Due Process in Arbitration Proceedings

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Introduction

In most domestic and international arbitrations, the procedures followed by the parties and the tribunal will never come under scrutiny by non-parties. The procedures adopted will be many and varied. In some cases the parties will have included, in their arbitration agreement, precise rules as to how the arbitration is to be conducted. Or, they may have incorporated procedural rules into their arbitration agreement by electing to have their arbitration conducted in accordance with the rules of a particular institute or body. In other cases, the way in which the arbitration is to be conducted will be left to the discretion of the tribunal.

Article 19(1) of Schedule 1 of the Arbitration Act 1996 (NZ) (the Act) provides that, subject to the provisions of Schedule 1, the parties are free to agree on the procedure to be adopted by the arbitral tribunal in conducting the proceedings. Pursuant to Article 19(2), failing such agreement, the arbitral tribunal may, subject to the provisions of Schedule 1, conduct the arbitration in such manner as it considers appropriate. These provisions give broad discretion to the parties and to the arbitral tribunal as to the procedures to be followed. However, where parties to a dispute elect to have that dispute resolved by arbitration (rather than some other form of dispute resolution) there are certain minimum requirements of procedural fairness that must be followed in those proceedings.

The Law on Due Process requirements in New Zealand arbitrations

In any arbitration conducted in New Zealand, there is a requirement imposed on the tribunal that:

> "The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case".[1]

This requirement comes from the UNCITRAL Model Law, which has been incorporated into New Zealand law in the form of Schedule 1 of the Arbitration Act 1996 ("the Act"). This is the overriding due process requirement applying to arbitrations conducted in New Zealand.

[1] Arbitration Act 1996, Schedule 1, Article 18.

In addition to the requirement to treat the parties equally and to give them a full opportunity of presenting their case, the Act also includes the following due process requirements:

- Unless the parties have agreed otherwise, hearings shall be held at an appropriate stage in the proceedings, if so requested by at least one party (Schedule 1, Article 24(1));
- The parties shall be given sufficient notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property, or documents (Schedule 1, Article 24(2));
- All statements, documents or other information supplied to the tribunal by one party shall be communicated to the other party(Schedule 1, Article 24(3));
- Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties (Schedule 1, Article 24(3));
- At any hearings or meetings of the tribunal (and in any proceedings on the papers) the parties may appear or act in person or may be represented by any other person of their choice (Schedule 1, Article 24(4));
- Where the tribunal appoints an expert to assist it on specific issues, unless otherwise agreed, a party may require the expert to participate in a hearing where the parties have the right to put questions to the expert and to present expert witnesses in order to testify on the points at issue (Schedule 1, Article 26(2));

The right of the parties to be heard in Article 18 and the right to see the documents and reports provided to the tribunal in Article 24, also brings with it the right to respond. As Fisher J noted in the High Court judgment in *Methanex Motonui Ltd v Spellman,* "[t]here would be no point in a provision of that nature unless it were associated with the opportunity to provide any relevant evidence and argument in response".[2]

In addition to the due process requirements that appear in the Act, there are also due process requirements from the "common law", which apply to arbitrations in New Zealand.[3] The exact scope of those common law due process requirements is open to some debate. It is being developed on a case by case basis by the New Zealand courts and the courts will also draw upon the case law being developed overseas, particularly in countries which have, like New Zealand, adopted legislation based on the UNCITRAL Model Law.[4]

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[2] [2004] 1 NZLR 95 at paragraph 140. See also the report of the New Zealand Law Commission "Arbitration" (1991) NZLC R20, para 340 at p 180 where the Commission stated that it considered that the opportunity to respond to another party's case is implicit in the idea of "presenting" a case pursuant to Article 18.

[3] Fisher J in *Methanex Motonui* at paragraphs 136 and 149. This view was confirmed by the Court of Appeal, [2004] 3 NZLR 454. See paragraphs 129 to 142 where the Court considers whether the parties had agreed to exclude the "broader common law requirements of natural justice".

[4] See Section 5(b) of the Act which provides that one of its purposes is "to promote international consistency of arbitral regimes based on the [Model Law]".

