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**COULD A BAT FLY? AN EVALUATION OF THE
PROPOSED BILATERAL ARBITRATION TREATY
IN THE NEW ZEALAND CONTEXT**

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Abstract

International trade is imperative for economic growth in New Zealand. However, there is lack of engagement from Small to Medium Sized Enterprises given the extensive barriers they face to international markets. The Bilateral Arbitration Treaty (BAT) is one method that aims to increase both trade and access to effective justice. It would replace the default mechanism of cross border litigation with international commercial arbitration for the resolution of international business-to-business disputes. This paper assesses the worth of the BAT in the New Zealand environment considering new issues highlighted by empirical research. These potential impediments include the expense, length and confidentiality of arbitral proceedings. The time length and cost issues raise concerns with access to justice, as protected by s 27 of the New Zealand Bill of Rights Act 1990 (BORA). The confidentiality of BAT proceedings prima facie conflict with open justice and s 14 of BORA. This paper recommends an expedited procedure option and fee structure be included in the terms of the BAT, in addition to the publication of BAT awards, to allay these concerns. Ultimately, the BAT would be a worthwhile pursuit of the New Zealand government to support increasing trade.

Key words

International commercial arbitration, Bilateral Arbitration Treaty, international dispute resolution, New Zealand Bill of Rights Act 1990, Small and Medium Size Enterprises.

Table of Contents

| | | |
|-----|--|----|
| I | INTRODUCTION..... | 4 |
| A | THE BILATERAL ARBITRATION TREATY | 7 |
| II | COST AND TIME LENGTH OF ARBITRAL PROCEEDINGS | 8 |
| A | COSTS OF ARBITRATION..... | 8 |
| B | TIME LENGTH OF ARBITRATION..... | 10 |
| C | PRINCIPLES OF NATURAL JUSTICE..... | 12 |
| 1 | <i>Applicability of the BAT to BORA.....</i> | 12 |
| 2 | <i>Scope and application of section 27(1).....</i> | 13 |
| 3 | <i>Justifiable limit.....</i> | 14 |
| D | REMEDIES | 15 |
| 1 | <i>Sole arbitrator.....</i> | 16 |
| 2 | <i>Expedited proceedings.....</i> | 16 |
| 3 | <i>Limited application.....</i> | 18 |
| 4 | <i>Fee structure.....</i> | 18 |
| E | SUMMARY..... | 21 |
| III | CONFIDENTIALITY OF ARBITRAL PROCEEDINGS | 22 |
| A | APPROACH IN OTHER JURISDICTIONS..... | 24 |
| B | NEW ZEALAND APPROACH..... | 25 |
| C | OPEN JUSTICE ISSUE AND BORA | 26 |
| D | SECTION 27 | 29 |
| E | SUMMARY..... | 29 |
| IV | CONCLUSION..... | 30 |
| V | BIBLIOGRAPHY..... | 32 |

I Introduction

The Bilateral Arbitration Treaty (BAT) proposes a more efficient default mechanism, in the form of international commercial arbitration, for international commercial dispute resolution where parties have neglected to provide for a particular method.¹ The focus of this paper will be on the influence the BAT could have on the government's aim of increasing trade through access to more effective justice. The emphasis will be on potential implications for Small and Medium Sized Enterprises (SMEs).²

International trade is an inexorable force in the New Zealand economy and is ancillary to economic growth. It comprises approximately 60 per cent of New Zealand's economic activity.³ Over the past five years, New Zealand's total exports have increased by 21 per cent with the value of exports for the year ended June 2015 reaching \$67.5 billion.⁴ Increased globalisation has transformed trade such that it is more accessible for businesses of all sizes. However, further engagement is necessary if the government is to achieve its goal of increasing the value of exports to the economy by 10 per cent (from 30 per cent to 40 per cent) before 2025.⁵

The New Zealand government policy of negotiating comprehensive free trade agreements across global markets seeks to mitigate some of the barriers to international markets businesses face.⁶ However, an important consideration is the role SMEs have to play in the globalisation of the New Zealand market. There is increasing consensus that SMEs provide stability to the economy and their success can contribute positively to GDP growth and

¹ New Zealand Law Society "Arbitration Treaties Could Help Settle International Disputes" (22 May 2015) New Zealand Law Society <www.lawsociety.org.nz>; Gary Born "Gary Born – Bilateral Arbitration Treaty Regime" (Victoria University of Wellington, Wellington, 17 May 2015).

² For the purpose of this paper, an SME is any firm employing less than 99 employees; Ministry of Business, Innovation and Employment *Small Business Sector Report* (2014) at 10.

³ New Zealand Ministry of Foreign Affairs and Trade "Trade Policy" Accessed June 23, 2016 <www.mfat.govt.nz>.

⁴ Statistics New Zealand *Global New Zealand – International trade, investment and travel profile: Year ended June 2015* (Ministry of Foreign Affairs and Trade and Statistics New Zealand, 2015) at 6; Ministry of Business, Innovation and Employment *Business Growth Agenda - Towards 2025* (2015) at 1.

⁵ Ministry of Business, Innovation and Employment, above n 4, at 1.

⁶ New Zealand Ministry of Foreign Affairs and Trade, above n 3.

employment.⁷ Whilst they comprise 60 per cent of the global workforce and 97.2 per cent of businesses in New Zealand, SMEs are not proportionately represented in international markets.⁸ In the preponderance of Organisation for Economic Cooperation and Development (OECD) nations and New Zealand, the level of international engagement is positively associated with enterprise size.⁹ Arguably, this is due to greater barriers to trade faced by SMEs compared to larger enterprises: the most commonly cited barrier for New Zealand SMEs is limited experience.¹⁰

Another barrier is international dispute resolution and access to effective justice.¹¹ The principal legal difference between international and domestic transactions is the clarity of the applicable legal framework.¹² International contracts can fail to include a dispute resolution clause and thus the disputes become subject to litigation as a default, often in multiple jurisdictions; “[w]ithout a neutral, efficient, and fair dispute resolution process that is legally enforceable, many businesses would not contract abroad for fear of foreign litigation”.¹³ The 2013 Queen Mary survey found firms are wary of initiating proceedings as it might mean losing future business opportunities.¹⁴ The differences in customs, procedures and laws are sufficient to deter a firm with limited resources from international litigation. There is a risk of facing inexperienced or biased judges or juries with a parochial

⁷ Ussal Sabbaz “World SME Forum for SME Advancement Globally” (Brochure produced by Union of Chambers and Commodity Exchanges of Turkey (TOBB), 2015).

⁸ World SME Forum “WSF Mission” (2015) World SME Forum <<http://worldsmeforum.org/about/>>; Ministry of Business, Innovation and Employment *Small Businesses in New Zealand: How do they compare with larger firms?* (March 2013) at 1.

⁹ Organisation for Economic Cooperation and Development *Entrepreneurship at a Glance 2012* (2012) at 60; Ministry of Business, Innovation and Employment *The Small Business Sector Report* (2014) at 8.

¹⁰ Ministry of Business, Innovation and Employment, above n 9, at 47.

¹¹ Petra Butler and Campbell Herbert “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty” (2014) 26 NZULR 186 at 188.

¹² Fabio Bartolotti *Drafting and Negotiating International Commercial Contracts: A Practical Guide* (International Chamber of Commerce, Paris, 2013) at 12.

¹³ William Fiske “Should Small and Medium-Size American Businesses ‘Going Global’ Use International Commercial Arbitration?” (2004) 18 Transnat’l Law 455 at 459.

