ELLA MCLEAN

**ARBITRATOR ETHICS IN NEW ZEALAND:
THE NEW ZEALAND APPROACH TO ETHICAL
OBLIGATIONS IN INTERNATIONAL ARBITRATION**

Faculty of Law
Victoria University of Wellington

2015

Abstract

Arbitrators in international arbitrations must observe ethical obligations of impartiality and independence, competence, diligence, confidentiality and compliance with the arbitration agreement. A New Zealand understanding of these standard international obligations is influenced by New Zealand's ethical culture. New Zealand arbitrators practicing overseas must recognise how their culture affects their approach to ethical obligations. In particular, they must be aware that a New Zealand approach to impartiality and independence may be seen as relaxed by those outside New Zealand. A New Zealand approach to ethical obligations is also applied during the enforcement of arbitrators' obligations where New Zealand is the seat of an international arbitration. Foreign parties are likely to be satisfied with the enforcement of ethical obligations in New Zealand. This is good news for those seeking to establish New Zealand as a regional hub of international arbitration.

Keywords

International arbitration - ethical obligations - New Zealand - culture of ethics - enforcement

Table of Contents

I Introduction	4
II Background	5
A The Role of the Arbitrator in Arbitration	6
B Why Should We Care About Ethical Obligations in International Arbitration?	7
III New Zealand's Culture of Ethics	8
A New Zealand Culture	9
1 Egalitarianism and conformity	9
2 Pragmatism and a 'can-do' attitude	12
B New Zealand's Legal Profession	13
1 New Zealand has a small and intimate legal community	13
2 Examples demonstrating the ethical culture of New Zealand's legal community	15
(a) Judge Wilson	15
(b) Judge Hesketh	18
C Conclusion: New Zealand's Culture of Ethics	19
IV Ethical Obligations of Arbitrators	20
A Impartiality and Independence	21
1 Source of the ethical obligations and what they involve	22
2 Continuing uncertainty	23
(a) A duty to investigate	23
(b) Party-appointed arbitrators	24
3 What does impartiality and independence mean in the New Zealand context?	25
B Competence	26
C Diligence	28
D Confidentiality	30
E Compliance with the Arbitration Agreement	33
F Additional Ethical Obligations	34
V Consequences for New Zealand Arbitrators Working Overseas	34
A Situations for Heightened Awareness	35
B Preventing New Zealand's Culture of Ethics from Disadvantaging Arbitrators	36
VI Consequences Where New Zealand is the Seat of Arbitration	37
A New Zealand as a Seat of International Arbitration	38
B Enforcing Ethical Obligations in New Zealand	38
1 Enforcement by the arbitral institution	38
2 Enforcement by professional groups	41
3 Enforcement by the courts	43
(a) Supervisory role	44
(i) Impartiality and Independence	44
(ii) Competence	45
(iii) Diligence	46
(iv) Confidentiality	46
(v) Compliance	46
(vi) Limits of the courts' supervisory role	47
(b) Award non-enforcement	48
C An Outsider's Perspective	49
D Where to From Here?	51
VII Conclusion	52
VIII Bibliography	55

I Introduction

The growth that international arbitration has experienced in recent decades has been accompanied by the development of ethical obligations governing the behaviour of arbitrators within international arbitrations. It is generally accepted that arbitrators acting in international arbitrations must be impartial and independent, competent, diligent, confidential and they must comply with the arbitration agreement. While these ethical obligations exist internationally, an individual's understanding of each obligation is influenced by their ethical background.

It is important to appreciate the effect of a country's ethical culture on understandings of these ostensibly standard obligations. Understanding this effect is the first necessary step towards ensuring that those involved in international arbitrations share the same expectations. Someone who is aware of their ethical culture and how it affects their understanding of ethical obligations will recognise that parties in an international arbitration may have different expectations of arbitrator behaviour. This allows individuals to adjust their approach to these obligations in accordance with the parties' legitimate expectations. This facilitates effective dispute resolution through international arbitration.

This paper considers New Zealand's culture of ethics and how it influences understandings of ethical obligations. It is concerned solely with an arbitrator's ethical obligations within international arbitration. This is because a New Zealand understanding of ethical obligations is most likely to clash with divergent attitudes at the international level. This paper may be seen as a tool for arbitrators to whom ethical obligations apply, and for those enforcing these obligations in New Zealand.

New Zealand's ethical culture can affect the way New Zealand arbitrators approach their ethical obligations. This may be a problem for arbitrators working in international arbitration overseas, particularly where fundamental obligations of impartiality and independence are concerned. New Zealand arbitrators must recognise how their background influences their approach to ethical obligations. This will allow them to adjust their approach to ethical obligations for the particular context.

The ethical culture of New Zealand also guides the enforcement of ethical obligations where New Zealand is the seat of an international arbitration. Again, an awareness of New Zealand's

ethical culture and its effects is important for those enforcing arbitrators' ethical obligations. This is particularly important in relation to impartiality and independence as the New Zealand approach to these obligations may appear relaxed to outside parties.

Despite New Zealand's relatively relaxed approach to impartiality and independence, foreign parties should be satisfied with New Zealand's standard of ethical regulation. Arbitral institutions and professional groups are the primary regulators of arbitrators and have an interest in ensuring high standards of behaviour. They will take ethical obligations, including impartiality and independence, very seriously within the New Zealand context. The New Zealand courts act as a backstop enforcer of ethical obligations and will only interfere with proceedings in serious cases of arbitrator misconduct where alternative means of regulation are unavailable. This is an appropriate role for the courts. That foreign parties should be satisfied by the New Zealand's enforcement of ethical obligations is good news for New Zealand's arbitration industry which seeks to establish New Zealand as destination for international arbitration in the Asia-Pacific region.

The necessary background to this analysis is provided in Part II of this paper. Part III investigates the culture of ethics within New Zealand. Part IV discusses each of an arbitrator's ethical obligations in turn. This discussion indicates where the obligations of impartiality and independence, competence, diligence, confidentiality and compliance are found in the New Zealand context. It also considers how each obligation is understood in New Zealand. Part V considers the consequences that a New Zealand understanding of ethical obligations has for New Zealanders working as arbitrators in international arbitrations. Part VI contemplates the effect of a New Zealand understanding on the enforcement of these ethical obligations and what this means for New Zealand's future as a seat of international arbitration.

II Background

To understand the ethical obligations of an arbitrator in an international arbitration it is crucial to understand the background against which these obligations exist. Firstly, a basic understanding of the role of the arbitrator within arbitration is necessary. Subpart A provides this information insofar as it is relevant to the remainder of this paper. Subpart B will then address why it is necessary to consider the ethical obligations of arbitrators within international arbitration.

A *The Role of the Arbitrator in Arbitration*

Arbitrators are chosen to adjudicate conflicts between parties. While this is the ultimate objective of an arbitrator, the precise role of an arbitrator in any proceeding depends on the nature of the arbitration. For example, an arbitrator's role in a specific arbitration is "subject to change through individually crafted arbitration agreements."¹ Moreover, the exact nature of the arbitrator's role may vary according to whether the proceeding is *ad hoc* or administered through an institution, as well as the number of arbitrators involved in the proceeding.

Ad hoc arbitrations are "administered by the arbitral tribunal",² and do not "rely on the supervision or formal administration of an arbitration center."³ On the other hand, institutional arbitrations are administered through pre-established arbitral institutions.⁴ The behaviour of arbitrators in institutional arbitration is governed by "pre-established rules of organisation and procedure".⁵ The opportunity to enforce an arbitrator's ethical obligations depends to a large extent on whether a proceeding is *ad hoc* or institutional. This issue is considered further in discussion on 'Enforcing Ethical Obligations in New Zealand' in Part VI.⁶

The number of arbitrators charged with adjudicating a conflict varies between arbitrations. In some cases a sole arbitrator will preside over the proceeding. In others, a panel of arbitrators (often three individuals) will be engaged to resolve the dispute.⁷ Where a proceeding involves a panel of arbitrators, the panel will often be composed of two individuals unilaterally appointed by each party and a third 'chairperson' that the parties or the party-appointed arbitrators have agreed on.⁸ Whether an arbitrator is jointly or unilaterally appointed may affect their relationship with the parties. Whether this affects the nature of their ethical obligation is a matter of controversy that is considered below.⁹

¹ Catherine A. Rogers "Regulating International Arbitration: A Functional Approach to Developing Standards" (2005) 41 Stan. J. Int'l L 53 at 106.

² Mauro Rubino-Sammartano *International Arbitration: Law and Practise* (2nd ed, Kluwer Law Journal, The Hague, 2001) at 4.

³ Walter Matli "Private Justice in a Global Economy: From Litigation to Arbitration" (2001) 55 Int'l Org 919 at 927.

⁴ Rubino-Sammartano, above n 2, at 4.

⁵ Aleksander Goldstajn "Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects" in Petar Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotham Ltd., London, 1989) 27 at 33.

⁶ See discussion at 38.

⁷ Rubino-Sammartano, above n 2, at 312.

⁸ See discussion in Rogers, above n 1; see also Rubino-Sammartano, above n 2, at 318 - 319.

⁹ See discussion on party-appointed arbitrators below, at 24.

B Why Should We Care About Ethical Obligations in International Arbitration?

The need to regulate arbitrators has been widely accepted. An arbitrator is required to act as ‘judge’ in coming to a binding (and often final) decision on a dispute. This is a significant responsibility. It is understandable that parties expect the person or persons charged with resolving their conflict to adhere to certain standards of behaviour. As Paulsson indicates, the legitimacy of the arbitral process relies on the confidence reposed in the ethical standards of arbitrators.¹⁰

Arbitration has experienced a rapid growth in popularity over the last few decades. The expansion of arbitration has meant that the ‘informal social controls’ that previously regulated professional conduct within international arbitration are no longer sufficient.¹¹ The growth of international arbitration has led to increased cultural and legal diversity in international arbitration today.¹² The changing nature of international arbitration has led the informal social controls of the past to be replaced by ethical rules.

Regulation of arbitrator conduct at the international level has been the topic of considerable scholarship. In 2005 Rogers said “professional standards and procedures for regulating arbitrators represent only partial and imperfect modifications on the earlier regime based on self-regulation.”¹³ In the decade since the statement was made there has been ongoing development in the regulation of arbitrators. While certain matters concerning the ethical obligations of arbitrators remain controversial,¹⁴ the “primary sources and mechanisms for professional regulation for arbitration” have been developed.¹⁵ These include the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration,¹⁶ as well as the rules of various arbitral institutions.¹⁷ These developments have stemmed largely from private international actors and do not recognise the fact that a person’s understanding of an ostensibly standard ethical obligation is influenced by their national culture.

¹⁰ Jan Paulsson *The Idea of Arbitration* (Oxford University Press, Oxford, 2013) at 147.

¹¹ Rogers, above n 1, at 61.

¹² Rogers, above n 1, at 62.

¹³ Rogers, above n 1, at 57.

¹⁴ See discussion on ‘continuing uncertainty’ at 23.

¹⁵ Catherine A. Rogers *Ethics in International Arbitration* (Oxford University Press, Oxford, 2014) at 7.

¹⁶ *IBA Guidelines on Conflicts of Interest in International Arbitration* (International Bar Association, London, 2004) [*IBA Guidelines 2004*]. These Guidelines have since been updated in 2014: *IBA Guidelines on Conflicts of Interest in International Arbitration* (International Bar Association, London, 2014) [*IBA Guidelines 2014*].

¹⁷ Rogers, above n 15, at 7.

Perceptions of ‘ethical’ or ‘unethical’ behaviour are influenced by an individual’s cultural context. While ethical obligations for arbitrators have developed at an international level the standard obligations that exist may apply differently across cultures. The possibility of ethical obligations having various interpretations poses a challenge to those engaged in international arbitration. While the development of ethical obligations at an international level is significant, it is also important that these obligations are uniformly understood. This means it is necessary to consider how the existing ethical obligations that govern arbitrator behaviour with international arbitration are understood in the New Zealand context.

While New Zealand is not currently a seat of choice for international arbitration, New Zealanders may work as arbitrators in foreign jurisdictions. It is important that New Zealanders engaged overseas understand the subconscious effect of New Zealand’s ethical culture on the way they understand their obligations as arbitrators.

The Arbitrators’ and Mediators’ Institute of New Zealand Inc (AMINZ) has expressed its intention to establish New Zealand as a regional hub for international arbitration.¹⁸ AMINZ is the primary professional group representing arbitrators in New Zealand and a central organisation within New Zealand’s arbitration landscape. The expressed intentions of AMINZ means it is necessary to examine how the ethical obligations of arbitrators are enforced in New Zealand and what effect this may have on New Zealand’s popularity as a regional seat of choice for international arbitration.

III New Zealand’s Culture of Ethics

This paper offers a unique New Zealand perspective on the ethical obligations of arbitrators. Culture affects the way people perceive ‘ethical situations’.¹⁹ Therefore, a general understanding of New Zealand’s culture of ethics is essential to fully understand the scope of arbitrators’ ethical obligations in the New Zealand context. There is little commentary available on New Zealand’s ethical culture. Therefore, this investigation attempts to distil an understanding of New Zealand’s ethical culture by looking at New Zealand culture and the nature of New Zealand’s legal profession.

¹⁸ For example the New Zealand International Arbitration Centre was established in 2013; see also the discussion in John G Walton “International Arbitration: Are we seat or are we just sitting” (paper presented to AMINZ Conference, Queenstown, August 2014).

¹⁹ See Scott J Vitell, Saviour L. Nwachukwa and James H. Barnes “The Effects of Culture on Ethical Decision-Making: An Application of Hofstede’s Typology” (1993) 12 Journal of Business Ethics 753 at 753.

Subpart A considers general aspects of New Zealand's culture. Discussion in subpart A is limited to aspects of New Zealand's culture that may be expected to influence New Zealand's culture of ethics and, in turn, the approach taken to the ethical obligations of arbitrators. Therefore while certain features of New Zealand society, such as multiculturalism and tikanga Māori, are important features of New Zealand culture, they are not included in this discussion.

Subpart B focuses on the particular nature of New Zealand's legal profession and how this may affect ethics within the legal community. Although arbitrators are not required to be legally qualified, they are often sourced from this legal community. Subpart C draws this discussion together by making tentative conclusions on New Zealand's culture of ethics.

A *New Zealand Culture*

Analysing one's own culture can be problematic. The nature of culture often means that a person is so familiar with their own culture that they fail to fully understand its unique characteristics. To get around this issue this paper considers the clichés and oft-repeated descriptions used in relation to New Zealand culture. The related values of egalitarianism and conformity are considered first. New Zealand's so-called pragmatism and 'can-do' attitude are discussed second. Some of the social phenomena described below are time-worn and do not necessarily represent contemporary New Zealand society. Nonetheless, the context behind these social phenomena and their continued resonance with New Zealand society warrants their consideration.

