AMINZ Seminar on Arbitrators' Duties 24 May 2005

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INTRODUCTION TO ARBITRATORS' DUTIES

Significance of arbitrators' duties

1. Arbitrators must provide parties with a process which is just, prompt and final. Of these, finality is particularly important. We may not be able to come up with a decision which keeps everyone happy; we can at least save them from a lengthy battle over its validity.

2. On this subject beware of the Jekyll and Hyde phenomenon. During the arbitration process both parties are our friends, relaxed and accommodating over procedural suggestions. But one day one of those parties is going to lose. As sure as night follows day, Dr Jekyll will then turn into Mr Hyde. Mr Hyde will go through everything with a fine toothcomb. Any perceived or imagined slip on the arbitrators' part will be held up to scrutiny in case it is the springboard for an appeal or application to set aside.

3. So although a whole range of duties will be discussed in this seminar, particular emphasis will be placed upon those duties which underpin the validity of the award. On that subject two preliminary points may be noted. First, the seminar is confined to domestic arbitrations. The fundamental principles of international arbitration are the same but the constitutional details differ. Secondly, the level of procedural formality will vary from one arbitration to another. Natural justice is a flexible concept. Although the fundamentals remain the same, the law does not require that a share-milking dispute submitted to the decision of an experienced farmer be handled with the procedural niceties of a multi-million dollar dispute submitted to an arbitral tribunal of distinguished jurists.[1]

4. Arbitrators' duties come from essentially three sources: (a) the law, (b) the agreement and (c) ethics. Each will be examined in turn.

(a) Duties arising from the law

5. In New Zealand, most of the duties applicable to arbitrators are found in the Arbitration Act 1990, court decisions interpreting that statute, and common law principles relating to natural justice. Natural justice principles are expressly preserved through Arts 34 and 36 of the First Schedule.

6. The Arbitration Act 1996 combines broad statutory objectives with detailed procedural rules. For arbitrators, it is relevant to note at the outset that the Act is intended to encourage the use of arbitration (s 5(a)) and to facilitate the enforcement of arbitral awards (s

5(e)). Consequently, in interpreting and applying the more specific statutory provisions, arbitrators should opt for an approach which will make the arbitration an effective and enforceable one.

7. These broad requirements are fleshed out in a series of specific rules found in the First and Second Schedules to the Act. These will shortly be discussed in more detail. At this point it is sufficient to note that the majority of these rules can be waived or varied by contract. This emphasis upon the will of the parties is often referred to as party autonomy, that is to say the power of the parties to control their own proceedings. An exception is an arbitrators overriding duty to ensure that natural justice prevails. The parties do not have the power to contract out from natural justice if they intend their process to remain an arbitration.[2]

8. Natural justice is a lawyers name for two features of procedural fairness: the right to present ones case (the audi alteram rule) and the right to impartiality (the nemo dat rule).

9. The right to present ones case includes reasonable notice of the arbitration and hearing, a reasonable opportunity to present ones own evidence and submissions, reasonable notice of the oppositions case, a reasonable opportunity to respond to it, and a reasonable opportunity to respond to any other material on which the arbitrator may rely. These natural justice requirements are captured at a broad level in Articles 34 and 36 which respectively provide for setting aside, or refusing to recognise or enforce, awards. The grounds for challenging an award under those provisions expressly include breaches of natural justice.[3] Most features of natural justice are also reinforced by more particular provisions in the First Schedule. Thus Art 18 stipulates that the parties shall be treated with equality and each party shall be given a full opportunity of presenting that partys case. Article 24(2) requires that the parties be given sufficient notice of hearings and evidentiary meetings.[4] Article 24(3) requires that all statements, documents and other information supplied to an arbitrator by one party be communicated to the other. It also requires the arbitrator to communicate to the parties any expert report or evidentiary document upon which he may rely.

10. The same approach is taken on the subject of actual or potential bias.[5] Articles 12 and 13 together provide an opportunity for an arbitrators appointment to be challenged, or for the arbitrator to be removed, on the ground that there are justifiable doubts as to that persons impartiality or independence. This too is simply a statutory formulation of the ancient common law maxim forming the other limb of natural justice. These longstanding principles at common law continue to be important due to the express recognition of a breach of the rules of natural justice as a ground for setting aside and award or refusing its recognition or enforcement. (art 34(2)(b)(ii) and 6(b) and their equivalent in art 36). In addition, there is a large and growing body of New Zealand decisions relating to the interpretation of the Arbitration Act 1996 itself.

