

## PRESENTERS

### **David Williams QC, LLB (Auck), LLM (Harvard), Lincoln's Inn, Barrister, Auckland**

David A R Williams QC is a member of Bankside Chambers (Auckland and Singapore) and also Essex Court Chambers, London. He is New Zealand's most experienced international arbitrator having been involved in over 100 international commercial arbitrations and numerous investment treaty arbitrations.

He was the New Zealand representative on the ICC Court of Arbitration, Paris 1999 - 2002. He was a Justice of the High Court of New Zealand from 1991 - 1994 and has served on a part-time basis since 2000 as a Justice of the Cook Islands High Court and Court of Appeal. He is also a Justice of the Court of the Dubai International Financial Centre, Dubai, UAE.

With Amokura Kawharu, Campbell Walker, Daniel Kalderimis, and Anna Kirk he is writing a text on commercial arbitration in New Zealand which will be published by Lexis-Nexis later this year.

### **Daniel Kalderimis, BA/LLB(Hons) (VUW), LLM (Colum), Principal, Chapman Tripp, Wellington**

Daniel Kalderimis is a commercial litigator who leads Chapman Tripp's international arbitration practice. Daniel is listed in *The International Who's Who of Commercial Arbitration* for 2010 and 2011. He is admitted in New Zealand, New York and England and Wales (where he is a solicitor-advocate for civil matters). Daniel is widely published, has previously taught at Columbia Law School and is presently an adjunct lecturer at Victoria University Law School.

## **Acknowledgement**

The authors and NZLS CLE gratefully acknowledge the assistance of Anna Kirk and Mark Tushingham of Bankside Chambers, Auckland, and Richard May, Julian Brown, Sarah Watson and Caleb McConnell of Chapman Tripp in editing and proof-reading the draft text.

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

<b>1.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
1.1	OVERVIEW .....	1
1.2	ESSENTIAL CHARACTERISTICS OF ARBITRATION .....	2
1.2.1	<i>The arbitration agreement</i> .....	2
1.2.2	<i>Enforceability of arbitral awards</i> .....	2
1.2.3	<i>Mandatory procedural standards in arbitration</i> .....	3
1.2.4	<i>Comparison with expert determination</i> .....	3
1.2.5	<i>“Med/Arb”</i> .....	3
1.3	CONTRACTUALISM AND PARTY AUTONOMY .....	4
1.4	OVERLAY OF PUBLIC LAW AND PUBLIC POLICY PROTECTIONS .....	6
1.5	OUTER LIMITS OF PARTY AUTONOMY .....	7
1.6	THE INTERNATIONAL INFLUENCE ON DOMESTIC ARBITRATION .....	7
1.7	TYPES OF ARBITRATION – AD HOC AND INSTITUTIONAL ARBITRATION .....	8
1.7.1	<i>The advantages and disadvantages of institutional and ad hoc arbitration: predictability versus flexibility</i> .....	10
1.7.2	<i>Procedural assistance</i> .....	10
1.7.3	<i>Administrative matters</i> .....	10
1.7.4	<i>Institutional stature and experience</i> .....	11
1.7.5	<i>Cost</i> .....	11
1.7.6	<i>Delay</i> .....	11
1.7.7	<i>The inadvisability of combining arbitral institutions</i> .....	11
1.7.8	<i>The inability to “opt out” of the Model Law, whatever the choice of procedural rules</i> .....	11
<b>2.</b>	<b>MECHANICS OF THE ARBITRATION ACT 1996.....</b>	<b>13</b>
2.1	RELATIONSHIP BETWEEN THE ACT AND THE MODEL LAW .....	13
2.1.1	<i>New Zealand is a ‘Model Law’ jurisdiction</i> .....	13
2.1.2	<i>The Act is domestic legislation, with important domestic innovations</i> .....	14
2.2	STRUCTURE OF THE ACT.....	15
2.3	THE SECTIONS OF THE ACT .....	15
2.3.1	<i>Purposes of the Act</i> .....	15
2.3.2	<i>Scope of the Act</i> .....	16
2.3.3	<i>The mandatory First Schedule, and the optional Second Schedule</i> .....	18
2.3.4	<i>Two other matters</i> .....	18
2.4	THE FIRST SCHEDULE (BASED ON THE MODEL LAW) .....	19
2.4.1	<i>Overview of the First Schedule</i> .....	19
2.4.2	<i>Main themes of the First Schedule</i> .....	19
2.4.3	<i>The limits of party autonomy and arbitral discretion with respect to procedure</i> .....	20
2.5	THE SECOND SCHEDULE (OPTIONAL ADDITIONAL RULES) .....	31
2.5.1	<i>Clause 1</i> .....	31
2.5.2	<i>Clause 2</i> .....	33
2.5.3	<i>Clause 3</i> .....	33
2.5.4	<i>Clauses 4 and 5</i> .....	33
2.5.5	<i>Clause 6</i> .....	33
2.5.6	<i>Clause 7</i> .....	33
2.6	THE THIRD SCHEDULE.....	34
<b>3.</b>	<b>2007 AMENDMENTS TO THE ACT .....</b>	<b>37</b>
3.1	THE LAW COMMISSION’S 2003 REPORT (NZLC R83) .....	37
3.1.1	<i>Confidentiality</i> .....	37
3.1.2	<i>Other issues</i> .....	38
3.1.3	<i>2006 amendments to the UNCITRAL Model Law</i> .....	39
3.1.4	<i>The Arbitration Amendment Act 2007</i> .....	39
3.2	AMENDMENT TO THE S 19 TRANSITIONAL REGIME RELATING TO UMPIRES .....	40
3.3	NEW CL 5(10) RELATING TO ERROR OF LAW .....	40
3.4	NEW CONFIDENTIALITY CODE.....	41
3.5	NEW INTERIM MEASURES REGIME.....	44
3.5.1	<i>Introduction</i> .....	44
3.5.2	<i>Examples of interim measures</i> .....	46

