with the consent of every other party after the making of the award; or (c) with the leave of the High Court. The High Court will not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties.

The NZ Act was amended in 2007 to provide for comprehensive rules on privacy and confidentiality of arbitrations (ss 14 to 14I), which apply to all arbitrations in New Zealand unless the parties agree otherwise.

Every witness giving evidence, and every counsel or expert or other person appearing before an arbitral tribunal, shall have the same privileges and immunities as witnesses and counsel in proceedings before a court (Art 19(3), Sch 1).

Another New Zealand addition to the Model Law is that the High Court may order that any money payable under an arbitral award is paid into court, or otherwise secured, while any application to set aside that award is determined (Art 34(5), Sch 1).

Without limiting the generality of what may constitute a conflict with the public policy of New Zealand for the purposes of setting aside an award under Art 34, Sch 1 or refusing to recognise and enforce an award under Art 36, Sch 1, the NZ Act declares that an award is in conflict with the public policy of New Zealand if it was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

1.2 When was the arbitration law last revised?

30 January 2021. Introducing a new section 10A to permit the arbitration of trust matters, per the introduction of New Zealand's new and revised Trusts Act 2019 (s 164).

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The arbitration agreement may be subject to its own governing law (separate from that of the contractual agreement).

The default position is that the law governing the arbitration agreement will be the law of the seat of the arbitration unless the parties indicate otherwise (Arts 34(2)(a)(i) and 36 (1)(a)(i), Sch 1).

The parties' express choice of law for substantive disputes under the agreement is likely to be considered as such an indication.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Art 16, Sch 1 of the NZ Act replicates the Model Law.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

There are no formal requirements for the form of an arbitration agreement. The agreement can either be an arbitration clause in a contract, or in the form of a separate agreement. The agreement may be made orally or in writing (Art 7(1), Sch 1). Only consumer arbitration agreements must be in written form (NZ Act, s 11).

2.4 To what extent if at all can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

A third party cannot be bound without their consent. An arbitration can only concern disputes between parties to the arbitration agreement.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP. corporate law etc.)?

Any dispute may be referred to arbitration unless the agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration (NZ Act, s 10(1)). Examples of non-arbitrable issues include contraventions under the Commerce Act 1986 (see eg *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 (HC)); certain consumer contracts (see s 11 Arbitration Act); certain *in rem* claims (see eg, *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC)); certain insurance disputes (see Insurance Law Reform Act 1977, s 8); intellectual property rights; and generally disputes engaging Tikanga Māori (see eg (*Ngawaka v Ngāti Rehua-Ngāti ki Aotea Trust Board* [2021] NZHC 291, at [2] per Palmer J). Existing arbitral proceedings may be stayed where an insolvency process is commenced (see Companies Act 1993, s 247).

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

An arbitration agreement is enforceable against a consumer only if the consumer enters into a separate written agreement with the other party to the contract, after a dispute has arisen out of or in relation to the contract, certifying that the consumer has read and understood the arbitration agreement and agrees to be bound by it (NZ Act, s 11(1)).

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes, irrespective of whether the seat of arbitration is within or outside of the jurisdiction.

3.2 How do courts treat injunctions by arbitrators enjoining parties to stay litigation proceedings?

Should a party ignore an anti-suit injunction issued by an arbitral tribunal, the High Court can enforce that injunction to stay the litigation proceedings. When considering the interim measures of an arbitral tribunal, the High Court will apply the statutory provisions on the recognition and enforcement of awards (Sch 1, Arts 35 and 36).

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

The High Court has jurisdiction to issue anti-arbitral injunctions, staying arbitral proceedings. Those injunctions can be issued against persons who are properly subject to the jurisdiction of the New Zealand courts (i.e., have been served with proceedings in accordance with the New Zealand High Court Rules).

In addition to anti-arbitral and anti-suit injunctions, the High Court can provide assistance through confidentiality orders, staying proceedings, interim measures, assisting with the appointment of arbitrators, assistance with taking evidence, and other matters relating to the recognition, enforcement or setting aside the award.

