

The relationship between courts and the arbitration community

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By

The Hon Sir William Young KNZM, KC

Overview of what follows

[1] The courts offer dispute resolution services which compete with those provided by arbitrators but at the same time facilitate arbitration (for instance by enforcing awards). This double-role sets the scene for what is sometimes acerbic, although largely one-sided, debates, for instance as to the respective merits of arbitration and litigation, the development of the law and generally whether courts are appropriately “pro-arbitration”.

[2] In what follows, I discuss a number of cases, on some of which I sat. By and large, I will let those cases speak for themselves (although from time to time I allow myself the privilege of additional comment). My underlying message is that the courts generally take a “pro-arbitration approach”, albeit that judicial conceptions of what that entails are not always exactly the same as those held within the arbitration community.

A market for dispute resolution services

[3] Some disputes are particularly suited to arbitration and not litigation. By way of example only, it would be at best cumbersome for a lease to provide that the rent to for the renewed term of a commercial lease should be the market rate, leaving it to be fixed by the High Court in default of agreement.

[4] Other categories of dispute tend not to, or perhaps cannot, be submitted to arbitration.

[5] George Washington's will contained what is usually described as an arbitration clause.¹ This famous, if perhaps contestable, example notwithstanding, trust and estate disputes were not able to be submitted to arbitration if they involved the interests of beneficiaries who were unascertained or lacked capacity.²

[6] Of more practical significance in the present context, the scope for abusive resort to arbitration in New Zealand has been distinctly limited by legislation. Thus, a submission to arbitration in a consumer insurance contract has long been legally ineffective.³ As well, s 11 of the Arbitration Act 1996 has now put in place general limitations on the ability to stipulate for arbitration in consumer agreements, limitations which, in practice, mean that submissions to arbitration are not found in such agreements. Similarly ineffective would be a submission to arbitration in an employment agreement as it would cut across the statutory remedies available to employees under the Employment Relations Act 2000.⁴ These limitations are important. They mean that arbitration in New Zealand has not given rise to the fairness issues that have arisen in other jurisdictions. The result is that there are not many, if any, instances in which insistence by one party on arbitration could fairly be regarded as abusive by the courts.

[7] Of even more practical significance for my present purposes is the reality that many disputes are susceptible to appropriate resolution by both litigation and arbitration. For such disputes, litigation and arbitration are what economists regard as

¹ "But having endeavoured to be plain, and explicit in all Devises—even at the expence of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.": 'George Washington's Last Will and Testament, 9 July 1799' (The US National Archives and Records Administration) <<https://founders.archives.gov/documents/Washington/06-04-02-0404-0001>>.

² These difficulties are now addressed by ss 142 - 148 of the Trusts Act 2019 (and s 10A of the Arbitration Act 1996), albeit on a basis that provides for supervision by the courts.

³ Insurance Law Reform Act 1977, s 8.

⁴ However, the parties may agree to allow an employment relationship problem to be submitted to arbitration after it has arisen: see s 155(1) of the Employment Relations Act 2000. In that event, s 155(2) provides that "nothing in the Arbitration Act 1996 applies in respect of that submission" and "the parties must determine the procedure for the arbitration".

substitutes for each other. In that sense, the courts and arbitrators are competitors in a market for dispute resolution services.

[8] Although many judges would be uncomfortable with this market analysis, it is not new.⁵ So in *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith observed:⁶

The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognisance of many suits which were not originally intended to fall under its jurisdiction [...] In consequence of such fictions it came, in many cases, to depend altogether upon the parties before what court they would choose to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure formed by this emulation which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most effectual remedy which the law would admit for every sort of injustice.

As well, it remains an orthodox law and economics analysis. Thus, Professor Gerhard Wagner has observed:⁷

[...] the core of the concept of competition [...] was developed with a view to private markets for goods and services, not for governmental functions such as judicial functions such as judicial dispute resolution by public courts that are charged with enforcing the law. Nonetheless, competition has been outgrowing these narrow confines and has developed into an economic concept that is able to capture a broader range of human activities, including the adjudication of disputes. It is therefore legitimate to speak of a market for adjudication and of judicial dispute resolution as a product.