¹⁴ Queen Mary University of London School of International Arbitration *Corporate Choices in International Arbitration: Industry perspectives* (PricewaterhouseCoopers, 2013) at 16. Whilst these surveys are authoritative, they primarily refer to the practices of large corporations.

outlook on international disputes.¹⁵ Furthermore, these judgments may not be enforceable outside of that jurisdiction and could be subject to further appeals. Therefore, to encourage increased trade in New Zealand, improvement in the efficiency of dispute resolution is necessitated.

International commercial arbitration is often purported to be a more efficient means of international dispute resolution. It is defined as a:¹⁶

... process by which parties consensually submit a dispute to a non-governmental decision-maker ... who renders a binding resolution finally resolving the dispute in accordance with neutral, adjudicative procedures affording the parties an opportunity to be heard.

The United States Supreme Court believes when parties choose arbitration over litigation they trade “the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”.¹⁷ International commercial arbitration is arguably afflicted with fewer disadvantages than international litigation.¹⁸ The commonly asserted advantages are the neutrality and expertise of the arbitrators; flexibility of procedure; enforceability of awards and decisions; privacy and confidentiality of hearings; limitations upon appeal; and, potentially, the speed and cost of hearings.¹⁹ Nearly all decisions are enforceable through the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958.²⁰ Whilst there has been relatively little international commercial arbitration involving New Zealand parties, New Zealand has been receptive to international arbitration and maintains a progressive approach to arbitration laws.²¹

¹⁵ Fiske, above n 13, at 457.

¹⁶ Gary Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2014) Vol 1 at 291.

¹⁷ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1984) at 628.

¹⁸ Born, above n 16, vol 1 at 73.

¹⁹ Paul Friedland *Arbitration Clauses for International Contracts* (2nd ed, Juris, Huntington, 2007) at 9-13.

²⁰ See The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38 (Opened for Signature 10 June 1958, entered into force 7 June 1959).

²¹ Simon Greenberg, Sally Fitzgerald and Bjorn Gehle “International Commercial Arbitration in Australia, New Zealand and the Pacific Islands” in Horacio Grigeria Naon and Paul Mason *International Commercial Arbitration: 21st Century Perspectives* (eBook ed, 2015) ch 15 at 15.04.

A *The Bilateral Arbitration Treaty*

Much expense may be wasted on litigation in a number of different jurisdictions ... There is however no international regime designed to produce uniformity of jurisdiction and governing law in the case of a multiplicity of claims.²²

The BAT proposes to increase access to justice for international commercial transactions by ensuring the enforcement of international commercial contracts, which is essential to support growth and efficiency in an economy.²³ It would promulgate international commercial arbitration as the default mechanism for the resolution of international business-to-business disputes. Thus its intention is to advance more effective and efficient default dispute resolution, which would potentially increase trade and business growth. It builds on the successful use of Bilateral Investment Treaties (BITs) for the past half century.²⁴ A BAT would enable the quick, expert and flexible resolution of international disputes and reduce uncertainty for businesses.²⁵

Under a BAT, parties would be free to opt out of its terms by choosing an alternative dispute resolution mechanism in their contract; prescribing a different arbitration procedure; or by expressly excluding the terms of the treaty.²⁶ Thus freedom to contract and party autonomy remain intact.²⁷ A BAT would prescribe the factors ordinarily found in an arbitration agreement: the applicable arbitration rules, the number of arbitrators and the appointing mechanism.²⁸ States would be free to select the rules and procedures to include, and arbitral awards would be directly enforceable.²⁹ A regional treaty could also be formed as a Multilateral Arbitration Treaty (MAT), or it could be incorporated into a general trade agreement.³⁰

²² *The Pioneer Container* [1994] 2 AC 324 (PC) at 334B per Lord Goff of Chiveley.

²³ Inessa Love *Settling Out of Court: How Effective is Alternative Dispute Resolution* (World Bank, 2011) at 1.

²⁴ Gary Born “BITs, BATS and Buts” (paper presented to Kiev Arbitration Days, Kiev, 15 November 2012) at 4.

²⁵ Butler and Herbert, above n 11, at 190; New Zealand Law Society, above n 1; Born, above n 1.

²⁶ Born, above n 24, at 5.

²⁷ Born, above n 1.

²⁸ Butler and Herbert, above n 11, at 190.

²⁹ (Draft) Model Bilateral Arbitration Treaty, art 5; Gary Born “BITs, BATs and Buts – Reflections on International Arbitration” (University of Pennsylvania Law School, Pennsylvania, 28 April 2014).

³⁰ Born, above n 24, at 7.

This paper reflects on the worth of a BAT in the New Zealand environment. In particular, it reassesses the BAT with regards to issues identified by new research. These potential impediments include the expense, cost and confidentiality of arbitral proceedings. Empirical research has raised the issues regarding the expense and length of arbitral proceedings as prima facie conflicting with s 27 of the New Zealand Bill of Rights Act 1990 (BORA).³¹ The confidentiality provision incorporated into the (Draft) Model BAT further raises an issue with s 14 of BORA as it prohibits the right to a public hearing.³² This paper examines these issues and analyses whether they can be allayed through measures capable of incorporation into the BAT.

II Cost and Time Length of Arbitral Proceedings

The BAT poses a prima facie breach of s 27 of BORA and the right to access courts, which has been codified in most human rights instruments.³³ Not only is the direct right to access impinged by the BAT but, if BAT arbitration exceeds the cost of default litigation, it impacts access to justice in a more general sense, and in particular for SMEs with fewer resources. The cost and time length associated with international commercial arbitration was once one of the core advantages of this method vis-à-vis litigation. However, this perspective has now changed and neither method can definitively assert these factors as benefits. Therefore, the following will comprise a discussion of the issues; compatibility with BORA; and potential remedies.

A Costs of Arbitration

Business enterprises of every description can find themselves entangled in legal proceedings with foreign companies ... The costs of these proceedings, and the consequences of losing, are often substantial.³⁴

³¹ See Chris Nixon and Georgia Whelan *Evaluating the Proposed Bilateral Arbitration Treaty* (NZIER, February 2016) and Hanneke van Oeveren “‘It hurts my head to think about it’ – SMEs and the Legal Framework for International Commercial Contracts” (LLB(Hons) Dissertation, Victoria University of Wellington, 2016).

³² (Draft) Model Bilateral Arbitration Treaty 2012, art 4(2).

³³ See generally International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.1.

³⁴ Gary Born *International Arbitration and Forum Selection Agreements* (3rd ed, Walter Kluwer Law & Business, Alphen aan den Rijn, 2010) at 1.

Arbitration is a private means of dispute resolution, normally agreed to by the contracting parties. It is thus not inconceivable it would be a more expensive alternative to state-funded litigation. Originally, however, the cost of international commercial arbitration was perceived to be an advantage over international litigation.³⁵ In recent years, this perspective has changed. The 2008 and 2013 Queen Mary surveys found the length of time and costs of international commercial arbitration are concerning disadvantages.³⁶ The cost of arbitration is now seen as its worst feature.³⁷

International commercial arbitration entails a multitude of costs that do not exist in litigation. The parties are required to pay the fees and expenses of the arbitrator(s) and the arbitral institution. There may also be an administrative assistant or secretary who requires payment.³⁸ Likewise, logistical expenses such as renting rooms, travel and accommodation need to be accounted for. In addition, the fees and expenses of parties' legal advisors and expert witnesses require payment. According to the International Chamber of Commerce (ICC), party costs comprise the majority of costs arising from arbitral proceedings at 83 per cent on average.³⁹

Nonetheless, there are serious concerns over the cost of litigation. A survey conducted in New Zealand showed respondents were concerned with the affordability of legal services and answered whether the average New Zealander could afford to go to court in the negative.⁴⁰ Anecdotal evidence suggests a domestic trial in New Zealand can cost upwards of \$100,000.⁴¹ No respondent believed the court system in New Zealand operates in a cost-

³⁵ Nigel Blackaby and others *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, Oxford, 2015) at 36.

