IN THE SUPREME COURT OF NEW ZEALAND SC 27/2013

[2013] NZSC Trans 26

BETWEEN **EWAN ROBERT CARR**

BROOKSIDE FARM TRUST LIMITED

Appellants

AND **GALLAWAY COOK ALLAN**

Respondent

ARBITRATORS AND MEDIATORS' INSTITUTE OF NEW ZEALAND

Intervener

Hearing:	28 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	D J Goddard QC, P J Dale and A J Wicks for the Appellants C A McLachlan QC, A V Foote and L W Wass for the Respondent D A R Williams QC and S E Fitzgerald for the Intervener

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CIVIL APPEAL

MR GODDARD QC:

May it please the Court. I appear with my learned friends Mr Dale and Mr Wicks for the appellants.

ELIAS CJ:

Thank you Mr Goddard.

MR McLACHLAN QC:

May it please the Court. My name is McLachlan and I appear with Ms Foote and Mr Wass, my learned friends, on behalf of the respondents on this appeal, Messrs Gallaway Cook Allan.

ELIAS CJ:

Thank you Mr McLachlan.

MR WILLIAMS QC:

May it please the Court. I appear for the Interveners, the Arbitrators and Mediators' Institute of New Zealand, pursuant to leave granted in September last. I appear with Ms Sally Fitzgerald. I should say I'm conscious of the conditions about leave and we've had the advantage of filing submissions and we will simply remain silent unless and until called upon.

ELIAS CJ:

Thank you Mr Williams. Yes Mr Goddard?

MR GODDARD QC:

Thank you your Honour. Perhaps one housekeeping matter to deal with first which is the supplementary submissions that I sought leave to file.

ELIAS CJ:

That's fine Mr Goddard.

MR GODDARD QC:

Thank you your Honour. I also have my usual two page road map in an effort to keep myself on the straight and narrow. If I could ask Madam Registrar to give that to the Court.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

I'd like to begin, your Honour, by going straight to the arbitration agreement that's the subject of this appeal. It's in volume 3 of the case on appeal on page 144, which is the first page in the volume after the index.

ELIAS CJ:

Sorry page?

MR GODDARD QC:

Page 144 your Honour, the first substantive page after the index. It's an agreement between the parties to the arbitration, ultimately the parties to this appeal. It records, it's a stand-alone arbitration agreement. It doesn't form part of a wider commercial contract. It records in the background that differences have arisen between the parties and that the parties have agreed to submit the dispute to arbitration. The critical clauses for present purposes are clauses 1.1 and 1.2. 1.1: "the dispute is submitted to the award and decision of the Honourable Robert Fisher QC as Arbitrator whose award shall be final and binding on the parties" and then the first of the parties additions to Dr Fisher's standard form, and I'll come to that in a moment, "(subject to clause 1.2)". So the parties added in here "subject to clause 1.2". That was a deliberate qualification of their agreement that the award would be final and binding on the parties. And then we come to 1.2, "The parties undertake to carry out any award without delay subject only to such rights as they may possess under articles 33 and 34 of the First Schedule to the Arbitration Act 1996, and clause 5 of the Second Schedule appeals subject to leave," and then the next set of words that the parties agreed to add to the standard form –

McGRATH J:

Why is it significant it's a standard form, if it is?

MR GODDARD QC:

Because one of the questions is the materiality of the provision that's sought to be deleted by severance your Honour and part of my submission is that this was a conscious addition by the parties to a standard form, not boilerplate for example.

WILLIAM YOUNG J:

And it's the only provision there that's italicised and has emphasis added?

MR GODDARD QC:

Yes, that's the next addition your Honour. So they deliberately added two things. First of all the subject to clause 1.2 and 1.1 to make it clear that they were only agreeing this would be final and binding subject to 1.2 and then 1.2, after the appeal (subject to leave), they've added this phrase, "but amended so as to apply to '*questions of law and fact*' (emphasis added)." The italics, the emphasis added are all the parties own. And the issue before the Court, the primary issue, is whether this agreement is invalid. It's common ground that it's invalid to the extent that it attempts to provide for review for errors of fact. That's inconsistent with the Arbitration Act, that can't be given effect. So the parties attempt to agree that the award would be subject to a review before the High Court for errors of law and fact, is ineffective.