3.5.3	<i>Source of powers of an arbitral tribunal</i> .....	47
3.5.4	<i>Relationship between the courts and arbitral tribunals concerning interim measures</i> .....	49
3.5.5	<i>The discretion to grant interim measures – is the remedy sought appropriate?</i> .....	54
3.5.6	<i>Preliminary orders regime</i> .....	55
3.5.7	<i>Enforcement of interim measures and preliminary orders</i> .....	56
<b>4.</b>	<b>SETTING UP AND CONDUCTING AN ARBITRATION</b> .....	<b>59</b>
4.1	APPROACHING AN ARBITRATION – FROM A COUNSEL’S PERSPECTIVE.....	59
4.1.1	<i>Prepare early – by drafting a sound arbitration agreement</i> .....	59
4.1.2	<i>Consider modifying the default rules</i> .....	59
4.1.3	<i>Consider adopting a procedural framework</i> .....	60
4.1.4	<i>Choosing between ad hoc or institutional arbitration</i> .....	60
4.1.5	<i>Commencing arbitration proceedings</i> .....	62
4.1.6	<i>Conducting arbitration proceedings</i> .....	63
4.1.7	<i>Conclusion</i> .....	63
4.2	APPROACHING AN ARBITRATION – FROM AN ARBITRATOR’S PERSPECTIVE.....	63
4.2.1	<i>General Issues</i> .....	63
4.2.2	<i>To what extent does the parties’ agreement on procedural matters limit the discretion of the arbitral tribunal?</i> .....	64
4.2.3	<i>The duties of the parties to co-operate</i> .....	64
4.2.4	<i>The procedural structure of a typical domestic arbitration</i> .....	65
4.2.5	<i>First procedural meeting of tribunal and the parties – Procedural Order No. 1</i> .....	66
4.2.6	<i>The timetable – is there a right to extensions of time?</i> .....	67
4.2.7	<i>The pleadings phase</i> .....	67
4.2.8	<i>Evidence gathering</i> .....	68
4.2.9	<i>The IBA Rules 2010</i> .....	68
4.2.10	<i>Pre-hearing conference</i> .....	71
4.2.11	<i>Evidentiary hearing – division of available hearing time</i> .....	72
4.2.12	<i>Taking evidence by video link</i> .....	72
4.2.13	<i>Is there a right to reply?</i> .....	73
4.2.14	<i>Post-hearing submissions</i> .....	73
4.2.15	<i>New issues arising</i> .....	73
4.2.16	<i>Drawing adverse inferences (art 9 IBA Rules)</i> .....	73
4.2.17	<i>Advocacy skills and procedural efficiency in arbitration</i> .....	74
<b>5.</b>	<b>ROLE OF THE NEW ZEALAND COURTS</b> .....	<b>75</b>
5.1	INTRODUCTION.....	75
5.2	THE ART 5 ADMONITION.....	75
5.3	COURT ASSISTANCE IN UPHOLDING THE ARBITRATION AGREEMENT.....	77
5.3.1	<i>Mandatory stay of proceedings under art 8(1)</i> .....	77
5.3.2	<i>Anti-suit and anti-arbitration injunctions</i> .....	79
5.4	COURT ASSISTANCE TO ENSURE PROPER COMMENCEMENT OF THE ARBITRATION PROCEEDINGS.....	81
5.5	COURT ASSISTANCE WITH INTERIM MEASURES.....	83
5.6	COURT ASSISTANCE WITH OBTAINING EVIDENCE.....	84
5.7	COURT ASSISTANCE IN RELATION TO ARBITRAL CONFIDENTIALITY.....	85
5.8	COURT REVIEW OF DOMESTIC ARBITRAL AWARDS.....	85
5.8.1	<i>Powers under the First Schedule – the art 34 set aside procedure</i> .....	85
5.8.2	<i>Powers under the Second Schedule – preliminary issues and appeals on a question of law</i> .....	89
5.9	COURT RECOGNITION AND ENFORCEMENT OF (DOMESTIC OR FOREIGN) ARBITRAL AWARDS.....	96
5.9.1	<i>Article 35 – the procedure for recognition and enforcement of arbitral awards</i> .....	96
5.9.2	<i>Article 36 – the grounds for refusing recognition and enforcement</i> .....	99
<b>6.</b>	<b>10 KEY DECISIONS OVER THE LAST DECADE</b> .....	<b>103</b>
6.1	<i>MARNELL CORRAO ASSOCIATES INC V SENSATION YACHTS LTD (2000) 15 PRNZ 608 (HC)</i> .....	103
6.1.1	<i>Overview</i> .....	103
6.1.2	<i>Facts and reasoning</i> .....	103
6.1.3	<i>Observations</i> .....	104
6.2	<i>GOLD &amp; RESOURCE DEVELOPMENTS (NZ) LTD V DOUG HOOD LTD [2000] 3 NZLR 318 (CA)</i> .....	105
6.2.1	<i>Overview</i> .....	105
6.2.2	<i>Facts and reasoning</i> .....	105
6.2.3	<i>Observations</i> .....	106

