SUMMARY JUDGMENT AND ARBITRATION: THE CONTEST BETWEEN PRAGMATISM AND PRINCIPLE

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I INTRODUCTION

The issue examined in this paper is the extent to which the courts can, or should, intervene under the Arbitration Act 1996 (the Act) where one party to an arbitration agreement applies for summary judgment and the other applies for a stay of proceedings and referral of the matter to arbitration.

The principal provisions of the Act covering this issue are Articles 5 and 8 of the First Schedule of the Act. Article 5 provides:

> 5. Extent of court intervention
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> In matters governed by this schedule, no court shall intervene except where so provided in the schedule.

Article 8(1) provides:

> 8. Arbitration agreement and substantive claim before court
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> (1) A court before which proceedings are bought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration 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.*
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> [emphasis added]

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Under art 8, a stay is mandatory unless one of the specific exceptions apply. This paper focusses on the italicised words (the "added words"), which appear to widen the grounds on which a court may decline to grant a stay.

The Act seeks to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 (and amended in

2006) (the "Model Law"), and to give effect to New Zealand's obligations under various treaties, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (the "New York Convention").[1] Article 8(1) of the Act is almost identical to art 8(1) of the Model Law and art II.3 of the New York Convention, except for the added words which do not appear in those instruments.

In order to satisfy the requirements for summary judgment the Court must be persuaded that, on the material before the Court, the plaintiff has established the necessary facts and the legal basis for its claim and that there is no reasonably "arguable defence" available to a defendant.[2]

An application for summary judgment and an application for stay of proceedings and reference to arbitration are competing applications. Issues arise as to which application should be heard first, or whether the applications should be heard together, and what test or tests should be applied?

On the one hand, it may be argued as a matter of principle, that if there is a bona fide or genuine dispute, the parties should be held to their bargain and the matter should be referred to arbitration for consideration of the merits. On the other hand, the pragmatist may argue that the efficacy of the summary judgment procedure should not be affected by defendants asserting a dispute where none actually exists.

The issue is not new. In 1989, it was considered by the Court of Appeal in *Royal Oak Mall Ltd v Savory Holdings Ltd*.[3] That case dealt with an application

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1 See s 5(b) and s 5(f).

2 See for example, *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/01, 5 June 2003, at [28]-[30] and *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162, at [26].

3 *Royal Oak Mall Ltd v Savory Holdings Ltd* CA106/89, 2 November 1989.

for stay under s 5 of the Arbitration Act 1908.[4] The Court of Appeal, drawing on UK authorities and commentary, determined that the same threshold test in summary judgment proceedings should be applied to an application for stay. This is known as the "the reverse sides of the same coin" approach.

Subsequently, the arbitration landscape has changed significantly with the introduction of the Arbitration Act 1996 adopting the Model Law and similar legislative changes in the UK and other jurisdictions. The issue has continued to arise frequently in the High Court where there has been debate as to the scope and implications of the added words in art 8(1), but the matter has not been argued before the Court of Appeal.[5]

However, the matter recently come before the Court of Appeal again in *Zurich Australian Insurance Ltd v Cognition Education Ltd*.[6] After a thorough examination of the countervailing policy arguments, the Court confirmed the "reverse sides of the same coin" approach.

Based on the decision in *Zurich* the legal position with regard to art 8(1) of the Act now seems tolerably clear: "pragmatism" seems to have triumphed over "principle". However the Court of Appeal's decision clearly leaves the policy position open for debate and with that the possibility of legislative intervention as part of future amendments to the Act. Given that leave to appeal is presently being sought before the Supreme Court, it is timely to assess the meaning, and merits, of the added words.

The structure of the paper is as follows.

First, in order to provide context for the discussion, we set out the legislative and case law history of art 8(1) which leads to the current interpretation by the Court of Appeal.

Secondly, we discuss the countervailing policy arguments and comment on some of the conclusions reached by the Court of Appeal in this regard.

Thirdly, we outline three options for resolution of the policy issues as follows:

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4 Section 5 of the Arbitration Act 1908 bestowed a wide discretion on the courts as to when a stay should be granted and did not contain the added words in art 8(1). See further below at text for nn 10-14.

5 In one post-1996 Arbitration Act decision, the Court of Appeal accepted an agreement by counsel that the reverse sides of the same coin approach applied: see *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd* CA65/00, 18 July 2000

6 *Zurich Australian Insurance Limited v Cognition Education Limited* [2013] NZCA 180.

(a) Leave the added words in art 8(1), accepting the current interpretation by the Court of Appeal.
(b) Delete the added words from art 8(1).
(c) Delete the added words from art 8(1) (where they apply to both domestic and international arbitration) and move them to Schedule 2 (where they would apply optionally to both forms of arbitration, but on an "opt-out" basis for domestic arbitrations and an "opt-in" basis for international arbitrations).

II THE HISTORY OF ARTICLE 8(1) AND THE ADDED WORDS

The added words seem to originate from the Arbitration Clauses (Protocol) Act 1924 (UK) and were included in that Act by s 8 of the Arbitration (Foreign Awards) Act 1930 (UK). These Acts were passed to give effect to the Geneva Protocol 1923 and the Geneva Convention 1927 in relation to foreign arbitration agreements and arbitral awards respectively. The reason for the inclusion of the added words was that the MacKinnon Committee on the Law of Arbitration in 1927 considered that it was "absurd" for stays to be granted on account of arbitration clauses despite the defendants being unable to indicate the existence of a dispute or any reason why they should not meet a claim.[7]

This UK legislation was mirrored in New Zealand by the Arbitration Clauses (Protocol) and Arbitration (Foreign Awards) Act 1933. The added words made their first appearance in New Zealand arbitration legislation in s 3 of that Act.[8]

Subsequently the added words appeared in s 4(2) of the Arbitration Act 1950 (UK) and in s 1 of the Arbitration Act 1975 (UK) in the context of international arbitrations. Section 1 of the Arbitration Act 1975 reads as follows:

> 1. Staying court proceedings where party proves an arbitration agreement
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> (1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and

7 MacKinnnon Committee *Report of the Committee on the Law of Arbitration* (CMD281, 1927).

8 Section 3 was repealed by the Arbitration (Foreign Agreements and Awards) Act 1982. The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 was repealed by the Arbitration Act 1996.