ELIAS CJ:

Yes I had wondered why it's put that way around because you did run a mistake in the High Court and the alternative way to have looked at this was that this was a, on its face, a common mistake. The trouble is that with the Contractual Mistakes Act 1977 you run into a brick wall because it doesn't mesh with the common law.

MR GODDARD QC:

Your Honour is exactly right and this case has actually thrown up an interesting respect in which the Contractual Mistakes Act is actually narrower than the common law in relation to mistake. It raises an interesting policy question about whether the Act needs to be revisited to deal with mistakes that are material but where at the time the contract is entered into, one can't yet, one can't say that this is substantial inequality, in exchange. So the agreement is substantially different but one doesn't know which way the inequality runs, or if there is one, but that, of course, is not a matter for this Court.

ELIAS CJ:

No but at common law that would be an invalid contract.

MR GODDARD QC:

As a whole, yes, your Honour.

ELIAS CJ:

So if that were a mistake but you are forced to argue that the contract is invalid because of the Arbitration Act unenforceability.

MR GODDARD QC:

It's – yes. It's not unusual for misapprehensions by a party to give rise, or by both parties, to give rise to a number of different remedies. For example if a –

ELIAS CJ:

No, I accept that.

MR GODDARD QC:

– if a misapprehension is being created by the statement by one party, however innocent, you may have remedies in misrepresentation or under the Fair Trading Act 1986, as well as under the Contractual Mistakes Act, so I certainly don't think one can say, because there was a mistake –

ELIAS CJ:

No.

MR GODDARD QC:

– and the Act doesn't apply, there is no other remedy.

ELIAS CJ:

No, but it may mean that you'll need to enlarge, at least for my benefit, on why the consequence of invalidity attaches because although it's quite clear that at common law it did attach to common mistake if material. I know it's not in contention but I'd like some help with that.

MR GODDARD QC:

Why don't I deal –

GLAZEBROOK J:

Can I just also say that I couldn't really understand what the concession, if you like, or the judgment which says that you couldn't tell whether it was going to be of significance or not, because if it's a material mistake then it is of significance by its definition, I would have thought.

MR GODDARD QC:

The problem with the Contractual Mistakes Act is that the test is not whether it's significant but whether it results in a substantially unequal exchange of values at the time of the contract.

GLAZEBROOK J:

But that must be the case if it's a material, if it's material to the contract it must do that by definition.

MR GODDARD QC:

Not if it deprives both parties of the same right which they both thought they were getting. I think that was the basis on which it proceeded and –

ELIAS CJ:

Well, I think there is an issue there, however, which I'd certainly not want to simply rubberstamp the reasoning in the lower Courts on.

MR GODDARD QC:

And your Honour is not being asked to but the issue is that I think the matter is not the subject – it wasn't the subject of an appeal to the Court of Appeal and it seemed difficult to resuscitate it at this stage. But all I think I need to say – I'm very happy to proceed on the basis that that shouldn't be foreclosed and that in an appropriate case that question might be revisited, and I think that's helpful to me when it comes to responding to my friend's argument that because there's no relief available under the Contractual Mistakes Act the same result shouldn't be able to be achieved by another path. My primary response to that was there was nothing unusual about there being more than one avenue for relief where a mistake influences the form of contract. But let me come back straight away –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to that invalidity issue and why it has been assumed by the parties. It's common ground that jurisdiction to entertain an appeal for error of fact isn't available under the Arbitration Act and can't be conferred by the consent of the parties.

ELIAS CJ:

Well it's simply unenforceable.

MR GODDARD QC:

Yes, and that's all that needs to be said –

ELIAS CJ:

But does – my query, I suppose, is whether a non-enforceability results in invalidity.

MR GODDARD QC:

That's the basis on, firstly, on which this has proceeded –

ELIAS CJ:

Yes, I understand that.

MR GODDARD QC:

– and secondly it's, I think, closely analogous to the situation of a term which is ultra vires one of the parties and there are many cases where that's been dealt with under this framework, that one party, which is a statutory corporation, didn't have power to enter into one aspect, one term of a contract so that provision is to that extent. One could say unenforceable against that party but the way the Courts have put it is an invalid provision of the contract and the question then becomes, does that invalidity extend to the whole contract or can it be confined to the particular provision. And in my submission this is a directly analogous situation. If it cannot be given to the agreement to have a review on questions of fact, as a matter of law that agreement is ineffective, invalid, and the question then becomes whether the fact that that agreement is ineffective, invalid, has no legal force, means that the whole of the contract is ineffective, invalid, has no legal force. Very similar to the situation, for example, that the Court of Appeal had to deal with in *Atrium Management Limited v Quayside Trustee Limited* [2012] NZCA 26, (2012) 13 NZCPR 69, which is a case I'll come to later, where one aspect of a management agreement entered into by a body corporate was ultra vires the body corporate and the question was whether that affected the whole of the management agreement.