6.3	<i>AMALTAL CORP LTD V MARUHA CORP (NZ) LTD</i> [2004] 2 NZLR 614 (CA), [2003] 2 NZLR 92 (HC)	107
	6.3.1 <i>Overview</i>	107
	6.3.2 <i>Facts and reasoning</i>	107
	6.3.3 <i>Observations</i>	108
6.4	<i>METHANEX MOTUNUI LTD V SPELLMANN</i> [2004] 3 NZLR 454 (CA), [2004] 1 NZLR 95 (HC)	109
	6.4.1 <i>Overview</i>	109
	6.4.2 <i>Facts and reasoning</i>	109
	6.4.3 <i>Observations</i>	110
6.5	<i>LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY V IMPREGILO SPA</i> [2005] 2 ALL ER (COMM) 265	111
	6.5.1 <i>Overview</i>	111
	6.5.2 <i>Facts and reasoning</i>	111
	6.5.3 <i>Observations</i>	112
6.6	<i>CARTER HOLT HARVEY LTD V GENESIS POWER LTD</i> [2006] 3 NZLR 794 (HC)	112
	6.6.1 <i>Overview</i>	112
	6.6.2 <i>Facts and reasoning</i>	113
	6.6.3 <i>Observations</i>	114
6.7	<i>CASATA LTD V GENERAL DISTRIBUTORS LTD</i> [2006] 2 NZLR 721 (SC)	114
	6.7.1 <i>Overview</i>	114
	6.7.2 <i>Facts</i>	114
	6.7.3 <i>The High Court decision</i>	115
	6.7.4 <i>The Court of Appeal decision</i>	115
	6.7.5 <i>The Supreme Court decision</i>	116
	6.7.6 <i>Observations</i>	117
6.8	<i>TODD TARANAKI LTD V ENERGY INFRASTRUCTURE LTD</i> (HC WELLINGTON, CIV 2007-485-2684, 19 DECEMBER 2007, DOBSON J)	117
	6.8.1 <i>Overview</i>	117
	6.8.2 <i>Facts and reasoning</i>	117
	6.8.3 <i>Observations</i>	118
6.9	<i>PREMIUM NAFTA PRODUCTS LTD V FILI SHIPPING CO LTD (SUB NOM FIONA TRUST &amp; HOLDING CORP V PRIVALOV)</i> [2007] UKHL 40, [2007] ALL ER 951	118
	6.9.1 <i>Overview</i>	118
	6.9.2 <i>Facts and reasoning</i>	118
	6.9.3 <i>Observations</i>	120
6.10	<i>DALLAH REAL ESTATE AND TOURISM CO V MINISTRY OF RELIGIOUS AFFAIRS OF THE GOVERNMENT OF PAKISTAN</i> [2010] UKSC 46, [2010] 3 WLR 1472; <i>MINISTRY OF RELIGIOUS AFFAIRS OF THE GOVERNMENT OF PAKISTAN V DALLAH REAL ESTATE AND TOURISM CO</i> (PARIS COURT OF APPEAL, 17 FEBRUARY 2011)	120
	6.10.1 <i>Overview</i>	121
	6.10.2 <i>Facts and reasoning</i>	121
	6.10.3 <i>English Supreme Court decision</i>	121
	6.10.4 <i>French Court of Appeal decision</i>	123
	6.10.5 <i>Observations</i>	123
<b>7.</b>	<b>INTERNATIONAL COMMERCIAL ARBITRATION</b>	<b>125</b>
7.1	INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION	125
	7.1.1 <i>Choice of arbitration for international commercial disputes</i>	126
	7.1.2 <i>Neutrality and certainty</i>	126
	7.1.3 <i>Enforceability of arbitral awards</i>	127
	7.1.4 <i>Waiver of sovereign immunity</i>	127
	7.1.5 <i>Confidentiality</i>	127
	7.1.6 <i>Specialised competence</i>	128
	7.1.7 <i>Procedural flexibility</i>	128
	7.1.8 <i>Speed</i>	128
	7.1.9 <i>Cost</i>	128
	7.1.10 <i>Summary</i>	128
7.2	DISTINGUISHING FEATURES OF THE MAIN INTERNATIONAL ARBITRATION RULES	129
	7.2.1 <i>The ICC Rules (1998): “supervised” arbitration</i>	129
	7.2.2 <i>The LCIA Rules (1998): “administered” arbitration</i>	130
	7.2.3 <i>The ICSID Rules (2006): state investment dispute arbitration</i>	130
	7.2.4 <i>The UNCITRAL Rules (2010) – ad hoc arbitration</i>	131