> void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. [Emphasis added]

The English courts interpreted the added words as requiring a summary judgment application and a stay application to be heard together. The word "dispute" in the added words was equated with "anything disputable" rather than "anything disputed". If the court found that the defendant did not have any defence to the application for summary judgment, the stay application would be dismissed and the summary judgment application would be granted. On the other hand, if the plaintiff could not succeed in the summary judgment application, the proceeding would be stayed for the dispute to be decided by arbitration. This came to be known as the "reverse sides of the same coin" approach.[9]

As noted above, the issue came before the New Zealand Court of Appeal in *Royal Oak Mall Ltd v Savory Holdings Ltd*.[10] The case involved an application for summary judgment and an application for a stay of the proceedings under s 5 of the Arbitration Act 1908, which bestowed a wide discretion on the courts to determine whether a stay should be granted.[11] Section 5 provided that the

> ... Court may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

The Court of Appeal referred to passages from Mustill and Boyd *Commercial Arbitration*[12] and *SL Sethia Liners Ltd v State Trading Corporation of India Ltd*[13] as to the reverse sides of the same coin approach. The Court held that:[14]

> These comments clearly point to the logic of applying the same threshold test in summary judgment proceedings to an application for stay in determining whether

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9 See for example, *SL Sethia Liners Ltd v State Trading Corporation of India Ltd* [1985] 1 WLR 1398 (CA) and *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 (CA); MJ Mustill and CS Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989) at 124.

10 *Royal Oak Mall Ltd v Savory Holdings Ltd*, above n 3.

11 Section 5 of the Arbitration Act 1908 was similar to the stay provisions (s 53) in the Australian Uniform Commercial Arbitration Acts enacted between 1984 and 1990.

12 Mustill and Boyd, above n 9.

13 *SL Sethia Liners Ltd v State Trading Corporation of India Ltd*, above n 9.

14 *Royal Oak Mall Ltd v Savory Holdings Ltd*, above n 3, at 9.

> there is a 'dispute' in circumstances such as the present, where the contractor can rely on a prima facie entitlement under the architect's certificate. The employer seeking arbitration must be able to point to some material demonstrating that there is a real issue to be decided. The contractor who opposes arbitration has the onus of satisfying the Court there is no arguable defence to his claim.

The issue came before the Court of Appeal again in 1994 in *Baltimar Aps Ltd v Nalder & Biddle Ltd*.[15] That case involved international arbitration governed by the Arbitration (Foreign Agreements and Awards) Act 1982.[16] Section 4(1) provided that any party to proceedings in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration may at any time apply to the court to stay the proceedings; and the court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.[17]

The Court of Appeal found that the mandatory terms of s 4(1) were "quite unambiguous" and only allowed for intervention by the court when the party seeking arbitration was acting in bad faith thereby abusing the court's process by applying for a stay.[18]

The Court found the following passage from page 123 of Mustill and Boyd *Commercial Arbitration* criticising the "added words" development in UK international arbitration compelling:[19]

> Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to

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15 [1994] 3 NZLR 129 (CA).

16 The Arbitration (Foreign Agreements and Awards) Act 1982 (like the Arbitration Act 1975 (UK)) was enacted to implement the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference at New York in 1958 ("New York Convention"). It was repealed by the Arbitration Act 1996. Both domestic and international arbitrations are now governed by that Act.

17 Section 4 is consistent with art II(3) of the New York Convention.

18 *Baltimar Aps Ltd v Nalder & Biddle Ltd*, above n 15, at 135.

19 *Baltimar Aps Ltd v Nalder & Biddle Ltd*, above n 15, at 135.

> cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute.

The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator and distinguished the position with regard to international arbitration from domestic arbitration in New Zealand as follows:[20]

> The foregoing comments [see paragraph [24] above] apply, of course, only to international arbitration agreements governed by the 1982 Act: the discretion given to the Court to order a stay in domestic arbitrations allows a different approach - see eg *Royal Oak Mall Ltd v Savory Holdings Ltd* … where this Court adopted the English practice of inquiring into the reality of the defence on applications for stay and summary judgment.

Subsequently, the decision in *Royal Oak* was followed in other cases dealing with s 5 of the Arbitration Act 1908.[21]

III NEW ZEALAND ARBITRATION REFORM

In 1991 the Law Commission issued its report on arbitration.[22] It proposed a draft Arbitration Bill based on the Model Law which was to encompass domestic and international arbitration. The Law Commission adopted article 8 of the Model Law relating to the stay of court proceedings but inserted the added words taken from s1 of the Arbitration Act 1975 (UK). The reason given for this approach in the report was essentially that "the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of

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20 *Baltimar Aps Ltd v Nalder & Biddle Ltd*, above n 15, at 135.

21 See *Reilly v Fletcher* HC Nelson CP17/95, 5 March 1996, Master Venning; and *Auckland City Council v Auckland Tepid Baths Ltd (No 1)* HC Auckland, HC78/96 and HC96/96, 10 February 1997, Hugh Williams J.