1 Egalitarianism and conformity

New Zealand has historically been described as an 'egalitarian' society.²⁰ While perceptions of equality continue, 'equal' is no longer an accurate description of New Zealand society. A recent report published by the Organisation for Economic Co-operation and Development (OECD) demonstrates that New Zealand society has been seriously affected by growing

²⁰ Jock Philips "Class – Understanding Class" (12 July 2012) Te Ara – the Encyclopedia of New Zealand <www.TeAra.govt.nz>; see also Jeffrey C Kennedy "Leadership and Culture in New Zealand" in Jagdeep S Chhokar, Felix C Brodbeck and Robert J House (eds) *Culture and Leadership Across the World: The GLOBE book of In-Depth Studies of 25 Societies* (Lawrence Erlbaum Associates, Mahwah, 2007) 397 at 399; and Duncan Webb "Judicial Conduct in Very Small Places: Some Contextual Questions" (2003) 6 Legal Ethics 106 at 109; and Stephen Levine "'Political Values – The fair society'" (13 July 2012) Te Ara - the Encyclopedia of New Zealand <www.TeAra.govt.nz> which explains the opinion of Leslie Lipson, New Zealand's first political science professor that in contrast to the United States of America and their Statute of Liberty, New Zealand's political views would be best symbolised in a 'Statute of Equality'.

inequality in the last 20 years.²¹ Nevertheless, while New Zealand is no longer an equal society in reality, egalitarian values continue to influence the ethical culture of New Zealand.

The notion of ‘egalitarianism’ continues to resonate in New Zealand. As Webb notes, “There is a perception of equality in New Zealand that is arguably quite unique.”²² He later observes that “while academically such a view is now considered almost absurd, and inaccurate even when uttered, there remains in the public perception a strong notion of egalitarianism.”²³ While egalitarianism may be a myth, a persistent public belief in this myth may nonetheless shape the culture of New Zealand.

The egalitarian myth is manifested in a general aversion to a person’s wealth or status affecting the way they are treated.²⁴ This social behaviour is explained in the Auckland University webpage that provides information about “social norms” to help international students adjust to life in New Zealand.²⁵ The webpage states that “New Zealand people dislike formality and tend to see each other as equals.” While it may be naïve to claim that all New Zealanders see each other as equal, the fact that this advice is given to international students indicates that this is considered to be a characteristic of New Zealanders on the whole.

Perceptions of egalitarianism also manifest in national values of conformity or the so-called ‘tall poppy’ syndrome. A tall poppy refers to a “conspicuously successful person.”²⁶ Tall poppy syndrome refers to a societal tendency to “to cut (an apparently successful person) down to size.”²⁷ To achieve highly is to distinguish oneself from one’s peers. Insofar as tall poppy syndrome exists in New Zealand it demonstrates an aversion to social distinction.²⁸

However, like egalitarianism, the extent to which the tall poppy syndrome remains applicable to New Zealand society has been challenged in recent years. The online Encyclopedia of New

²¹ Max Rashbrooke “How New Zealand’s Rich-Poor Divide Killed its Egalitarian Paradise” *The Guardian* (online ed, London, 12 December 2014).

²² Webb, above n 20, at 108.

²³ Webb, above n 20, at 109.

²⁴ Webb, above n 20, at 109.

²⁵ The University of Auckland “New Zealand social values” <www.auckland.ac.nz>.

²⁶ V Suchitra Mouly and Jayaram K. Sankaran *The Tall Poppy Syndrome in New Zealand: An Exploratory Investigation* (The University of Auckland Department of Management Science and Information Systems, Working Paper No. 222, March 2001) at 1; referring to the definition of ‘tall poppy’ contained in the Oxford Dictionary of New Zealand English 1997 edition.

²⁷ Mouly and Sankaran, above n 26, at 1; see also Kennedy, above n 20, at 399.

²⁸ See also discussion in V Suchitra Mouly and Jayaram K. Sankaran “The Enactment of Envy within Organisations” (2002) 38.1 *The Journal of Applied Behavioural Science* 36 at 54, in which the connection between egalitarianism and tall poppy syndrome is clearly made.

Zealand connects tall poppy syndrome to New Zealand society in the 1950s.²⁹ The website suggests that “by the 2000s there was less cutting down of ‘tall poppies’, less pressure to conform and a much greater readiness to celebrate excellence and diversity.”³⁰ While this may be true, a nuanced application of tall poppy syndrome persists in New Zealand society.

New Zealanders are proud of fellow citizens who achieve highly in their field (especially on the international stage).³¹ Examples include Sir Edmund Hillary, All Black’s captain Richie McCaw and the singer Lorde.³² While these successful individuals have not been ‘cut down’ there is a general interest that these ‘tall poppies’ remain grounded or down-to-earth.³³ This interest is reflected in the fact that “many [New Zealand] celebrities...are able to go about their daily lives relatively untroubled by fans because they are not regarded as special and it would be seen as trammelling [the egalitarian] virtue to shower them in public adulation.”³⁴

New Zealand is not an equal society yet it clings to perceptions of egalitarianism. This is seen in the way New Zealanders generally avoid treating people differently on the basis of wealth and status. This is demonstrated when looking at the tall poppy syndrome in New Zealand. While New Zealand society may be more willing to celebrate achievement than it was in the past, humility remains highly valued.

The persistence of egalitarian values has important implications for the nature of ethics in New Zealand. When a society insists on viewing everyone as ‘equals’, this must mean that everyone’s behaviour is judged according to the same standard. The value placed on humility

²⁹ Stephen Levine “Political values - Political values and the ‘Kiwi’ way of life” (13 July 2012) Te Ara - the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

³⁰ Levine, above n 29.

³¹ See Kennedy, above n 20, at 422.

³² The example of Sir Edmund Hillary who climbed Mt Everest in 1953 indicates that in fact the tall poppy syndrome has always been more about cutting down people who acted as if they were better than others rather than cutting down those who achieved highly.

³³ Regarding Richie McCaw see Sport New Zealand “McCaw leadership recognised through award” (press release, 21 May 2014) which quotes Sport New Zealand Chief Executive describing McCaw as having “earned the support and respect of the nation through his humble and down-to-earth nature.” Regarding Lorde see “Lorde’s hot New Zealand summer holiday” Stuff (online ed., New Zealand, 7 January 2015) which refers to the singer having a “typical Kiwi summer holiday” and mentions her humility. Regarding Sir Edmund Hillary see Justin Brown *Myth New Zealand* (Hurricane Press, Cambridge, 2010) at 148 and 149, where Brown comments on humility of the national hero who still had his name in the phone book and who sounded surprised when called at his home to be wished happy birthday by a New Zealand radio show. See also Kennedy, above n 20, at 407, where Kennedy discusses the tall poppy syndrome and says that it is the “attitude displayed by the high achiever” that is important.

³⁴ Webb, above n 20, at 109.

is also part of New Zealand's ethical culture and can influence reactions to misconduct. This will be further demonstrated by the legal community's reaction to Hesketh J's actions.³⁵

2 *Pragmatism and a 'can-do' attitude*

'Pragmatism' is defined as "a reasonable and logical way of doing things or of thinking about problems that is based on dealing with specific situations instead of on ideas and theories."³⁶ To describe New Zealanders as pragmatic means New Zealand citizens have a "practical, problem-solving approach to life."³⁷ This characteristic reportedly originates from New Zealand's early colonial history.³⁸ Pragmatism in New Zealand society has frequently been referred to as a 'can-do' attitude.

Modern life in New Zealand does not demand the same pragmatic attitude that early pioneers needed to survive. However, despite changing circumstances, the value of pragmatism persists.³⁹ This is exemplified in the "preference for common-sense solutions [that] can still be heard in New Zealander's discussions of politics".⁴⁰

It has been said that "New Zealanders don't look favourably on rules, detailed administrative procedures, or being controlled by micromanaging bureaucrats."⁴¹ This distaste for strict rules is arguably an extension of pragmatic values. A 'can-do' attitude is the antithesis of strict insistence on formal rules and procedures. Where rules and procedures are seen as unnecessary and burdensome there is a risk that they will be overlooked.

While New Zealand society generally values pragmatism, one must consider whether this extends to the legal profession. Lawyers must understand rules and procedure and must work with them on behalf of others. This suggests that the legal community has a greater respect for rules and procedure than New Zealand society generally. However, this does not prevent the legal profession being practical and problem-solving. Commentators have observed that a 'can-do' attitude within New Zealand's legal profession affects judicial ethics in New Zealand.⁴²

³⁵ See discussion concerning Hesketh J at 18.

³⁶ Merriam-Webster Dictionary "Pragmatism" <www.merriam-webster.com>.

³⁷ Kennedy, above n 20, at 400.

³⁸ Levine, above n 29.

³⁹ Levine, above n 29.

⁴⁰ Levine, above n 29.

⁴¹ Kennedy, above n 20, at 422.

⁴² Webb, above n 20, at 113.

A ‘can-do’ ethical attitude prevents “trifles” from interfering with an arbitrator’s job.⁴³ This does not bode well for the necessary introspection required of arbitrators when considering their ethical obligations. This attitude may leave less prominent ethical issues overlooked or dismissed.

B New Zealand’s Legal Profession

This subpart considers the ethical culture pervading New Zealand’s legal profession. The small and intimate nature of the legal community is considered first. This analysis is followed by two examples that demonstrate the legal profession’s approach to ethics. The ethical culture of New Zealand’s legal profession is part of the New Zealand context that may influence understandings of an arbitrator’s ethical obligations. This New Zealand context may affect the way New Zealand arbitrators engaged international arbitration view their ethical obligations, as well as the way these obligations are enforced within New Zealand.

1 New Zealand has a small and intimate legal community

New Zealand’s small population of approximately 4.5 million is reflected in the size of its legal community.⁴⁴ At the time of writing, there are 12,422 people holding a New Zealand practising certificate.⁴⁵ Of these lawyers, 545 are found outside New Zealand. The 11,877 lawyers found in New Zealand represents New Zealand’s legal community from which a culture of professional ethics emerges.

Although 11,877 lawyers is not a significant number of lawyers in itself, it is considerable given the size of New Zealand’s overall population. New Zealand has one lawyer per 370 individuals.⁴⁶ This is similar to the proportion of lawyers in England.⁴⁷ However, while New Zealand may have a relatively high proportion of lawyers, the small size of New Zealand’s

⁴³ Webb, above n 20, at 113.

⁴⁴ The estimated resident population at the time of the latest census (July 2013) was 4,442,100. It has been estimated to have increased since then with the estimated population at 30 June 2014 at 4,509,900: see Statistics New Zealand “National Population Estimates: At 30 June 2014” (14 August 2014) <www.stats.govt.nz>.

⁴⁵ Email from Christine Schofield (Acting Registry Manager at the New Zealand Law Society) to Ella McLean (author) regarding the Law Society Registry (6 January 2015).

⁴⁶ Elliot Sim “Oversupply of lawyers an ‘opportunity’” *LawTalk* (New Zealand, 7 November 2014).

⁴⁷ Sim, above n 46.

legal profession makes it more likely for lawyers to be acquainted with one another than may be the case in larger jurisdictions.⁴⁸

Of the 11,877 lawyers currently in New Zealand, approximately 46% are based in Auckland.⁴⁹ Wellington is the second most popular region for lawyers with approximately 22% of lawyers in New Zealand found in the capital.⁵⁰ Wellington also has the highest proportion of lawyers in the country.⁵¹ The concentration of lawyers in Auckland and Wellington increases the chance of lawyers knowing one another. New Zealand has been described as a "tight-knit legal community" on this basis.⁵²

New Zealand's judiciary is sourced from within this tight-knit legal community. Positions in the District Court and High Court are advertised and candidates are selected in consultation with both the legal profession and the judiciary.⁵³ Judges sitting on the Court of Appeal and the Supreme Court are generally sourced from within the judiciary and positions are not publicly advertised.⁵⁴ High Court judges feed into the Court of Appeal and "it is expected that most appointments to the Supreme Court will come from the Court of Appeal or the High Court."⁵⁵

The process of judicial appointment in New Zealand is significant as it means the judiciary is closely intermingled with New Zealand's tight-knit legal community. Although this reflects appointment procedures in other common law countries this approach is not universal. In Civil Law countries the career paths of judges and lawyers are generally separated. The comingling

⁴⁸ For example, in England and Wales there were 132,636 practising solicitors as at November 2014; see Solicitors Regulation Authority "Regulated Population Statistics" <www.sra.org.uk>. There was also 15,585 practising barristers as of December 2012; see Bar Standard Board *Bar Barometer: Trends in the profile of the Bar* (The General Council of the Bar of England and Wales, London, June 2014) at 13.

⁴⁹ Calculation made from figures in email from Christine Schofield, above n 45. It is interesting to note that this concentration has not changed significantly over time, 41% of lawyers were found in Auckland back in 1978, demonstrating that the concentration of lawyers has long been an feature of New Zealand's legal profession: see Georgina Murray "New Zealand Lawyers: From Colonial GPs to the Servants of the Capital" in Richard L Abel and Philip S Lewis (eds) *Lawyers in Society: The Common Law World* (University of California Press, Berkeley, 1988) 318 at 327.

⁵⁰ Calculation made from figures contained in email from Christine Schofield, above n 45.

⁵¹ As at 1 February 2014, Wellington had 1 lawyer to every 84 inhabitants: see Geoff Adlam "Snapshot of the New Zealand Legal Profession 2014" *LawTalk* (New Zealand, 28 February 2014) at 11.

⁵² Webb, above n 20, at 107.

⁵³ Ministry of Justice "Appointing Judges: A judicial appointments commission for New Zealand? – II Current New Zealand Situation" <www.justice.govt.nz> at [31].

⁵⁴ Ministry of Justice, above n 53, at [37].

⁵⁵ Ministry of Justice, above n 53, at [38]

of judiciary with the legal profession reinforces the intimate nature of New Zealand's legal community.

There is an element of elitism within New Zealand's legal community.⁵⁶ Part of this stems from the fact that a law degree requires several years of tertiary education. Lawyers and judges also earn relatively high wages especially in the highest levels of the profession.⁵⁷ Furthermore there is "evidence of law running in families."⁵⁸ This point is demonstrated by the fact that many judges are themselves the children of judges and lawyers.⁵⁹ These elements of elitism accentuate the intimacy of New Zealand's legal community. While these 'elite' characteristics are not unique to New Zealand, the small size of New Zealand makes them more pronounced. This is because a small total New Zealand population makes the elitism of certain members of society more conspicuous.

2 *Examples demonstrating the ethical culture of New Zealand's legal community*

The ethical culture of New Zealand's legal community can be further explored through the examples of Wilson J and Hesketh J. The actions of these judges and the legal community's reactions illustrate the ethical culture of the legal profession in practice. It is this practical reality that is crucial to this paper's investigation of the New Zealand context and its effect on understandings of arbitrators' ethical obligations.

(a) Judge Wilson

The actions of Wilson J were the subject of discussion in *Saxmere*.⁶⁰ As a Judge on the Court of Appeal, Wilson presided over a dispute between Saxmere Company Limited and the Wool

⁵⁶ See Murray, above n 49, at 345. See also Jock Anderson "Make secretive judges open their wallets" (18 April 2013) NBR <www.nbr.co.nz>, which describes the involvement of several judges and senior lawyers in the horse racing industry, this may be seen as one demonstration of wealth within the legal community.

⁵⁷ According to the 2013 Census, 48% of New Zealand's lawyers have an income of over \$100,000 compared to just 9% of New Zealand's general population: see "Some interesting blips in lawyer incomes" *LawTalk* (New Zealand, 12 November 2014).