³⁶ Queen Mary University of London School of International Arbitration *International Arbitration: Corporate Attitudes and Practices 2008* (PricewaterhouseCoopers, 2008) at 2.

³⁷ Queen Mary University of London School of International Arbitration *International Arbitration Survey: Improvements and Innovations in International Arbitration* (White & Case, 2015) at 7.

³⁸ Blackaby and others, above n 35, at 36.

³⁹ International Chamber of Commerce *ICC Commission Report: Decisions on Costs in International Arbitration* (2015) at 3.

⁴⁰ Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12 Otago LR 329 at 336.

⁴¹ Butler and Herbert, above n 11, at 197.

effective manner.⁴² The respondents noted lawyers' costs are too expensive and there needs to be a change of conduct.⁴³

These concerns would only be exacerbated with the addition of international parties to the dispute. Expenditure in national court litigation may far exceed arbitral proceedings given the risk of parallel or multiplicitous proceedings and the potential for lengthy appeal.⁴⁴ International disputes are not subject to, albeit with some exceptions, a comprehensive body of law for use in determining the dispute. Instead, resolution of the dispute becomes subject to national law in whichever state claims jurisdiction.⁴⁵ Thus claims may be made in the place of contracting, the place of performance and the jurisdiction of each party. This requires parties to engage more resources to familiarise themselves with multiple jurisdictions and employ further legal counsel.

Comparatively, arbitration has less formality requirements. It has no restrictions on the appearance of legal counsel from jurisdictions outside of the seat of arbitration.⁴⁶ However, ultimately, both forms of international dispute resolution necessitate significant expenditure. It is the nature of the dispute which dictates the expense required, not necessarily the method elected for its resolution. The BAT would, at the very least, reduce the cost of international commercial arbitration given there would be no need to negotiate an arbitration agreement.⁴⁷ It would dictate the procedure for commencing proceedings. Moreover, it removes the risk of multiplicitous proceedings.

B Time Length of Arbitration

International commercial arbitration ordinarily requires between 18 and 36 months for the final award to be reached.⁴⁸ As arbitrators are likely to have other professional commitments, delays in arbitral proceedings are not uncommon.⁴⁹ Due to this risk, some

⁴² Righarts and Henaghan, above n 40, at 341.

⁴³ At 340.

⁴⁴ Blackaby and others, above n 35, at 37; Born, above n 16, vol 1 at 87.

⁴⁵ Butler and Herbert, above n 11, at 198.

⁴⁶ At 203.

⁴⁷ Bruno Gaundalini "Bilateral Arbitration Treaties and Efficiency: a New Proposal on and an Old Challenge to International Commercial Arbitration" 10 *Revista Brasileira De Arbitragem* 16 at 18.

⁴⁸ Born, above n 16, vol 1 at 88; see also Chartered Institute of Arbitrators *Costs of International Arbitration Survey* (2011) at 1.

⁴⁹ Blackaby and others, above n 35, at 37.

arbitral institutions require arbitrators to declare their availability and to conduct a procedural conference to mitigate superfluous expense and delays.⁵⁰

Disputes subject to national court regimes may also face lengthy delays due to the incapacity of the courts to manage excessive caseloads.⁵¹ The possibility of appellate review and new trial proceedings risks lengthening this period.⁵² Stringent procedural requirements can contribute to this delay. There is concern over delays in civil litigation in New Zealand as it is uncommon for civil proceedings to be heard within a year of filing.⁵³ In a survey of domestic litigation, no respondent believed the court system operates efficiently.⁵⁴ This causes uncertainty for parties and contributes to a greater quantum of costs; not only due to the cost of proceedings but also the impact on businesses and individuals.⁵⁵ However, New Zealand litigation does not raise the same level of concern evident in alternative jurisdictions.⁵⁶

Ultimately, it is impossible to decree which method of dispute resolution faces less costs and faster resolution of disputes.⁵⁷ Both methods can engender substantial expense and delay.⁵⁸ It is particularly important to recognise that fast and cheap resolution of disputes does not necessarily advance effective dispute resolution or superior access to justice.⁵⁹ Moreover, whilst the method of dispute resolution is important, the behaviour of legal counsel can contribute to the length and cost of dispute settlement.⁶⁰

⁵⁰ At 37; International Chamber of Commerce, Rules of Arbitration 2012, art 11(2).

⁵¹ Born, above n 16, vol 1 at 88.

⁵² Born, above n 34, at 7.

⁵³ John Hansen “Courts, Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View” (2006) 11 Otago LR 351 at 357 and see Saskia Righarts and Mark Henaghan “Delays in the New Zealand Civil Justice System? Opinion v fact” (2011) 12 Otago LR 455.

⁵⁴ Righarts and Henaghan, above n 40, at 341.

⁵⁵ Hansen, above n 53, at 357.

⁵⁶ See generally The Right Honourable Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HSMO, July 1996).

⁵⁷ Born, above n 16, vol 1 at 88.

⁵⁸ At 87.

⁵⁹ Blackaby and others, above n 35, at 37.

⁶⁰ Hansen, above n 53, at 366.

C Principles of Natural Justice

The speed and cost concerns relating to international commercial arbitration raise an issue with s 27 of BORA:

27 Right to Justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

The potential issue with s 27 in a broad sense (access to justice and access to effective justice) has already been thoroughly canvassed, along with the compliance with s 27(2) and the right to judicial review.⁶¹ Thus the following section assesses the BAT and its compliance with principles of natural justice as per s 27(1), as businesses may be forced to consider alternatives to BAT dispute resolution to minimise costs.

1 Applicability of the BAT to BORA

BORA applies to acts done by the “legislative, executive, or judicial branches of the Government”.⁶² It is important to assess the BAT’s BORA compliance due to the significant impact it could have on business conduct and trade. The threshold in s 3 of the Act is met as BORA has already been deemed to apply to arbitrators as they hold a quasi-judicial function.⁶³ Furthermore, businesses subject to the terms of a BAT for international commercial dispute resolution would be able to bring a claim as per s 29, which deems BORA to apply, as far as practicable, to legal persons.⁶⁴

An arbitral tribunal established via the mechanism provided for in the BAT would constitute a tribunal for the purposes of s 27. A “tribunal” in s 27(1), broadly interpreted as necessitated by *Ministry of Transport v Noort*, encompasses any body established by law making a determination as to a “person’s rights, obligations, or interests protected or

⁶¹ See Butler and Herbert, above n 11.

⁶² New Zealand Bill of Rights Act 1990, s 3.

⁶³ *Jivray v Hashwani* [2011] UKSC 40, [2011] WLR 1872 at [41] per Clarke LJ.

⁶⁴ New Zealand Bill of Rights Act 1990, s 29.

recognised by law”.⁶⁵ Additionally, “determination” has an “adjudicative sense”.⁶⁶ A BAT tribunal would have been established by law and is given the jurisdiction to make determinations on the obligations of the parties arising from their contracts. Thus, BORA applies to any arbitral tribunal established by the BAT.

2 *Scope and application of section 27(1)*

Section 27(1) was enacted based on article 14.1 of the International Covenant on Civil and Political Rights (ICCPR); guaranteeing everyone the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law”.⁶⁷ Whilst the section does not specifically state the right of access to a court or tribunal, it does require these bodies to act in accordance with procedural requirements considered fundamental to the rule of law.⁶⁸ The Court of Appeal has held s 27 is not restricted by the ICCPR and nor is it restricted to a specific class of natural justice rights.⁶⁹ Instead, the section enshrines the full array of pre-existing rights pertaining to natural justice.⁷⁰ Therefore, the right is given a generous interpretation.⁷¹

Section 27 incorporates two key principles: the opportunity to be heard and the requirement of an impartial decision-maker.⁷² Natural justice principles have been held to be (but not limited to): rights to notice, to contradict, to representation, to an impartial determination, to an oral hearing, and to consultation in advance.⁷³ In *Bellet v France* the European Court of Human Rights held that for the right of access to justice to be effective an individual must “have a clear, practical opportunity to challenge an act that is an interference with his rights”.⁷⁴

⁶⁵ *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 278; New Zealand Bill of Rights Act 1990, s 27(1).