ELIAS CJ:

All right, thank you.

MR GODDARD QC:

That's perhaps worth flagging but your Honour is quite right that this is not one of those cases where a term of a contract is invalid because it's prohibited by statute, so illegal, and it's also not a case of invalidity, voidness as it's sometimes termed, because a term is contrary to public policy, and those are categories of case where this issue of severance has arisen. But there are also cases where it's arisen because a provision is ultra vires one of the parties, and also perhaps even closer it's arisen in circumstances where a provision of a contract is too uncertain to be given effect, and that, I think, is perhaps the closest analogy –

ELIAS CJ:

Yes, that might be the case –

MR GODDARD QC:

– so where a term of a contract is so uncertain that it can't be given effect, a lease on the usual term, this is one of the examples, then the question – so that term is ineffective, invalid. The question becomes does that mean the contract as a whole is invalid, that there is no contract, or can one say, no it's just that term that's the problem and we can sever it, and it's the same enquiry in my submission.

So at the heart of the matter before the Court is the question whether in circumstances where the parties' agreement to extend review to questions of fact is invalid, and I'll just use that as a synonym for ineffective, in my submission they're the same for this purpose, that means that the whole of the agreement is invalid or whether it means that – or whether the rest of the contract can be saved, to use the language of many of the cases, by severing the offending provision. The Courts below have proceeded on the basis that's what's being severed are just the words "and fact". I don't know that it matters much but actually when one pauses and reads the clause with just those words deleted, clause 5 but amended so as to apply to questions of law, it's a slightly silly thing to say because it applies to questions of law if you don't amend it. So I think what's really being sought, if one deals squarely with what the parties agreed, is severance, as your Honour Justice Young put to me, of the words beginning "but" through to the end of that clause 1.2.

WILLIAM YOUNG J:

Just pausing there. The case would have been more obviously one of mistake if this hadn't been in the document but it was apparent from the correspondence that the parties believed that the appeal under the Arbitration Act extended to points of fact.

MR GODDARD QC:

In that case the only possible source of relief would have been –

WILLIAM YOUNG J:

Mistake.

MR GODDARD QC:

– in mistake or if one party had represented that it would be available potentially in misrepresentation or under the Fair Trading Act.

ELIAS CJ:

It does seem very odd that the result would have been so different if there had been a representation compared to a common mistake, evident on the face of the document.

WILLIAM YOUNG J:

I don't think a representation would cut the mustard, would it, it's a question of law.

MR GODDARD QC:

A representation – the English Courts have moved away from the requirement that a misrepresentation has to be a fact rather than a law and –

WILLIAM YOUNG J:

What about our Contractual Remedies Act, is it the same as a statement of fact – a representation of fact?

MR GODDARD QC:

No it doesn't your Honour, it says misrepresentation and I've written elsewhere, in fact, on this issue and suggested that it's high time that the New Zealand Courts revisited that distinction which never, in my submission, had a very sound basis and which has been firmly and convincingly rejected by the English Courts but I have to wait for another case to have the opportunity to run that argument before

your Honours. But the – and certainly under the Fair Trading Act there's no question but that a representation of, a statement about law can amount to misleading and deceptive conduct. The Act proceeds on that basis.

It's perhaps – this case throws up a number of difficulties with our contract statutes. One of the challenges, of course, of applying the Contractual Remedies Act would be that now a representation rather than entitling one to set aside the contract, subject to cancellation rights, gives you a right to damage – as if the representation had been a term but of course if it was a term it would be ineffective, it's not clear where it takes you, so – but that's again another issue for another day.