For domestic arbitrations (unless the parties agree otherwise), and international arbitrations by agreement of the parties, the High Court can also assist with consolidation of arbitral proceedings, procedural matters regarding the conduct of the arbitration, determining preliminary points of law, appeals on questions of law, costs and extensions of time for commencing proceedings.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Yes. There are no restrictions in the NZ Act or the common law on the instruction of outside counsel or self-representation in arbitration proceedings. Note that, in court proceedings, bodies corporate, such as companies and other incorporated entities, must be represented by local legal counsel.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

A person being considered as arbitrator must disclose any circumstances likely to raise justifiable doubts as to the arbitrator's independence or impartiality (Art 12(1)). This is an objective test and includes any circumstances that would cause a reasonable third party to doubt independence or impartiality (*Banks v Grey District Council* [2004] 2 NZLR 19 (CA), [30])..

Failure to disclose can be a ground to set aside the award under art 34(2)(a)(iv) or may make the award unenforceable under art 36(1)(a)(iv).

A Court when faced with a challenge to an arbitrator on the basis of independence and impartiality must consider:

(1) What might lead the decision-maker to decide the dispute other than on its merits? And

(2) The "*articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits*".

(*Saxmere Company Ltd v The Escorial Company Ltd* [2009] NZSC 72, [4])

Therefore, the courts do require that the undisclosed circumstance justify the outcome by demonstrating "*apparent*" bias (although proof of actual bias is unnecessary).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Previously the High Court had jurisdiction to assist in the appointment of the arbitral tribunal when the parties were in dispute over that appointment. Now, that jurisdiction has been transferred to the Arbitrators' and Mediators' Institute of New Zealand ("**AMINZ**"). Article 11(5) of the NZ Act lists the criteria that AMINZ must consider when appointing the tribunal – any qualifications required by the arbitral agreement, independence and impartiality and (for international arbitrations) nationality. If there is a dispute about the appointment made by AMINZ, or if AMINZ fails to appoint the tribunal within 30 days, then the parties can ask the High Court to make the appointment (Art 11(7), Sch 1).

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Pre-arbitration interim measures are available from the courts.

Art 9(1) of Sch 1 makes no judgment as to whether the arbitral tribunal or the courts should have priority when it comes to issuing interim measures of protection. However, in practice, the parties should ordinarily apply first to the arbitral tribunal if it has been constituted.

Clause 3(3) of Sch 2 (which applies to domestic arbitrations unless the parties agree otherwise) provides the court with the same powers to make an order as it would have in civil proceedings before that court. Courts may grant an *ex parte* order (albeit an interim order), but only where it is essential to apply without notice, including where such notice would defeat the purpose of the order sought, or because the application is so urgent that it is not feasible to give notice (*Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559, [94]). In the latter category, counsel should still attempt to provide even informal notice to the other parties.. The Court of Appeal has held that Art 9 empowers the court to grant interim measures, including ex parte interim measures, in support of a foreign arbitration. Although this does not confer jurisdiction over a particular defendant, interim relief may still be available pending valid service. (*Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559)

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Yes, subject to limited exceptions. Note that arbitration-related court proceedings are public unless the Court orders them to be private.

Arbitrations are conducted confidentially. The NZ Act contains a detailed regime regarding the confidentiality of arbitral proceedings and, where a court so orders, court proceedings involving arbitrations (sections 14A – 14I). The parties may, however, agree in writing to contract out of these provisions, whether in the arbitration agreement or otherwise.

Section 14A provides that arbitral proceedings must be conducted in private. Section 14B provides that arbitration agreements are deemed to provide that the parties and the arbitral tribunal must not disclose 'confidential information', which means information that relates to the arbitral proceedings or to an award made in those proceedings, and includes a non-exhaustive list of such information (such as pleadings, evidence, transcripts, rulings and awards). Sections 14C and 14D provide some limits and exceptions to the no disclosure rule. Under section 14E, the High Court may allow or prohibit disclosure of confidential information if the arbitral proceedings have been terminated or a party lodges an appeal concerning confidentiality.