⁶⁶ *Chilsholm v Auckland City Council* (CA 32/02, 29 November 2002).

⁶⁷ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1479; International Covenant on Civil and Political Rights, above n 33, art 14.1.

⁶⁸ Butler and Herbert, above n 11, at 207.

⁶⁹ *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 (CA) at [21].

⁷⁰ Butler and Butler, above n 67, at 1481.

⁷¹ Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act* (2004) at 436.

⁷² *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 69, at [11].

⁷³ Butler and Butler, above n 67, at 1485.

⁷⁴ *Bellet v France* (1995) 29 EHRR 591 (ECHR) at [36].

Fisher J in *Methanex Motunui Ltd v Spellman* observed that “[a]rbitration is a process by which a dispute is determined according to enforceable standards of natural justice.”⁷⁵ Moreover, the United Nations Commission on International Trade Law (UNCITRAL) Rules, as employed by the draft BAT, affirm that proceedings should be conducted so “as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”.⁷⁶ Nonetheless, the issues with time and cost may be at odds with the natural justice requirements of an arbitral tribunal. The speed and cost associated with arbitration depends upon the efficiency of the arbitrators, parties and counsel, and also the national court system the proceedings are compared to.⁷⁷ In relatively efficient jurisdictions, such as New Zealand, the distinction between the two methods of dispute resolution would be minimal. The reduced right to appeal can also reduce the time length and cost of arbitration, as compared to litigation.⁷⁸

The time and cost of arbitration may hinder access to justice as it places dispute resolution out of reach for firms with fewer resources. This is particularly pertinent for SMEs with managerial and budget constraints, as compared to larger firms with a multitude of personnel and resources.⁷⁹ If these businesses are required to go through arbitration as the default for the resolution of their dispute, they may choose to discount the dispute to avoid the cost. Ad hoc arrangements in the form of varying business structures, such as acting on a transactional basis, may instead be used to minimise risk. Thus, access to justice for these firms may be unattainable and their right under s 27(1) breached.

3 Justifiable limit

Section 5 of BORA allows justified limitations of the rights contained within the Act. Tipping J in *R v Hansen* set out the test to determine whether the limit to s 27(1) is justifiable as per s 5:⁸⁰

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b) (i) is the limiting measure rationally connected with its purpose?

⁷⁵ *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 (HC) at [50].

⁷⁶ United Nations Commission on International Trade Law GA Res 68/109, A/68/462 (2013) art 17(1).

⁷⁷ Friedland, above n 19, at 8.

⁷⁸ At 16.

⁷⁹ van Oeveren, above n 31, at 28.

⁸⁰ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

- (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
- (iii) is the limit in due proportion to the importance of the objective?

The purpose of the BAT is to promote international trade and investment, and fairness in dispute resolution. By providing a more efficient default dispute resolution mechanism, it aims to foster cross-border trade. Litigation raises insurmountable concerns with regards to the time length of proceedings and the potential for this to be extended across jurisdictions and appeals. Default arbitration would reduce this risk by streamlining the dispute and ensuring certainty for the parties. This limitation is sufficiently important to pose a potential curtailment of the right under s 27(1).⁸¹

The limitation, by providing for default international commercial arbitration as opposed to international litigation, is rationally connected to the purpose of supporting international trade. It improves the certainty with which firms can operate, knowing that a default system exists for them to fall back on should the transaction sour. It is arguable the provision for default arbitration improves access to justice for firms.⁸² Therefore, in light of the uncertainty as to which method of dispute resolution is less costly for firms, the limit is a justifiable impairment of s 27(1) when compared with default litigation.⁸³ Resorting to default arbitration, for the purposes of increasing international trade in support of the government's aim, does not unreasonably infringe on the principles of natural justice codified by s 27(1).⁸⁴

D Remedies

Whilst the conclusion above suggests there is no superfluous impediment to party rights under s 27(1) of BORA, this does not mean the potential defects to the BAT do not require attending to. The BAT, in its current draft format, is not unamendable. A longstanding advantage of international commercial arbitration is procedural flexibility. Contracting states are free to incorporate extra articles or adopt alternative arbitral institutions or rules to suit their requirements.

⁸¹ At [121]: this is a mere threshold test.

⁸² See Butler and Herbert, above n 11.

⁸³ *R v Hansen*, above n 80, at [121]: this is a mere threshold test.

⁸⁴ Especially given Fisher J's conclusion in *Methanex Motonui Ltd v Spellman*, above n 75, and the deference given to Parliament for political and economic decisions; *R v Hansen*, above n 80, at [116].

The following is a list of potential remedies that could be incorporated to ensure the efficiency of dispute resolution under a BAT. It is not intended to be exhaustive. These procedures could reduce the time and cost required of parties. Arbitration could thus become the cheaper and more expedient method of international commercial dispute resolution. The importance of these to SMEs who, generally, have fewer resources at their disposal than larger firms, cannot be overstated. Nonetheless, it is imperative to recall that the time taken and cost required for the resolution of a dispute depends primarily on the nature of the dispute.

1 Sole arbitrator

In typical international commercial arbitrations, three arbitrators are appointed. It is common for each party to elect one arbitrator, who then appoints the third. This ensures the neutrality of the arbitrators and the final award. The alternative is to appoint a sole arbitrator with the purpose of facilitating the expediency of the decision and award. In a tribunal of three arbitrators, all three need to agree or reach a majority on the decision.⁸⁵ The negotiation period after the dispute hearing can thus be exaggerated through lack of consensus.

The draft BAT states that a sole arbitrator will be utilised and appointed by the Secretary-General of the Permanent Court of Arbitration (PCA).⁸⁶ These elements may be adapted by contracting parties. However, by placing the decision in hands other than those of the parties, it further ensures the neutrality of the decision. The appointment of a sole arbitrator, subject to exceptional cases where the Secretary-General of the PCA decides three arbitrators would be appropriate, will expedite the arbitral proceedings. The place of the arbitration could be more easily agreed upon and the parties would need only bear the expenses of one arbitrator.⁸⁷ Whilst this has already been incorporated into the BAT, it signals a different approach to traditional arbitrator appointments, thus serving to mitigate the risks identified above.

2 Expedited proceedings

An increasingly popular approach is the use of expedited or “fast-track” proceedings. These require the arbitrator to conduct the hearing and/or render the final award within a specified

⁸⁵ Blackaby and others, above n 35, at 237.

⁸⁶ (Draft) Model Bilateral Arbitration Treaty 2012, art 4(1).