⁵⁸ Webb, above n 20, at 108; see also Murray, above n 49, at 331.

⁵⁹ Webb, above n 20, at 108.

⁶⁰ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere* (No. 1)]; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere* (No. 2)].

Board Disestablishment Company Limited. The relationship between Wilson and Galbraith QC who represented the Wool Board was considered twice by the Supreme Court in 2009.

Prior to hearing the appeal Wilson had “telephoned counsel for Saxmere [Francis Cooke QC]⁶¹ and disclosed that he and Mr Galbraith had some mutual but unspecified business association.”⁶² The relationship disclosed was accepted by Saxmere and the case went to trial. The Court of Appeal found against Saxmere.⁶³

Saxmere was granted leave to appeal this decision on the basis of Wilson’s “apparent bias” when new evidence emerged concerning Wilson and Galbraith’s relationship.⁶⁴ Evidence before the Supreme Court established that Galbraith and Wilson “had been close personal friends for many years and had together with others been involved in the establishment of [a] horse stud.”⁶⁵ Despite this, the court did not accept that Wilson was “beholden to Mr Galbraith because of the business dimension of their relationship.”⁶⁶ The standard of apparent bias necessary to disqualify a judge had not been reached.⁶⁷

The Supreme Court subsequently reconsidered its decision when evidence emerged that Wilson was “in significant comparative debt” and owed Galbraith a significant sum of money.⁶⁸ The Supreme Court found apparent bias on the basis of this new evidence.

Saxmere gave the Supreme Court an opportunity to discuss the ethical obligations of impartiality and independence.⁶⁹ The fact that the Supreme Court initially found no apparent bias is significant given Wilson and Galbraith’s close personal relationship and business connections. It is possible that these facts would have been sufficient for a finding of apparent bias in other jurisdictions.

⁶¹ Sir David Gascoigne *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson* (The Judicial Conduct Commission, 7 May 2010) at [36].

⁶² Gerard McCoy “Judicial Recusal in New Zealand” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 322 at 328-329.

⁶³ McCoy, above n 62, at 328.

⁶⁴ McCoy, above n 62, at 329.

⁶⁵ McCoy, above n 62, at 331.

⁶⁶ *Saxmere (No. 1)* at [25] per Blanchard J.

⁶⁷ McCoy, above n 62, at 331.

⁶⁸ McCoy, above n 62, at 334.

⁶⁹ See further discussion on impartiality and independence at 21.

The potential for a personal relationship to give rise to apparent bias has been recognised by the Court of Appeal of England and Wales in *Locabail (UK) Ltd v Bayfield Properties Ltd*,⁷⁰ and by the High Court of Australia in *Webb v R*.⁷¹ While these cases did not specifically concern the relationship of a judge with counsel, they contain no indication that one person must be ‘beholden’ to another which was the standard applied by the Supreme Court in *Saxmere*.

The relationship between a judge and counsel was considered by the Nova Scotia Court of Appeal in *R v Smith & Whiteway Fisheries Ltd*.⁷² Apparent bias was not established in that case. However, while the pair had been law partners seven years prior and had “maintained a relationship after [the Judge’s] elevation to the bench” their relationship was not as close as that of Wilson and Galbraith.⁷³ Discussion in the judgment indicates that a close friendship, or business relationship, would be less acceptable than the relationship that existed in the case. Furthermore there was no indication that a judge must be beholden to counsel before apparent bias is established.

Saxmere also provides a general insight into New Zealand’s legal community. Firstly, the facts of *Saxmere* confirm that New Zealand has a tight-knit legal community, especially in the upper levels of the profession and the judiciary.⁷⁴ The phone call made by Wilson to Saxmere’s counsel demonstrates the level of contact between the judiciary and “the relatively small and

⁷⁰ In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, at [25], the Lord Chief Justice stressed that every potential case of bias must be decided on the “facts and circumstances of the individual case” but contemplated that a “real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case.” See also Christopher Forsyth “Judges, bias and recusal in the United Kingdom” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 361 at 371, where *Locabail* is described as the leading UK case on the applications of the test of bias.

⁷¹ *Webb v R* (1994) 181 CLR 41. In this case Deane J recognised ‘association’ as a category that suggests bias. He said, at 74, that ‘association’ “consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings.” See also Colin Campbell “Judges, bias and recusal in Australia” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 279 at 281.

⁷² *R v Smith & Whiteway Fisheries Ltd* 133 NSR (2d) 50.

⁷³ See Lorne Sossin “Judges, bias and recusal in Canada” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 301 at 313.

⁷⁴ “In New Zealand judges are appointed almost entirely from the practising legal profession. Most were senior barristers in active practice at the time of their appointment. Following their appointment judges regularly have lawyers appearing before them whom they knew when in practice and with whom they have sometimes had long associations. These associations have arisen from a variety of circumstances which include having been partners in the same law firm, practising barristers in the same chambers, or simply through appearing regularly in the same cases for different parties before courts and tribunals over the years. They regularly develop into personal friendships within this relatively small sector of the New Zealand legal community”: *Saxmere (No. 1)*, above n 60, at [101] per McGrath.

congenial inner bar.”⁷⁵ The events also highlighted the extent to which senior lawyers and judges (including the chief justice) were involved in the racing industry.⁷⁶

Wilson’s actions also demonstrate a relaxed attitude towards rules and procedures generally. According to the judicial conduct commissioner, disclosures should be made “either in open court or through the Court’s normal means of communication with the parties, for example, via the Registrar.”⁷⁷ The disclosure via a phone call is a far cry from this standard. Wilson clearly identified that his relationship with Galbraith was at least a minor issue, but nothing that could not be fixed with a telephone call.⁷⁸ Moreover, once the scandal came to light Wilson “admitted on television he breached court guidelines but only saw the guidelines later – claiming judges did not follow the guidelines in practice.”⁷⁹

Saxmere exposes the practical reality of judicial conduct and indicates a relaxed approach to ethical issues, particularly the obligations of impartiality and independence. *Saxmere* case could have been a wake-up call for the judiciary to take ethical obligations more seriously in the future. However, some commentators have suggested that the “sharp message from the Wilson affair” has been ignored.⁸⁰

(b) Judge Hesketh

Hesketh J was charged with using a document with intent to defraud for filing false travel expense claims.⁸¹ The District Court judge pleaded guilty to the charge, resigned and was “subsequently struck off from the roll of barristers and solicitors.”⁸² While Hesketh’s actions were unethical, the legal community was “sympathetic and ultimately forgiving of this

⁷⁵ McCoy, above n 62, at 328.

⁷⁶ Anderson, above n 56. Furthermore, according to McCoy, above n 62, at 329, Chief Justice Elias “recused herself from hearing the appeal as she and Wilson J were, ironically, in business together in yet another equine venture”.

⁷⁷ Gascoigne, above n 61, at [36].

⁷⁸ The Judicial Conduct Commissioner indicates that prior to *Saxmere*, “Justice Wilson and Mr Galbraith discussed what the Judge’s change in status might mean when Mr Galbraith appeared as counsel before him. They both concluded that there should not be any difficulty. But the Judge says that he was conscious of the possibility of some issue arising, at some stage”: Gascoigne, above n 61, at [34].

⁷⁹ Anderson, above n 56.

⁸⁰ Anderson, above n 56.

⁸¹ Webb, above n 20, at 113.

⁸² Webb, above n 20, at 113.

judge.”⁸³ Hesketh was permitted to remain at a firm as a law clerk,⁸⁴ and was “restored to the roll of barristers and solicitors” only 20 months after being struck off.⁸⁵

While the legal profession did not condone Hesketh’s unethical behaviour, it also did not ostracise him for his actions. The sympathy shown towards Hesketh reflects the legal profession’s view of his behaviour. As the President of the Law Society put it:⁸⁶

[Hesketh] suffered heavily for his actions in falsely claiming travel expenses. Since the matter came to light, he has acted honourably and in a manner which befitted a judicial officer. He is entitled to considerable credit for this.

This view of Hesketh must have been reinforced by the actions of Judge Beattie, who was also charged with filing false travel expense claims but “chose not to resign, and defended (successfully) the fraud charges brought.”⁸⁷

The reaction of the legal profession indicates a belief that “once a person has ‘fessed-up’ and paid the penalty he or she should be given the opportunity to redeem himself or herself and ought not to be unduly hampered by past conduct.”⁸⁸ This ability to look beyond the misconduct of an individual - especially when they have demonstrated humility – is an important aspect of the profession’s ethical culture. This example suggests that once within New Zealand’s tight-knit legal profession unethical behaviour can be forgiven. One will not necessarily be regarded as unethical on the basis of a single indiscretion.

C Conclusion: New Zealand’s Culture of Ethics

A continuing perception of egalitarianism exists (rightly or wrongly) in New Zealand society. This cultural value favours the use of a common standard when judging people. An indiscretion does not necessarily mean that a person is considered a ‘bad’ person, especially where the individual recognises that they behaved unacceptably. This is because all people are liable to

⁸³ Webb, above n 20, at 116.

⁸⁴ Webb, above n 20, at 115.

⁸⁵ Webb, above n 20, at 116.

⁸⁶ Webb, above n 20, at 115, which quotes the Decision of the New Zealand Law Society Disciplinary Tribunal, 17 September 1997.

⁸⁷ Webb, above n 20, at 114.

⁸⁸ Webb, above n 20, at 116

commit the occasional indiscretion. This is demonstrated by the Hesketh J example. This common standard approach to ethical behaviour must also apply to arbitrators.

The ‘can-do’ attitude that exists in New Zealand affects the way New Zealanders view ‘ethical’ situations.⁸⁹ A pragmatic approach to ethical obligations encourages individuals to ignore slight or potential issues in order to get a job done. While this is often a useful quality, it can be problematic when applied to ethical obligations. Wilson J’s actions demonstrate this issue as the Judge did not allow his relationship with counsel to complicate the hearing of a case. Wilson was aware that this relationship raised potential impartiality concerns yet he believed these issues could be resolved by a brief telephone call. A pragmatic approach to ethical issues is likely to result in a more relaxed approach than is expected elsewhere. This is an issue for New Zealand arbitrators acting in jurisdictions that expect a stricter approach to ethics. It also has implications for the enforcement of arbitrators’ ethical obligations in New Zealand.

The small size and intimate nature of New Zealand’s legal profession has influenced the culture of ethics that exists within the profession. In particular it influences the approach taken to obligations of impartiality and independence. The tight-knit nature of New Zealand’s legal profession makes it impractical to raise concerns over impartiality and independence on the basis of every personal relationship. The nature of New Zealand’s legal profession requires a more lenient approach to impartiality and independence than is necessary in other jurisdictions. This culture of ethics in turn influences the obligations of impartiality and independence required of an arbitrator. New Zealanders acting as arbitrators overseas and those enforcing ethical obligations in New Zealand are likely to demonstrate a relatively lenient approach to impartiality and independence.

IV Ethical Obligations of Arbitrators

This part of the paper considers an arbitrator’s ethical obligations of impartiality and independence, competence, diligence, confidentiality and compliance with the arbitration agreement. Additional ethical obligations that may exist in some contexts but are not universal are discussed in subpart F. The source of each ethical obligation is considered and an effort is made to understand how these obligations are coloured by New Zealand’s particular context. The New Zealand perspective offered in the discussion of these obligations is largely based on

⁸⁹ For the purpose of this discussion it is necessary to make generalisations about New Zealand on a societal level. The approach described in this paper will not apply to all New Zealanders in the same way.

the preceding analysis of New Zealand's culture of ethics, the Arbitration Act 1996 and the AMINZ Code of Ethics.⁹⁰

The Arbitration Act regulates arbitration within New Zealand.⁹¹ The Act applies to both domestic and international arbitration conducted within New Zealand, although Schedule 2 only applies to international arbitration through agreement of the parties.⁹² This paper is not concerned with Schedule 2 due to this domestic orientation. Schedule 1 of the Arbitration Act is “essentially” the UNCITRAL Model Law.⁹³

AMINZ is a “voluntary association of arbitrators and mediators set up to support the growth of alternative dispute resolution in all its forms, including arbitration.”⁹⁴ While other professional groups for arbitrators do exist, AMINZ plays a central role in arbitration in New Zealand.⁹⁵ AMINZ has a Code of Ethics containing 13 Ethical Statements with which its members must abide.⁹⁶ Commentary and guidance accompany each Ethical Statement. Ethical obligations existing under this Code are important to the domestic landscape of arbitration.

A *Impartiality and Independence*

Impartiality and independence are the fundamental obligations of an arbitrator. Impartiality has been described as a “state of mind” that enables an arbitrator to address a dispute neutrally.⁹⁷ Independence describes being “free from outside control.”⁹⁸ Outside control may arise through an arbitrator's relationship with one of the parties. While a subtle distinction exists between these terms, this distinction is not significant in practice.⁹⁹ Rogers says that the “terms are used more or less interchangeably by institutions and courts, and their true meaning is determined more in their application than in their phraseology.”¹⁰⁰

⁹⁰ Arbitrators' and Mediator's Institute of New Zealand Inc *Code of Ethics* (1 December 2011).

⁹¹ Section 6. This means where the arbitral *seat* is in New Zealand: see Gabrielle Kaufmann-Kohler “Globalisation of Arbitral Procedure” (2003) 36 Vand. J. Transnat'l L 1313 at 1315; see also Goldstajn, above n 5, at 30.

⁹² Section 6.

⁹³ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (United Nations publication, Vienna, 2008) [hereinafter referred to as the UNCITRAL Model Law]; see Law Commission, above n 93, at [2].

⁹⁴ Anthony Willy *Arbitration* (Brookers, Wellington, 2010), at 5.

⁹⁵ AMINZ is the professional group that commentators in New Zealand focus on: see for example Willy, above n 94. Furthermore, LEADR, an alternative professional group that is present in New Zealand, started in Australia whereas AMINZ has always been a New Zealand organisation. For these reasons it better to use AMINZ as a NZ example to demonstrate ethics in New Zealand.

⁹⁶ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at 2.

⁹⁷ Rubino-Sammartano, above n 2, at 331.

⁹⁸ Oxford English Dictionary Online “Independence” <www.oxforddictionaries.com>.

⁹⁹ Rogers, above n 15, at 91.

¹⁰⁰ Rogers, above n 15, at 91.

The sources of these ethical obligations within the New Zealand context are considered first. The second section of this discussion addresses two issues of continuing uncertainty that plague the ethical obligations of impartiality and independence. The final section considers what exactly the obligations of impartiality and independence entail in the New Zealand context.

1 Source of the ethical obligations and what they involve

The Arbitration Act requires that all potential arbitrators disclose “any circumstances likely to give rise to justifiable doubts as to that person’s impartiality or independence.”¹⁰¹ This duty of disclosure endures throughout the arbitral proceedings; arbitrators must “disclose without delay” if such circumstances arise.¹⁰²

Obligations in the AMINZ Code of Ethics reflect those contained in New Zealand’s legislation. The key statement on impartiality and independence within the Code requires AMINZ members to “disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias.”¹⁰³

The duty of disclosure described in the Act and the Code is central to impartiality and independence. The AMINZ ‘Guide to Arbitration’ says that “if the arbitrator has a relationship or interest it should be disclosed to the parties.”¹⁰⁴ Even if an arbitrator believes they are independent and impartial, disclosure is necessary for justice to be seen to be done.