22 Law Commission *Arbitration* (NZLC R20, 1991).

any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement".[23]

Subsequently, the Act was enacted with the added words inserted in art 8. Interestingly, as recently as 1982 (in s 14 of the Arbitration (Foreign Agreements and Awards) Act 1982), Parliament had taken the opposite approach with regard to the stay of proceedings in the context of international arbitration by repealing s 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933. As the purpose of the Arbitration (Foreign Agreements and Awards) Act 1982 was to implement the New York Convention, the repeal of s 3 was presumably to ensure that New Zealand legislation was consistent with art ll(3) of the New York Convention.[24]

The preponderance of New Zealand cases since the commencement of the Act have followed the "reverse sides of the same coin" approach based on *Royal Oak* and the added words in art 8(1).[25]

In *Pathak v Tourism Transport Ltd*,[26] Heath J reviewed the purposes of the Act and the background to the inclusion of the added words and stated:[27]

> In approaching the interpretation of art 8 I remind myself that the part of art 8 with which I am concerned has been adopted verbatim from the Model Law. The only words which have been added to art 8(1) are the concluding words "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" which were inserted to maintain the integrity and efficiency of the summary judgment procedure used in this Court and the District Court for cases in which there was no arguable defence. Reference is made to that policy decision in the Law Commission Report at para 309: NZLC R20 at p.167.

However, there have been dissenting voices.

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23 Above n 22, at [308]-[309].

24 See the discussion below at [78] and [79]. When the Arbitration (Foreign Agreement and Awards) Bill was introduced in 1982, express reference was made to the power to stay legal proceedings. The New York Convention was referred to as being designed to "avoid some of the legal shortcomings revealed by earlier legislation and conventions" and the Bill was described as representing "an updating of our [NZ] international responsibilities in this area" – see Hansard Vol 443, 152-153.

25 See, for example, *Yawata Ltd v Powell* HC Wellington AP142/00, 4 October 2000, Penlington J. A comprehensive list of relevant cases since 1997 is set out in the Court of Appeal's judgment in *Zurich Australian Insurance Limited v Cognition Education Limited*, above n 6, at [55] fn 24.

26 [2002] 3 NZLR 681.

27 *Pathak v Tourism Transport Ltd*, above n 26, at [28].

In *Todd Energy Ltd v Kiwi Power (1995) Ltd*,[28] Master Thomson took the view that the Law Commission had made a "serious error" when it recommended including the added words in the new legislation. He considered the added words had the potential to create problems which he listed as follows:[29]

1. The necessity for the court in each case to determine what constitutes a dispute?
2. The approach the Court should take when faced with concurrent applications for summary judgments and stay.
3. The fact that if the Court hears the summary judgment application and refuses it then two hearings (at least) will result. That may well have occurred in *Royal Oak Mall Ltd*; it certainly had that result in *Fletcher Construction Ltd.* In such cases duplication of judicial resources and the extra time and costs will follow.
4. There is a real danger that if the summary judgment application fails and the dispute goes to arbitration, the arbitrator (often possessed of greater expert knowledge than the Court as to the nature of the dispute) will be handicapped in resolving it by findings made by the Judge which will be res judicata *Maclean v Stewart* (1997) 11 PRNZ 66.
5. To determine the summary judgment may take hours even days to hear (the English experience), and the Master's experience here.[30]

Master Thomson considered that summary judgment should only be considered where the claim is admitted or, if the issue is a point of law, the Court can see at once that the point is misconceived.

Master Thomson's views gained some traction in the High Court. In *Body Corporate 344862 v E-Gas Ltd*,[31] Dobson J stated that the approach put forward by MasterThomson "appears well justified".[32] After reviewing the decision of Heath J in *Pathak*, Dobson J stated:[33]

> With great respect to Heath J, I am not satisfied that the extent of the additional wording in Article 8, even when viewed in the light of the prior gloss from the Law

28 HC Wellington, CP46/01, 29 October 2001, Master Thomson.

29 Above n 28, at [34].

30 Master Thomson reiterated these views in *Alstom New Zealand Ltd v Contact Energy Ltd* HC Wellington, CP160/01, 12 November 2001.

31 HC Wellington CIV-2007-485-2168, 23 September 2008.

32 *Body Corporate 344862 v E Gas Ltd*, above n 31, at [66].

33 *Body Corporate 344862 v E Gas Ltd*, above n 31, at [69].

> Commission's work that preceded the 1996 Act, warrants the reading down of the mandatory terms of Article 8. The Uncitral model intends that courts respect the sanctity of commitments made by parties to contracts, to resolve disputes arising under them in a private forum. Permitting potential bifurcation of the dispute by allowing arguments on summary judgment before the Court, before the party preferring litigation can be compelled to refer the dispute (or what remains of it) to arbitration must be inconsistent with that principle. The consequence of a successful summary judgment argument is not that there was no dispute but that the forum of one party's choosing has been persuaded that it is a dispute to which the other party had no arguable defence.

Dobson J proposed that one rationalisation of the two approaches could be that a stay should only be declined if the whole dispute is able to be resolved on summary judgment.[34]

In 2003, the Law Commission considered the issue again in its report entitled *Improving the Arbitration Act 1996*.[35]

The Law Commission noted the criticisms of Master Thomson but ultimately determined that:[36]

> We are not prepared to revisit this issue. The efficacy of the summary judgment procedure is in issue. Clearly the Commission, in 1991, made its recommendation after receiving submissions which led it to believe that the "added words" were necessary. We are not prepared to reject that view without undertaking further public consultation. It is a matter which submitters will be at liberty to raise with a select committee if a Bill is introduced into the House of Representatives to give effect to recommendations made in this report.