11. If the parties seek to depart from natural justice or any other mandatory element under the Arbitration Act they are free to do so, but only by disavowing any attempt to have an arbitration and instead opting for some other process such as an expert determination or mediation.[6] The

advantages and disadvantages of an expert determination, and the way in which one is chosen, is a large topic warranting examination on another occasion. It is sufficient to say at this point that the most significant advantage of expert determinations is freedom from challenge of the kind that can be brought with respect to arbitrations while the chief disadvantage is the lack of the support of powers, and enforcement procedures, associated with arbitrations.

12. The fact that the parties to an arbitration can not contract out from certain procedural principles does not mean that they must also have substantive legal principles applied to their dispute whether they want it or not. If nothing else is said on the subject, the arbitrators duty is to apply the law of the land.[7] But the parties are free to allow or direct the arbitrator to decide on some other basis. For example they could require the arbitrator to decide according to general considerations of justice and fairness.[8] Even if the parties leave substantive law as the basis for decision, the choice of arbitrator, and the amount in dispute, may discourage the courts from interfering where the arbitrator has produced an award that is not a textbook example of legal reasoning.[9]

(b) Duties imposed by agreement

13. The second source of arbitrators' duties is contractual. The parties are free to contract out from the whole of the Second Schedule to the Arbitration Act, to a number of the presumptive rules in the First Schedule, and even to some of the statutory provisions.

14. Rules in the First Schedule which may be negated by agreement include the number and appointment of arbitrators (arts 10 and 11), the challenge procedure (art 13), interim measures (art 17), place, commencement and language of arbitration (arts 0, 21 and 22), pleadings and form of hearing (arts 23 and 24(1)), default (art 25), tribunal use of experts (art 26), choice of law (art 28) and obligation to give reasons (art 31(2)).

15. Statutory provisions in the main body of the Act which can be negated by agreement include the equation of the Arbitral Tribunals powers with those of the High Court (s 12(1)(a)) and the power to award interest (s 12(1)(b)) and confidentiality requirements (s 14).

16. This contractual autonomy of the parties is expressly recognised in art 19 in a more general way, providing as it does that subject to such exceptions the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting their proceedings.

17. One of the first duties of an arbitrator is therefore to peruse the arbitration clause or submission agreement which gave rise to his or her appointment. In addition to modifying those rules otherwise applicable under the Arbitration Act, the agreement may go on to address such additional topics as timetables for the taking of specified procedural steps and the imposition of a time limit within which an award must be issued.

18. As disputes are normally concerned with rights and liabilities between the parties, the contract between the parties will normally be the main focus of attention. However the better view appears to be that the parties also enter into a supplementary contract with the arbitrator completed when he accepts appointment.[10] In some situations this can assume significance, for example when considering the arbitrators right to recover fees,[11] his non-negligent liability,[12] his duty of confidentiality,[13] and the extent to which he is personally bound by institutional rules.[14]

19. Not all agreements between the parties will be recorded in a formal agreement. In addition to the original arbitration clause or submission agreement, the parties may agree upon a particular course of action during the arbitration. The arbitrator may not be happy with the parties new proposal. Technically, agreements between the parties after the arbitrator has accepted appointment will not be legally binding upon him. In practice, if the arbitrator is unable or unwilling to accept the parties variations he will probably resign.[15]

(c) Ethical duties

20. Ethics is the third and final source of arbitrator duties. Arbitrators ethics come from an individuals own sense of justice, the observation of other arbitrators, and the formal codes of ethics of arbitral institutions such as AMINZ[16] and the International Bar Association.[17] The codes of ethics typically include requirements as to impartiality, qualification, diligence, confidentiality and prior arrangements over remuneration.

21. The role of ethics, and the corresponding limits of law and contract, can be illustrated in several ways. First, appeals under cl 5 and applications to set aside under art 34 are concerned with the law yet the heart of an award is non-legal. The evaluation of the evidence, the making of factual findings, the exercise of value judgments, and the exercise of discretions, are primarily a matter of individual judgment which is not controllable by the law. Ethics are the only real restraint upon the arbitrator in such matters. The same is broadly true in the case of duties to take care, to achieve a prompt outcome, and to help the parties to achieve a satisfactory resolution of their dispute.