The obligations of impartiality and independence extend beyond disclosure; where the “arbitrator is not personally satisfied that he or she can act with complete impartiality, the appointment must be declined or the arbitration discontinued.”¹⁰⁵ This is the case even where full disclosure is made to the parties and no objections are raised.¹⁰⁶ This situation is demonstrated in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration.¹⁰⁷ The Guidelines categorise conflicts of interest and includes a non-waivable red list of situations where conflicts of interests cannot be waived by the parties.¹⁰⁸

¹⁰¹ Schedule 1, s 12(1).

¹⁰² Schedule 1, s 12(1).

¹⁰³ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 2.

¹⁰⁴ Arbitrators’ and Mediator’s Institute of New Zealand Inc *Guide to Arbitration* (July 2004) at 4.

¹⁰⁵ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 104, at 4.

¹⁰⁶ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 104, at 4.

¹⁰⁷ *IBA Guidelines 2014*, above n 16.

¹⁰⁸ *IBA Guidelines 2014*, above n 16, at 6. The guidelines are significant as they convert qualitative standards into quantitative standards: see Rogers, above n 15, at 94.

The Arbitration Act and the AMINZ Code of Ethics contain some further statements affirming the obligations of impartiality and independence. The Act demands that “parties shall be treated with equality” during the arbitral proceedings.¹⁰⁹ Unequal treatment of parties is likely to emerge from the partiality or bias of the arbitrator.

The Code states that all AMINZ members “should uphold the integrity and fairness of the relevant dispute resolution process.”¹¹⁰ Impartiality and independence are inherent to fairness. Members must also “make decisions in a just, independent and considered manner.”¹¹¹

Although this discussion has focused the sources of these obligations in the New Zealand context, the obligations of impartiality and independence are acknowledged internationally. As Rogers explains, “Despite the range of sources and the variations in their application, there is surprisingly broad agreement about the general substance of arbitrator’s ethical obligations.”¹¹²

All arbitrators should be familiar with the obligations of impartiality and independence. This is because “all international arbitration rules impose such a duty.”¹¹³ However, understandings of these obligations can fluctuate depending on the context. This paper specifically concerns the New Zealand context and its effect on the way New Zealand arbitrators, and those enforcing ethical obligations within New Zealand, understand these ostensibly universal obligations.

2 *Continuing uncertainty*

Although obligations of impartiality and independence are well accepted, uncertainty continues over certain aspects of these obligations. The first area of uncertainty discussed is whether there is a duty to investigate. The second relates to party-appointed arbitrators and how the obligations of impartiality and independence apply to them.

(a) A duty to investigate

The duty to investigate is a recent development in the ethical obligations applying to arbitrators in international arbitration.¹¹⁴ The duty to investigate is part of the duty of disclosure. Arbitrators have a duty to investigate possible conflicts of interests and may not simply “turn a blind-eye” to the conflict, a practice which occurred in the past.¹¹⁵

¹⁰⁹ Schedule 1, s 18.

¹¹⁰ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 3.

¹¹¹ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 10.

¹¹² Rogers, above n 15, at 90.

¹¹³ Rogers, above n 15, at 241.

¹¹⁴ Rogers, above n 15, at 248.

¹¹⁵ Rogers, above n 15, at 248.

While the duty to investigate is generally accepted by arbitral institutions at the international level, national law appears to be lagging behind.¹¹⁶ Neither the Arbitration Act nor the AMINZ Code of Ethics mention any duty to investigate possible conflicts of interest. Whether the duty of disclosure involves a duty to investigate has not yet been considered by the New Zealand courts.

Although obligations of impartiality and independence found in New Zealand do not expressly include a duty to investigate, the duty may be implied by New Zealand courts.¹¹⁷ New Zealand has shown a deference to international rules in other areas of arbitration. For example, the Arbitration Act is largely an adoption of the UNCITRAL Model Law. If New Zealand courts are asked to consider whether the obligations of impartiality and independence include a duty to investigate, it is probable that this duty will be recognised.

(b) Party-appointed arbitrators

As foreshadowed in discussion on the role of an arbitrator, the existence of unilaterally appointed arbitrators continues to complicate matters of arbitrator impartiality and independence.¹¹⁸ This complexity stems from the relationship a party-appointed arbitrator has with ‘their’ party.¹¹⁹

The existence of party-appointed arbitrators sits uncomfortably with the ethical obligations of impartiality and independence. The fact that arbitrators are chosen by one of the parties threatens the appearance of independence. Parties may use unilateral appointments to choose an arbitrator they believe to be ‘on their team’. This may be someone the party knows personally, or someone the party expects will share their view of the dispute. Failing to use unilateral appointments in this way may disadvantage a party.

How can the obligations of impartiality and independence be reconciled with the existence of party-appointed arbitrators? There is no single answer to this question. Paulsson argues that reconciliation is unattainable and that the use of party-appointed arbitrators should be abandoned.¹²⁰ Some jurisdictions have accepted a more permissive attitude to the obligations of party-appointed arbitrators.¹²¹ Rogers approaches this matter by assessing the exact role of

¹¹⁶ Rogers, above n 15, at 249.

¹¹⁷ Courts in other jurisdictions have done this: see Rogers, above n 15, at 249.

¹¹⁸ At 6.

¹¹⁹ The process of party-appointed arbitrators is expressly provided for in the Arbitration Act, Sch 1, art 11(3).

¹²⁰ Paulsson, above n 10, at 279.

¹²¹ Rubino-Sammartano, above n 2, at 343.

a party-appointed arbitrator. She denies that party-appointed arbitrators are exempted from impartiality and independence obligations and instead argues that their obligations should be understood in light of “the differentiated role assigned to party-appointed arbitrators.”¹²²

The uncertainty surrounding party-appointed arbitrators internationally is not apparent in the obligations of impartiality and independence found in New Zealand. For example, the Arbitration Act allows the impartiality and independence of a party-appointed arbitrator to be challenged by either party to an arbitration.¹²³ Commentary to the Act indicates that in New Zealand, “The requirement for arbitrator to be completely impartial and unbiased applies to sole arbitrator and two [unilaterally appointed] arbitrators equally.”¹²⁴ While New Zealand case law on the impartiality and independence of party-appointed arbitrators concerns domestic arbitration, the same approach can be expected to apply to international arbitration.

3 What does impartiality and independence mean in the New Zealand context?

While impartiality and independence are universally recognised obligations in international arbitration, this paper argues that understandings of ethical obligations within New Zealand are inevitably coloured by the national context. Impartiality and independence are generally assessed through qualitative standards. The use of qualitative standards allows for “significant discretion in interpreting how that standard applies.”¹²⁵ In light of this, it is necessary to consider how the New Zealand context influences interpretations of impartiality and independence.

Commentary provided to the AMINZ Code of Ethics indicates a strict duty of disclosure in relation to impartiality and independence. Guidance stipulates that disclosure should be made where there is any doubt over whether an objective observer may perceive partiality or bias.¹²⁶ It also states that disclosures should “be comprehensive so that parties are fully and fairly informed of the relevant facts which might lead to a recusal request.”¹²⁷

While the rules provided on disclosure seem strict, *Saxmere* is a useful example in assessing how impartiality and independence are treated in New Zealand. First of all, *Saxmere*

¹²² Rogers, above n 15, at 335.

¹²³ Schedule 1, art 12(2). See also Philip Green, Babara Hunt and Tomas Kennedy-Grant *Green and Hunt on Arbitration Law and Practise* (online looseleaf ed, Brookers) at [ARSch1.12.08(2)]; see *Grey District Council v Banks* [2003] NZAR 487 at [44], and *Banks v Grey District Council* [2004] 2 NZLR 19 (CA) at [29].

¹²⁴ Green, Hunt and Kennedy-Grant, above n 123, at [ARSch1.12.08(2)]; see also *Tolmarsh Developments Ltd v Stobbs* HC Auckland M809/90, 20 September 1990 at 8.

¹²⁵ Rogers, above n 15, at 244.

¹²⁶ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 6.

¹²⁷ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 6.

demonstrated that judicial guidelines are not always referred to. This suggests that the strict instructions AMINZ provides for its members may not be followed in every case.

New Zealand arbitrators and those enforcing the ethical obligations of arbitrators in New Zealand are likely to approach the obligations of impartiality and independence in a way that seems cavalier to those unfamiliar with the New Zealand context. This conclusion flows from the intimate nature of New Zealand's legal profession which requires a relaxed approach to impartiality and independence obligations, as well as the pragmatic attitude to problem-solving that exists in New Zealand. Ethical obligations are respected in New Zealand yet the number of situations that raise impartiality or independence concerns in New Zealand is relatively limited.

It should be noted that this relaxed approach to impartiality and independence relates solely to situations where bias is alleged to arise through a relationship. It is also possible for impartiality issues to arise where an arbitrator has a financial interest in the outcome of the proceeding. There is no reason suspect that New Zealand's approach in such cases would be seen as relaxed by outsiders. As Cooke P confirms in *Auckland Casino Ltd v Casino Control Authority*, "there is no doubt that any direct interest, however small, in the subject of the inquiry disqualifies a person from acting as a judge in that matter."¹²⁸

B Competence

According to Rogers, "Arbitrators also have general obligations of competence and diligence, which are specified in some ethical rules."¹²⁹ In relation to competence she explains that an arbitrator "should not accept an appointment unless actually possessing the requisite skills."¹³⁰

Where parties have specified certain qualifications for their arbitration, a challenge may be made on the ground that an arbitrator "does not possess qualifications agreed to by the parties."¹³¹ This allows parties to control whether their dispute is arbitrated by an expert or not, for example by an "architect or a civil engineer".¹³² The obligation that an arbitrator is competent in the manner specified by the parties has not led to difficulties in practice.¹³³

¹²⁸ *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 9; see also Green, Hunt and Kennedy-Grant, above n 123, at [ARSch1.12.05].

¹²⁹ Rogers, above n 15, at 96.

¹³⁰ Rogers, above n 15, at 96.

¹³¹ Arbitration Act, sch 1, art 12(2).

¹³² Willy, above n 94, at 68.

¹³³ Willy, above n 94, at 68.

While it is easy to determine an arbitrator's competence in relation to qualifications specified by the parties, the situation is not as clear cut in relation to competence generally. The first statement in the AMINZ Ethical Code states that: "Prior to accepting an appointment a member should have undertaken training and have appropriate experience in the relevant dispute resolution process."¹³⁴ In determining whether this ethical obligation is satisfied, commentary to the Code advises members to ask themselves: "*How would my competence to undertake this task be judged by my peers.*"¹³⁵

One way of assessing competence is by reference to the AMINZ membership structure. AMINZ provides several types of membership including Student; Affiliate; Associate and Fellow.¹³⁶ An 'Affiliate' describes someone who is "interested in dispute resolution but not qualified."¹³⁷ On the other hand, an 'Associate' is both "qualified and interested in dispute resolution."¹³⁸ Fellowship is granted to AMINZ members who "by virtue of his or her training and/or experience and his or her personal qualities, demonstrates competence at the date of admission".¹³⁹

To become an Associate of AMINZ "applicants must be able to show that...they have sufficient knowledge of dispute resolution through his or her experience and/or training to fulfil the syllabus requirements."¹⁴⁰ The syllabus requirements may be evidenced through training at the 'Massey University Dispute Resolution Centre',¹⁴¹ or through the University of Auckland, the University of Waikato or Victoria University.¹⁴² The AMINZ website also notes that "sometimes a mix of experience and training will fulfil the syllabus."¹⁴³ The syllabus clearly requires a basic understanding of New Zealand's legal system.¹⁴⁴

AMINZ appears to require high levels of competence from its Associates. As Associates are 'qualified' in dispute resolution, the education and training required to become an Associate indicates what is necessary to fulfil Code's competence requirements. While no arbitrator is required to be part of AMINZ, the professional group's importance within New Zealand means

¹³⁴ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at Ethical Statement 1.

¹³⁵ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at 5.

¹³⁶ Arbitrators' and Mediator's Institute of New Zealand Inc "Membership" <www.aminz.org.nz>.

¹³⁷ Arbitrators' and Mediator's Institute of New Zealand Inc "Associate" <www.aminz.org.nz>.

¹³⁸ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 137.

¹³⁹ Arbitrators' and Mediator's Institute of New Zealand Inc "Fellow" <www.aminz.org.nz>.

¹⁴⁰ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 137.

¹⁴¹ Massey University offers a Graduate Diploma in Business Studies (Dispute Resolution).

¹⁴² Arbitrators' and Mediator's Institute of New Zealand Inc, above n 137.

¹⁴³ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 137.

¹⁴⁴ The Education Syllabus for Associateship may be found at Arbitrators' and Mediator's Institute of New Zealand Inc, above n 137.

that its high competence standards are likely to influence the general approach to this ethical obligation in New Zealand. This is especially so given that standards are unlikely to vary significantly within New Zealand's tight-knit legal community.

New Zealand is generally regarded as producing lawyers of high calibre. According to Walton: "It is a common observation in many fields that New Zealand is a crèche for international talent; none more so than in the law".¹⁴⁵ If New Zealand's professional standards are generally acceptable overseas, the New Zealand approach to arbitrator competence should also be of an acceptable standard.

C Diligence

Diligence relates to the way an arbitrator approaches the proceeding at hand. According to Rogers, diligence is a general obligation of arbitrators.¹⁴⁶ Her explanation of diligence incorporates an element of efficiency; an arbitrator must be "able to accommodate the arbitration in his or her schedule."

While the Arbitration Act does not address the obligation of diligence specifically, it does require that arbitrators "act without undue delay".¹⁴⁷ This means that arbitrators have a "statutory obligation to positively drive the process through to a conclusion."¹⁴⁸ This reflects the requirement of efficiency that diligence embraces.

The obligation of diligence is specifically included in the AMINZ Code of Ethics which requires the proceeding to be "conducted with due diligence."¹⁴⁹ The commentary to this ethical statement refers to the Shorter Oxford English Dictionary Sixth Edition 2007 which defines diligence to mean:¹⁵⁰

- 1 *"careful attention; heedfulness, caution*
- 2 *the quality of being diligent; industry, assiduity*
- 3 *speed, dispatch, haste".*

¹⁴⁵ Walton, above n 18, at 3.

¹⁴⁶ Rogers, above n 15, at 96.

¹⁴⁷ Schedule 1, art 14(1).

¹⁴⁸ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at 10.

¹⁴⁹ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at Ethical Statement 5.

¹⁵⁰ Arbitrators' and Mediator's Institute of New Zealand Inc, above n 90, at 12.

This ethical statement is described as “an injunction for the member to at all times conduct the process with care and applying persistence and effort in doing so.”¹⁵¹

The element of efficiency that diligence encompasses is further recognised when the AMINZ Code states that potential arbitrators “should accept the appointment only if that have the ability to conduct the process in an efficient and timely manner.”¹⁵² In doing so, the Code of Ethics advises arbitrators to follow the courts’ example by establishing arbitration timetables and “insisting on adherence where reasonable to do so.”¹⁵³

An arbitrator should adhere to any time limits specified in the arbitration agreement.¹⁵⁴ Where time limits have not been set, it may be difficult to determine the “ideal duration” of an arbitration.¹⁵⁵ This is a matter of controversy and will depend on the nature and circumstances of the proceeding.¹⁵⁶

While efficiency is important, the obligation of diligence also obliges arbitrators to take care while considering a dispute. Ethical Statement 10 states that “a member should make decisions in a just, independent and considered manner.”¹⁵⁷ The commentary explains that the ‘*considered*’ requirement:¹⁵⁸

... is a reminder that although members are charged with conducting the process in an efficient and timely manner there is an overarching duty to give the matter careful thought. There is an obligation to take into account and weigh the arguments advanced on behalf of each of the parties making the determination.