The position is different for court proceedings under the NZ Act. Section 14F provides that these must be conducted in public, unless the court makes an order that the whole or any part of the proceedings must be conducted in private. A court may make an order for a private hearing on the application of any party to the

proceedings made under section 14G, and only if satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party having the whole or part of the proceedings conducted in private. In determining an application for an order under section 14F, section 14H requires that the court must consider the open justice principle and any other public interest considerations, the importance of privacy and confidentiality of arbitral proceedings, the terms of an arbitration agreement between the parties to the proceedings, and the reasons stated by the applicant for the order. If an order is made, the court file is kept private (section 14I).

4.5.2 Does it regulate the length of arbitration proceedings?

No.

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects??

No. Parties are free to agree on the place of the arbitration. Failing such agreement, the place of arbitration will be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (Art 20(1), Sch 1).

Notwithstanding the above, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents (Art 20(2), Sch 1).

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Yes, unless otherwise agreed by the parties (Art 17A, Sch 1). A party may apply for an interim measure requiring any party to do all of any of the following: (a) maintain or restore the status quo pending the determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; (d) preserve evidence that may be relevant and material to the resolution of the dispute; (e) give security for costs.

An applicant for an interim measure of the kind described in (a), (b) or (c) must satisfy the tribunal that: (1) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and (2) the harm substantially outweighs the harm that is likely to result to the respondent if the nature is granted; and (3) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

An applicant for an interim measure of the kind described in (d) must satisfy the tribunal of the same matters but only to the extent that the tribunal considers appropriate.

An applicant for an interim measure of the kind described in (e) must satisfy the tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Tribunals have wide powers to decide on evidentiary matters, including the exchange of evidence and conduct of hearings for oral evidence (Arts 19 and 24, Sch 1).

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request court assistance in taking evidence. When such request is made, the High Court may make an order of subpoena or the District Court may issue a witness summons to compel attendance before an arbitral tribunal to give evidence or produce documents. The High Court of District Court may order a witness to submit to examination on oath or affirmation before the arbitral tribunal or other person for the use of the tribunal (Art 27, Sch 1).

4.5.6 Does it make it mandatory to hold a hearing?

No. The parties are free to agree that no hearing shall be held. Subject to any agreement of the parties, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearing be held, the tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party (s 24(1)).

4.5.7 Does it prescribe principles governing the awarding of interest?

Section 12 provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court. This includes interest.

Whether or not interest will be awarded will depend on the circumstances. Where the award is for money due on a contract, interest may be awarded at the rate, if any, provided in the contract for late payment. In addition, when there is no contractual claim to interest, the arbitral tribunal has power under section 12 to award interest on the whole or part of any sum which is awarded to any party, or which was in issue in the arbitration and paid before the date of the award. Interest may be awarded for the whole or any part of the period up to the date of the award or the date of payment, and the tribunal has power to fix the rate of interest. Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award carries interest as from the date of the award at the same rate as a judgment debt.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitral tribunal has discretion in respect of the allocation of costs (which will usually follow the result) but there is an expectation the costs and expenses will be reasonable, and will have actually been incurred.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

Section 13 provides arbitrators immunity from civil liability for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.

This statutory immunity does not cover breach of contract, fraud, bad faith or other bases of civil liability.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

The New Zealand courts would be expected to take a similar view to the English courts' increasing willingness to accept a tribunal having made factual findings as to alleged criminal conduct in determination of a civil claim. There is no clear positive duty for a tribunal to raise suspicions of fraud or bribery in the absence of allegations by the parties. There may be circumstances where it is appropriate to do so to assist with the enforceability of any award.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes. The parties can agree that an award will not contain reasons. Further in the event of a settlement between the parties, the parties may agree that an award on agreed terms be given without reasons (Sch 1, Arts 30-31).

5.2 Can parties waive the right to seek the annulment of the award?

The parties cannot agree to exclude the right to seek an annulment of an award on the grounds specified in art 34. (*Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at [105], [108], [116] and [141])

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

An award must be in writing and signed by the arbitrator or arbitrators. If there are multiple arbitrators, at least a majority of them must sign the award (with an explanation given for the omission of any signature) (Art 31(1), Sch 1). A signed copy of the award must be delivered to each party (Art 31(4), Sch 1). An award must state the reasons on which it is based, except for where the parties have agreed that no reasons are to be given, or the award is on agreed terms (Art 31(2)).