The competitive dynamic

From a judicial perspective

[9] Judges operate in a constitutional and institutional framework that largely shields them from market forces. Their remuneration is not dependent on the number of cases they hear or fees which litigants pay to have their disputes heard. This said, the

⁵ See, generally, William Landes and Richard Posner, “Adjudication as a Private Good” (1979) 8(2) *The Journal of Legal Studies* 235; and Gerhard Wagner, “The Dispute Resolution Market” (2014) 62(5) *Buffalo Law Review* 1085.

⁶ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (eBook ed, Electric Book Co, 2001) at 959–960.

⁷ Wagner, above n 5, at 1089–1090.

competitive dynamic is nonetheless of some moment for judges and the judiciary as an institution.

[10] In the first place judges can be expected to take professional pride in their work. In general terms the more interesting and important the cases they decide, the more satisfying their careers will be. There is a public interest dimension to this. The greater the diversion of commercial disputes from the courts, the greater the reluctance of some counsel to become judges. The less commercially orientated the bench becomes, the more likely it is that commercial disputes will be arbitrated. There is thus a potential for feed-back loops in which public respect for, and morale within, the judiciary are diminished, with adverse effects on recruitment and retention of judges which in turn produces a judicial system which may be seen by some litigants as not fit for purpose. The less respect the public has for the judiciary, the less effective that judiciary will be.⁸

The arbitration community's offering

[11] Arbitration is conducted in private and, subject to some exceptions, confidentiality attaches to the process and result. In contradistinction, litigation is usually conducted in public and almost always without anything approaching general confidentiality. Publicity associated with litigation is regarded by many in the commercial community as a harm which can be avoided by arbitration. This is a major reason for choosing arbitration over litigation.

[12] Another major attraction for arbitration is that it enables the parties to choose the adjudicator. The way this is presented is apparent from the following remarks made by the late Sir Ian Barker, an arbitrator and former New Zealand judge:⁹

One of the greatest benefits of arbitration is the ability of the parties to choose the arbitrator [...] some commercial parties and/or their lawyers see the use of such a decision-maker as rather less of a lottery than litigating in the High Court, where one does not know what Judge will consider the case, or, where an assigned Judge might be viewed as lacking in commercial expertise.

⁸ See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, Chicago, 2015).

⁹ Ian Barker, "Arbitration, Mediation and the Courts" [2004] *New Zealand Law Journal* 489, 490.

As this suggests, arbitration is marketed on the basis that the ability of the parties to choose an arbitrator means that arbitration is better than litigation in terms of accuracy of outcome and efficiency of process (measured in cost and time).

A public interest in the development of the law

[13] An issue which is at least loosely related to how judges perceive arbitration is that as more commercial disputes are arbitrated rather than litigated, the ability of the courts to develop the law is diminished. This was discussed by Lord Thomas, the then Lord Chief Justice of England and Wales, in a lecture he gave in which he noted the considerable reduction in the number of arbitrated cases which had come before the courts by appeal or reference.¹⁰

[14] Sir Bernard Eder, an English arbitrator who had retired after five years' service as commercial judge, gave a robust response to Lord Thomas:¹¹

if the problem is that the common law is being stifled or even hindered because there are fewer appeals, I am totally unpersuaded that the answer lies in forcing private litigants to finance the development of the common law by pursuing appeals to the High Court, the Court of Appeal and even the Supreme Court. Whatever public interest there may be in that object, I see no reason why its achievement should depend on their time and money – unless they so desire.

He also offered this advice:¹²

It is, in my view, no good complaining that the development of the common law is being hindered because parties prefer arbitration unless those responsible for the administration of our court system take the necessary steps to make it more attractive.

[15] Sir Bernard did not deny that the development of the law by court decisions is a public good. Rather, the points he was making were that:

- (a) the legal system cannot compel people to litigate and, in this way, facilitate the development of the law;

¹⁰ Lord Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration" (The Bailii Lecture 2016, 9 March 2016).

¹¹ Sir Bernard Eder, "Does arbitration stifle development of the law? Should s.69 be revitalised?" (AGM Keynote Address, Chartered Institute of Arbitrators (London Branch), 28 April 2016) [19].

¹² Ibid, [9].

- (b) decisions to litigate or arbitrate are made by those who meet the associated costs and who will be guided in such decisions by what they see as their best interests;¹³ and
- (c) the only appropriate response of the courts is to improve the dispute resolution services the courts provide.

This is a competition analysis.