There is nothing inherent in New Zealand’s culture of ethics to suggest that New Zealand’s approach to the ethical obligation of diligence differs significantly from other jurisdictions. If anything, a pragmatic approach to an arbitral proceeding may enhance efficiency by preventing trivial matters delaying an effective outcome. While trivial matters may be overlooked, a pragmatic approach does not mean that the care required in considering substantive matters is abandoned. The diligence of New Zealand arbitrators acting in international arbitrations is likely to meet standards expected in other jurisdictions. Similarly, the attitude of those

¹⁵¹ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 12.

¹⁵² Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 4.

¹⁵³ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 10.

¹⁵⁴ Willy, above n 94, at 86.

¹⁵⁵ Rubino-Sammartano, above n 2, at 548.

¹⁵⁶ Rubino-Sammartano, above n 2, at 548.

¹⁵⁷ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 10.

¹⁵⁸ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 23.

enforcing the ethical obligation of diligence in New Zealand is unlikely to attract criticism from foreign observers.

D Confidentiality

Parties to an arbitration agreement generally value the confidentiality that arbitration offers. However, while parties may have “pronounced and precise expectations” in relation to confidentiality, Rogers considers this “one area where formal ethical regulation remains underdeveloped.”¹⁵⁹ While the regulation of arbitrator confidentiality may be generally underdeveloped, New Zealand offers “statutory protection of confidentiality in arbitration unless the parties agree otherwise.”¹⁶⁰ Provisions addressing confidentiality in the Arbitration Act and the AMINZ Code of Ethics are highly prescriptive.

Since amendment in 2007,¹⁶¹ the Arbitration Act has required that “an arbitral tribunal conduct the arbitral proceeding in private.”¹⁶² While this provision suggests that privacy is mandatory it remains subject to the parties’ agreement.¹⁶³ Parties to the arbitration may agree that others can view proceedings.¹⁶⁴

Section 14B is the starting point for confidentiality in the Arbitration Act. It states that “Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.”¹⁶⁵ Arbitrators are expressly subject to this confidentiality provision.¹⁶⁶ ‘Confidential information’ is defined widely to mean “information that relates to the arbitral proceedings or to an award made in those proceedings.”¹⁶⁷

¹⁵⁹ Matti S Kurkela *Due Process in International Commercial Arbitration* (Oceana Publications Inc, New York, 2005) at 189.

¹⁶⁰ New Zealand Dispute Resolution Centre “International Dispute Resolution” <www.nzdrc.co.nz>.

¹⁶¹ Arbitration Amendment Act 2007.

¹⁶² Section 14A.

¹⁶³ Green, Hunt and Kennedy-Grant, above n 123, at [AR14A.02].

¹⁶⁴ The privacy of the arbitral process may also be overridden by an order of the court if the principle of open justice demands it: see Green, Hunt and Kennedy-Grant, above n 123, at [AR14A.02].

¹⁶⁵ Section 14B(1).

¹⁶⁶ Contrast this to the situation that existed before the Arbitration Amendment Act 2007, where confidentiality applied only to the parties to the proceedings, not to the arbitrators: see Green, Hunt and Kennedy-Grant, above n 123, [AR14.05(1)].

¹⁶⁷ Paragraph (a) of the definition of “confidential information” in s 2 of the Arbitration Act.

The starting point for confidentiality established in s 14B is subject to s 14C which explains when a party or the arbitral tribunal may disclose information.¹⁶⁸ Willy provides a summary of the exceptions found in s 14C:¹⁶⁹

Section 14C allows disclosure in a number of as yet untested circumstances. These are

- (1) disclosure is “no more than is necessary” and is made “to a professional or other adviser of any of the parties”;
- (2) disclosure is made “in accordance with a court order or subpoena”;
- (3) disclosure is authorised or required by law. (except the 1996 Act);
- (4) disclosure is “required by a competent regulatory body (including the New Zealand Exchange Limited)”;
- (5) disclosure made pursuant to an order made by the arbitral tribunal; or the High Court or pursuant to s 14D or 14E.

Questions regarding the disclosure of confidential information by a party are referred to the arbitral tribunal which has the power to “make or refuse to make an order allowing all or any of the parties to disclose confidential information.”¹⁷⁰ While it is the parties who seek to disclose information, the power the tribunal is given regarding disclosure is significant.

The obligation of confidentiality is clearly set out in the AMINZ Code of Ethics. Ethical Statement 6 states that:¹⁷¹

A member, subject to legal obligations or other recognised expectations must observe the duty to protect the privacy of those participating in the process, and the confidentiality of all elements of the process.

Ethical Statement 7 adds that:¹⁷²

Confidential information received by as member as a third party neutral, or in some other role, in the process may not be:

1. used to the member’s personal advantage, or
2. in the absence of party consent, be used in other separate process involving one of the original parties and a third party.

¹⁶⁸ Section 14B(2).

¹⁶⁹ Willy, above n 94, at 128.

¹⁷⁰ Section 14D.

¹⁷¹ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 6.

¹⁷² Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at Ethical Statement 7.

While the Arbitration Act contains prescriptive rules governing confidentiality, Willy criticises the 2007 amendments. In his opinion, the Arbitration Amendment Act removed “the blanket confidentiality to arbitral proceedings” that previously existed, only to replace it with “a regime which removes all certainty that material and evidence produced and given at arbitration will remain confidential.”¹⁷³ This criticism is directed at the uncertainty created over whether information will remain confidential given the exceptions to confidentiality in s 14C. It does not mean that an arbitrator’s ethical obligation of confidentiality is uncertain.

The prescriptiveness of the Arbitration Act is reflected in the Code of Ethics. Commentary to Ethical Statement 6 (above) describes when disclosure will be permitted: ¹⁷⁴

Disclosure is only permitted under the most limited of circumstances. Examples of such circumstances include:

- 1 Where disclosure is required by law, or by order of a court.
- 2 Where the member reasonably believes that disclosure is necessary to prevent a serious risk to the health, safety or welfare of any person.
- 3 Where the intention to commit a crime is disclosed, and the member has reasonable grounds for believing that the crime will be committed, the member then has a duty to report that intent to the appropriate authority.
- 4 Where a party has expressly authorised a disclosure to another and where that information is solely held by that party. Where the information is held by more than one party, then all parties having the information must authorise the disclosure.
- 5 Where it is necessary to protect the interests of a party where the member comes to appreciate that there are genuine incapacity issues applying to a party in the process.
- 6 Where disclosure is necessary to give effect to any insurance cover arrangements, or collection of unpaid professional fees and disbursements incurred in the course of the process.
- 7 Where disclosure is necessary to respond to or to defend a complaint, allegations, claim or other form of proceeding against the member brought by a party to the process. Disclosure is limited to matters solely concerned with the complainant party in the absence of written consent to waive confidentiality by any other participating party.

¹⁷³ Willy, above n 94, at 128.

¹⁷⁴ Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 14.

- 8 Where any of these circumstances apply the disclosure as an exception to this Ethical Statement is only allowed to the minimum extent reasonably necessary to discharge the exception.

The prescriptive approach taken to the ethical obligation of confidentiality in New Zealand is interesting. Guidance provided in the Act and the Code leaves limited scope for arbitrators to exercise their judgement in determining whether disclosure is acceptable. Furthermore, the New Zealand legal profession requires a duty of confidentiality.¹⁷⁵ The ethical obligation of confidentiality is therefore well-recognised and understood within New Zealand.

The New Zealand context supports a strict approach to confidentiality. The confidentiality of arbitration is protected and may only be departed from in certain circumstances. The way in which confidentiality has been dealt with in New Zealand means that arbitrators from New Zealand are likely to respect confidentiality within arbitral proceedings. A robust approach to the enforcement of confidentiality may also be expected within international arbitration seated in New Zealand in light of this prescriptive legislative protection.

E Compliance with the Arbitration Agreement

Parties to an arbitration agreement have significant control over the procedure. The Arbitration Act provides that “Subject to the provisions of [Schedule one] the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”¹⁷⁶ Given the importance of party control within international arbitration, it is not surprising that “arbitrators have a duty to conduct the arbitral proceedings in accordance with the parties’ arbitration agreement” as well as any “subsequent procedural agreements between the parties.”¹⁷⁷

This duty is contractual in nature given that an arbitrator is appointed by parties to conduct an arbitration in accordance with their arbitration agreement. However, this duty has also been described as an ethical obligation.¹⁷⁸ Therefore, the duty of compliance is included in this discussion of ethical obligations for the sake of completeness.

¹⁷⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 8; see also Arbitrators’ and Mediator’s Institute of New Zealand Inc, above n 90, at 13.

¹⁷⁶ Schedule 1, art 19(1).

¹⁷⁷ Rogers, above n 15, at 96.

¹⁷⁸ Rogers, above n 15, at 96.

In New Zealand the legislature and the courts have demonstrated respect for the principle of party control over arbitral proceedings. For example, the Arbitration Act was intended to “break with the sometimes heavy-handed regulation of the arbitral process by the High Court”.¹⁷⁹ When a court is required to consider an arbitral proceedings it will generally be to ensure that the arbitrator carried out the proceeding “within the terms of the agreement.”¹⁸⁰ The present attitude of the courts is to “lend uncritical support to the construction of the agreement to arbitrate.”¹⁸¹

The attitude displayed by New Zealand’s legislature and courts demonstrates significant respect for party control and the integrity of the arbitration agreement. This suggests that the ethical obligation that an arbitrator complies with the arbitration agreement is well entrenched in New Zealand. New Zealand arbitrators involved in international arbitrations can be expected to comply with the terms of the arbitration agreement. Similarly, enforcement bodies within New Zealand can be expected to insist on compliance.

F Additional Ethical Obligations

Some national systems impose ethical duties on arbitrators beyond those generally accepted at the international level. For example, the national laws of some jurisdictions “impose certain obligations on arbitrators when they suspect corruption or are confronted with criminal wrongdoing.”¹⁸² Likewise, parties from different national legal systems may have different expectations of an arbitrator when it comes to proposing, or refraining to propose a settlement.¹⁸³ It is not possible to examine all these additional ethical obligations within this paper. While New Zealand does not impose additional ethical obligations it is important to remember that additional ethical obligations may apply in some contexts.

V Consequences for New Zealand Arbitrators Working Overseas

While New Zealand may not be a common seat for international arbitration at present, New Zealanders are nonetheless involved in international arbitration overseas. As at 1 February 2014, 502 lawyers holding a New Zealand practising certificate were based overseas.¹⁸⁴ Forty-

¹⁷⁹ Willy, above n 94, at 14.

¹⁸⁰ Willy, above n 94, at 14.

¹⁸¹ Willy, above n 94, at 14. While Willy is referring to English cases he says, at 19, that it may “be assumed that the development of the law in the United Kingdom relating to the interpretation of agreement is applicable in New Zealand.”

¹⁸² Rogers, above n 15, at 97.

¹⁸³ Rogers, above n 15, at 97.

¹⁸⁴ Adlam, above n 51, at 14.

two per cent of these individuals (212) were in England; 196 in London specifically.¹⁸⁵ London is a popular location for arbitration; it is therefore likely that a proportion of New Zealand lawyers based in London are involved in international arbitration.

The above numbers only serve to demonstrate that legally trained New Zealanders often relocate to foreign jurisdictions. It is entirely possible for a New Zealander to work as an arbitrator overseas without possessing a New Zealand practicing certificate. While it is difficult to determine the numbers exactly, New Zealand is regarded as having “a relatively high number of highly regarded practitioners working internationally in arbitration.”¹⁸⁶ Some New Zealanders who have been recognised for their work in international arbitration include Audley Sheppard,¹⁸⁷ Stephen Jagusch,¹⁸⁸ Wendy Miles,¹⁸⁹ Anthony Sinclair,¹⁹⁰ James Hosking,¹⁹¹ Jason Fry,¹⁹² and Peter Thorp.¹⁹³

New Zealanders working overseas need to be sensitive to the fact that perceptions of ethical issues vary between cultures. New Zealand’s culture of ethics may prevent New Zealand arbitrators identifying ethical issues in situations that those from different backgrounds would regard as ‘ethical’. Subpart A of this section illustrates situations in which New Zealand arbitrators must exercise heightened awareness to ethical issues. Subpart B considers how to prevent New Zealand’s culture of ethics from disadvantaging New Zealanders involved in international arbitration overseas.

A *Situations for Heightened Awareness*

The primary area in which New Zealand arbitrators must exercise caution is in relation to the fundamental ethical obligations of impartiality and independence. The size and intimacy of New Zealand’s legal community is the most important factor distinguishing New Zealand from other jurisdictions. Cities that have typically emerged as popular locations of arbitration are generally international trade centres and have larger populations than New Zealand as a whole.

¹⁸⁵ Adlam, above n 51, at 14.

¹⁸⁶ Walton, above n 18, at 3.

¹⁸⁷ Partner at Clifford Chance (London); named as a ‘Leading Individual’ in International Arbitration in The Legal 500 “International Arbitration” <www.legal500.com>.

¹⁸⁸ Partner at Quinn Emanuel Trial Lawyers (London).

¹⁸⁹ Partner at Boies, Schiller & Flexner LLP (London).

¹⁹⁰ Partner at Quinn Emanuel Trial Lawyers (London).

¹⁹¹ Partner at Chaffetz Lindsey LLP (New York).

¹⁹² Partner at Clifford Chance (Paris).

¹⁹³ See Peter Thorp “International Arbitrator in Asia and Europe” <www.thorparbitrator.com>.

It has been argued above that the approach to impartiality and independence taken in New Zealand may appear relaxed to those outside New Zealand. It is advisable that New Zealand arbitrators exercise heightened awareness when considering how people from larger, less intimate communities could view their relationships and interests. This is a situation where pragmatic decision-making should be set aside and a more cautious approach adopted.

The IBA Guidelines on Conflicts of Interest in International Arbitration are a very useful tool for New Zealand arbitrators. The IBA Guidelines divide conflicts of interests into “quantitative, fact-based categories”.¹⁹⁴ These Guidelines “help reduce ambiguities and much of the guesswork for arbitrators in deciding whether to make a disclosure.”¹⁹⁵ New Zealand arbitrators should have a working knowledge of the IBA Guidelines and may refer to them when considering the ethical obligations of impartiality and independence.

New Zealand arbitrators should be as well prepared as any to fulfil their ethical obligations of compliance, competence, diligence and confidentiality. They should nevertheless remain aware of New Zealand’s pragmatic attitude and ensure that this attitude does not affect their approach to these ethical obligations. Furthermore, arbitrators should familiarise themselves with any additional ethical obligations that apply in the country they are operating in.