⁸⁷ Blackaby and others, above n 35, at 237.

period of time.⁸⁸ The procedure was introduced due to concerns over lengthy delays.⁸⁹ It typically entails the simplification of procedure, the exclusion of some practices and a time limit for the publication of the final award.⁹⁰ If the deadline is not met there is a risk the validity of the award may be challenged.⁹¹ The use of an abbreviated time period would clearly reduce some of the disadvantages of arbitration. If arbitral proceedings are handled efficiently, it is plausible the costs borne by the parties will be reduced.⁹²

The UNCITRAL Rules, the use of which has been proposed by the draft BAT, do not contain a clause pertaining to time limits. However, a number of national and institutional rules, as well as arbitration agreements, often prescribe time limit requirements for making an award.⁹³ The Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016 include an extensive expedited procedure clause. Article 5 of the Rules provide that, if the value of the dispute is under the equivalent of S\$6,000,000, parties may apply for an expedited procedure.⁹⁴ An expedited procedure requires a sole arbitrator, time limits, reduction of evidence and the final award to be made in six months from the date of constitution of the tribunal.⁹⁵ In exceptional circumstances, any of the above measures may be changed. As at 31 December 2015, SIAC had received a total of 231 applications for fast-track arbitration, of which 140 were accepted.⁹⁶ The mechanism was introduced in July 2010.⁹⁷

The draft BAT does modify the UNCITRAL Rules as article 4(1)(f) provides that awards should be made no more than eighteen months following the constitution of the arbitral tribunal. This does not go far enough. This author proposes there should be the inclusion of an expedited proceedings clause requiring a six-month deadline for the rendering of the

⁸⁸ Born, above n 16, vol 2 at 212.

⁸⁹ Blackaby and others, above n 35, at 361.

⁹⁰ At 363.

⁹¹ Born, above n 34, at 95.

⁹² Eva Muller "Fast-Track Arbitration: Meeting the Demands of the Next Millennium" (1998) 15 J Int'l Arb 5 at 15.

⁹³ See International Chamber of Commerce, Rules of Arbitration 2012, art 30(1); Stockholm Chamber of Commerce, Arbitration Rules 2010, art 37.

⁹⁴ Singapore International Arbitration Centre, Arbitration Rules 2016, art 5.1.

⁹⁵ Art 5.2.

⁹⁶ Singapore International Arbitration Centre *SIAC Annual Report 2015* (2015) at 18.

⁹⁷ At 18.

final award in line with the SIAC approach. Whilst article 7(1)(d) dictates that failure to adhere to the procedures prescribed by Article 4 may provide a ground for recognition and enforcement of the award to be refused, the disadvantage wrought by this risk is outweighed by the benefits in increasing efficiency and reducing costs.⁹⁸

The opportunity for expedited proceedings, upon application by the parties, would serve to reduce the expenditure required. However, the impact on legal costs is less easy to predict, and there is a further risk that needs noting: the use of expedited proceedings could potentially compromise the quality or effectiveness of the dispute resolution. There is already a concern that unreasonable constraints are being imposed on arbitrators and counsel.⁹⁹ However, to businesses, the reduction of costs may be sufficient to counter these potential drawbacks.

3 Limited application

Given the preponderance of firms in New Zealand are SMEs not heavily engaged in international trade, it would be wise to exclude certain disputes from the scope of the BAT.¹⁰⁰ The draft includes the definition of an international commercial dispute and thereby excludes, as a perfunctory list that may be elaborated upon by contracting states, certain disputes from the ambit of the BAT.¹⁰¹ As an extension of this, it would perhaps be pertinent to exclude disputes involving an amount under a certain threshold. For firms with disputes under the specified amount, default international commercial arbitration may not necessarily provide them with effective access to justice. Moreover, it is entirely feasible international litigation would also be excessive for these firms and they would perhaps be better to apply less adversarial methods or alternative arrangements.¹⁰²

4 Fee structure

The most efficient method to reduce costs would be the inclusion of a fee structure to determine the costs to be borne by both parties at the outset of the dispute, regardless of

⁹⁸ The use of this provision could lead to litigation, adding to the costs of the parties.

⁹⁹ Born, above n 34, at 95.

¹⁰⁰ See generally Gary Born, Chris Nixon, Hanneke van Oeveren and Georgia Whelan “Bilateral Arbitration Treaty Regime – Access to Justice for Small and Medium Sized Business: An Economic Analysis” (Victoria University of Wellington, Wellington, 2 March 2016).

¹⁰¹ (Draft) Model Bilateral Arbitration Treaty 2012, art 1.

¹⁰² However, in the international realm even the less adversarial methods can result in significant costs.

the length of the arbitration. The cost would be determined by the value in dispute. A fee structure would be applicable to the BAT as a state-mandated form of dispute resolution which has adopted the principles of international commercial arbitration.¹⁰³ The power vested in an arbitral tribunal under a BAT derives from the state; as does the power vested in the courts.¹⁰⁴ Therefore, given its role as a treaty, it could incorporate a fee structure to determine the costs of the arbitral tribunal and the fees to be paid to lawyers. This would present a significant reduction in costs assumed by the parties and ensure consistency in disputes resolved by the BAT.

An integrated fee structure has not been adopted by arbitral institutions because of the implications for party and state autonomy. Arbitral institutions are merely private bodies providing a service, subject to a fee which cost calculators can be used to determine.¹⁰⁵ Consequently, legal counsel costs are subject to the relevant fees of the lawyers hired. These costs are not insignificant, especially when combined with the arbitrator fees.¹⁰⁶ Therefore, the efforts employed by arbitral institutions to reduce their own costs may not be effective vis-à-vis a lack of change in the fees charged by lawyers.¹⁰⁷

A more efficient option is the German approach to the determination of costs for its domestic litigation system, which could be readily incorporated into the terms of the BAT.¹⁰⁸ From the outset, all the costs to be borne by the parties are established through statute and are primarily based on the value of the claim. The fee received by the court is calculated by the value of the claim and, for civil cases, it is determined by the Gerichtskostengesetz (Court Costs Act) 2004.¹⁰⁹ The court fees, for civil claims, are paid

¹⁰³ Asher Emanuel “The Constitutionality of Default Arbitration” (LLB(Hons) Dissertation, Victoria University of Wellington, 2015) at 4.

¹⁰⁴ At 3.

¹⁰⁵ See generally the International Chamber of Commerce, Singapore International Arbitration Centre and Stockholm Chamber of Commerce websites.

¹⁰⁶ See the London Court of International Arbitration 2014, Schedule of Costs at 2(i); Singapore International Arbitration Centre “Schedule of Fees” (1 August 2016) <www.siac.org.sg>.

¹⁰⁷ In New Zealand, lawyers must charge a fee that is fair and reasonable; see Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

¹⁰⁸ See DeutscherAnwaltVerein “DAV-Prozesskostenrechner” (2013) <anwaltverein.de>.

¹⁰⁹ Gerichtskostengesetz (Court Costs Act) 2004, annex 1 and 2; E-Justice “Cost of court proceedings – Germany” (10 April 2013) <<https://e-justice.europa.eu/>>.

when the action is brought or the application filed.¹¹⁰ This system was introduced to preserve the integrity of the court system and discourage unmeritorious claims.¹¹¹ Subsequently, litigation costs are not considered a barrier to accessing justice in Germany.¹¹²

German lawyers are not remunerated for the time spent on a case, but instead are paid a fee provided by the *Rechtsanwaltsvergütungsgesetz* (Lawyer's Remuneration Act) 2004 or by alternative agreement on higher compensation.¹¹³ In each case, the appropriate fee from the prescribed range must be determined by taking into account all the circumstances. This includes the breadth of work involved, the importance of the case, the financial circumstances of the parties, and the risk of liability incurred by the lawyer.¹¹⁴ The German approach to litigation means lawyers have an incentive to avoid lengthy trials, as they are paid an extra fee for settling the dispute.¹¹⁵ This is inapposite to the traditional common law approach whereby lawyers are paid based on time spent on the claim.¹¹⁶

Lawyers in Germany are thereby prevented from setting exorbitant representation fees. Recalling that the ICC has determined that 83 per cent of the costs of arbitration arise from the party costs, this would represent a significant reduction in the total costs faced by businesses.¹¹⁷ The standardisation of costs would ensure the accessibility of BAT dispute resolution for all firms. However, by permitting businesses to set higher remuneration for legal counsel, party autonomy would not be impaired. Overall, a fee structure would enhance the achievement of the principal aim of the BAT: the provision of more efficient dispute resolution to encourage increased cross-border trade.