Judicial responses to the offering of the arbitration community

[16] Judicial attempts to improve the way in which, say, commercial litigation is dealt with, have occurred in a context in which there is an awareness that litigants have choices. I think that this has contributed to improvements in the judicial process.

[17] There are, however, limits to how the courts can respond in a competitive way to what arbitration offers. For instance, it is not open to the courts to match the confidentiality provided by arbitration with a standing offer to impose confidentiality orders in all commercial cases. This would be inconsistent with the open justice principle. Nor would it be open to the judiciary to allow the parties to a dispute to pick the judge who is to determine it. This would unacceptably derogate from the ways in which judges are assigned to cases and thus to the independence of the judiciary. And although there are many examples around the world of commercial courts (such as the Commercial Court in London), within the New Zealand context, it would be unacceptable to offer preferential treatment for commercial litigants if the corollary was consequential delays to criminal trials (in respect of which there is no competitive pressure).

[18] In short, the response of the judiciary in New Zealand to the competitive pressure offered by arbitration has been pretty muted.

¹³ In his paper at [19], Sir Bernard referred to an ironic suggestion made decades ago by Lord Devlin that if the importance of developing the law is of controlling significance, litigants should be prohibited from settling cases in which interesting points of law are involved.

The necessity for the courts to facilitate arbitration and associated debates

[19] To a large extent, arbitration is dependent on facilitation by the courts of the arbitral process. This means that the arbitrators require the co-operation of their competitor – the courts – to operate.¹⁴ In competition law, the essential facilities doctrine applies where one firm in a market controls a facility to which all competitors in that market need access in order to operate. This doctrine is engaged, at least by analogy, in this context.

[20] There are a number of ways in which the courts engage with the arbitral process, but my discussion will be largely confined to three of them, to all of which I will accord the title ,“principle”:

- (a) The “stand-aside principle”. This requires the courts to defer to arbitration by refusing to hear disputes that are subject to arbitration.
- (b) The “confidentiality principle”. Thus, arbitral proceedings are private and confidential to the parties. This principle is of some, but less significance, when the courts become involved.¹⁵
- (c) The “enforcement principle”. This requires the courts to accept awards as final determinations of disputes and enforce them accordingly.

[21] Competition law is complete with examples of the operators of essential facilities putting spokes in the wheels of their competitors. As it happens, I have not seen it suggested that the courts have acted in a deliberately anti-competitive manner in facilitating (or not facilitating) arbitral processes or proceedings. However, the reality that the courts and arbitrators are competitors adds tabasco to what are usually pretty one-sided debates that ensue from decisions that are regarded as not “pro-arbitration”.

¹⁴ As Professor Paulsson stated, “the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself”: Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, Oxford, 2013) 30.

¹⁵ See s 14F of the Arbitration Act 1996.

[22] I say “one-sided” because non-judicial commentators tend to come from the arbitration community and judges seldom engage directly with criticism. However, judges do occasionally join the fray.

[23] In *Westport Insurance Corp v Gordian Runoff Ltd*, the decision of arbitrators in favour of an insurer (Gordian) against a reinsurer was set aside following hearings before Einstein J in the Supreme Court of New South Wales,¹⁶ the Court of Appeal of New South Wales¹⁷ and the High Court.¹⁸ In his judgment in the High Court, Heydon J observed:¹⁹

The merits of arbitration

The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy. It is not intended to make any criticisms in these respects of the arbitrators, of Einstein J, or of the Court of Appeal, for on the material in the appeal books none are fairly open. But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater *relevant* expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.

[24] This prompted the following comment in *Williams & Kawharu on Arbitration*:²⁰

Despite these comments, the learned judge omitted reference to the fact that eight months had passed between the hearing in the High Court of Australia and the delivery of its judgment.

The stand-aside principle

[25] Where litigation is commenced in respect of a dispute which is subject to an arbitration agreement, art 8(1) of sch 1 to the Arbitration Act 1996 requires the court, on timely application, to stay the proceedings:

¹⁶ *Westport Insurance Corp v Gordian Runoff Ltd* [2009] NSWSC 245, [2010] ALMD 1045.

¹⁷ *Gordian Runoff Ltd v Westport Insurance Corp* [2010] NSWCA 57, (2010) 267 ALR 74.