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

For a domestic arbitration, the parties have a right to appeal on questions of law (unless they agree to opt-out). For international arbitrations, the parties can agree that they will have a right to appeal on questions of law. See clause 5, Sch 2.

There are no appeals for questions of fact.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

An award (whether local or foreign) must be recognized as binding and, on application in writing to the High Court, must be enforced by entry as a judgment, or by action (Art 35, Sch 1). No distinction is made between awards made in NZ and other jurisdictions.

An application for recognition and enforcement may be brought in the High Court, or in the District Court (if the amount of money payable by the award is within the District Court's jurisdiction). That application must be made in writing, accompanied by the duly authenticated original award (or certified copy) and, if in writing, the original arbitration agreement (or certified copy), plus translations into English.

An application for recognition and enforcement must be brought within 6 years of the date on which the award became enforceable by action in New Zealand (Limitation Act 2010, s 36(3)). The court retains a discretion to grant relief from the limitation period if it thinks just to do so on an application made to it for the purpose (Limitation Act s 36(4)).

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. However, the High Court has a discretion to stay recognition and enforcement of an award in the event of an application to set aside or suspend the award (Art 36(2), Sch 1).

The High Court has a discretion to order that any money made payable by an award that is subject to an annulment proceeding should be paid into court, or otherwise secured, until the annulment proceeding is determined (Art 34(5), Sch 1).

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Article 36(1)(a)(v), Sch 1 provides grounds for a party to oppose the recognition or enforcement of an award on the basis it is not yet binding, or has been set aside or suspended by a court of the country in which it was made.

The courts retain a residual discretion under Art 36(1), Sch 1 to recognise and enforce a foreign award notwithstanding that it has been set aside or suspended by a court at the foreign seat. However, in the absence of clear and substantial injustice occurring in the seat, it is unlikely the New Zealand courts will do so. New Zealand courts have accepted the UK position as set out by Kerr LJ in *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 (EWCA) at 301, that "*our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law*" (*CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA) at 694 per Barker J). Although this case was decided before the 1996 Act, no subsequent cases have departed from this approach.

5.8 Are foreign awards readily enforceable in practice?

Yes.

6. Funding arrangements

6.1 Are there laws or regulations relating to, or restrictions to, the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

There are no statutory restrictions on third-party funding. Arbitral tribunals are generally not concerned with the sources of litigation funding. The tribunal has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (Art 19, Sch 1). Art 17, Sch 1 affords the tribunal the power to grant an order for security for costs as an interim measure. In court proceedings, however, courts may impose disclosure requirements in non-representative cases, such as disclosure of the identity of the funder, its amenability to the jurisdiction of the New Zealand courts, and details of its financial standing.

6.2 If so, what is the practical and/or legal impact of such laws, regulations or restrictions?

See response to 6.1.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

There is no specific recognition of blockchain-based evidence (ie using blockchain to ensure the security and authenticity of electronic evidence) in New Zealand. Parties to New Zealand-based arbitrations are entitled to determine their own rules and procedure, failing which the arbitrator will conduct the arbitration as it considers appropriate: Article 19 (Schedule1), including determining the admissibility of any evidence. Arbitrators may be guided by New Zealand's Evidence Act 2006 and/or the IBA Rules on the Taking of Evidence in International Arbitration but neither specifically consider blockchain-based evidence as yet.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognized as valid?

In New Zealand, an arbitration agreement may be made orally or in writing. There is no reason why an arbitration agreement recorded on a blockchain would not be regarded as valid.

An arbitration award must be in writing, signed by at least a majority of the members of the tribunal, state the date and place of arbitration, (unless the parties agree otherwise) must provide reasons for the determination, and a copy must be delivered to the parties. An award that does not comply with these form requirements risks being deemed unenforceable (*Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770).