Subsequently, the provisions of the Arbitration Act 1996 were amended by the Arbitration Amendment Act 2007. There was no amendment to art 8(1).

IV UK ARBITRATION REFORM

Notably, the UK has headed in the opposite direction from New Zealand on this issue.

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34 *Body Corporate 344862 v E Gas Ltd*, above n 31, at [70]. For further support of the approach put forward by Master Thomson, see *Gawith v Lawson* HC Masterton CIV-2010-435-253 4 May 2011 at [7]-[8]; AAP Willy *Arbitration* (Brookers, Wellington, 2010) at [4.9]; D Williams and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at [4.13.5]; and P Green and B Hunt *Green and Hunt on Arbitration Law and Practice* (looseleaf ed, Brookers) at ARSch1.8.12.

35 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [242]-[247].

36 Law Commission, above n 35, at [247].

In *Hayter v Nelson and Home Insurance Co*,[37] Saville J cast doubt on the "reverse sides of the same coin" approach based on s 1 of the Arbitration Act 1975 (UK). Saville J found as follows:[38]

> In my judgment in this context, neither the word 'disputes' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them….
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> …the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today.

However, he accepted that the words "there is not in fact any dispute" in s 1(1) of the Arbitration Act 1975 (UK) must be taken as meaning "there is not in fact anything disputable". He applied a narrow interpretation to the added words, finding that in order to avoid a stay it must be "readily and immediately demonstrable that the respondent has no good grounds at all for disputing the claim".[39]

Ultimately, in 1996, the United Kingdom Parliament enacted new arbitration legislation: the Arbitration Act 1996 (UK). This reform was based on recommendations from the Departmental Advisory Committee on Arbitration Law ("DAC"). The new Act was designed to respond to the Model Law but with exceptions for rules peculiar to English law. Significantly, the added words did not appear in the stay provision (s 9). In the DAC Report, the Committee explained the omission of the added words as follows:[40]

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37 [1990] 2 Lloyd's Rep 265. Further cases suggesting that the "reverse sides of the same coin" test should be reconsidered in the UK were *Home and Overseas Insurance Co Ltd v Mentor Insurance Co* [1989] 1 Lloyd's Rep 473 and *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL).

38 *Hayter v Nelson and Home Insurance Co*, above n 37, at 268.

39 *Hayter v Nelson and Home Insurance Co*, above n 37, at 270 and 271.

40 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February, 1996), Chapter 2, at [55].

> The Arbitration Act, 1975 contained a further ground for refusing a stay, namely where the Court was satisfied that "there was not in fact any dispute between the parties with regard to the matter to be referred." These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in *Hayter v Nelson*…

In *Halki Shipping Corp v Sopeks Oils Ltd*,[41] the majority of the English Court of Appeal held that the omission of the words in s 1 of the Arbitration Act 1975 was to exclude the Court's summary judgment jurisdiction based on an investigation of what was in fact disputable as contained in the earlier legislation. Henry LJ said that he took the excision of the added words as showing that Parliament does not consider that the safeguards against arbitral delay that summary judgment provides are today necessary in the public interest.[42]

However, in a dissenting judgment, Hirst LJ stated that:[43]

> In my judgment, if the DAC [Departmental Advisory Committee on Arbitration Law] had intended to carry through such a revolutionary alteration in the law, with such seriousconsequences on very well established procedures in arbitration cases, they would have spelt it out explicitly, with a full explanation and a detailed justification of the change, so that Parliament was fully apprised of its significance.
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> This they have not done, and I am therefore not persuaded …. that Parliament, in enacting s 9 without the 1975 qualification, effected (sub silentio) an abolition of the existing Ord 14 practice.

V AUSTRALIAN ARBITRATION REFORM

Domestic arbitration in Australia has recently undergone a major reform with the introduction of new uniform Commercial Arbitration Acts ("CAAs") in most states.[44] As with the New Zealand and UK reforms, the Model Law is the basis for the new uniform commercial arbitration legislation and one of the aims of the reforms was to reduce the scope for judicial intervention.[45]

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41 [1998] 2 All ER 23.

42 *Halki Shipping Corp v Sopeks Oils Ltd*, above n 41, at 45.

43 *Halki Shipping Corp v Sopeks Oils Ltd*, above n 41, at 40.

44 For example, see the Commercial Arbitration Act 2010 (NSW) which commenced on 1 October 2010.

45 Doug Jones *Commercial Arbitration in Australia* (2nd ed, Thomson Reuters, 2012) at s [1.230].

Section 8 of the CAAs provides for the stay of substantive claims before the Courts and is identical to art 8 of the Model Law; the proceedings must be stayed unless the arbitration agreement is null and void, inoperative or incapable of being performed. As noted in *Commercial Arbitration in Australia*, the rationale behind this is that the parties should be held to their bargain to resolve their disputes through arbitration[46] and s 8 is an important change for the Australian domestic arbitration landscape as it brings Australia into alignment with comparable jurisdictions in upholding the arbitration agreement.[47]

Previously, the Courts had a discretionary power to stay under s 53 of the superseded uniform Commercial Arbitration Acts (enacted between 1984 and 1990) which was similar to s 5 of the Arbitration Act 1908.

International arbitration is governed by the International Arbitration Act 1974 (Cth) ("IAA"), which was amended in 2010 to better conform with the Model Law.[48] Section 7(2) of the IAA provides that the Court must stay proceedings and refer the parties to arbitration if there is a valid arbitration agreement.