22. Secondly, because s 13 provides arbitrators with a statutory immunity for negligence, the duty to take care is essentially ethical removal of an arbitrator under art 14 of the First Schedule could arise in only the most extreme of cases.

23. Thirdly, it is primarily ethics which drives an arbitrator to seek expedition in the arbitration. It would be an extreme case before he could be removed under Art 14 for failure to act without undue delay. Clearly that should not deter him from seeking to expedite the arbitration at every point. Note also that on this topic the interests of lawyers do not always coincide with those of their clients. This is something which judges have recently been forced to acknowledge as one of the foundations of active case management.

24. Perhaps the most important duty of ethical origin is an overarching concern to achieve a satisfactory resolution of the dispute as a whole. Suppose the arbitrator is presented with an arbitration agreement which does not extend to all of the issues which the parties want resolved or a lawyer-inspired timetable which will produce needless delay and expense. In law, an arbitrator has no duty to question the proposals put to him if they fall within the jurisdiction conferred on him by statute and contract. Ethics, however, suggest that his role extends beyond mere obedience to legally binding rules.

25. Not all would necessarily agree but my own perception of arbitrators is that they are more than mere decision-makers. To at least some degree they are also professional advisers on dispute resolution and arbitration law. Usually their experience and expertise far exceeds those of the parties, and in most cases those of their legal representatives as well. That is probably one of the considerations which guided the parties in their choice of arbitrator in the first place. Accordingly in my view arbitrators have an important advisory role in helping the parties and their lawyers secure a satisfactory resolution of the dispute.

26. Others share the view that arbitrators should see themselves as more than the passive recipients of terms and procedures emanating from the parties.[18] It is appropriate for arbitrators to make active suggestions as to the most efficient process for resolving the dispute including, should this be needed, the execution of a fresh arbitration agreement. In addition procedural directions usually work best if they have been worked out between the parties and the arbitrator with the benefit of the arbitrators expertise. However it is partly a matter of personal style and others will feel more comfortable with a relatively passive role.[19]Nor will the same approach be appropriate regardless of the characteristics of the particular case and the experience of the particular counsel involved.

Sanctions for breach of arbitrators' duties

27. An arbitrators' duties therefore come from the law, the contract, and ethics. The next question is whether it matters if the arbitrator fails to comply with those duties.

28. The most significant sanction for non-compliance with an arbitrators duty is no doubt the blow to ones professional pride and reputation in seeing an ineptly produced award set aside or overturned on appeal. From a self-interest point of view, there could also be loss of future business associated with any reputation for delays or ineptitude as an arbitrator.

29. The second sanction is removal as an arbitrator for failure to act in an impartial manner[20] (arts 12 and 13) or for dilatoriness (art 14).

30. The third may be non-payment of arbitration fees. On an application for review of fees under cl 6 it is foreseeable that the Court would be influenced by delays or ineptitude on the arbitrators part causing significant loss to the parties. There could well be an implied term to similar effect

where the arbitrator brings an action for fees based upon his contract with the parties.[21] With or without an implied term, a similar outcome could also result from the Courts exercise of its remedial discretion under s 9 of the Contractual Remedies Act 1979 if the parties had cancelled their contract with the arbitrator for default on his part.

31. The fourth sanction may be that of personal liability to the parties for financial loss caused by the arbitrators default, although the law on this topic is unresolved. Section 13 of the Arbitration Act provides a statutory immunity for claims against negligence. In common law countries the courts have tended to extend this immunity by analogy to judges.[22] It should be noted, however, that the statutory immunity conferred by s 13 does not extend to acts done in bad faith, conscious excessive jurisdiction or other intentional acts. Recent developments with barristers also suggest that the tide is running against immunity for the professions. There remains the possibility, therefore, that in limited circumstances the parties could sue the arbitrator.[23]

32. Finally, for those arbitrators who are members of AMINZ, there is the potential sanction of disciplinary action.[24]

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[1] An example of the broad approach, rightly or wrongly, is *Kiwi Homes Ltd v Lassen* (HC Auckland CP 829./98, Fisher J 23 June 2000) (parties to a building dispute involving $40,000 chose to refer complex legal matter to registered building surveyor and clerk of works. Leave to appeal on question of law refused. As the parties deliberately went down that route I do not think that one of them should now be allowed to come to the High Court complaining that the Arbitrators award is not a text-book example of legal reasoning).