But I want to pick up the core of your Honour's point which is that if one party had said to the other, "We can do this properly," and I said, "Okay, that's a good idea, let's do this," if there had been an express or implied representation that rights of review were available in relation to questions of fact, that would certainly have created an entitlement to relief under the Fair Trading Act and in this case the only sensible relief would be, in my submission, to set aside the agreement and its consequences under section 43. And if there had been such a representation then there would be a strong argument that it was on a matter which the parties had expressly or impliedly agreed to be essential and entitling cancellation. But, of course, cancellation is prospective, not retrospective, so one would still need, I think, to apply for relief under section 9 in relation to the steps that had been taken to date. These are all avenues that might have been relevant but the appellant, the applicants in the High Court for an order setting aside the award, aren't confined by those remedies because there is also the point, which is common ground, that the contract is at least in part invalid. That's never been questioned below by any party, or by the Courts, and it's right, in my submission, for the reasons that I identified earlier. The parties cannot, effectively, cannot validly agree to rights of review on questions of fact because they cannot validly agree to it. Their agreement is, to that extent, invalid. Does that mean that the whole of the agreement is invalid or just that bit. Can that bit be severed? That is the central issue for the Court.

ELIAS CJ:

The other loose thread in my mind is the way this case has been served up in terms of the arbitration agreement because what we have here is an arbitration award. Is there a difference in unravelling things? Have we got beyond that? Are we now into the Arbitration Act regime in which questions of invalidity of the award are the issue?

MR GODDARD QC:

I'll come to the relevant provisions of the Arbitration Act but what your Honour will see in short is that one of the grounds on which an award maybe set aside is that the arbitration agreement was invalid. So the statutory, one of the statutory criteria for setting aside an award is that the agreement was invalid and of course the question of setting aside an award can arise only where there has been an award, so it's very clear from the structure of the Act that one of the questions that the Court can, and must, enquire into if it's raised by an applicant, is the validity of the agreement and that's not surprising because an award derives its force from the agreement of the parties to submit to arbitration. No agreement, no force. It's as simple as that.

With that page open showing the party, the language the parties agreed to – now, let me go to my 1.3 of my road map. The next point I want to make very briefly is that this expanded scope of review was agreed at a very early stage in the parties' discussions about the possibility of going to arbitration and changes were made to the standard form to reflect the agreement and I can illustrate this very quickly from a couple of references in the same volume of the case on appeal. First of all page 219, the possibility of arbitration was first canvassed in correspondence in September 2009 and Duncan Cotterill acting for Gallaways wrote on the 15th of September to GCA lawyers for the car interests and said, in paragraph 3, "Our client may, subject to a satisfactory arbitration agreement, consent to the issues being dealt with by way of arbitration rather than by the High Court. The arbitration agreement would need to provide inter alia the following: 1. Arbitration in Auckland. 2. Procedure in accordance with the High Court Rules. 3. The parties to have the same rights of appeal as if the arbitration had been dealt with by the High Court." So this marker was laid down by the Gallaways at an early stage and if we turn over one page to the response two days later, paragraph 3, "We note your proposal in relation to the arbitration. We have no difficulty with points 3.2 and 3.3." So that same rights of appeal i.e. errors of law and fact was common ground from the very beginning. What we then see is an approach to the chosen arbitrator and at 242 an email back from the arbitrator to the parties thanking them for the enquiry. Confirming availability for appointment. Three weeks pencilled in. Then paragraph 2, "I attach precedent arbitration agreement." I'm not going to spend a lot of time on this point but I do just want –

ELIAS CJ:

Sorry, what page are you on?

MR GODDARD QC:

I'm sorry, I'm at 242, precedent arbitration agreement. In ordinary usage one would refer to the whole of the agreement we were looking at a moment ago as an arbitration agreement and my submission in relation to this argument by AMINZ adopted by the respondent is essentially that the statute uses the term in its ordinary way. But here we've got a reference to a precedent arbitration agreement being attached and some instructions for how the parties might proceed in relation to any arbitration agreement and then the standard form is over the page at 243 and I want to go to this just to show that 1.1 of the standard form doesn't have that subject to clause 1.2 and that 1.2 provides by default for exclusion of rights of appeal on questions of law but not clause 4.5 of the Second Schedule and there's a footnote that says, "If right of appeal desired delete the words "but not" and substitute the word "and" and what we've seen from the final agreement is that the parties not only put "and" in there, they added in "rights of appeal on questions of law" but they added that language if we look back at page 144, "But amended so as to apply to *'questions of law and fact' (*emphasis added)."