<b>8. INVESTMENT TREATY ARBITRATION .....</b>	<b>133</b>
8.1 INTRODUCTION .....	133
8.2 THE INVESTMENT TREATY ARBITRATION SYSTEM.....	133
8.2.1 <i>The structure and nature of investment treaties</i> .....	134
8.2.2 <i>New Zealand's role in the investment treaty arbitration system</i> .....	136
<b>APPENDIX A:.....</b>	<b>139</b>
COMPARISON OF ACT FIRST SCHEDULE AND THE MODEL LAW .....	139
<b>APPENDIX B:.....</b>	<b>157</b>
THE ACT'S CONFIDENTIALITY CODE .....	157
<b>APPENDIX C:.....</b>	<b>161</b>
SAMPLE ARBITRATION CLAUSES .....	161
<b>APPENDIX D:.....</b>	<b>165</b>
DEBEVOISE & PLIMPTON LLP PROTOCOL TO PROMOTE EFFICIENCY IN INTERNATIONAL ARBITRATION .....	165
<b>APPENDIX E:.....</b>	<b>169</b>
MODEL PROCEDURAL ORDER NO. 1 .....	169
<b>APPENDIX F: .....</b>	<b>179</b>
SAMPLE TEMPLATE HEARING SCHEDULE.....	179
<b>APPENDIX G: .....</b>	<b>183</b>
SAMPLE TERMS OF APPOINTMENT AS AN ARBITRATOR.....	183
<b>APPENDIX H: .....</b>	<b>191</b>
SAMPLE PROTOCOL FOR A SITE VISIT .....	191
<b>APPENDIX I:.....</b>	<b>193</b>
COMPARISON OF NEW ZEALAND'S INVESTMENT TREATY COMMITMENTS .....	193
<b>BIBLIOGRAPHY .....</b>	<b>195</b>
MODEL LAW TEXTS.....	195
SELECTED MODEL LAW COUNTRY TEXTS .....	195
ENGLISH TEXTS .....	196
INTERNATIONAL COMMERCIAL ARBITRATION TEXTS.....	196
INVESTMENT ARBITRATION TEXTS.....	197