Some guidance as to the due process requirements from the common law that apply in New Zealand is given by Fisher J in his judgments in *Trustees of Rotoaira Forest Trust v Attorney General* [5] and in the *Methanex Motonui* case.

In *Trustees of Rotoaira Forest Trust v Attorney General*, Fisher J stated that the detailed manner in which natural justice requirements apply to particular arbitrations would seem to turn upon the particular arbitration agreement, the nature of the dispute and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise. [6]

He went on to note that, in his view, the basic requirements for a fair hearing were usefully summarised by Mustill & Boyd in "The Law and Practice of Commercial Arbitration in England" (2nd Edn, 1989) at p 302 as follows:

> "1. Each party must have notice that the hearing is to take place.
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> 2. Each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses.
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> 3. Each party must have the opportunity to be present throughout the hearing.
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> 4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
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> 5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebuttal evidence and addressing oral argument.
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> 6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."[7]

In addition, Fisher J stated that the arbitrator must confine himself to the material put before him by the parties unless the contrary is agreed. This extends to the arbitrator's own opinions, ideas and knowledge where either party might otherwise be taken by surprise to that party's prejudice. If the arbitrator unexpectedly decides the case on a point which he has invented himself he creates surprise and deprives the parties of their right to address full argument to the case which they have to answer.[8]

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[5] [1999] 2 NZLR 452, 458.

[6] Pursuant to Section 19(2) of the Arbitration Act 1996, as the arbitration proceedings commenced before 1 July 1997, the applicable statute governing the arbitration proceedings was the Arbitration Act 1908. However, Fisher J stated that he considered that Article 18, Schedule 1 of the Arbitration Act 1996 reflected the pre-existing common law (page 459).

[7] [1999] 2 NZLR 452 at page 459.

[8] [1999] 2 NZLR 452 at page 460. See also the decision of Dobson J in *Todd Petroleum Co Ltd v Shell (Petroleum Mining) Company Ltd*, HC WN, CIV – 2008 – 485-2816 [2009]NZHC 843 (17 July 2009) where he set aside parts of an award and remitted the award to the arbitrator on the basis that there had been breaches of natural justice as: (i) a key decision adversely affecting Todd in the arbitrator's award was based on an issue that arose only tangentially in the arbitration and on which

The extent to which an arbitrator may draw on his own general knowledge and expertise was considered further by Fisher J in the High Court judgment in *Methanex Motonui.* In that case the parties were arguing about the recalculation of the economically recoverable reserves (ERR) in the Maui gas field. Methanex applied to have the award remitted to the arbitrator under Articles 34(2) and (4) of the First Schedule to the Act on the basis that there had been a breach of natural justice as it was denied the opportunity to respond to or comment on:

(a) certain supplementary information and data given to the arbitrator (described as the "independent expert" in the submission agreement) by one of the other parties; and

(b) the independent expert's own reservoir simulation model which he used to determine the level of ERR.

In a settlement agreement entered into prior to the arbitration, Methanex had agreed that it would not appeal any decision of the independent expert unless it was "induced or affected by fraud or corruption". The defendants (the "Sellers" of gas from the Maui gas field) considered that this meant that Methanex had contracted out of any right it might have to review the award for breaches of natural justice and they therefore applied to strike out Methanex's application.[9]

The findings of Fisher J on the extent to which a party may contract out of the natural justice requirements that would otherwise apply in arbitration proceedings is considered further below. With regard to the issue of the extent to which an arbitrator may draw on his own general knowledge and expertise, Fisher J laid down the following principles:

- Unless agreed otherwise, lay arbitrators must confine their fact finding to the information provided by the parties (they may also take into account matters that would be the subject of "judicial notice" in Courts of general jurisdiction);[10]

- Where the arbitrator has been chosen for their expertise in the subject matter of the dispute, they can draw on their knowledge and expertise for general facts, that is to say facts which form part of the general body of knowledge within their area of expertise as distinct from facts that are specific to the particular dispute;[11]

Todd had not, therefore, made any submissions; and (ii) a decision adversely affecting Shell, pursuant to which the arbitrator had attributed fiduciary obligations to the parties, was an argument that had not been run before the arbitrator and on which the parties had not had an opportunity to make submissions.