VI CURRENT POSITION IN NEW ZEALAND

As noted above, the issue recently came before the New Zealand Court of Appeal in *Zurich Australian Insurance Ltd v Cognition Education Ltd*.[49]

Cognition was the insured under a contract frustration insurance policy issued by Zurich.

Cognition made a claim under the policy. Zurich declined to indemnify Cognition. Despite the policy containing an arbitration clause, Cognition issued proceedings in the High Court seeking summary judgment. Zurich filed an appearance under HCR 5.49 objecting to urisdiction and also applied for a stay of the proceedings in reliance on the arbitration clause.

Cognition argued that the jurisdictional issue must be decided before the Court could consider the merits of the summary judgment application and therefore the stay application had to be determined first. Zurich argued that logic and practicality dictated that the applications should be heard together and that the tests to be applied where essentially the same; whether Zurich had an arguable defence to Cognition's claim.

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46 Jones, above n 45, s [4.620].

47 Jones, above n 45, s [4.635].

48 International Arbitration Act Amendment Act 2010 (Cth).

49 *Zurich Australian Insurance Limited v Cognition Education Limited*, above n 6.

In a detailed and reasoned decision Bell AJ agreed with the position taken by Cognition.

He held that both applications required an inquiry into whether Zurich had an arguable defence to Cognition's claim and the matters should therefore be heard together.[50]

The matter was argued before the Court of Appeal on review in February this year.

Several policy arguments for and against the respective positions were canvassed before and considered by the Court of Appeal. In particular, the arguments as to party autonomy with regard to dispute resolution, holding parties to their bargains, reduced judicial intervention and promoting consistency of arbitral regimes based on the Model Law. Key policy arguments will be discussed further in the next section.

The Court of Appeal acknowledged that some of the policy arguments supporting the "principled" approach have merit. However, the Court said that there are countervailing arguments and "Parliament has made its choice which we must uphold".[51]

The Court noted that the fact that the New Zealand Parliament chose to insert the added words in 1996 after the United Kingdom Parliament had chosen to remove them, suggests that the New Zealand Parliament considers that the safeguards against arbitral delay which summary judgment provides are still necessary.[52]

The Court of Appeal found that by including the added words to art 8(1), Parliament intended that the courts would apply the same arguable defence test to stay applications as is applied to summary judgment. The Court concluded that there will be no dispute for the purposes of art 8(1) if the defendant has no arguable basis for disputing the plaintiff's claim and the court is empowered to refuse to stay a proceeding if the claim is a proper one for summary judgment. In so concluding, the Court of Appeal endorsed the decision of Bell AJ at first instance that summary judgment and stay applications should be heard together.

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50 *Cognition Education Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2012] NZHC 3257.

51 *Zurich Australian Insurance Limited v Cognition Education Limited*, above n 6, at [76].

52 *Zurich Australian Insurance Limited v Cognition Education Limited*, above n 6, at [53] and [54].

VII THE COUNTERVAILING POLICY ARGUMENTS

In this part of the paper, we traverse the main arguments for and against the Court of Appeal's decision in *Zurich*.

A Arguments for Exercising Usual Summary Judgment Jurisdiction, rather than Referring Parties to Arbitration

The best argument – and the one which appealed to the Court of Appeal – is not in fact one of policy. It is that, applying ordinary statutory interpretation principles, this is the most obvious interpretation of the added words.

Although the literal meaning of the words themselves does not import, or even refer to, the summary judgment procedure, it nevertheless appears that this was the intention behind their inclusion as glosses on art 8(1) of the Model Law.

First, this is apparently what the New Zealand Law Commission considered would be the effect of the added words. The relevant passage from the 1991 Report[53] is cited by the Court of Appeal at [43]:

> The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report:
>
> Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 Arbitration International at 53)
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> The phrase makes it explicit in this provision the element of "dispute" which is already expressly included in article 7(1) when read with s 4. The same reasoning underlies the recommendation in the Alberta ILRR report that a court be empowered to refuse to stay an action if "the case is a proper one for a default or summary judgment".
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> In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no "matter which is the subject of an arbitration agreement" within the meaning of article 8(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

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53 Law Commission, above n 22, at [308] and [309].

Mr Galbraith QC submitted that the word "useful" and reference to the absence "of *any* dispute", in the latter paragraph, meant that it would be wrong to conclude that the Law Commission was necessarily endorsing the "arguable defence" interpretation of the added words. The Court of Appeal, however, found the passage to be clear in context ("the preceding paragraph puts the matter beyond all doubt": [45]). That is, whatever its merits as arbitration policy, it does appear that the Law Commission was trying to achieve the availability of the usual summary judgment procedure, the "efficiency of [which] should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated".

Secondly, by the time the Act was being drafted, there was significant (though not universal) case law under the Arbitration Act 1975 (UK) that the added words would be interpreted as importing the usual summary judgment procedure.[54] If the New Zealand drafters had not intended this result, it would have been prudent to use a different formulation.

Thirdly, there was, at this time, a conflict of New Zealand authority as to whether the summary judgment procedure would be available where parties had agreed to arbitrate:

- in *Royal Oak*, a domestic arbitration governed by s 5 of the Arbitration Act 1908, which did not contain the added words, the summary judgment procedure was held applicable; but
- in *Baltimar*, an international arbitration governed by s 4(1) of the Arbitration (Foreign Agreement and Awards) Act 1982, which also did not contain the added words,[55] the summary judgment procedure was held inapplicable.

In light of this conflict, the inclusion of the added words were a clear nod in the direction of the *Royal Oak* interpretation, and could fairly be seen as confirmation of its continued relevance. Again, had this result not been intended, it would have been prudent to use a different formulation.