Arbitrators should also recognise that the New Zealand legal profession displays a relatively forgiving attitude towards breaches of ethical obligations as seen in the case of Judge Hesketh. Such attitudes may not exist in foreign jurisdictions where an arbitrator is practising. A lapse of judgment leading to a breach of an ethical obligation may have a lasting impact on ones’ international arbitration career.

B Preventing New Zealand’s Culture of Ethics from Disadvantaging Arbitrators

It is crucial that New Zealand arbitrators acting overseas are aware that their understanding of ethical obligations may be influenced by New Zealand’s culture of ethics. Where an arbitrator is aware that different ethical expectations exist, they are able to consider what behaviour is expected of them in an international arbitration. On the other hand, an arbitrator who is unaware that ethical obligations may be interpreted differently will not question their own understanding of their ethical obligations. In such cases, New Zealand arbitrators will simply apply a New

¹⁹⁴ Rogers, above n 15, at 244.

¹⁹⁵ Rogers, above n 15, at 244.

Zealand understanding of ethical obligations without considering the context they are working in.

Education can be used to increase the cultural awareness of New Zealand arbitrators. An awareness of different ethical cultures could be incorporated into existing courses on legal ethics. Discussion of ethics in arbitration does not necessarily require detailed discussion of ethical standards elsewhere. It is sufficient to acknowledge that ‘ethics’ may change depending on context and to demonstrate this by highlighting some peculiarities that exist in other jurisdictions. An arbitrator who appreciates that ethics is contextual can seek advice on ethical obligations when working in an unfamiliar context.

It is also appropriate to consider ethical culture in courses dealing with arbitration. New Zealanders seeking a career as an international arbitrator may be expected to participate in courses on arbitration, or dispute resolution more generally. If such courses address the fact that ethical obligations may vary between countries, students will be better prepared for a career in international arbitration.

VI Consequences Where New Zealand is the Seat of Arbitration

New Zealand is not presently a seat of choice for international arbitrations. Nevertheless, there is interest in the country becoming a regional hub for international arbitration in the future. New Zealand has significant cultural and trade ties to other countries in the Asia-Pacific region and is well-placed to serve as an arbitral location for disputes involving parties in this area.¹⁹⁶ If this vision for New Zealand is to be realised, it is prudent to examine how New Zealand’s ethical culture may apply to international arbitrations seated in New Zealand.

Subpart A describes the current state of international arbitration in New Zealand. Subpart B considers how an arbitrator’s ethical obligations can be enforced in New Zealand. This information is necessary when considering how New Zealand’s culture of ethics may be imposed upon international arbitration. Subpart C considers how New Zealand’s attitude towards an arbitrator’s ethical obligations may be viewed by those outside New Zealand. Subpart D addresses the question ‘where to from here?’

¹⁹⁶ John Walton expressed the view that New Zealand is well placed to be a seat of choice in the Asia-Pacific region in Walton, above n 18.

A *New Zealand as a Seat of International Arbitration*

As previously stated, New Zealand does not attract much business as a seat of international arbitration. However, it is clear that AMINZ seeks to encourage international arbitration in New Zealand. It has been said that:¹⁹⁷

AMINZ sees its role as promoting our arbitrators [those that are members of AMINZ] and New Zealand more generally, and creating a conducive environment for regional arbitration. Our ultimate objective it for NZ to be a seat of choice for international dispute resolution, and in particular international commercial arbitration, with all the necessary facilities and resources at its disposal.

New Zealand's only international arbitral institution - the New Zealand International Arbitration Centre (NZIAC) - was established in 2013. The NZIAC describes itself as providing an "effective forum for the settlement of international trade, commerce, investment and cross-border disputes in the Australasian/Pan Pacific region".¹⁹⁸ The recent establishment of the NZIAC suggests that international arbitration is set to increase in New Zealand.

While the NZIAC is an interesting emergence in New Zealand's international arbitration landscape, it does not necessarily mean that the NZIAC will administer all international arbitrations taking place in New Zealand. New Zealand may be the seat of *ad hoc* arbitration. It is also possible for New Zealand to be chosen as a seat of an international arbitration administered by an arbitral institution based elsewhere.

B *Enforcing Ethical Obligations in New Zealand*

While it is clear that arbitrators have certain ethical obligations, these obligations mean nothing unless they are adequately enforced. In assessing the effect of New Zealand's ethical culture on New Zealand's performance as a seat of international arbitration, one must understand how the ethical obligations of arbitrators are enforced in New Zealand. Enforcement through the arbitral institution is considered first, followed by enforcement through professional groups and finally enforcement of ethical obligations through the New Zealand courts.

1 *Enforcement by the arbitral institution*

Arbitral institutions have the capacity to ensure that the proceedings they administer accord with institutional rules. The NZIAC Rules for International Commercial Arbitration regulate

¹⁹⁷ Walton, above n 18, at 5.

¹⁹⁸ New Zealand Dispute Resolution Centre, above n 160.

arbitrations administered through the NZIAC. While the arbitral institution does not have an ethical code of conduct, the ethical obligations of arbitrators discussed above are reflected in these rules.

The NZIAC Rules explicitly require impartiality and independence. They state that:¹⁹⁹

Any Arbitral Tribunal conducting an arbitration under these Rules shall be impartial and independent of the Parties. No arbitrator appointed to an Arbitral Tribunal shall act as an advocate for any Party and each arbitrator shall, from the time of his or her appointment, assume a continuing duty to immediately disclose to the Parties and NZIAC, any circumstances arising in the future which may be likely to give rise to justifiable doubts as to that arbitrator's impartiality or independence in the eyes of any of the Parties, until the Arbitration is concluded.

Potential arbitrators have the duty to disclose "any circumstances past or present likely to give rise to justifiable doubts as to his or her impartiality or independence in the eyes of any of the Parties."²⁰⁰ This substantially reflects the legislative requirements previously discussed in this paper.²⁰¹ Circumstances giving rise to "justifiable doubts as to the arbitrator's impartiality or independence" may form the basis of a challenge to any arbitrator.²⁰²

The NZIAC maintains a 'Panel' and an 'approved list' of arbitrators.²⁰³ The institution can ensure the competence of arbitrators on these lists through self-regulation. Where the person approached for appointment is not on the Panel or approved list of arbitrators, that person "shall furnish to the Registrar a written resume of his or her past and present professional positions and experience as an arbitrator".²⁰⁴ This allows the NZIAC to ensure the competence of any arbitrator involved in its proceedings.

¹⁹⁹ New Zealand Dispute Resolution Centre "NZIAC Rules for International Commercial Arbitration" <www.nzdrc.co.nz> at [5.11].

²⁰⁰ New Zealand Dispute Resolution Centre, above n 199, at [5.10].

²⁰¹ See discussion the source of the ethical obligations of impartiality and independence at 22.

²⁰² New Zealand Dispute Resolution Centre, above n 199, at [5.14].

²⁰³ See New Zealand Dispute Resolution Centre "Arbitration Panels" <www.nzdrc.co.nz>; see also New Zealand Dispute Resolution Centre, above n 199, at [5.9].

²⁰⁴ New Zealand Dispute Resolution Centre, above n 199, at [5.9].

The NZIAC Rules requires arbitral tribunals to:²⁰⁵

...adopt such procedures and give such directions and rulings as may be required to ensure that the process for the determination of the matters in dispute is fair, prompt, and cost effective...

This must be done in accordance with the Purpose of the NZIAC Rules which is:²⁰⁶

...to ensure that Arbitration is conducted fairly, promptly, and cost effectively, and in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved.

The ethical obligation of diligence may be discerned in the references to promptness and proportion.

As the NZIAC is administering the arbitral proceedings, it can ensure that the law of the seat is respected.²⁰⁷ The NZIAC Rules state that “The law applicable to the Arbitration shall be the Arbitration law of the seat of the Arbitration”.²⁰⁸ A NZIAC arbitration will generally be seated in New Zealand in which case the Arbitration Act will apply. This includes provisions relating to confidentiality.²⁰⁹ The control the NZIAC has over proceedings also puts it in a prime position to insist that the arbitrator complies with the parties’ arbitration agreement.

The NZIAC is a relatively new institution and there is no commentary available on the quality of its regulation. However, it is in the interest of arbitral institutions like the NZIAC to protect their institutional credibility by ensuring high standards of arbitrator behaviour. On this basis one may assume that its regulation is adequate.

The majority of this section has considered the NZIAC Rules. This is because the NZIAC is New Zealand’s only arbitral institution. However, the fact that an arbitration in New Zealand is administered by an arbitral institution does not necessarily mean that the NZIAC Rules apply. It is open to the parties to agree on “modifications” of these Rules.²¹⁰ Moreover, it is possible for an institutional arbitration to be seated in New Zealand yet administered by a different arbitral institution. Institutional proceedings through an offshore institution will not reflect the

²⁰⁵ New Zealand Dispute Resolution Centre, above n 199, at [5.13].

²⁰⁶ New Zealand Dispute Resolution Centre, above n 199, at [2.1].

²⁰⁷ New Zealand Dispute Resolution Centre, above n 199, at [1.4].

²⁰⁸ New Zealand Dispute Resolution Centre, above n 199, at [7.1].

²⁰⁹ See above discussion on confidentiality at 30.

²¹⁰ New Zealand Dispute Resolution Centre, above n 199, at [7.1].

New Zealand approach to arbitrators' ethical obligations. Such situations are therefore beyond the scope of this paper.

2 Enforcement by professional groups

Professional groups also play an important role in regulating the behaviour of arbitrators. According to Willy: "Where the arbitrator is a member of a professional group such as AMINZ or LEADR, the investigatory or disciplinary bodies of those institutes are increasingly called upon to examine and decide such challenges [to the arbitrator's integrity]." ²¹¹ While not required by New Zealand law, professional group membership is nevertheless common amongst arbitrators and provides a platform through which arbitrators may advertise their services. ²¹²

Some arbitrators appointed to international arbitrations seated in New Zealand will be members of professional groups that have no connection to New Zealand. In such cases ethical obligations may be enforced through the professional group the arbitrator belongs to. These situations will not involve the application of a New Zealand approach to ethical obligations and are therefore outside the scope of this paper.

AMINZ is the primary professional group to which New Zealand arbitrators belong. Where New Zealand is chosen as the seat of an international arbitration, it is foreseeable that an AMINZ member will be chosen to arbitrate. AMINZ is in a position to enforce the ethical obligations of the arbitrator in such cases. Where this occurs the New Zealand approach to ethical obligations is relevant. The Code of Ethics that AMINZ members are required to abide by has already been discussed at length. ²¹³

As arbitrators are often legally trained, it is possible that an arbitrator belongs to a law society. The New Zealand Law Society may arguably be used to enforce the ethical obligations of New Zealand lawyers that are acting as arbitrators in international arbitrations seated in New Zealand. While arguable, this paper submits that regulation through the New Zealand Law Society is inappropriate.

The New Zealand Law Society is required to "enforce the provisions of [the Lawyers and Conveyancers Act 2006], and of any regulations and rules made under it, that relate to the

²¹¹ Willy, above n 94, at 87.

²¹² For example, the AMINZ website allows people to 'Find an Arbitrator': see Arbitrators' and Mediator's Institute of New Zealand Inc "Search Panel/Lists" <www.aminz.org.nz>.

²¹³ See discussion on the ethical obligations of arbitrators at 20.

regulation of lawyers.”²¹⁴ The Lawyers and Conveyancers Act requires that all lawyers providing “regulated services” must comply with the “duties of care owed by lawyers to their clients”.²¹⁵ Regulated services includes “arbitration services” for the purpose of the Act.²¹⁶

Parties to an arbitration have significant control over who arbitrates their dispute and arbitrators are ultimately engaged to resolve the parties’ conflict. On this basis, it is fair to describe the parties to an arbitration as an arbitrator’s clients. Accordingly, the arbitrator appears to owe the parties duties of care. The duties of lawyers may be found within the Rules of Conduct and Client Care.²¹⁷ These Rules cover matters of competence,²¹⁸ independence,²¹⁹ and confidential information.²²⁰

Assuming that ‘arbitration services’ includes the service provided by arbitrator it seems that the New Zealand Law Society can enforce obligations existing under the Rules of Conduct and Client Care when New Zealand lawyers act as arbitrators. However, it can also be convincingly argued that the Lawyers and Conveyancers Act and the related Rules of Conduct and Client Care were never intended to apply to arbitrators.

The reference to ‘arbitration services’ is arguably only intended to refer lawyers *representing* parties within arbitration. Under this interpretation, lawyers acting as arbitrators do not need to observe the duties of care required of lawyers because arbitration is not a ‘regulated service’ for the purposes of the Lawyers and Conveyancers Act. If this is accepted, the regulatory function of the New Zealand Law Society cannot extend to the regulation of arbitrators.

The latter interpretation that excludes arbitrators from the Law Society’s regulation would be favoured by Rogers who argues that:²²¹

Bar authorities do not presume to apply their rules and disciplinary regime when an attorney they have licensed is serving, for example, as an umpire in a children’s Little League baseball game or youth football game. Those bar authorities seem similarly out of their league, so to speak, in extending their disciplinary authority to an attorney’s

²¹⁴ Lawyers and Conveyancers Act, s 65(c).

²¹⁵ Section 4.

²¹⁶ Paragraph (a) of the definition of “regulated services” in s 6 of the Act includes “legal services”; Section 6 defines “legal services” to mean “services that a person provides by carrying out legal work for any other person”; paragraph (d) of the definition of “Legal work” in s 6 includes arbitration services.

²¹⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules.

²¹⁸ Chapter 3.

²¹⁹ Chapter 5.

²²⁰ Chapter 8.

²²¹ Rogers, above n 15, at 87-88.

service as an arbitrator on the premise that serving as an arbitrator is simply another category of legal service.

Rogers also notes that “a small but apparently growing number of national bar associations are seeking to impose ethical obligations on attorneys who are licensed by them and act as arbitrators.”²²² This trend indicates that bar associations do not assume a regulatory function over arbitrators in absence of an express statement to this effect.

While an argument can be made in support of the New Zealand Law Society regulating its members in their role as arbitrators, this argument can be convincingly rebutted. Reference to ‘arbitration services’ in the Lawyers and Conveyancers Act is better understood to refer to a lawyer representing a party in an arbitration. This limited interpretation is supported by examples of bar associations in other jurisdictions that have expressly extended their powers to regulate their members’ actions as arbitrators.²²³

Finally, it is possible that an arbitrator does not belong to any professional group. Arbitrators are not required to belong to such organisations. Therefore, enforcement through professional groups will not be available in every case.

3 *Enforcement by the courts*

New Zealand courts also play a role in enforcing the ethical obligations of arbitrators involved in international arbitrations seated in New Zealand. In doing so, the courts will necessarily apply a New Zealand understanding of these obligations. While the capacity of the courts to enforce an arbitrator’s ethical obligations is fairly limited and the process may be slow, courts act as an important backup where arbitral proceedings are *ad hoc* and enforcement through professional group membership is unavailable.

New Zealand has sought to minimise interference in international arbitration by limiting the scope of court supervision.²²⁴ New Zealand courts have “no general power to supervise the conduct of arbitrations other than that conferred by the legislation.”²²⁵ Accordingly, the Arbitration Act is the starting point for the following analysis of the courts’ role in enforcing

²²² Rogers, above n 15, at 87.