[9] The Sellers also applied to strike out Methanex's application on the basis that it was not actually a "party" to the arbitration. It's right to participate in the arbitration being limited to putting in submissions and expert reports via the Crown. In the High Court, Fisher J determined that Methanex had an arguable case that it was a party to the relevant arbitration agreement. On appeal, the Court of Appeal reversed that ruling and determined that there was no such arguable case that Methanex was a party to the arbitration.

[10] *Methanex Motonui* (HC) at paragraph 155.

[11] *Methanex Motonui* (HC) at paragraph 156.

- However, expert arbitrators cannot rely on facts that they know about the specific dispute, if such facts have not been put forward by the parties;[12]

- Nor can expert arbitrators rely on their knowledge of general matters that fall outside their area of expertise;[13]

- Nor can they rely on reports or opinions obtained from others;[14]

- As stated in the *Rotoaira Trust* case, in general an arbitrator must provide notice of, and an opportunity to respond to, issues, ideas, methods, research, investigations and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments traversed before the arbitrator.[15]

Fisher J stated that these requirements of natural justice from the common law have been "incorporated into the statutory structure by the unqualified use of the expression 'natural justice' in art 34" (the Article setting out the grounds upon which an award may be set aside by the Courts).[16]

Fisher J concluded that the independent expert's model was not an "expert report" or "evidentiary document" in the terms referred to in Article 24(3) of Schedule 1. It was his own work and methodology and therefore it did not need to be provided to the parties for review and comment.[17]

The Court of Appeal agreed with Fisher J that the independent expert's model was not an "expert report" in the sense of Article 24(3).[18] The Court considered the issue of whether the model was an "evidentiary document" (which would have required disclosure to the parties under the second limb of Article 24(3)) to be a more difficult question. The Court reviewed the legislative history of the phrase, including the papers of the UNCITRAL working group when it was debating what was to become the Model Law. That history indicated that "evidentiary document" was not intended to extend to the tribunal's methods of analysis of the evidence, such as computer modelling. The Court therefore concluded that the

[12] *Methanex Motonui* (HC) at paragraph 161(b).

[13] *Methanex Motonui* (HC) at paragraph 161(b).

[14] *Methanex Motonui* (HC) at paragraph 161(b). Unless, of course, those reports are produced by the parties.

[15] *Methanex Motonui* (HC) at paragraph 161(d).

[16] Article 34(2)(b)(ii) provides that the court may set aside an award if it finds that the award is in conflict with the public policy of New Zealand. In a New Zealand addition to the Model Law, Article 34(6)(b) provides that an award is in conflict with the public policy of New Zealand if " a breach of the rules of natural justice occurred: (i) during the proceedings; or (ii) in connection with the making of the award".

[17] *Methanex Motonui* (HC) at paragraph 147.

[18] *Methanex Motonui* (CA) at paragraph 145.

independent expert's reservoir simulation model was not an evidentiary document under Article 24(3) and that the Act accordingly did not require its disclosure to the parties.[19]

Contracting out of Due Process requirements

One of the key threshold issues for determination in the *Methanex* case was whether it is possible to contract out of the natural justice requirements that would otherwise apply in New Zealand arbitrations, under the Act and at common law.

In the High Court, Fisher J analysed the relationship between the minimum standards of procedural fairness contained in the Act (and the UNCITRAL Model Law), the principles of natural justice that apply at common law, and the differences between arbitration and expert determination. Fisher J accepted that it was possible to contract out of the common law natural justice requirements that are imported into the Act, by virtue of Article 34 of Schedule 1 (and its reference to setting aside an award for a breach of natural justice). It was also possible to contract out of the non mandatory due process requirements in the Act. However, there were certain irreducible natural justice requirements that were mandatory under the Act and it was not possible to contract out of those requirements, even with informed consent.