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54 See the cases cited in *Zurich Australian Insurance Limited v Cognition Education Limited* (above n 6), at n 8 of the Court of Appeal's decision. But see also *Hayter v Nelson and Home Insurance* [1990] 2 Lloyd's Rep 265 (QB), in which Saville J accepted that the phrase "not in fact any dispute" meant there was not in fact anything disputable.

55 Though the s 4(1) power to stay permitted a court to refer to arbitration "any matter in dispute between the parties"; which could be argued to implicitly create the same effect as the express added words.

Fourthly, the Act was passed five months after the Arbitration Act 1996 (UK), which deliberately chose not to include the added words in its s 9(1). As the Court of Appeal notes at [54], the decision of the New Zealand Parliament to retain the added words where they had not been retained in the United Kingdom suggests that the perceived safeguards of summary judgment were still considered useful.

Finally, the inclusion of the added words was a deliberate departure from the Model Law.

Some effect needs to be given to this choice. Holding that it does not import the summary judgment procedure, where this could reasonably have been expected, has overtones of judicial engineering to water down a possibly unattractive, but reasonably clear, statutory provision.

The policy arguments in favour of the reverse sides of the coin approach are weaker than the statutory interpretation arguments. The main one mentioned by the Court of Appeal is that "the summary judgment procedure does offer a timely and efficient means of resolution", which should be available to prevent a claimant being forced into the expense of a full scale arbitration if there is no arguable defence (at [75]).

Aside from this, there is the fact that the Law Commission did not see fit to revise the Act during its 2007 review, but instead thought it appeared to be working well in practice.

In short, the basic case is that the summary judgment jurisdiction is a useful additional mechanism, deliberately retained by the legislature as a domestic innovation, and there is no real evidence of it causing havoc over the past decade and a half. Proponents would no doubt say that opponents are waging a storm in a teacup.

B Arguments for Referring Parties to Arbitration, rather than Exercising Summary Judgment Jurisdiction

Policy arguments are relevant in the context of consideration by the courts only if the statutory interpretation argument is not foreclosed. But it may not be. The Court of Appeal's statutory interpretation decision relies on a series of inferences. It is true that effect needs to be given to the deliberate inclusion of the added words, and that significant English authority had interpreted those words as importing summary judgment jurisdiction. But:

- the words do not themselves import, or even refer to, summary judgment jurisdiction; and

- there were by 1996 loud dissenting voices, most notably the *Hayter v Nelson* decision,[56] suggesting that the words should not be interpreted to have that effect.

One could reasonably argue, as did Mr Galbraith QC, that the inclusion of the words was ambiguous at best – leaving the decision as to what interpretation to place on them as a matter for the courts. A possible interpretation is that they preserved, not full summary judgment jurisdiction, but only a residual discretion to refuse a stay where there really was in fact no dispute; that is, the alleged dispute was plainly contrived, advanced in bad faith or amounted to an abuse of process. If so, the Law Commission's deliberate inclusion of the words may be regarded less as a decisive step than a kick for touch. In light of the confused and inconsistent caselaw, the exact meaning of and procedure imported by those words would be for the courts to develop. On this view, a statutory interpretation exercise is insufficient, and one does need to advert to policy arguments.

If so, there are formidable policy arguments in its favour.

First, it is easy to overestimate the efficiency of the summary judgment procedure. The procedure is beguilingly simple, but can involve significant legal and evidential complexity. As to legal complexity, it is well established that even difficult points of law can be appropriate for summary judgment.[57] As to factual complexity, while summary judgment should not be granted where there are disputed material facts, there is often much work required to safely establish the existence of disputed facts. Where, despite differences on certain factual matters, the lack of a tenable defence is plain on the material before the court, summary judgment will in general be entered.[58] The summary judgment procedure is, in reality, a form of preliminary truncated trial. In many cases of genuine complexity, it will obviously not succeed, so a defendant need not be put to considerable expense. But there is a material subset of arbitration cases for which a summary judgment application could possibly succeed, if not carefully defended. In those cases, the procedural burden on a defendant is not minor. And, in any event, the defendant is deprived of having the merits considered by the specialist arbitrator or arbitrators s/he bargained for.

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56 *Hayter v Nelson and Home Insurance Co*, above n 37.

57 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.

58 Above n 4.

This leaves aside the time the process can take. At least several months are required. If, as in *Zurich*, appeals are taken, the process can take much longer. In *Zurich*, the plaintiff's summary judgment application was filed on 9 March 2012, with a procedural hearing held on 27 November 2012. The Court of Appeal's decision was heard in February 2013, with a decision given on 29 May 2013. Leave to appeal is presently being sought before the Supreme Court. And all of this before the defendant's protest to jurisdiction is heard, a substantive summary judgment hearing is held (presently scheduled for September 2013), a decision given – and, if unsuccessful – the parties are then required to commence arbitration. In other words, what looks like a procedural shortcut can in fact be treacherous.[59]

Secondly, because art 8(1) does not refer to the summary judgment procedure, it does not include any machinery for applying it in the context of arbitrations. Nor do the High Court Rules. This makes it ripe for exploitation. In theory, the procedure is available even once an arbitration has commenced. Imagine that a claimant commences an arbitration against a defendant, who responds by:

- commencing summary judgment proceedings for a negative declaration that the plaintiff is not lawfully entitled to the relief sought in the arbitration; and
- seeking an anti-arbitration injunction in order that the dispute be resolved by those summary judgment proceedings.[60]

The defendant would presumably respond by seeking a stay of the summary judgment proceedings under art 8(1). But, on the reverse sides of the coin approach, the court would only be bound to grant a stay if, considering the merits of the claim, it found there was, in fact, a dispute between the parties with regard to the matters agreed to be referred.