²²³ See Rogers, above n 15, at 87, where she refers to “Article 55 of the Italian *Codice Deontologico Forense* [which] specifically requires, among other things, that Italian lawyers who serve as arbitrators remain independent, disclose certain information about relevant contacts, and preserve the trust that parties place in them.” She also refers to developments in the United States of a “Model Rule for Lawyers Acting as Third Party Neutrals” and explains that while this Model Rule has not yet been adopted it has experienced support.

²²⁴ Willy, above n 94, at 14.

²²⁵ Willy, above n 94, at 82; see also Arbitration Act, sch 1, art 5.

the ethical obligations of arbitrators who preside over international arbitrations in New Zealand.

This section begins by examining the limited supervisory role granted to the courts by legislation and how it can be used to enforce arbitrators' obligations. The section then considers how courts may regulate an arbitrator's ethical behaviour through award non-enforcement.

(a) Supervisory role

Schedule 1 of the Act allows parties to challenge the appointment of an arbitrator.²²⁶ A party's challenge of an arbitrator will initially be sent to the arbitral tribunal to decide.²²⁷ If the party's challenge is unsuccessful at this initial stage, that party may request "the High Court to decide on the challenge".²²⁸

It is also open to any party to request that the High Court considers the termination of an arbitrator's mandate where that arbitrator is "unable to perform the functions of that office".²²⁹ This includes both factual and legal inability.²³⁰ The ethical obligations of an arbitrator may be relevant to factual or legal inability.

The High Court's ability to consider challenges to appointments and terminations of mandate is central to its supervisory role. The Arbitration Act's confidentiality provisions are also relevant to the enforcement of confidentiality. The following discussion considers each of an arbitrator's ethical obligations in turn to determine how they can be enforced by the courts. The limits of the courts' supervisory role are then considered.

(i) Impartiality and independence

A party may challenge an arbitrator where "circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence".²³¹ Where the challenge proceeds to the High Court, the court has the power to consider the arbitrator's partiality or bias. Although the High Court's ability to enforce impartiality and independence obligations in this way is

²²⁶ Article 13.

²²⁷ Article 13(2); it is also possible for the arbitrator to withdraw at this point or for the other party to the arbitration to agree to the challenge in which case the arbitrator's mandate will be extinguished.

²²⁸ Schedule 1, art 13(3).

²²⁹ Schedule 1, art 14(1); See also Willy, above n 94, at 82, where it is explained that art 14(1) provides the "only grounds for the removal of arbitrators".

²³⁰ Schedule 1, art 14(1).

²³¹ Arbitration Act, sch 1, art 12(2).

important, timeframes are set limiting when a party may challenge the appointment of an arbitrator.²³² Therefore, a challenge will not always be available.

In his book on arbitration in New Zealand, Willy suggests that “bias on the part of an arbitrator is grounds for removal” as it amounts to a legal inability to perform the functions of the arbitrator.²³³ If this so, the High Court can consider the termination of an arbitrators’ mandate due to a breach of the obligations of impartiality and independence. The court may enforce the fundamental obligations of impartiality and independence on this basis.

(ii) Competence

As noted above,²³⁴ a party may challenge an arbitrator’s appointment “if that arbitrator does not possess the qualifications agreed to by the parties.”²³⁵ If required to consider such a challenge, the High Court can enforce an arbitrator’s ethical obligation of competence to the extent that ‘competence’ relates to qualifications specified by the parties. However, challenges to the appointment of arbitrators not having specified qualifications have not presented difficulties in practice.²³⁶ It is therefore improbable that such a challenge would advance all the way to the High Court.

Besides challenges predicated on an arbitrator’s lack of specified qualifications, the High Court can arguably enforce the ethical obligation of competence by terminating the mandate of an incompetent arbitrator. If an arbitrator is so incompetent that they are ‘factually unable’ to perform the functions of the office their mandate may be terminated under art 14(1). On this subject Willy says:²³⁷

If the arbitrator does not possess the skill and experience professed at the time of appointment, then the arbitrator was liable to be removed under the [previous] Act and there seem to be no reason why that should not be the case under the 1996 Act.

²³² Unless the parties have agreed otherwise, a challenge must be brought to an arbitral tribunal within 15 days of the party becoming aware of the “constitution of the arbitral tribunal” or the circumstances that give rise to “justifiable doubts as to the arbitrator’s impartiality or independence”: see art 13(2). After that, party has 30 days to request the High Court to consider the challenge if the arbitral tribunal decides against the challenge: see art 13(3). Furthermore, under art 12(2), a party may only challenge an arbitrator they have appointed “for reasons of which that party becomes aware after the appointment has been made.”

²³³ Willy, above n 94, at 83.

²³⁴ At 26.

²³⁵ Arbitration Act, sch 1, art 12(2).

²³⁶ Willy, above n 94, at 68.

²³⁷ Willy, above n 94, at 83.

However he does not believe that an arbitrator may be removed if the parties were aware of the arbitrator's abilities and experience at the time of appointment. As Willy explains, "If the parties choose to put their affairs in the hands of an incompetent arbitrator then so be it."²³⁸

(ii) Diligence

The High Court may be requested to "decide on the termination of mandate" of an arbitrator who "fails to act without undue delay".²³⁹ When this occurs, the Court must determine what amounts to undue delay. This will inevitably involve consideration of whether the arbitrator is acting with appropriate efficiency in light of the issue they are required to decide. In considering the termination of mandate on the basis of undue delay the court is effectively enforcing an arbitrator's ethical obligation of diligence.

(iii) Confidentiality

As discussed above, the Arbitration Act contains provisions governing the confidentiality of information.²⁴⁰ If the arbitral tribunal discloses information outside the exceptions provided for in s 14C, they will be in breach of s 14B of the Act. Where this occurs the concerned party may "seek an interim injunction measure from the High Court or the District Courts on application under art 9 of Schedule 1 or otherwise by way of injunction."²⁴¹ By granting an injunction the courts are enforcing the arbitrator's ethical obligation of confidentiality.

(iv) Compliance

If an arbitrator does not comply with the terms of the arbitration agreement it may be possible for the High Court to terminate the mandate of the arbitrator on the grounds that they are legally unable to perform the functions of the office.²⁴² The mandate to act as an arbitrator stems from the arbitration agreement itself. If an arbitrator does not comply with the arbitration agreement they are essentially breaching their contract with the parties. Where this contract is breached, the arbitrator's mandate ceases to exist. On this basis they are not legally able to perform the functions of the office.

While this means of enforcement regulates breaches of an arbitrator's contractual obligations, it must also be regarded as the enforcement of ethical obligations. This is because an arbitrator's

²³⁸ Willy, above n 94, at 83.

²³⁹ Article 14(1).

²⁴⁰ At 30.

²⁴¹ Green, Hunt and Kennedy-Grant, above n 123, at [AR14.06].

²⁴² Arbitration Act, sch 1, art 14.

contractual obligations that stem from the arbitration agreement are conflated with their ethical obligation to comply with the arbitration agreement. This means that it is possible for the High Court to enforce an arbitrator's ethical obligation of compliance.

(v) Limits of the courts' supervisory role

The ability of the High Court to enforce the ethical obligations of arbitrators who are acting in international arbitrations seated in New Zealand has been considered. While theoretically useful, there are nonetheless limits to enforcing ethical obligations through the New Zealand courts.

Although Schedule 1 of the Arbitration Act applies whenever New Zealand is the seat of an international arbitration,²⁴³ this does not necessarily mean that proceedings are carried out in New Zealand.²⁴⁴ In some cases, New Zealand's role as 'arbitral seat' will amount to a "fictional construct".²⁴⁵ The disjoint between the seat of arbitration and the venue where arbitration actually takes place complicates enforcement through national court systems. It is harder for parties to request the High Court to consider challenges and terminations of mandate, or to seek injunctions from the courts, when they are not in fact in New Zealand.

Where a request for the termination of an arbitrator's mandate is made to the High Court, the Court must be satisfied that the arbitrator is legally or factually unable to perform their job. Legal or factual inability is a high standard. For an arbitrator to be considered *unable* to perform the functions of their office, their behaviour must be entirely unsatisfactory. If the arbitrator's behaviour simply disappoints a party it is unlikely that the Court would consider their mandate terminated.

The Law Commission's 1991 report on arbitration indicates that the New Zealand courts should take a conservative approach to regulating ethical obligations.²⁴⁶ This is demonstrated in the Law Commission's response to the suggestion that "the reference to 'qualifications agreed to by the parties' in article 12 could extend to those impliedly agreed, including competence and diligence".²⁴⁷ In their opinion:²⁴⁸

²⁴³ Section 6.

²⁴⁴ Kaufmann-Kohler, above n 91, at 1318.

²⁴⁵ Kaufmann-Kohler, above n 91, at 1318.

²⁴⁶ Law Commission, above n 93.

²⁴⁷ Law Commission, above n 93, at [326]; see also Green, Hunt and Kennedy-Grant, above n 123, at [AHSch1.12.10].

²⁴⁸ Law Commission, above n 93, at [327].

...the general thrust of the [UNCITRAL] Model Law, and of the draft Act [now the Arbitration Act 1996], is inconsistent with an expansive interpretation of the scope of the challenges under Article 12, and that New Zealand courts would take a properly cautious approach to such arguments.

Although dealing specifically with art 12, reference to the ‘general thrust’ of the Model Law and the Act indicates that the Law Commission expects the High Court to adopt a similarly cautious approach when considering the termination of an arbitrator’s mandate.

(b) Award non-enforcement

Award non-enforcement, or the setting aside of an arbitral award, may be used by New Zealand courts to enforce arbitrators’ ethical obligations.²⁴⁹ Where an arbitrator has breached their ethical obligations, a party may apply to the High Court to set aside the arbitral award. Circumstances in which an application may be made to set aside an arbitral award are set out in art 34 of the Arbitration Act’s first schedule. Article 34 allows the High Court to set aside an arbitral award where the rules of natural justice have been breached.²⁵⁰ A party may argue that the breach of an arbitrator’s ethical obligation amounts to a breach of the rules of natural justice.

While it is unclear what amounts to a breach of the rules of natural justice, there appears to be a high threshold required before an award can be set aside.²⁵¹ While possible, enforcing ethical obligations through award non-enforcement is likely to be problematic. The Arbitration Act’s provisions for setting aside an award made in New Zealand are essentially the same as art 36 which governs the recognition or enforcement of an arbitral award.²⁵²

Article 36 is a reflection of the New York Convention, an international treaty that was created to facilitate the ‘recognition and enforcement of foreign arbitral awards’.²⁵³ This Convention has a “strong pro-enforcement bias”.²⁵⁴ This pro-enforcement bias is likely to influence courts when considering an application to set aside an award under art 34. Although awards made in

²⁴⁹ Rogers, above n 1, at 77.

²⁵⁰ Articles 34(2)(b)(ii) and 34(6)(b).

²⁵¹ Green, Hunt and Kennedy-Grant, above n 123, at [ARSch1.34.09].

²⁵² Schedule 1, art 36.

²⁵³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959) [hereinafter referred to as the New York Convention]. New Zealand acceded to this Convention on the 6th of January 1983; see New York Convention “New York Convention Countries” <www.newyorkconvention.org>.

²⁵⁴ Rogers, above n 1, at 77.

international arbitrations seated in New Zealand are not ‘foreign’ awards, the policy of enforcing arbitral awards made in international arbitrations is relevant nonetheless.

The indirect influence of the New York Convention means that the High Court is unlikely to set aside an arbitral award made in an international arbitration seated in New Zealand, except in very serious cases of arbitrator misconduct. This leads to a disjoint between conduct standards – the standard of conduct that parties may expect from arbitrators – and the enforcement standards a court will apply when considering an application to set aside an award.²⁵⁵ This is not an adequate approach to enforcing the ethical obligations of arbitrators.

C An Outsider’s Perspective

If New Zealand is to establish itself as a hub for international arbitration in the Asia-Pacific region, the approach taken to the enforcement of arbitrators’ ethical obligations must be acceptable to foreign parties. An ideal seat of arbitration would not allow unnecessary interference in arbitral proceedings.²⁵⁶ Parties often choose to arbitrate their dispute because they do not want to subject it to a national legal system.

While international arbitration needs space to flourish, New Zealand should not simply sit back and become the ‘Wild West’ of international arbitration. Where an arbitrator behaves badly parties will expect a mechanism through which the ethical obligations of that arbitrator will be enforced.

The arbitral institution that administers a proceeding, and any profession groups to which an arbitrator belongs, provide the best means of enforcing an arbitrator’s ethical obligations. In New Zealand, the relevant organisations are the NZIAC and AMINZ respectively. Like arbitrators, “the individuals who staff regulatory authorities are products of a local legal culture.”²⁵⁷ The NZIAC and AMINZ will exercise an understanding of arbitrators’ ethical obligations that reflects the New Zealand context.

Those calling on the NZIAC and AMINZ to enforce the ethical obligations of arbitrators should be satisfied with the enforcement of competence, diligence, confidentiality and compliance obligations. This is because the New Zealand approach to these obligations is relatively robust.

²⁵⁵ Rogers, above n 1, at 76.

²⁵⁶ See Law Commission, above n 93, at [45].

²⁵⁷ Rogers, above n 15, at 260.

It is possible that foreign parties would find these New Zealand organisations to take a relaxed approach to the fundamental obligations of impartiality and independence.²⁵⁸ This is improbable where parties are from the small Pacific Island states for whom New Zealand seeks to be a regional hub.²⁵⁹ An issue is more likely to arise where parties are from countries in Asia which generally have far larger populations than New Zealand. However, it is important not to overstate this possibility. While New Zealand's context may result in a relatively 'relaxed' approach to impartiality and independence, arbitral institutions and professional groups have an invested interest in ensuring high standards of arbitrator behaviour. In general, the regulation they provide should satisfy foreign parties.

If enforcement through arbitral institutions and professional groups is unavailable, foreign parties may turn to the New Zealand courts to enforce an arbitrator's ethical obligations. For the reasons stated above, the capacity of the courts to assist parties is limited.²⁶⁰ The High Court may interfere in arbitral proceedings in instances of serious partiality and bias, serious incompetence, undue delay, or a breach of the arbitration agreement. Parties may also seek an injunction from the courts where the Arbitration Act's confidentiality provisions have been breached.

The limited scope of New Zealand courts in regulating the behaviour of arbitrators involved in international arbitrations in New Zealand is appropriate. The capacity of the New Zealand courts to enforce ethical obligations in extreme situations reflects the courts' role as an 'effective backstop'.²⁶¹ The fact that New Zealand courts may enforce the ethical obligations of arbitrator in serious situations aligns with the legitimate expectation of protection that parties involved in international arbitration will have.

The relaxed approach taken to impartiality and independence in New Zealand may also be less apparent in the enforcement of ethical obligations than expected. It is possible for those enforcing the ethical obligations of arbitrators to consider the expectations of foreign parties. The tribunal of the International Centre for Settlement of Investment Disputes (ICSID) contemplated cultural perceptions of impartiality in deciding *Hrvatska Elektroprivreda d. d. v*

²⁵⁸ See discussion above on impartiality and independence at 21.