> "...If the parties say that they want arbitration, but in the same breath say they do not want enforceable natural justice, their two statements are incompatible. Arbitration is a process by which a dispute is determined according to enforceable standards of natural justice. The scope of the particular natural justice to be applied in a given case may be modified by agreement. But enforceable natural justice cannot be excluded altogether if the process is to remain arbitration".[20]

The relevant mandatory natural justice requirements in the Methanex case were:

(1) the right in Article 18 of Schedule 1 to be treated with equality and to be given a full opportunity to present a case; and

(2) the right in Article 24(3) of Schedule 1 to see all statements, documents or other information supplied to the tribunal by the other party and also any expert reports or evidentiary documents on which the tribunal may rely in making its decision. As noted above, this right also includes the implicit right to comment on and respond to such statements, documents and evidence.

Nevertheless, the parties' attempt to waive the right to review the award for a breach of natural justice was not completely ineffective. Fisher J held that it was an indication of the parties' contractual intentions. In addition to being effective to exclude the non-mandatory and common law natural justice requirements, it also justified a restrictive construction of those rights that could not be contracted away.

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[19] *Methanex Motonui* (CA) at paragraphs 146 to 158. He also found that Methanex had had an opportunity to respond to the "supplementary information" provided to the independent expert.

[20] *Methanex Motonui* (HC) at paragraph 50.

The Court of Appeal's starting point, in analysing whether Methanex had waived its right to apply for a review of the award, was Article 34 of Schedule 1. The Court of Appeal concluded that "the law does not permit the parties to exclude review based on the grounds specified in Article 34".[21] The Court noted that the drafting of Article 34 proceeds on the basis that a breach of the rules of natural justice associated with an arbitration (Article 34(6)(b)) has the consequence that the award is contrary to the public policy of New Zealand (Article 34(2)(b)(ii)) and that it is not likely that the New Zealand Parliament would have countenanced a power to exclude review of such awards.[22]

On that basis, the Court concluded that a contractual provision purporting to exclude such a review would derogate impermissibly from Articles 18 and 24 of the First Schedule.[23] That said, the Court did consider that it was possible for the parties to stipulate for a process which, while consistent with Articles 18 and 24, did not satisfy what would normally be the requirements of natural justice and that the Courts ought to be prepared to give effect to such stipulations.[24] The Court of Appeal agreed with Fisher J that any broader common law requirements of natural justice had been excluded in the settlement agreement entered into by Methanex prior to the arbitration.[25]

Due Process in practice

As set out above, there are a number of mandatory statutory due process requirements that must be complied with when conducting an arbitration in New Zealand. There are also a number of other statutory due process requirements and due process requirements from common law that must be complied with, unless the parties have "agreed otherwise". However, there is likely to be a wide range of views as to how those requirements are actually to be interpreted and applied in practice.

When arbitral tribunals wish to obtain guidance as to what constitutes "due process" on any given issue, in addition to looking to the statutes and case law, they can look to:

(a) respected arbitral texts (such as Redfern & Hunter[26] and Mustill & Boyd[27]);

(b) the rules and publications of the leading arbitral institutions;[28] and

[21] *Methanex Motonui* (CA) at paragraph 108.

[22] *Methanex Motonui* (CA) at paragraph 116(c).

[23] *Methanex Motonui* (CA) at paragraph 116(d).

[24] *Methanex Motonui* (CA) at paragraph 117.

[25] *Methanex Motonui* (CA) at paragraph 142.

[26] 5th Edn, 2009.

[27] 2nd Edn, 1989 (and 2001 Companion Volume).

[28] Such as the ICC Rules; The IBA Rules on the Taking of Evidence in International Arbitrations (2010); and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996). In New Zealand,

(c) arbitral awards of leading arbitrators that have made it into the public domain.

However, as there are no specified "rules of procedure" that must be followed in all arbitrations (as compared with procedural rules applying before the Courts of different levels) it is often more of an art than a science to determine what approach a tribunal will or should take in any given situation.