Thirdly, an expansive interpretation of art 8(1) is out of step with modern arbitration practice, whether domestic or international. The Court of Appeal thought otherwise, but could refer only to several Canadian provinces and South Africa, in which either the reverse sides of the coin approach, or a wider discretion, is given with respect to stays of court proceedings relating to matters subject to an arbitration agreement (see [73]). With respect, this is unconvincing.

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59 As Lord Scarman said in *Tilling v Whiteman* [1980] AC 1 at 25, of preliminary points of law being too often treacherous short cuts.

60 Relying on the decision of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 (HC).

One of the purposes of the Act is to harmonise the law in Model Law jurisdictions, of which there are now 66, including most of New Zealand's Asian neighbours (Hong Kong, Japan, Malaysia, Singapore, South Korea and Thailand). Australia has recently tightened up both its federal and state legislation to conform more closely to the Model Law.[61] The United Kingdom, which is not a Model Law jurisdiction, has nevertheless led the way in underscoring the inviolability of the arbitration agreement, confirming that the Court will enforce it in any way possible – whether through a stay of English court proceedings,[62] or an anti-suit injunction in respect of foreign court proceedings[63] – rather than subvert the arbitral process by enquiring into the merits.

Fourthly, and perhaps most importantly, there is certainly no escaping the conclusion that the decision is completely out of step with *international* arbitration orthodoxy. The Court of Appeal noted Mr Ring QC's submission that party autonomy works both ways: the parties agreed that New Zealand law would apply to the arbitration in question, and that it would be held in New Zealand (at [74]). But this is beside the point. The added words put New Zealand in breach of its international obligations under art II(3) of the New York Convention, which provides that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New Zealand's obligation is not met whenever, instead of referring the parties to arbitration, a New Zealand court embarks upon a summary judgment procedure. An argument can be made that a restrictive interpretation of the added words must be preferred, as this is most consistent with New Zealand's international obligations.[64]

The practical effect on foreign parties may, in fact, be overstated because Zurich's – yet unresolved – protest to jurisdiction may still avail it. But – as a

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61 See the section on *Australian arbitration reform*, at Part V above.

62 *Premium Nafta Products Ltd v Fili Shipping Co Ltd (sub nom Fiona Trust & Holding Corp v Privalov)* [2007] 4 All ER 951, [2007] UKHL 40.

63 *Ust-Kamenogorsk Hydropower Plant JSC v AER Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 (12 June 2013).

64 See *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); *New Zealand Air Line Pilots' Association Inv v Attorney-General* [1997] 3 NZLR 269 (CA); and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

fifth concern – this risks creating an odd disparity between the treatment of foreign and domestic parties to the *same* arbitration agreement. Some explanation is required. At the end of his judgment in the High Court, Bell AJ identified three potential caveats. One was that "international cases may be treated differently" on the basis that:[65]

> [t]he exercise of the court's power to assume jurisdiction over non-residents may restrict New Zealand's summary judgment approach to New Zealand residents, and not apply it to foreigners, thereby allowing consistency with the arbitration regimes of other countries.

In other words, a foreigner sued in New Zealand could – as has Zurich – protest jurisdiction under HCR 5.49 on the basis that New Zealand is *forum non conveniens* due to the existence of the arbitration agreement. High Court Rule 5.49(7) requires that objections to jurisdiction relating to service abroad must be determined under HCR 6.29. In determining whether to exercise their jurisdiction under this rule, the Court may take into account "whether New Zealand is the appropriate forum under r 6.28(5)(c) and whether other relevant circumstances support an assumption of jurisdiction under r 6.28(5)(d)" (HC decision, at [60]).

Associate Judge Bell did not appear to consider that the same procedural route was available to a New Zealand-resident defendant, anticipating that a *forum non conveniens* argument would be made by "non residents" only. This may not be so.[66][68] Even if, however, a New Zealand resident can theoretically advance a *forum non conveniens* argument, they may well face a more difficult task than their foreign counterpart in doing so. The rubber really hits the road where the place of arbitration is outside New Zealand, but summary judgment proceedings are brought in New Zealand. Here, it is easy to see a protest to

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65 *Cognition Education Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand*, above n 50, at [60].

66 Although the High Court has subject matter and personal jurisdiction over a New Zealand party served in New Zealand, a New Zealand party may still invoke the doctrine of *forum non conveniens* at common law (see for example, *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC) at 525; and *Longbeach Holdings Limited v Bhanabhai and Co Limited* [1994] 2 NZLR 28 (CA) at 35). The Supreme Court has recently confirmed that a *forum non conveniens* protest may properly be made under HCR 5.49 (*Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94 at [25]-[27]), and several High Court decisions have proceeded on the basis that a New Zealand party served in New Zealand *does* have a right to apply for a stay on *forum non conveniens* grounds. Most relevantly, the High Court has previously – and prior to the Act coming into force – upheld an application by a domestic party that New Zealand is a *forum non conveniens*, and stayed the proceedings, where the parties had agreed to arbitrate any disputes between them in London: *Mobil Oil New Zealand Ltd v The Ship "Stolt Sincerity"* HC Auckland AD628/93, 14 March 1995.

jurisdiction from a foreign party succeeding. It is less easy to imagine the same protest succeeding from the New Zealand party to the same agreement. Permitting all parties to assert jurisdictional defences would completely neutralise the added words for international arbitrations, or at least those held outside of New Zealand. This would, effectively, reverse the reverse side of the same coin analysis of art 8(1) in an international context.