¹¹⁰ E-Justice, above n 109.

¹¹¹ Burkhard Hess and Rudolf Heubner *Cost and Fee Allocation in Civil Procedure: National Report for Germany* (International Academy of Comparative Law, 2010 (preliminary version)) at 8.

¹¹² At 16.

¹¹³ *Rechtsanwaltsvergütungsgesetz* (Lawyer's Remuneration Act) 2004, annex 1 and 2; E-Justice, above n 109.

¹¹⁴ E-Justice, above n 109.

¹¹⁵ Gerhard Dannemann "Access to Justice: an Anglo-German Comparison" (1996) 2 *European Public Law* 271 at 281.

¹¹⁶ Arbitration is better understood as a hybrid of both approaches.

¹¹⁷ International Chamber of Commerce, above n 39, at 3.

E Summary

The SIAC Arbitration Rules, as an example, include ensuring that the dispute is resolved in an appropriate manner, through cooperation with the parties, to ensure the fair, economical, timely and final resolution of the dispute.¹¹⁸ The BAT would benefit from the inclusion of such a clause, to highlight the purpose of its existence. However, the successfulness of these principles is dependent on the nature of the dispute at hand.¹¹⁹

There is, of course, no ideal period within which all arbitrations should be completed ... Everything depends on the nature, subject-matter, complexity and scope of the disputes, and whether the parties have a common interest in reaching an early resolution of their disputes.

The length of arbitral proceedings and costs incurred are potential deterrents to the use of international commercial arbitration for resolution of disputes. International litigation suffers from more ills as the rigid structure of national court systems and the potential for ongoing appeals inhibits the potential for parties to enforce the efficient and timely resolution of their dispute. The cost of litigation excludes a section of society from accessing justice.¹²⁰ This is, in a large part, contributed to by the behaviour of lawyers;¹²¹ a significant proportion of their fees arise from litigation.¹²²

Comparatively, arbitration upholds party autonomy and is an inherently flexible method of dispute resolution. As the BAT stands, there is sufficient access to effective justice as per s 27(1) of BORA. However, there are alternative methods that could be incorporated to reduce its potential defects. The elision of an expedited procedure option and a fee structure to the BAT should be done, as the complementarity of these would reduce the cost and time length of arbitral proceedings. The minimum cost, as calculated by a fee structure, would indicate where disputes of a lesser value should be excluded from BAT dispute resolution.

¹¹⁸ Singapore International Arbitration Centre, Arbitration Rules 2016, art 19.1.

¹¹⁹ Jean Rouche, Gerald H. Pointon, Jean-Louis Devolvé *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2009) at 175.

¹²⁰ Hansen, above n 53, at 354.

¹²¹ Righarts and Henaghan, above n 53, at 466.

¹²² See The University of Waikato and the Institute for Business Research *Law Firm Practice and Comparison 2013* (2013).

Nonetheless, the concern of this section has been the access to principles of natural justice for SMEs. There is a concern that whilst the affordability for SMEs is increased by adopting these mechanisms into the treaty (and improve access to justice on that front), it may lead to the employment, or sole availability, of inexperienced arbitrators and legal counsel. Experienced arbitrators and lawyers could refuse to participate in BAT procedures in favour of more lucrative job opportunities. This could have the effect of a reduction in justice for businesses or a lower quality form of access to justice. It is important to balance speed and justice; the requirement for timely dispute resolution must not impact on the right of parties to present their case and on the tribunal's right to consider the case fully.¹²³ Speedier dispute resolution necessarily requires the sacrifice of some elements to the procedure.¹²⁴ The parties must address, for themselves, the dichotomy of paying for effective dispute resolution via the BAT and the possibility of being sued successfully in a foreign jurisdiction and risking bankruptcy. This is not something the BAT could redress unilaterally.

III Confidentiality of Arbitral Proceedings

The privacy and confidentiality of arbitral proceedings is often upheld as one of the primary benefits arising from arbitration.¹²⁵ Privacy is an integral part of arbitration as it closes arbitral proceedings from third parties and the public.¹²⁶ Confidentiality relates to obligations on the parties to not disclose documents to third parties.¹²⁷ Thus, confidentiality is an extra layer to privacy, as it involves ongoing secrecy on behalf of the parties to the dispute.¹²⁸ However, it is inapposite to principle of open justice. It is this conflict which will be analysed in this section.

Primarily, confidentiality and privacy requirements seek to prevent “trial by press release” and enforce a business-like resolution of disagreements:¹²⁹

¹²³ Muller, above n 92, at 6.

¹²⁴ At 8.

¹²⁵ Queen Mary University of London School of International Arbitration, above n 37, at 6.

¹²⁶ Born, above n 16, vol 2 at 2782.

¹²⁷ At 2782; Kyriaki Noussia *Confidentiality in International Commercial Arbitration* (Springer, Heidelberg, 2010) at 1.

¹²⁸ At 26.

¹²⁹ Born, above n 16, vol 1 at 89; vol 2 at 2781.

... confidentiality is perceived as encouraging efficient, dispassionate dispute resolution ... reducing the risks of damaging disclosure of commercially-sensitive information ... and facilitating settlement by minimising the role of public posturing.

It allows parties to air their grievances without fear of public retaliation and to protect their financial circumstances and trade secrets from exposure to the public.¹³⁰ The confidentiality factor can be decisive for firms choosing between international commercial arbitration and litigation, where a business has good reason to withhold certain information from the public or interested third parties.¹³¹ In practice, however, underlying information may become public.¹³² Given the reasons for confidentiality and the emphasis placed on it when agreeing to arbitrate, it is not feasible to suggest confidentiality is not an essential component of international commercial arbitration.¹³³

There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case.¹³⁴ In a number of jurisdictions, confidentiality is treated as an implied duty upon the parties, whilst other institutional arbitration rules expressly provide for the confidentiality of documents. However, there are a number of exceptions to this. In some circumstances, the award may be made public, either through litigation concerning to its enforcement or for precedential use.¹³⁵ As a general rule, arbitral awards have less of an expectation of confidentiality, however this does not diminish the confidentiality of documents relating to the proceedings.¹³⁶ The lack of consensus as to the status of confidentiality in international commercial arbitration requires consideration, particularly given its potential incorporation into the BAT. Therefore, the following discusses whether it is appropriate for the New Zealand context.

¹³⁰ Blackaby and others, above n 35, at 134.

¹³¹ Friedland, above n 19, at 22.

¹³² Noussia, above n 127, at 26.

¹³³ Serge Lazareff “Confidentiality and Arbitration: Theoretical and Philosophical Reflections” [2009] ICC Ct Bull Supp 81 at 81.

¹³⁴ Michael Hwang and Katie Chung “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26 J Int’l Arb 609 at 629.

¹³⁵ Born, above n 16, vol 1 at 90; Blackaby and others, above n 35, at 133.

¹³⁶ Born, above n 16, vol 2 at 2820.