So this is a matter to which the parties expressly turned their minds and in respect of which they very consciously altered the standard form suggested to them as an option by their chosen arbitrator and I don't know that I need to labour that point much more but if one looks at page 259 there's an email back with draft amendments to that standard form and over on 260 we see the insertion. So going back to 144, to the arbitration agreement in this case, we have a very deliberate decision by the parties to agree to go to arbitration on the basis that both parties would preserve their rights of appeal on questions of law and fact and as I say at 1.4 of my road map what Gallaways are seeking to enforce against Mr Carr is an agreement that differs from the agreement actually entered into by the parties by deleting the words that the parties agreed to add to the standard form, those words that add a right of appeal on questions of fact, and that deletion materially alters the scope of the review rights from that which was agreed by the parties.

At the risk of stating the obvious I say at 1.5 that Mr Carr did not enter into an agreement to that effect. Mr Carr never entered into a contract to arbitrate subject only to rights of review on questions of law. That is not something he ever agreed to.

And there's no basis on which the Court could conclude that he would have been willing to do so if he'd been aware that the parties' desired outcome couldn't be achieved. We just don't know what would have happened. If an officious bystander had popped up, as lawyers are fond of imagining that they do from time to time, and said, but you do realise, don't you, that you can't have a right of appeal on questions of fact, and the respondent's have not attempted to argue that there's any basis to the thinking that Mr Carr would have agreed to that. There's no evidential foundation for that suggestion at all. And what that means, in my submission, is set out at my 1.7. It's a simple proposition of basic contract principle. The Court shouldn't impose on Mr Carr an agreement that he did not make and that there's no reason to think he would have agreed to make if asked at the time. Why do we enforce contracts? We enforce contracts because parties have freely agreed to their terms. Do we add terms to contracts? Only if they can properly be implied in accordance with the well established test which essentially asks whether they're already implicit in the language used by the parties or whether it goes without saying, whether the parties would have, if asked at the time, said yes, yes, of course.

The same approach should apply to subtraction. A contract should not be enforced against a party with certain terms that were agreed subtracted if that makes a material difference to the rights and obligations of that party. There's just no conceptual basis in law for enforcing an agreement modified in that way. And really the thrust of my submissions is that severance shouldn't be dealt with as a separate little island of law divorced from basic contract principles, which is unfortunately how many of the authorities proceed. Severance is an issue that needs to be tackled in a way that is firmly grounded in basic principles of contract law and that make sense when we look at other aspects of contract law such as the approach that the Courts take to adding terms to an agreement. One of the examples I give in my submission is the possibility that Mr Carr might have said, well, maybe this doesn't work but let's imply a term, that the parties agree that errors of law or fact can be referred to an arbitration appeal panel. The parties could have agreed that perfectly validly. One can have a private tribunal that hears questions of law and fact on appeal. Obviously if Mr Carr had contended for that, Gallaways would say, no you can't imply that term, that doesn't go without saying, it's not obvious we would have agreed to that, but exactly the flip side applies in relation to this attempt to subtract from the contract and still hold Mr Carr to it. It's not obvious that Mr Carr would have agreed to it. There's every reason to think he wouldn't have. In those circumstances there's no basis for enforcing against him the contract modified in this significant way.

I want to look now at the Arbitration Act because it provides an important backdrop to the issue before the Court. It's under tab 1 of my bundle of authorities and what I'll do is I'll just go through it, identifying provisions that are relevant both to the case as it's being argued in the Courts below and in my initial submissions, and provisions that are relevant to the additional issue raised by AMINZ about what arbitration agreement means. And I accept that obviously the Court has to engage with that question of statutory interpretation, even though it hasn't been raised before, the Court needs to interpret the statute and it's a question of law.

So begin with the interpretation provision, section 2, and there's a definition of arbitration agreement but not one which, in my submission, assists the Court to decide the particular issue before it: "arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." Now the case for the appellants is that what we were looking at a moment ago is an arbitration agreement. That's how it's described as a matter of ordinary usage. The whole of it is the arbitration agreement. What AMINZ and Gallaways argue is that the arbitration agreement is only the first two lines of clause 1.1. They say that everything else is something else. That's certainly not the language that was used by the arbitrator when he sent out a draft arbitration agreement, he sent the whole thing, not just two lines, or by the parties when corresponding about it. It's not the language naturally used by any lawyer in relation to a post-dispute agreement to arbitrate and there's no good reason to give the term a narrower meaning, quite the contrary as I'll show as we go through the statute. It's consistently used in the Act in a way which encompasses provisions governing matters of procedure and other ancillary matters.