[2] *Methanex Motunui Limited v Spellman* [2004] 1 NZLR 95 (HC); *Methanex Motunui Limited v Spellman*[2004] 3 NZLR 454 (CA)

[3] Art 34(2)(a)(ii) and (b)(ii) and (6)(b) and Art 36 equivalents.

[4] I.e. meetings of the Arbitral Tribunal for the purpose of inspecting goods, property and documents. As to notice requirements in general see also Art 34(2)((a)(ii) and Art 36 equivalent.

[5] For full details as to arbitrator impartiality see AMINZ Seminar Materials 6 April 2004 Impartiality,Independence and Disclosure presented by David Williams QC, Graeme Christie and John Green.

[6] *Methanex Motunui Limited v Spellman* 1 NZLR 95 (HC)

[7] Art 28(2) and note appeals on questions of law under cl 5

[8] Art 28(3) and see the power to exclude appeals on questions of law: s 6(2)(b). See further Redfern and Hunter supra at para 1-96

[9] *Kiwi Homes Ltd*, supra

[10] See the discussion in Redfern and Hunter supra paras 5-16 5-21. .

[11] Clause 6(1) and (2) as to costs are said to apply unless the parties agree otherwise. Party is defined in s 2 in a manner which tends to exclude arbitrators. Unless the parties agree otherwise is not repeated for cl 6(3) and (4) but the whole of the Second Schedule, which includes cl 6 as to costs, is subject to contract: s 6(2)(b). See further discussion in the following paper Duties During Preliminary Stages infra.

[12] Note that s 13 (an arbitrator is not liable for negligence in respect of any done or omitted to be done in the capacity of arbitrator. Is not subject to contrary agreement between the parties, whether in the sense of parties to the dispute or in a sense which could include the arbitrator himself.

[13] Section 14 is probably limited to the parties to the dispute.

[14] See, for example, the primary duty of arbitrators as stated in art 35 of the ICC Arbitration Rules to make sure that the award is enforceable at law

[15] Redfern supra para 5-12.

[16] AMINZ Code of Ethics adopted 25 July 2003.

[17] IBA Code of Ethics for International Arbitrators

[18] As Newman and Hill put it in *The Leading Arbitrators Guide to International Arbitration* 73, 74 It is true that, when the parties agree, it is difficult for the arbitrators to go against such agreement. However, the arbitrator should not, at least not without an attempt to convince the parties of the reasonableness of its suggestions, accept any request by the parties about the time they wish to have for preparing their case, the number of witnesses, the length of the oral hearings, etcmore often than not, the parties will at least attempt to find a reasonable compromise if the arbitrators diplomatically put some pressure on them

[19] For example cl 4.4 of the AMINZ Arbitration Protocol casts the arbitrator in a more passive light, providing that if the parties are unable to agree on procedural matters, the tribunal shall have the power to make directions as appropriate.

[20] An example is *Auckland Co-operative Taxi Society Limited v Perfacci Limited* (Auckland CIV-2003-0404-5495 Heath J 10 October 2003). (Arbitrator removed in course of arbitration on ground manner in which hearing being conducted would have caused fair-minded and informed observer to have justifiable doubts in arbitrators impartiality). See further Redfern and Hunter *Law and Practice of International Commercial Arbitration* 4th Ed para 5-25 5-26.

[21] This is a potential explanation for *Bayne v Kumar* (HC Auckland M 1440/97 20/10/95) where it was held that the Court has the power to deprive the arbitrator of fees for extra work if the arbitrator had misconducted the arbitration in a way that caused additional costs.

[22] For full discussions see Redfern and Hunter (supra) paras 5-16 5-20.

[23] See further Redfern and Hunter (supra) and A A P Willy: *Arbitration in New Zealand* 2nd Ed pp 5, 77, 78.

[24] See AMINZ Rules, Rules 12.1 12.30.