In general, electronic transactions and the validity thereof are dealt with under Part 4 of the Contract and Commercial Law Act 2017. Under the Act, a requirement that information must be provided in writing will be met by information in electronic form, provided it is readily accessible so as to be usable for subsequent

reference. The Act expressly includes as an example of the type of information it is intended to apply to as the "giving a statement of reasons", which is likely to be analogous to an arbitral award.

However, the award must also be delivered to the parties (Article 31(4) of Schedule 1 of the Arbitration Act) which usually requires it being served on the parties. A block-chain based award may satisfy the "in writing" requirement, but unless electronic service of an award recorded on a blockchain has been agreed by the parties, the delivery requirement is unlikely to have been met.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

This has not been tested in New Zealand.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

This has not been tested in New Zealand.

As noted in 7.2, above, the form requirements of an arbitration award in New Zealand necessitate that it be written, and signed by at least a majority of the tribunal. As also noted in 7.2, it is likely that an electronically signed award would be recognised as valid, provided the award met the mandatory form requirements.

Part 4 of the Contract and Commercial Law Act 2017 provides that legal requirements for signatures are met by way of electronic signature provided the signature adequately identifies the signatory and his/her approval of the information to which the signature relates, and is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required. Certain transactions, such as for the transfer of land, require that an e-signature be "fresh", in the sense that it may not be an image of a signature inserted into a document, but must actually be digitally signed by the signatory.

Though we have not been able to identify circumstances in which the validity of an e-signature on an arbitral award has been considered by a New Zealand court, we consider it is likely that a New Zealand court would recognise and enforce such an award. We consider that best practice would be for the arbitrator or tribunal members to digitally sign the award, rather than place a pre-signed digital image onto the award.

8. Is there likely to be any significant reform of the arbitration law in the near future?

No. There are no bills currently before Parliament to amend the NZ Act.

9. Compatibility of the Delos Rules with local arbitration law

Under Schedule 1 of the Arbitration Act 1996, parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting arbitral proceedings. The Delos Rules do not appear to conflict with any mandatory aspect of the NZ Act.

The NZ Act contains a presumption of privacy of proceedings and the non-disclosure of any confidential information, which includes all pleadings and any award (ss 14A-14D). These sections, however, may be overridden by the parties' agreement recorded in writing (s 14). Rule 8.8 of the Delos Rules permits the publication of Awards or extracts thereof, provided the confidential character of each such Award has been maintained. Therefore, even where content is redacted, the publication of parts of an Award by Delos could conflict with the default confidentiality provisions in the Act. We recommend that the parties when agreeing to be bound by the Delos Rules note the operation of rule 8.8 and reach agreement as to what is considered "confidential information" under the Rules as a preliminary matter. The parties may also choose to waive entirely the obligations of confidentiality through the operation of s 14 of the NZ Act.

10. Further reading

David Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, New Zealand, 2017)

Phillip Green, Barbara Hunt, Tomas Kennedy-Grant *Green & Hunt on Arbitration Law and Practice* (online ed, Thomson Reuters)

Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, New Zealand, 2020)

Daniel Kalderimis and David Williams « Arbitration – contemporary issues and techniques » (New Zealand Law Society seminar, 2011)

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, *i.e.* with offices and a case team?	New Zealand Dispute Resolution Centre (NZDRC) https://www.nzdrc.co.nz/ New Zealand International Arbitration Centre (NZIAC) https://www.nziac.com/ Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) https://www.aminz.org.nz/
Main arbitration hearing facilities for in-person hearings?	Various organisations offer facilities for in-person arbitration hearings. See for example: The Arbitration and Mediation Centre, Auckland https://arbmedcentre.co.nz/ Resolution Institute, Wellington https://www.resolution.institute/
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	NZ Print Shop, Auckland https://www.nzprintshop.co.nz/ City Print NZ, Wellington https://www.cityprint.co.nz/
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	Real-Time Transcripts Ltd https://www.stenography.co.nz/ Optima Juris http://courtreporternewzealand.com/
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	New Zealand Society of Translators & Interpreters (NZSTI) https://nzsti.org/
Other leading arbitral bodies with offices in the jurisdiction?	ϕ