¹⁸ *Westport Insurance Corp v Gordian Runoff Ltd* [2011] HCA 37, (2011) 244 CLR 239.

¹⁹ *Ibid*, 288.

²⁰ David Williams and Amokura Kawharu, *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) 14, fn 64.

[...] unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

And art 5 of that schedule provides:

5 Extent of court intervention

In matters governed by this schedule, no court shall intervene except where so provided in this schedule.

[26] Except in the important sense that it is not provided for as an exception to the stand-aside principle, the Act does specifically address the problem of mixed disputes, that is disputes where some, but not all of the issues are subject to an arbitration agreement. This arises most acutely where there are more than two parties and not all of them are subject to an arbitration agreement. This problem was addressed by Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd*.²¹ In issue was a dispute involving Carter Holt Harvey Ltd, Genesis Power Ltd and Rolls Royce New Zealand Ltd in respect of two principal contracts. As between Genesis Power and Rolls Royce, the relevant contract included an arbitration clause. There was, however, no arbitration clause in the contract between Carter Holt Harvey and Genesis Power. Carter Holt Harvey issued proceedings in the High Court against Genesis Power and Rolls Royce. Genesis Power commenced arbitral proceedings against Rolls Royce. Rolls Royce, concerned that it was facing liability in two proceedings in respect of the same subject matter, made an interlocutory application to the High Court for directions in relation to an intended application for an order staying the arbitration. Genesis Power contended that the changes brought about by the enactment of the Arbitration Act 1996 ousted the court's jurisdiction to grant a stay of arbitration. Randerson J concluded that the court retained its inherent jurisdiction to order a stay of arbitral proceedings, notwithstanding the terms of art 5 of sch 1 to the Act. The upshot was that the parties consented to an order consolidating the claims in the High Court.²²

[27] The existence of a dispute being fundamental to the arbitral process, the stand-aside principle does not apply where there is no dispute. But while there must be

²¹ *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 (HC).

²² For critical remarks on the course taken at the later trial of these proceedings in the High Court, see Williams and Kawharu, above n 20, at 77–78.

a no-dispute exception to the stand-aside principle, there is room for debate as to the extent and operation of that exception. This debate can arise where the plaintiff issues summary judgment proceedings, the defendant seeks a stay on the basis of an arbitration agreement, and the plaintiff responds by saying that if the summary judgment test (no arguable defence) is met, it follows that there is no dispute. In *Zurich Australian Insurance Ltd v Cognition Education Ltd*, there were competing applications, by Cognition for summary judgment and by Zurich for a stay.²³ Cognition argued that its summary judgment application should be dealt with first, on the basis that if the summary judgment test was satisfied, the basis for a stay (ie that there was a dispute) would fall away. Despite its apparent logical force, this argument is not compelling, particularly where questions of law are involved. Although a question of law can be determined definitively on summary judgment and, once determined, might leave the way open to the conclusion that there is no arguable dispute, the reality is that, prior to such determination, there may well be a dispute which is both genuine and within the scope of the arbitration agreement. The Supreme Court thus held that the stay application was to be dealt with first.

The confidentiality principle

[28] Two of the most proclaimed advantages for arbitration over litigation are the privacy of the proceedings – that is that arbitral proceedings take place in private – and associated expectations and rights as to confidentiality. Against that background, there was consternation in 1995 in the arbitration community after the High Court of Australia held in *Esso Australia Resources Ltd v Plowman* that, absent a confidentiality clause, the parties to an arbitration did not owe each other duties of confidentiality.²⁴ This was immediately addressed in New Zealand by s 14 of the Arbitration Act (as first enacted) which imposed confidentiality restrictions on arbitral parties and tribunals. To the same general effect is the current s 14B.

²³ *Zurich Australian Insurance Co Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383.

²⁴ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10. See also Patrick Neill QC, “Confidentiality in Arbitration” (1996) 12(3) *Arbitration International* 287, 289, noting that the decision was akin to a “nuclear event” which sent “seismic tremors throughout the arbitration world”.

[29] From the point of view of those who arbitrate, however, there is still the problem that litigation in respect of an arbitration or later award (including proceedings to enforce an award) is likely to be conducted in open court and thus subject to publicity, with the courts generally reluctant to make confidentiality orders. This was addressed by amendments inserted in 2007²⁵ (ss 14F–14H) which provide that the privacy and confidentiality which attach to arbitration are material to whether confidentiality should be directed in court proceedings but proceed on the basis of a starting point of open justice.