A Approach in Other Jurisdictions

The British Arbitration Act 1996 does not refer to an obligation of confidentiality on the parties. However, this was merely because of the perceived difficulty of drafting a sufficient formulation, given the many exceptions and qualifications that would need to be included.¹³⁷ Thus, the Departmental Advisory Committee decided the obligation should be left to the courts to develop.¹³⁸ The courts have accepted an implied obligation of confidentiality arising in arbitration.¹³⁹ *Russell v Russell* accepted that one of the principal reasons for parties to choose arbitration was “with an express view of keeping their quarrels from the public eye”.¹⁴⁰ A similar approach has been adopted in Singapore which accepts the existence of an implied duty but will impose such a duty only to the extent it is reasonable to do so.¹⁴¹ Furthermore, the Singapore International Arbitration Act 2012 allows parties to request Singaporean court proceedings relating to international arbitration to remain confidential.¹⁴²

The High Court of Australia declined to follow the United Kingdom in *Esso Australian Resources Ltd v Plowman* in 1996.¹⁴³ The Court held that confidentiality was not an essential attribute of arbitration on the basis that there were too many exceptions to the rule for it to be viable. Moreover, the Court found that the presumed privacy of arbitral hearings did not require confidentiality to be upheld. However, this case pertained to domestic considerations and therefore it is less clear what the Court would hold with respect to international arbitrations.¹⁴⁴

Thus there is a dichotomy of approaches between the two foremost jurisdictions New Zealand tends to look to in reforming the law. Moreover, there is a recent trend whereby

¹³⁷ Noussia, above n 127, at 9.

¹³⁸ At 9.

¹³⁹ *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA) at 1213. See also *Ali Shipping Co Ltd v ‘Shipyard Trogir’* [1999] 1 WLR 314 (CA); *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd’s Rep 243 (QB); and *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

¹⁴⁰ *Russell v Russell* (1880) LR 14 Ch D 471 at 474.

¹⁴¹ *Myanma Young Chi Oo Co v Win Nu* [2003] 2 SLR 547 (Singapore High Court) at [17] and [19].

¹⁴² International Arbitration Act 2012, ss 22 and 23 (Singapore).

¹⁴³ *Esso Australian Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 (HCA) at 401-402.

¹⁴⁴ Born, above n 16, vol 2 at 2818.

international arbitrations in which there is a legitimate public interest are being held in public.¹⁴⁵

B New Zealand Approach

New Zealand's approach to confidentiality is "the most promising attempt" to completely codify the duty.¹⁴⁶ The approach adopted in 1996 for domestic arbitrations was in direct retaliation to the High Court of Australia decision in *Esso*.¹⁴⁷ The Government Administration Committee noted:¹⁴⁸

... the privacy of the proceedings in an arbitration is a key advantage compared with litigation that is conducted in public. In selecting arbitration as their way of resolving disputes, parties would not contemplate that one of them might publicise or pass on information given in the course of the arbitration because such conduct would negate some of the advantages derived from arbitrating.

In 2007, the Arbitration Act was amended and the confidentiality sections were clarified. None of the parliamentary debates highlighted confidentiality of proceedings as an issue.¹⁴⁹ Section 14 states that the provisions relating to privacy and confidentiality apply to any arbitration that is conducted in New Zealand.¹⁵⁰ Section 14B(1) states confidentiality is an implied contractual term of the agreement to arbitrate; s 14C stipulates the limits to this duty. Parties may apply under s 14D or s 14E to disengage the confidentiality and privacy of the arbitral hearing. However, it has been made abundantly clear that the confidentiality of arbitral proceedings does not extend to court proceedings relating to the arbitration, although a party may apply under s 14F (following the guidelines in s 14G and s 14H) for the proceedings to be held in private.¹⁵¹

¹⁴⁵ Blackaby and others, above n 35, at 127.

¹⁴⁶ Michael Hwang and Katie Chung "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" in Michael Hwang *Selected Essays on International Arbitration* (Academy Publishing, Singapore, 2013) 90 at 154.

¹⁴⁷ See Peter Hilt, (21 August 1996) 557 NZPD 14247; *Esso Australian Resources Ltd v Plowman (Minister for Energy and Minerals)*, above n 143.

¹⁴⁸ As cited in Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [35].

¹⁴⁹ See New Zealand Parliament "Arbitration Amendment Bill" (2007) <www.parliament.nz>.

¹⁵⁰ Arbitration Act 1996, s 14.

¹⁵¹ *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250 (HC) at [26]; Arbitration Act 1996, s 14F.

C Open Justice Issue and BORA

Article 4(2) of the draft BAT proposes the confidentiality of any arbitral proceedings conducted under the BAT. The obligation of confidentiality under art 4(2) applies to all documents produced by a party to the arbitration, including awards, orders, correspondence, and all documents produced in the arbitration. The exceptions are where disclosure is required by a legal duty or to protect/pursue a legal right, including the enforcement or challenge of an arbitral award; which would require recourse to a national court operating under the principle of open justice. This raises a prima facie issue with the principle of open justice and s 14 of BORA, which protects the right to freedom of expression.

As aforementioned, the threshold in s 3 of the Act is met as BORA has already been deemed to apply to arbitrators as they hold a quasi-judicial function,¹⁵² and businesses subject to the terms of a BAT would be able to bring a claim as per s 29.¹⁵³ Thus this section analyses the BAT's compliance with s 14.¹⁵⁴

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Freedom of expression has been defined as being “as wide as human thought and imagination” in New Zealand jurisprudence.¹⁵⁵ The historical formulation of open justice requires “that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹⁵⁶ In *Lewis v Wilson*, s 14 was found to uphold the principle of open justice and stated that upholding this principle was “critical to the maintenance of public confidence in the system of justice.”¹⁵⁷ *R v Liddell* found that the importance of open judicial proceedings in a democratic state was re-emphasised, amongst other principles, by s 14 of BORA.¹⁵⁸ Thus, s 14 includes the freedom to seek, receive and impart court decisions and documents.

¹⁵² *Jivray v Hashwani*, above n 63, at [41] per Clarke LJ.

¹⁵³ New Zealand Bill of Rights Act 1990, s 29.

¹⁵⁴ New Zealand Bill of Rights Act 1990, s 14.

¹⁵⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

¹⁵⁶ *R v Sussex Justices, ex parte McCarthy* [1924] KB 256 at 259 per Lord Hewart CJ.

¹⁵⁷ *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR 546 (CA) at [1] and [79].

¹⁵⁸ *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

Open justice requires open court processes, unless to do so would frustrate the administration of justice.¹⁵⁹ Jeremy Bentham stated that publicity:¹⁶⁰

... is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.

Open justice is important to deter inappropriate behaviour on behalf of the court, maintain public confidence in the administration of justice and ensure the impartiality of decisions.¹⁶¹ This ensures the right to a fair trial by an impartial decision-maker, which the Court of Appeal perceives as an essential right of the individual and “permeating the very fabric of a free and democratic society”.¹⁶² Whilst open justice is framed as an individual right, it safeguards the monitoring of the judiciary and acts as a check against the arbitrary use of power, in accordance with the rule of law.¹⁶³ Furthermore, the publicity of litigation ensures Parliament can “monitor the enforcement of public law and amend legislation when judicial decisions go awry”.¹⁶⁴

The public interest requires that the right to freedom of expression is not restricted except where the circumstances necessitate it.¹⁶⁵ Article 19.3 of the ICCPR provides that freedom of expression may be limited in order to: respect the rights and reputations of others, and to protect national security, public order, or public health and morals. In respect of arbitration, the principle of party autonomy typically supersedes the principle of open justice.¹⁶⁶ However, the BAT limits party autonomy, prescribing the default method where parties have not agreed on a method of dispute resolution. Therefore, there is an issue in that the confidentiality of arbitral proceedings is a breach of the principle of open justice, as protected by s 14 of BORA.

¹⁵⁹ Law Commission, above n 148, at [64].

¹⁶⁰ As cited in *Scott v Scott* [1913] AC 417 at 477.

¹⁶¹ *R v Legal Aid Board, ex parte Kaim Todner* [1999] 1 QB 966 at 977 per Lord Woolf MR.

¹⁶² Butler and Butler, above n 67, at 563.

¹⁶³ Catherine Rogers “Transparency in International Commercial Arbitration” (2006) 54 U Kan L Rev 1301 at 1304.