²⁵⁹ This is because these countries are very small and have very limited legal communities. In some cases the legal communities of these states are in fact connected to the legal community of New Zealand: see discussion under "Other Significant Institutional Arrangements" at Ministry of Justice "Contemporary constitutional status of the homelands and the modern relations with New Zealand" <www.justice.govt.nz>.

²⁶⁰ At 47.

²⁶¹ Rogers, above n 15, at 256.

The Republic of Slovenia.²⁶² Impartiality in that case arose when the “respondent retained an English barrister who was a member of the barrister’s chambers in which the [arbitral] Tribunal’s President was a door tenant.”²⁶³ While this relationship would be “perfectly acceptable” to English parties, it led the Croatian claimant to have justified doubts regarding impartiality.²⁶⁴

While the approach of the ICSID tribunal has not officially been accepted in New Zealand, the decision attracted significant attention. It is likely that its approach would be adopted if a similar situation arose in the New Zealand context. New Zealand has demonstrated a desire follow international trends within arbitration.²⁶⁵ If a foreign party seeks to have an arbitrator’s obligations of impartiality and independence enforced in New Zealand, it is likely that the tribunal or court would accommodate their expectations as foreign parties.

The approach taken to ethical obligations in New Zealand should generally satisfy foreign parties. Arbitral institutions and professional groups will usually be available to enforce the obligations of unsatisfactory arbitrators where New Zealand is the seat of an international arbitration. Where these enforcement options are unavailable, parties may rely on New Zealand courts to prevent serious breaches of ethical obligations.

Although the approach taken to impartiality and independence in New Zealand may be regarded as relaxed, the tribunal or court deciding issues of impartiality and independence may take a foreign party’s expectations into consideration. On this basis, the approach taken to ethical obligations in New Zealand will be seen as satisfactory and New Zealand is likely to develop as a regional seat of international arbitration.

D Where to From Here?

While New Zealand’s approach to enforcing the ethical obligations of arbitrators should satisfy the expectations of foreign parties, it is nevertheless appropriate to consider what can be done to promote New Zealand as regional hub of international arbitration.

Self-regulation is the most effective means of enforcing the ethical obligations of arbitrators.²⁶⁶

²⁶² *Hrvatska Elektroprivreda, d. d. v The Republic of Slovenia*, ICSID Case No. ARB/11/1, Decision on Disqualification of Counsel, 10 Aug. 2011; see also Rogers, above n 15, at 63.

²⁶³ Rogers, above n 15, at 63.

²⁶⁴ Rogers, above n 15, at 63.

²⁶⁵ Seen in New Zealand having extensively incorporated the UNCITRAL Model Law, above n 93, into its national legislation. Also seen in New Zealand being an early party to the New York Convention, above n 253.

²⁶⁶ See Rogers, above n 15.

The NZIAC and AMINZ must insist on high standards of arbitrator behaviour. This also applies to arbitral institutions and professional groups that are established in New Zealand in the future.

While the New Zealand Government should not interfere with arbitral proceedings, it may support arbitral institutions and professional groups in promoting New Zealand as an arbitral seat in the Asia-Pacific region. Support may come in the form of funding or the sharing of resources with the NZIAC and AMINZ. The New Zealand Government may also use diplomatic relationships within the region to advertise New Zealand as a seat of international arbitration.

In the same way that New Zealand arbitrators acting overseas would benefit from an ethical education, education can ensure that the New Zealand approach used in the enforcement of ethical obligations is well-regarded. Those charged with regulating arbitrators within New Zealand should understand that parties from different countries may have different expectations of an arbitrator and of those enforcing arbitrators' obligations. Once aware of this, one may attempt to accommodate these differences.

Finally, it is foreseeable that increasing numbers of New Zealand lawyers will find work as arbitrators if New Zealand establishes itself as a regional seat of international arbitration. If this is the case, it is important that these arbitrators understand the ethical obligations of arbitrators and how ethical expectations may differ between national contexts. An understanding of the ethical expectations of Asian and Pacific parties is particularly important given the intention to attract parties from within the region. The education of arbitrators will no longer be solely to assist New Zealand arbitrators working in international arbitrations overseas, rather it will play an important part in promoting New Zealand as a regional hub of international arbitration.

VII Conclusion

It is essential to acknowledge one's culture of ethics and to understand how this influences one's understanding of arbitrators' ethical obligations. The culture of ethics within New Zealand's legal community is characterised primarily by the small size and intimate nature of its legal profession. This makes it relatively likely for individuals within the legal profession to know one another. Pragmatism and egalitarianism are also relevant to New Zealand's culture

of ethics. The persistence of a pragmatic attitude prevents minor or trivial matters getting in the way of a job. While this attitude can be useful at times, it is not always conducive to careful consideration of ethical matters. Egalitarianism may influence the way the legal community reacts to instances of misconduct.

The influence of New Zealand's ethical culture on understandings of ethical obligations is most pronounced in relation to an arbitrator's fundamental obligations of impartiality and independence. The small and intimate nature of New Zealand's legal profession, combined with a pragmatic attitude, means that a New Zealand approach to impartiality and independence is likely to be perceived by outsiders as relaxed in instances where partiality and bias arise from an arbitrator's relationships. On the other hand, a New Zealand approach to the obligations of competence, diligence, confidentiality and compliance is unlikely to attract negative attention within international arbitration.

It is essential that New Zealanders acting as arbitrators in international arbitrations overseas are aware of the manner in which New Zealand's ethical culture can influence understandings of ethical obligations. New Zealand arbitrators should exercise heightened awareness where obligations of impartiality and independence are concerned; they must be mindful of the fact that their understandings of these obligations may fall below the expectations of the parties to the proceeding. Education is important in raising the awareness of New Zealand arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration should be used by New Zealand arbitrators to lessen reliance on contextual understandings.

A New Zealand approach to arbitrators' ethical obligations will also be apparent where New Zealand organisations or courts are required to enforce the ethical obligations of an arbitrator in international arbitrations seated in New Zealand. Enforcement of the obligations of competence, diligence, confidentiality and compliance with the arbitration agreement present no perceivable problems. A New Zealand approach to these obligations is likely to meet the expectations of foreign parties. However, enforcement of an arbitrator's obligations of impartiality and independence may fall below expectations.

While a relatively relaxed approach to impartiality and independence may be expected to threaten New Zealand's legitimacy as a regional hub of international arbitration, this will not necessarily be the case. Arbitral institutions and professional groups are the primary regulators of arbitrator conduct. The NZIAC and AMINZ have an interest in maintaining high standards of arbitrator conduct and there is scope for them to adopt the approach of the ICSID tribunal

and accommodate the expectations of foreign parties. The regulation they provide is likely to satisfy foreign parties. The New Zealand courts may be regarded as a secondary regulator that will only interfere in very serious cases of arbitrator misconduct. While the ability of the New Zealand courts to enforce ethical obligations is limited, this situation is appropriate as it limits court interference in international arbitration.

VIII Bibliography

A Cases

1 New Zealand

Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142 (CA).

Banks v Grey District Council [2004] 2 NZLR 19 (CA).

Grey District Council v Banks [2003] NZAR 487.

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2009] NZSC 72, [2010] 1 NZLR 35.

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2) [2009] NZSC 122, [2010] 1 NZLR 76.

Tolmarsh Developments Ltd v Stobbs HC Auckland M809/90, 20 September 1990.

2 Australia

Webb v R (1994) 181 CLR 41.

3 Canada

R v Smith & Whiteway Fisheries Ltd 133 NSR (2d) 50.

4 United Kingdom

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, CA.

5 International cases

Hrvatska Elektroprivreda, d. d. v The Republic of Slovenia, ICSID Case No. ARB/11/1, Decision on Disqualification of Counsel, 10 Aug. 2011.

B Legislation

Arbitration Act 1996.

Arbitration Amendment Act 2007.

Lawyers and Conveyancers Act 2006.

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

C *Treaties*

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959).

D *International Documents*

IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association, London, 2004).

IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association, London, 2014).

United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (United Nations publication, Vienna, 2008).

E *Books and Chapters in Books*

Justin Brown *Myth New Zealand* (Hurricane Press, Cambridge, 2010).

Colin Campbell “Judges, bias and recusal in Australia” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 279.

Yves Dezalay and Bryant G. Garth *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, Chicago, 1996).

Christopher Forsyth “Judges, bias and recusal in the United Kingdom” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 361.

Aleksander Goldstajn “Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects” in Petar Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotham Ltd., London, 1989) 27.

Philip A Joseph “Appointment, discipline and removal of judges in New Zealand” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 66.

Jeffrey C Kennedy “Leadership and Culture in New Zealand” in Jagdeep S Chhokar, Felix C Brodbeck and Robert J House (eds) *Culture and Leadership Across the World: The GLOBE book of In-Depth Studies of 25 Societies* (Lawrence Erlbaum Associates, Mahwah, 2007) 397.

Gerard McCoy “Judicial Recusal in New Zealand” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 322.

Georgina Murray “New Zealand Lawyers: From Colonial GPs to the Servants of the Capital” in Richard L Abel and Philip S Lewis (eds) *Lawyers in Society: The Common Law World* (University of California Press, Berkeley, 1988) 318.

Kate O'Regan and Edwin Cameron "Judges, bias and recusal in South Africa" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 346.

Jan Paulsson *The Idea of Arbitration* (Oxford University Press, Oxford, 2013).

Catherine A. Rogers *Ethics in International Arbitration* (Oxford University Press, Oxford, 2014).

Mauro Rubino-Sammartano *International Arbitration: Law and Practise* (2nd ed, Kluwer Law Journal, The Hague, 2001).

Lorne Sossin "Judges, bias and recusal in Canada" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 301.

Hans van Houtte "Conduct of Arbitral Proceedings" in Petar Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotham Ltd., London, 1989) 113.

Anthony Willy *Arbitration* (Brookers, Wellington, 2010).

F *Journal Articles*

Gabrielle Kaufmann-Kohler "Globalisation of Arbitral Procedure" (2003) 36 Vand. J. Transnat'l L 1313.

Walter Mattli "Private Justice in a Global Economy: From Litigation to Arbitration" (2001) 55 Int'l Org 919.

V Suchitra Mouly and Jayaram K. Sankaran "The Enactment of Envy within Organisations" (2002) 38.1 JAB 36.

Khawar Qureshi "Time for change?" (2013) 163 7582 UKNLJ 13.

Khawar Qureshi "Time for change? Pt 2" (2013) 163 7583 UKNLJ 14.

Catherine A. Rogers "Regulating International Arbitration: A Functional Approach to Developing Standards" (2005) 41 Stan. J. Int'l L 53

Scott J Vitell, Saviour L. Nwachukwa and James H. Barnes "The Effects of Culture on Ethical Decision-Making: An Application of Hofstede's Typology" (1993) 12 Journal of Business Ethics 753.

Duncan Webb "Judicial Conduct in Very Small Places: Some Contextual Questions" (2003) 6 Legal Ethics 106.

G *Looseleaf Texts*

Philip Green, Babara Hunt and Tomas Kennedy-Grant *Green and Hunt on Arbitration Law and Practise* (online looseleaf ed, Brookers).

H *Official Reports*

1 *New Zealand*

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

Sir David Gascoigne *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson* (The Judicial Conduct Commission, 7 May 2010).

2 *United Kingdom*

Bar Standard Board *Bar Barometer: Trends in the profile of the Bar* (The General Council of the Bar of England and Wales, London, June 2014).

H *Internet Resources*

Jock Anderson “Make secretive judges open their wallets” (18 April 2013) NBR <www.nbr.co.nz>.

Stephen Levine “Political values - Political values and the ‘Kiwi’ way of life” (13 July 2012) Te Ara - the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

Stephen Levine ““Political Values – The fair society” (13 July 2012) Te Ara - the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

Jock Philips “Class – Understanding Class” (12 July 2012) Te Ara – the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

Arbitrators’ and Mediator’s Institute of New Zealand Inc “Affiliate” <www.aminz.org.nz>.

Arbitrators’ and Mediator’s Institute of New Zealand Inc “Associate” <www.aminz.org.nz>.

Arbitrators’ and Mediator’s Institute of New Zealand Inc “Fellow” <www.aminz.org.nz>.

Arbitrators’ and Mediator’s Institute of New Zealand Inc “Membership” <www.aminz.org.nz>.

Arbitrators’ and Mediator’s Institute of New Zealand Inc “Search Panel/Lists” <www.aminz.org.nz>.

LawFuel “The Arbitrator Stars – Law Fuel ‘Arb Star’ List” <www.lawfuel.co.nz>.

Merriam-Webster Dictionary “Pragmatism” <www.merriam-webster.com>.

Ministry of Justice “Appointing Judges: A judicial appointments commission for New Zealand? – II Current New Zealand Situation” <www.justice.govt.nz>.

Ministry of Justice “Contemporary constitutional status of the homelands and the modern relations with New Zealand” <www.justice.govt.nz>.

New York Convention “New York Convention Countries” <www.newyorkconvention.org>.

New Zealand Dispute Resolution Centre “Arbitration Panels” <www.nzdrc.co.nz>.

New Zealand Dispute Resolution Centre “International Dispute Resolution” <www.nzdrc.co.nz>.

New Zealand Dispute Resolution Centre “NZIAC Rules for International Commercial Arbitration” <www.nzdrc.co.nz>.

Oxford English Dictionary “Independence” <www.oxforddictionaries.com>.

Solicitors Regulation Authority “Regulated Population Statistics” <www.sra.org.uk>.

Statistics New Zealand “National Population Estimates: At 30 June 2014” (14 August 2014) <www.stats.govt.nz>.

The Legal 500 “International Arbitration” <www.legal500.com>.

The University of Auckland “New Zealand social values” <www.auckland.ac.nz>.

I Other Resources

1 Professional Group Documents

Arbitrators’ and Mediator’s Institute of New Zealand Inc *Code of Ethics* (1 December 2011).

Arbitrators’ and Mediator’s Institute of New Zealand Inc *Guide to Arbitration* (July 2004).

2 Conference papers

John G Walton “International Arbitration: Are we seat or are we just sitting” (paper presented to AMINZ Conference, Queenstown, August, 2014).

3 Working papers

V Suchitra Mouly and Jayaram K. Sankaran *The Tall Poppy Syndrome in New Zealand: An Exploratory Investigation* (The University of Auckland Department of Management Science and Information Systems, Working Paper No. 222, March 2001).

4 Newspaper articles

“Lorde’s hot New Zealand summer holiday” *Stuff* (online ed., New Zealand, 7 January 2015).

Max Rashbrooke “How New Zealand’s Rich-Poor Divide Killed its Egalitarian Paradise” *The Guardian* (online ed, London, 12 December 2014).

5 Magazine articles

“Some interesting blips in lawyer incomes” *LawTalk* (New Zealand, 12 November 2014).

Geoff Adlam “Snapshot of the New Zealand Legal Profession 2014” *LawTalk* no. (New Zealand, 28 February 2014).

Elliot Sim “Oversupply of lawyers an ‘opportunity’” *LawTalk* (New Zealand, 7 November 2014).

6 *Media releases*

Sport New Zealand “McCaw leadership recognised through award” (press release, 21 May 2014).

7 *Emails*

Email from Christine Schofield (Acting Registry Manager at the New Zealand Law Society) to Ella McLean (author) regarding the Law Society Registry (6 January 2015).

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 15,613 words.