So that's arbitration agreement. Then we have in section 5 the purposes of the Act. There's no real dispute about this but I should perhaps pause on 5(a), "To encourage the use of arbitration as an agreed method of resolving commercial and other disputes." The submissions of AMINZ certainly promote the use of arbitration as a method of resolving commercial and other disputes. The word that rather disappears on their approach is "agreed" and yet it's fundamental because the only reason that an arbitration can be conducted and has the effect of resolving a dispute is because the parties have agreed to submit their dispute to that arbitral tribunal. And then as AMINZ quite rightly notes the goals of the Act (d), "To redefine and clarify the limits of

judicial review of the arbitral process and of arbitral awards; and (e) to facilitate the recognition and enforcement of arbitration... awards; and (f) to give effect – " oh – to promote international consistency, in (b) as well, based on the UNCITRAL Model Law.

Section 6, "Rules applying to arbitrations in New Zealand." The very familiar provision that says the provisions of Schedule 1 apply to arbitrations when the place of arbitration is New Zealand and in the case of a domestic arbitration the provisions of Schedule 2 apply unless the parties agree otherwise. This is obviously a domestic arbitration so the provisions of Schedule 1 apply except to the extent that they can be and have been modified by agreement and Schedule 2 applies unless the parties agree otherwise.

Because it's helpful to understand the scope of the term arbitration agreement it's worth pausing to look at section 11, "Consumer arbitration agreements." Where a contract contains an arbitration agreement and a person enters into that contract as a consumer, the consumer has to, by a separate written agreement, confirm that they're happy to have the matter referred to arbitration. And that's relevant because if we turn over to subsection (4) what we see is a provision that for the purposes of article 4 of Schedule 1 and that's the waiver provision that I'll come to in a moment, subsection (1) is treated as if it were a requirement of the arbitration agreement. See here we have the statute treating certain preliminaries to the conduct of the arbitration as requirements of the arbitration agreement. We see a similar broad approach to what's encompassed in an arbitration agreement reflected in section 12 powers of arbitral tribunal in deciding disputes. Subsection (1), "An arbitration agreement unless otherwise agreed by the parties is deemed to provide that," and then there are certain matters that the arbitration agreement is deemed to provide in relation to the relief that can be awarded and in particular the award of interest. So this is saying, "Well, these are matters that might be dealt with in an arbitration agreement and we're going to deem certain provisions of this kind to be included in the arbitration agreement."

Section 14. This is the introductory section in relation to the confidentiality regime for arbitration and what it says is that acceptance of the parties may otherwise agree in writing whether in the arbitration agreement or otherwise sections 14A to 14I apply for every arbitration for which the place of arbitration is or would be New Zealand. So again this proceeds on the basis that if the parties include a term in the agreement to

go to arbitration which governs matters of privacy then that's a term of the arbitration agreement. It would make no sense to talk about agreeing this in the arbitration agreement if the arbitration agreement was just the core submission. That's just not the way in which the language is used here. And then again we see in 14B a deeming provision in relation to what arbitration agreements are deemed to provide that the parties in the arbitral tribunal must not disclose confidential information. The parties can, of course, agree otherwise in the arbitration agreement.

And then turning over to 14F that's the provision that requires court proceedings under the Arbitration Act to be conducted in public except in certain circumstances a party can apply for an order that court proceedings will be conducted in private and section 14H deals with the matters that the Court must determine when it decides whether to direct that proceedings be conducted in private and one of those, paragraph (d), is the terms of any arbitration agreement between the parties to the proceedings. What this obviously envisages is the that the Court will look at the terms of the arbitration agreement including the way in which matters like confidentiality and privacy are dealt with and take that into account in deciding how to approach an application for privacy in court. Again, that makes no sense if the arbitration agreement is just the core submission language.

There's nothing else in the body of the Act that needs to be referred to. Schedule 1 begins on page 16, rules applying to arbitration generally. So this applies to all arbitrations where the place of arbitration is in New Zealand. Some of these are mandatory provisions, others can be contracted out of. Article 2 of the Schedule confirms that for the purposes of the Schedule arbitration agreement has the same meaning as assigned in section 2. So the term is used consistently across the body of the Act in the Schedule as one would expect.

We then come to one of the more illuminating provisions in relation to how the term arbitration agreement is used in this legislation and it's article 4, "Waiver of right to object. A party who knows that any provision of this Schedule from which the parties may derogate," so it's any non-mandatory one, "or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating that party's objection to such non-compliance without undue delay... shall be deemed to have waived the right to object." Now this is obviously addressed to provisions of the arbitration agreement that, for example, provide a procedure to be followed, provide for a right to make certain submissions,

provide for certain steps to be taken, perhaps set a timetable, or which provide for matters such as translations or other things like that. So if you've got a provision of that kind, and it's not complied with, and no objection is taken at the time, then the party that didn't object is deemed to have waived the right to object and that's important when we come to challenges.