That said, a body of information is building up on the "general approach" that will be taken by tribunals in arbitration proceedings, particularly in international arbitration proceedings. Set out below is a commentary on the approach of tribunals (that this author has observed) to a number of issues that arise frequently in arbitrations. This does not purport to be an empirical or statistical analysis and is simply based on the author's involvement in numerous arbitrations and on discussions with others who practice in the field as practitioners and arbitrators.

- *Cross Examination*

In the *Rotoaira Trust* case, Fisher J cited a list of requirements from Mustill & Boyd (2nd Ed, 1989) that were said to constitute basic requirements for a fair hearing. Requirement No. 5 was that:

> "Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebuttal evidence and addressing oral argument."

In this author's experience, although most international tribunals will allow some form of cross-examination of the opponent's witnesses, that is not always the case. Some tribunals (particularly those from a civil law background with the tradition of the judge testing the evidence) consider that cross-examination will not be of assistance to them in deciding the case.

Also, in almost all arbitrations, cross-examination is limited by time. Where the evidence is detailed and voluminous (for example in construction and accounting cases) Counsel is unlikely to be allowed to cross-examine a witness on each and every aspect of their evidence and will be expected or required to focus on key issues.

- *Length of Hearings*

Generally hearing times in arbitral proceedings will be kept to the minimum necessary to do justice between the parties. Hearing times will, in general, be much shorter than would be the case if the same issues were debated in courts of common law jurisdiction.

Answering the question of how long should be allowed for a hearing often seems to be an attempt to find a middle ground between the party who wants as long as possible to present their case (or counterclaim or defence) and the party who wants the hearing to be as short as possible. The arbitrator will be seeking to set a hearing length that allows the parties a

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tribunals can look to the AMINZ Arbitration Protocol (www.aminz.org.nz, V7/2204) or the various sets of arbitration rules that have been developed by NZDRC (www.nzdrc.co.nz).

reasonable opportunity to present their case and to test that of their opponents, while still seeking to keep the process efficient and cost-effective.

In arbitration proceedings, many of the issues will be debated in papers filed before and after the hearing. In particular, detailed legal argument and analysis is often dealt with in the papers. In most arbitrations, the tribunal will not allow for closing oral submissions (except to a very limited extent) and will call for written "post hearing briefs" or "closing submissions".[29]

- *Form of evidence - The Avco case*

In general, Tribunal's are eager to find ways to reduce the volume of documents they are required to review in cases. They are more than willing to hear proposals as to how documentary evidence can be cut down or summarised, without prejudicing the integrity of the underlying information. For example, in construction cases, information is often categorised and summarised by claims consultants. Or information can be analysed and summarised by experts appointed by the parties or the Tribunal.

However, the *Avco* case is an example of where an attempt to reduce the volume of evidence to be dealt with by the Tribunal went horribly wrong for one of the parties.[30]

The *Avco* case was argued before the Iran-US Claims tribunal. At a procedural hearing (before the chairman of the tribunal sitting alone) there was a discussion about whether the US Corporation was required to prove its side of the case with the actual invoices of sums that had been incurred. The chairman stated that the tribunal was not enthusiastic about receiving "kilos and kilos of invoices". It was therefore agreed that the US corporation would retain an international firm of accountants to verify that the accounts submitted to the tribunal accurately summarised the invoices in the records. However, before the case came to a hearing, the chairman of the tribunal resigned and was replaced. At the hearing the tribunal asked why the underlying invoices had not been produced. The US Corporation's counsel explained the process that had been agreed with the former chairman. However, in the final award the tribunal disallowed the claims that had been documented by the accountants and said:

> "The Tribunal cannot grant the [claimant's] claims solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit."

The tribunal proceeded to make an award against the US Corporation. The US Corporation resisted enforcement on the basis that it was unable to present its case.[31] The US Courts agreed and the US Court of Appeals held that by "misleading the [US Corporation], however

[29] Cf requirement 6 in the list from Mustill & Boyd: "The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."

[30] Iran Aircraft Ind v Avco Corp, majority opinion, reported in (1993) XVIII Ybk Comm Arb 599.