¹⁶⁴ Adriann Lanni “Protecting public rights in private arbitration” (1998) 107 Yale LJ 1157 at 1161.

¹⁶⁵ *Attorney-General v Butler* [1953] NZLR 944 (SC) at 946.

¹⁶⁶ Law Commission, above n 148, at [46].

The test as to whether the limiting of s 14 is justifiable is reproduced here for ease of access:¹⁶⁷

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b) (i) is the limiting measure rationally connected with its purpose?
- (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
- (iii) is the limit in due proportion to the importance of the objective?

The BAT aims to facilitate international trade and ensure access to justice. Article 4(2) of the draft BAT, providing for the confidentiality of documents relating to the arbitral proceedings, has the purpose of limiting additional repercussions. The exception is where parties have stipulated that art 4(2) or confidentiality will not apply to disputes arising under their contract. Keeping the dispute between the parties has several significant advantages as discussed in the preceding sections. It serves to protect the relationship between the parties, without public exacerbation of the dispute and ensure justice, which may be undermined by adverse publicity in high profile disputes. Furthermore, it helps to protect the reputation of parties to the dispute.¹⁶⁸ The purpose of confidentiality is sufficiently important to justify the curtailment of s 14.¹⁶⁹ There is a rational connection between the need for confidentiality and the overall purpose of the BAT to enhance cross-border trade.¹⁷⁰

As it stands, it is a proportionate limitation on freedom of expression. Parties can exclude the application of this article, or provide for an alternative method of dispute resolution in their contract. Moreover, the New Zealand legislature has not recognised a problem with the confidentiality of arbitration in the past. In passing the Arbitration Act 1996, with a confidentiality provision and without a Section 7 Report, Parliament chose to encourage arbitration, including encouragement of confidentiality, as it helps distinguish arbitration from litigation.¹⁷¹ Likewise, the enactment of s 14 of the Arbitration Act 1996 and the amendments in 2007, ensured the New Zealand judiciary avoided the approach taken in

¹⁶⁷ *R v Hansen*, above n 80, at [104] per Tipping J.

¹⁶⁸ Gary Born *Draft Commentary on Model Bilateral Arbitration Treaty* (Wilmer Cutler Pickering Hale and Dorr LLP, 13 March 2015) at 12.

¹⁶⁹ *R v Hansen*, above n 80, at [121]: this is a mere threshold test.

¹⁷⁰ At [121]: this is a mere threshold test.

¹⁷¹ Law Commission, above n 148, at [2].

Esso.¹⁷² Whilst denying, to an extent, open justice, the BAT facilitates access to effective justice for all businesses.¹⁷³ Therefore, the limit can be seen as justifiable.

*D Section 27*¹⁷⁴

However, there may also be an issue with the confidentiality provision and s 27 of BORA. As aforementioned, s 27(1) was enacted based on article 14.1 of the ICCPR, which guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law.” Section 27(1) requires the observance of principles of natural justice. Both natural justice and open justice are concerned with procedural standards of a fair hearing.¹⁷⁵ Regardless, the purpose of confidentiality in international commercial arbitration arguably enhances the standard of the procedure and its compliance with principles of natural justice. It is entirely feasible that the standards of natural justice are met without open justice.¹⁷⁶

E Summary

The confidentiality of arbitral proceedings is a core aspect to arbitration generally and an important addition to the BAT. Whilst some jurisdictions are eroding the right to confidentiality, others, such as New Zealand, are incorporating thorough provisions in their domestic law. Institutional arbitration laws also provide for the confidentiality of proceedings. New Zealand has never considered the confidentiality of arbitration as suspect and has strived to ensure its protection through extensive statutory provisions. Therefore, it is unlikely the confidentiality of BAT arbitration would raise a substantial issue to its ratification.

However, alternative constructions of the passage could be adopted in order to make the BAT more palatable.¹⁷⁷ An option this author supports is the allowance for the publication

¹⁷² At 43; *Esso Australian Resources Ltd v Plowman (Minister for Energy and Minerals)*, above n 143; Arbitration Amendment Act 2007.

¹⁷³ See Butler and Herbert, above n 11.

¹⁷⁴ See also Butler and Herbert, above n 11; Emanuel, above n 103.

¹⁷⁵ Joseph Jaconelli *Open Justice: A Critique of the Public Trial* (Oxford University Press, Oxford, 2002) at 31.

¹⁷⁶ At 33.

¹⁷⁷ See Born, above n 169, at 12.

of arbitral awards arising under the BAT,¹⁷⁸ whilst maintaining the confidentiality of documents submitted in the arbitration.¹⁷⁹ This would permit the development of precedent arising from arbitrations under a BAT and allow for the accountability of arbitrators if the public is able to critique the decisions reached, whilst protecting commercial secrets and the particulars of the dispute. In doing so, there would be contributions to commercial jurisprudence to guide future disputes under the BAT. The parties could be protected by a redaction of any identification in the text of the award. This would serve to protect the general public interest in the outcome of these disputes, which has been put aside in the preceding discussion of the BORA conflict as the emphasis of this paper has been the worth of the BAT to the businesses, in particular SMEs, themselves.

IV Conclusion

The BAT would be supportive of, and a worthwhile addition to, the plethora of treaties governing New Zealand's international relations. At present, there is no sufficient international legal mechanism to ensure the uniform resolution of disputes to a sufficient standard.¹⁸⁰ The provision for more efficient default dispute resolution would improve international trade in New Zealand through the minimisation of one of its core risks. Evidence tentatively suggests that firms, and SMEs in particular, do not often incorporate a dispute resolution clause into their agreements; predominantly because they do not often negotiate formal contracts.¹⁸¹ In this situation, firms are subjected to international litigation with unsavoury jurisdictional and enforceability issues. The exchange from international litigation to international commercial arbitration is therefore:¹⁸²

... a deliberate one, motivated by the perception that the formalities and technicalities of domestic litigation in national courts often produce parochial, inefficient and

¹⁷⁸ A full discussion on the merits of this approach is beyond the scope of this paper. Instead, see Paul Comrie-Thomson "Necessary and Practical: A National Law Obligation to Publish International Commercial Arbitral Awards" (LLB(Hons) Dissertation, Victoria University of Wellington, 2016).

¹⁷⁹ Born, above n 169, at 12.

¹⁸⁰ The United Nations Convention on Contracts for the International Sale of Goods [1995] NZTS 22 (signed 11 April 1980, entered into force 1 January 1988) is of limited application and The Hague Convention on Choice of Court Agreements (signed 30 June 2005, entered into force 1 October 2015) has yet to receive sufficient international recognition.

¹⁸¹ See Butler and Herbert, above n 11; Nixon and Whelan, above n 31 and; van Oeveren, above n 31.

¹⁸² Born, above n 16, vol 2 at 2126.

expensive dispute resolution proceedings, subject to lengthy appeals in one or several national court systems.

There is room under a BAT for parties to tailor the dispute to suit the complexity and nature of the dispute. Time and cost is an issue for both international litigation and arbitration. Preference for a BAT would be enhanced through the integration of an expedited procedure option and a fee structure similar to Germany. Resorting to arbitration would serve to lessen the burden on national courts and taxpayer funding of civil disputes would be reduced.¹⁸³ Moreover, there should be provision for the publication of awards, with party identifiers redacted. This would ensure compatibility with BORA. Whilst “[n]either public nor private justice ever achieves its ideals consistently”, the BAT would be a significant improvement for default dispute resolution.¹⁸⁴

¹⁸³ Robin Cooke “Party Autonomy” (1999) 30 VUWLR 257 at 258-259.

¹⁸⁴ Jan Paulsson “Why Good Arbitration Cannot Compensate for Bad Courts” (2013) 30 J Int’l Arb 345 at 353.

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