It therefore seems doubtful that the same jurisdictional latitude will be permitted to the New Zealand party. Because, certainly in practice if not also in theory, the New Zealand party will have a greater difficulty in establishing *forum non conveniens* in support of an international arbitration agreement, the foreign party has available a sharper tactical weapon than does the New Zealand party. Given the primacy of the equality principle to arbitrations,[67] this is concerning. In Europe, the tactic of initiating court proceedings in breach of an arbitration agreement has become a topic of some considerable debate. The European Court of Justice has ruled that, as a matter of comity and equality, applicable EU regulations prohibit domestic courts (in practice, the English courts) from granting anti-suit injunctions to prevent what has become colloquially known as the "Italian torpedo" – filing proceedings in breach of an arbitration agreement, in a European court with a full docket, in order to slow the progress of a claim.[68]

Judicial endorsement of the reverse sides of the coin approach confirms that a "New Zealand torpedo" is available in international arbitrations – but most obviously for foreign parties to use against New Zealand parties. The tactic would give the foreign party a chance at a summary dismissal of a claim; something which is not a usual feature of international arbitration. The dismissal would not be binding on a foreign arbitral tribunal, but it would have persuasive tactical effect.

VIII DISCUSSION: THREE OPTIONS FOR RESOLVING THE POLICY ISSUES

We now put forward for discussion three options for resolution of the issues discussed above.

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67 See Schedule 1, art 18.

68 *West Tanker Inc v Ras Riunione Adriatica di Sicurta SpA* [2007] UKHL 4; and *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* Case C-185/07, 10 February 2009 (ECJ). Note that the United Kingdom Supreme Court has recently confirmed its jurisdiction to award anti- suit injunctions in respect of foreign court proceedings: see *Ust-Kamenogorsk*, above n 65.

A Leave the Added Words in Article 8(1), Accepting the Current Interpretation by the Court of Appeal

This option requires an acceptance that the main policy reason for the original introduction of the added words remains valid today: that is that arbitration is prone to inefficiency and delay and summary judgment should be the preferred method for determining whether there is anything disputable to be referred to arbitration.

With regard the "efficiency" of the summary judgment procedure, see the discussion at paragraphs [73] to [76] above.

With regard to arbitration, Williams and Kawharu note that:[69]

> The NZ Act specifically allows parties to agree on the procedure to be followed by the arbitral tribunal. Therefore, there is nothing to prevent parties from agreeing that the arbitrator may rule upon any claim or defence, without holding a full evidential hearing, if the arbitrator concludes that there is no material issue of fact and that a claim or defence can be determined as a matter of law. The object of the "added words" is worthy, but the insertion of the added words was unnecessary to achieve it.

Further, it can be argued that the problems with delay and inefficiency in arbitration have been recognised by the market and steps have been taken to address them. There are now several bodies in the New Zealand market which offer parties the option of fixed fee arbitrations on the documents for low value claims and a range of expedited arbitration procedures.[70]

Of course, parties may not – and usually do not – agree on the procedure for the arbitration in advance of a dispute. As a result, and due to the limits on the arbitrator's discretion as to procedure imposed by art 18, Schedule 1 and natural justice, it perennially remains unclear whether a strike out or summary judgment procedure is permissible in any given arbitration.

B Delete the Added Words from Article 8(1)

This option appears to shift the balance in favour of the "principled" approach by providing for party autonomy, holding the parties to their bargain, reduced judicial intervention and bringing the New Zealand position into line with other comparable jurisdictions. However, it is not free of difficulty.

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69 Williams and Kawharu, above n 34, at s [4.13.5].

70 See the websites for the New Zealand Dispute Resolution Centre (www.nzdrc.co.nz) and the Building Disputes Tribunal (www.buildingdisputestribunal.co.nz).

As the UK experience has shown, the purpose of excision of the added words needs to be clearly articulated by Parliament; otherwise it may lead to confusion and uncertainty. In *Halki Shipping*, the English Court of Appeal was unable to agree unanimously on the effect of excision of the added words by the UK Parliament.[71]

Further, if the added words are excised, how should the New Zealand courts deal with an application for a stay of summary judgment proceedings?

- Should it be enough for the respondent to simply dispute the claim so that the matter must be referred to arbitration unless and until the claim is admitted?[72]
- Or should the Court have to be satisfied at least that the dispute is *bona fide* or genuine?
- Would it be possible to refuse a stay if the matter turns on a point of law which is plainly misconceived?[73]
- And which party bears the onus in this regard?

Another issue to consider is whether there will only truly be party autonomy if the parties have the option of agreeing whether they want the protection of the added words or not?

Delete the added words from art 8(1) (where they apply to both domestic and international arbitration) and move them to Schedule 2 (where they would apply optionally to both forms of arbitration, but on an "opt-out" basis for domestic arbitrations and an "opt-in" basis for international arbitrations).

This solution would make the safeguards anticipated by the summary judgment procedure available by default in domestic arbitrations, but they would have to be specifically selected for international arbitrations.

Making this change arguably better focuses the original intent of the drafters of this domestic innovation – by preserving the effect of *both* the decisions in *Royal Oak* and *Baltimar*. That is, it would preserve the comfort blanket of imposed judicial oversight for most domestic arbitrations. But it would also assuage international concern over New Zealand court interference with international arbitration. As noted above, the added words are contrary to New Zealand's treaty obligations under the New York Convention, and put New Zealand out of step with other Model Law jurisdictions.

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71 See Part IV above.

72 As appears to be the position in *Halki Shipping*, above n 41.

73 See above text following n 32 and for n 41.

This change would also have the effect of neutralising the New Zealand torpedo. A foreign party would not be able to steal a march on its New Zealand counterparty by seeking summary judgment, unless both parties had specifically permitted this option. One can safely wager that few, if any, parties to international arbitrations would select the added words.