[30] In *Telstraclear Ltd v Kordia Ltd*,²⁶ the High Court refused an application for confidentiality in respect of a challenge to an arbitral award which arose out of a contract to establish a fibre optic cable transmission network in New Zealand. In rejecting the application, the Judge had regard to the public interest associated with the construction of the then proposed network. As well, the Judge declined to anonymise the names of the parties or to redact parts of the judgment.

The enforcement principle

[31] There are a number of provisions in the Arbitration Act which, in one way or another, give effect to this principle. Some of these address recurrent problems which, in the past, enabled the derailing of arbitral processes. Thus, under art 16 of sch 1, an arbitral tribunal has a general jurisdiction to rule on its own jurisdiction (including challenges based on the existence of validity of the arbitration agreement) and time limits for such challenges are provided for.²⁷ As well, under art 12 of that schedule there is a procedure for dealing with challenges to the impartiality of arbitrators. In both instances, there is provision for referral of the issue to the High Court for final determination.

[32] Clause 4 of the second schedule provides for the court to be invited to address a preliminary point of law, but this is only with the consent of the arbitral tribunal or the consent of all the parties. And cl 5 of that schedule provides:

²⁵ Arbitration Amendment Act 2007.

²⁶ *Telstraclear Ltd v Kordia Ltd* [2010] BCL 773 (HC).

²⁷ This is known as the competence-competence principle.

5 Appeals on questions of law

- (1) [...] any party may appeal to the High Court on any question of law arising out of an award—
- (a) if the parties have so agreed before the making of that award; or
 - (b) with the consent of every other party given after the making of that award; or
 - (c) with the leave of the High Court.

[33] Article 34 of the first schedule provides for setting aside awards. The grounds are narrow but include situations where the arbitration agreement is not valid under New Zealand law, or the award is contrary to New Zealand public policy.

[34] Under art 36, awards must be enforced by the courts unless the party resisting enforcement can establish one of a limited list of exceptions corresponding to the grounds on which an award can be set aside.

[35] The leading case on art 34 is *Carr v Gallaway Cook Allan*,²⁸ which involved a claim for professional negligence which the parties agreed to submit to ad hoc arbitration. The arbitration agreement provided for an appeal to the High Court on questions of fact and law. The right of such appeal was of sufficient significance to the parties that the key words (“questions of law and fact”) were italicised and followed by “emphasis added”. As the High Court has no jurisdiction to hear appeals on questions of fact, the purported conferral of a right of appeal on the facts was ineffective. At issue was whether the arbitration award was enforceable notwithstanding the invalid appeal rights. The appellant, who had been unsuccessful in the arbitration on an issue of causation, challenged the award arguing that the arbitration agreement was “not valid under the law” of New Zealand. As I have indicated, art 34(2)(a) contemplates that an award pursuant to an invalid agreement may be set aside by the High Court and the Supreme Court held that the award in this case should be set aside.

[36] The upshot of the Supreme Court judgment was that the dispute was litigated in the High Court where the defendant solicitors abandoned the factual argument on which

²⁸ *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] NZLR 1 792.

they had succeeded in the arbitration and were later ordered to pay damages of \$9,500,000 together with interest and costs (which included a half share of the arbitrator's fee).²⁹

[37] The dispute between the parties was very factual. That the key words relating to an appeal on questions of fact had been emphasised in the arbitration agreement suggests – indeed might be thought to establish – that the availability of such an appeal was of importance to the parties from the outset. And that the appellant later succeeded at trial suggests that the unavailability of a right of appeal on the facts apparently conferred by the agreement was of real practical significance. If the Court had upheld the award, it would have had the consequence that the appellant was bound by an arbitral process which differed materially from the process he had agreed to.

[38] The judgment was not well-received in the arbitration community albeit that criticism has tended to be guarded. Perhaps typical of such criticism are the following comments made on the judgment by a professional arbitrator:³⁰

In essence, the parties agreed to arbitrate; they fully participated in the arbitration; there was no suggestion that the arbitrator failed to conduct the arbitration properly; and the successful party was happy to appeal on questions of fact had it been allowed. But the fact that they had allowed for the possibility of an appeal on findings of fact has been held to strike down the agreement to arbitrate and invalidate the entire arbitral proceedings, in which both parties had willingly participated.