[31] See Art V(1)(h) of the New York Convention and the comparable provision in the Model Law Art 34(2)(a)(ii).

unwittingly, the tribunal denied [it] the opportunity to present its claim in a meaningful manner".[32]

- *Witnesses in the Hearing Room*

There tend to be differing approaches to the issue of whether witnesses who are to give oral evidence (and be cross-examined) at a hearing, should be present in the hearing room prior to giving evidence. The approach taken will generally depend on the issues on which the witness is giving evidence. Where the witness is giving evidence on a contentious factual issue (i.e. where the parties take differing positions on what actually happened) then tribunals tend to exclude witnesses until they have given evidence. The same approach is generally taken where there are allegations of fraud or dishonesty.

Tribunals do not generally exclude expert witnesses who may sit through the evidence of the factual witnesses of each side, should they choose to do so.

The exclusion of factual witnesses can cause "due process" difficulties where the witness is also the claimant or defendant (for example the director of a "one person company") or where the witness is the main client representative.

In the list of "fair hearing requirements" from Mustill & Boyd (listed above) it is suggested that one of the requirements is that, "each party must have the opportunity to be present throughout the hearing". Where the "party" is also a witness, then that opportunity may be denied. However, the party will clearly still have the opportunity of being represented by counsel, even if they are personally excluded until they have given evidence.

- *Notice of hearing and opportunity of attending*

There are various provisions in the Act protecting the rights of the parties to be given adequate notice of any hearing and to be given the opportunity of attending the hearing and presenting their case. See Articles 18 and 24(2) of Schedule 1 and also the grounds for setting aside an award in Articles 34(2)(a)(ii) and 34(6)(b) (and the corresponding grounds for resisting enforcement in Articles 36(1)(a)(ii) and 36(3)(b).

However, the tribunal does have the power to continue with proceedings and issue an award where a party fails, without sufficient cause, to present its case or attend a hearing, after having been given a full opportunity to present its case (Article 18) and sufficient advance notice of any hearing (Article 24(2)). See the powers of the tribunal in this regard in Articles 25(c) and (d) of Schedule 1.

Tribunals are often called upon to strike a balance between one party who wants to progress the arbitration as quickly as possible and another party who wishes to delay the proceedings (or avoid them altogether). Where one party claims that it (or its counsel) is unable to attend a procedural or substantive hearing, the tribunal must decide whether to grant an adjournment of the hearing (with all the attendant delays and costs) or to press on, even in the absence of the party that claims it cannot attend.

[32] The *Avco Case*, page 602.

In the case of *Kanoria v Guinness*[33], the English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness. In the circumstances, the court decided that "this is an extreme case of potential injustice" and resolved not to enforce the arbitral award.

The opposite conclusion was reached in the case of *Swisher Hygiene v Hi-Gene Ltd*, before the New Zealand courts. In that case, Swisher Hygiene obtained an award against Hi-Gene Ltd, from a tribunal seated in North Carolina, USA. Swisher sought to enforce the award before the New Zealand Courts, Hi-Gene resisted the application for enforcement and sought an order refusing enforcement on the grounds that it was unable to present its case and that recognition and enforcement of the award would be contrary to the rules of natural justice.

In that case, Hi-Gene had initially taken little or no part in the arbitration proceedings and did not participate in the telephone conference to schedule the filing of submissions and the hearing date. Subsequently, Hi-Gene advised the claimant's counsel (but not the tribunal) that the scheduled hearings dates did not suit it (as its counsel and director were not available on that date). In the end, the hearing went ahead, on the scheduled dates, without the participation of Hi-Gene and an award was made against Hi-Gene.

in the High Court, Duffy J held that Hi-Gene had been given sufficient opportunity to attend the scheduled hearing and that Hi-Gene did not act reasonably in its approach to seeking an adjournment (in that it failed to contact the tribunal directly for several months and did not provide a detailed explanation as to why it could not attend on the specified dates).[34]

The Court of Appeal confirmed the High Court ruling and stated that it did not consider that Hi-Gene had overcome the high threshold required to establish the public policy ground for refusing enforcement. Nor was there any abuse of process.[35] The Court considered that the arbitrators gave Hi-Gene ample advance notice of the time and place of the hearing and that given the delays attributable to Hi-Gene, the arbitrators had proper grounds for refusing the adjournment requested by Hi-Gene.[36]