Another response has been along the lines that although the judgment might technically be correct it exposes a problem with the wording of art 34 which needs to be rectified.³¹

A third arbitration case in the Supreme Court

[39] The only other Supreme Court decision on the current Act which I propose to discuss is *Casata Ltd v General Distributors Ltd*.³² This arose out of an arbitration concerning a rental dispute. The submission to arbitration did not specifically address party and party costs and in their submissions to the arbitrators neither party sought

²⁹ *Carr v Gallaway Cook Allan* [2016] NZHC 2065.

³⁰ John Walton, "Supreme Court looks at arbitration" (Auckland District Law Society, 8 August 2014).

³¹ Williams and Kawharu, above n 20, at 61.

³² *Casata Ltd v General Distributors Ltd* [2006] NZSC 8, [2006] 2 NZLR 721.

costs. In fact, however, the General Distributors had made a *Calderbank* offer.³³ The award of the arbitrators (the first award) did not include or reserve costs. General Distributors then sought costs on the basis it had beaten its own offer. In applying for costs, it relied on art 33 of the first schedule, which operates as a slip rule. The arbitrators issued a second award which required Casata to pay costs to General Distributors. Casata applied to the High Court to have the second award set aside on the ground that the arbitrators were *functus officio* and had no power to make a second award concerning the costs of the parties. There is a default provision in cl 6(1)(b) of the second schedule which provides that, in the absence of an award of party and party costs, each party is responsible for its own costs.

[40] Before the Supreme Court there were two key issues:

- (a) whether the absence of reference to costs in the first award and the operation of cl 6 of the second schedule precluded the second award of costs; and
- (b) if the answer to the first question was “yes”, whether the failure to address costs in the first award was an error of law warranting remittal to the arbitrators so that they could address costs afresh (but presumably in the same way as they had in the second award).

[41] The majority in the Supreme Court found in favour of General Distributors on the first point. They found that costs were implicitly at issue with the result that the absence of a mention of costs in the first award was a slip, which could be corrected under art 33 without any inconsistency with cl 6.

[42] The outcome seems to me to have been in accordance with the justice of the case. The making of the *Calderbank* offer meant that as between the parties costs were in issue. That costs had not been specifically mentioned in the submission to arbitration or before the arbitrators might be thought to be a technicality. I see this as a pro-arbitration judgment: the award of the arbitrators was upheld and technical arguments said to stand in the way of what was a just decision were swept away. The judgment

³³ See *Calderbank v Calderbank* [1975] 3 WLR 586 (CA).

has, however, been subject to excoriating criticism from within the arbitration community, to the point of being described as involving “unjustified judicial intervention”, “plainly wrong” and “an impermissible case of judicial legislation”.³⁴ These criticisms referred to the expansive and perhaps non-literal view taken by the majority of what had been referred to arbitration and the reliance placed on decisions that pre-dated the Act.

So where have I got to?

[43] The courts have generally upheld arbitral agreements and the awards that result from them. For instance, the Court in *Cognition Education* could, at least in logic, have allowed the summary judgment application to proceed as a means of determining whether there was a “dispute” that was susceptible to arbitration. However, doing so would have been subversive of the submission to arbitration. The decision in favour of a stay was thus “pro-arbitration”. The decisions that are not so “pro-arbitration” – *Carter Holt Harvey Ltd v Genesis Power Ltd*, *Telstraclear Ltd v Kordia Ltd* and *Carr v Gallaway Cook Allan* are all, in a sense, cases on the margin. In a multi-party dispute, there are sometimes going to be difficulties giving effect to an arbitration submission between only two of them (*Carter Holt Harvey Ltd v Genesis Power Ltd*). In a conflict between the confidentiality that applies to arbitral proceedings and the open justice principle that operates in the courts, judges are unlikely to see arbitral confidentiality as automatically trumping open justice in relation to proceedings in the High Court, especially given the weight placed on open justice in ss 14F – H of the Arbitration Act (*Telstraclear Ltd v Kordia*). And at least as I see it, to have enforced the award in *Carr v Gallaway Cook Allan* would have been to hold Carr to a bargain that he had never entered into.

³⁴ Williams and Kawharu, above n 20, at 78 and 80.