- *The Last Word*

One issue that arises time and again in arbitrations is "who should have the last word"? In common law jurisdictions, the general practice has been to allow the claimant to have the last word (particularly in oral hearings) on the basis that the claimant has the burden of proof. However, in international arbitrations, that practice is not widely followed. Generally

[33] [2006] EWCA Civ 222; [2006] Arb LR 513

[34] HC of New Zealand, Auckland, CIV-2009-404-001573, 2 December 2009.

[35] [2010] NZCA 359.

[36] Hi-Gene sought leave from the Supreme Court to appeal the decision of the Court of Appeal. That application was refused. Hi-Gene Ltd v Swisher Hygiene Franchise Corpn [2010] NZSC 132.

arbitrators will seek to allow each party an equal number of opportunities to make oral submissions.

The same approach is often taken with regard to written submissions. However, the key consideration of the tribunal is generally to ensure that each party has been given a reasonable opportunity to respond to any new evidence or arguments raised by the other party. This can lead to what seems to be an endless round of submissions and counter-submissions with each side claiming that new points have been raised by the other party. In such situations the tribunal needs to take a firm grip of the process and require the party seeking to put in a further submission to articulate exactly what points are said to be new and why it is that the party was not able to deal with those issues in an earlier submission.

- *Med-Arb and Private Caucasing*

There are a number of different forms of "Med/Arb", some of which raise serious due process issues. In one form, the parties agree to start with mediation and if that fails, the mediation terminates and the dispute goes to an arbitration tribunal. In a second form, where the mediation fails, the same mediator becomes the arbitrator. In a third form, after the arbitration has commenced, the arbitrator takes on the role of mediator from time to time, descending into the fray, debating the issues with the parties and engaging in private discussions in the hope of achieving a consensual result.

In these latter two forms of Med/Arb, there are considerable concerns that the requirements of natural justice and due process will be breached. In particular, the arbitrator will have knowledge of one or both parties' cases and that information will not have been disclosed to the other party. Therefore the parties will not have a full opportunity to test and respond to the case that has been put to the arbitrator by the other side. As noted by Fisher J in the Methanex case, the requirement in Article 24(3) of Schedule 1 for all information provided by one party to the tribunal to be shared with the other party is fundamental and non-waivable.

However, given that the courts (including the New Zealand courts) set a high threshold with regard to the public policy ground for setting aside an award, it is not clear whether a complaint that private discussions have occurred, would be sufficient to have an award set aside on the basis that there was a breach of natural justice. This is particularly so if the parties agreed on the med/arb process (or did not object to the med/arb process) during the course of the arbitration.

Conclusion

Arbitration has carved itself out a unique place in the alternative dispute resolution spectrum, in particular, due to the enforceability of arbitral awards (internationally and domestically). However, with the ability to rely on national courts to enforce arbitral awards, comes the responsibility to ensure that the process is conducted in accordance with the requirements of natural justice.

As stated by Fisher J in the *Methanex* case,

> "If the parties say that they want arbitration, but in the same breath say they do not want enforceable natural justice, their two statements are incompatible. Arbitration is

> a process by which a dispute is determined according to enforceable standards of natural justice." [37]

In New Zealand, those standards are to be found in the Arbitration Act 1996 and in the common law. Parties can agree to waive their rights under the natural justice requirements that come from the common law and certain of the statutory requirements. However, they cannot contract out of the grounds for setting aside awards (or for refusing enforcement of awards) that are to be found in Articles 34 and 36, Schedule 1 of the Act. Nor can they contract out of the other mandatory natural justice requirements in Schedule 1 of the Act.

Arbitral tribunals will have to continue to conduct a balancing act in trying to ensure that arbitration is an efficient, cost-effective and speedy alternative to traditional court litigation, while at the same time maintaining the natural justice and due process requirements to ensure that the process results in an enforceable arbitral award.

[37] *Methanex Motonui* (HC) at paragraph 50.