So this is a provision which was seen as very important in the development of the Model Law, article 4 of the Model Law, and plays an important role both in the Model Law and in the Act. It prevents people sitting on their hands, failing to take an objection at the time when it's due, particularly on a matter of procedure, and then after the award comes out putting their hands up and saying 'oh well we were always unhappy about this'. And it works only if arbitration agreement means the whole of the agreement including the procedural requirements set out in it, otherwise it becomes a nonsense. Clearly what this is talking about is procedural matters. Provisions of the Schedule and any requirement under the Arbitration Act not complied with if you don't raise the objection you've waived it. It wouldn't make any sense if arbitration agreement just meant those two lines in which you submit to the decision of a particular tribunal.

ARNOLD J:
Well it gets some support from article 34(2)(a)(iv) in that respect that it does provide for awards to be set aside where the arbitral procedure was not in accordance with the agreement of the parties and so when you read that with article 4 it's simply saying, yes, there is a right to set aside if the procedure is not followed but you've got to object straight away.

MR GODDARD QC:
Your Honour is a step ahead of me and that, in my submission, is exactly right, and that dual set of provisions, which work together, wouldn't work if arbitration agreement didn't embrace procedural provisions in the Arbitration Act.

The problem in terms of giving effect to what the parties actually agreed is found in article 5 of the First Schedule which prohibits intervention by the Court except where so provided by the Schedule. There's not dispute about that but it's worth noting in passing.

Article 7, “Form of arbitration agreement. An arbitration agreement may be made orally or in writing.” The provision of oral arbitration agreements in New Zealand expansion of the regime in many other countries, and then, “Subject to section 11,” which is the consumer arbitration provision, “an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.” So this contemplates two types of arbitration agreement. A clause in a contract or a separate agreement and what we have here is a separate agreement entered into after the dispute had arisen and what this tell us is the arbitration agreement is in the form of that separate agreement, it treats them as equivalents, as one would expect, consistent with the point that his Honour Justice Arnold made a moment ago. It’s the whole thing.

Then moving through Schedule 1, past the appointment of arbitrator provisions, we come to chapter 4, “Jurisdiction of arbitral tribunal,” and article 16, the competence competence provision, which aficionados sometimes insist on pronouncing in German but occasionally French but I’ll just stick with my plain vanilla New Zealand accent for today. “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.” So that’s harking back to that distinction that we saw a moment ago in article 7, the two forms an arbitration agreement may be in, a clause in a contract or a separate agreement. It’s concerned with arbitration clauses forming part of a wider contract and it says you treat that as separable and assess its validity independently, and that’s the point made in the next sentence. “A decision by the arbitral tribunal that the contract, the wider contract, is null and void, shall not entail ipso jure, necessarily the invalidity of the arbitration clause”. And there's a lot of case law on when a challenge to the wider contract will or will not impugn the arbitration clause. Forgery does. Misrepresentation doesn't generally speaking. I could go on.

Then there's a whole lot of provisions on interim measures that are not relevant today, chapter 5, conduct of the proceedings not in issue. We can move across I think to chapter 6, “Making of award and termination of proceedings,” and article 31, “Form and contents of award.” I think I may have overlooked this one in my supplementary submissions but it’s another illustration of the point that arbitration agreement isn't just the reference. If we look at paragraph (5), “Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be

paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt." So again what this contemplates is that if the parties have entered into, have included a term about the payment of interest in their arbitration clause or separate arbitration agreement, then that's part of the arbitration agreement. That's unsurprising, it's ordinary English, it points against the narrow reading, includes provisions relating to interest.

Then we come to the provision under which application was made to the Court in chapter 7, "Recourse against award," article 34, "Recourse to a Court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3). (2) An arbitral award may be set aside by the High Court only if," now I just pause there to note the "may". That confers a discretion. That's not in dispute but it's a discretion to be exercised in a principled way and in my submission it will normally be exercised where one of the serious defects listed in paragraph 2 is made out and I'll come to the authority for that a little later. "May be set aside by the High Court only if – (a) the party making the application furnishes proof that—(i)," this is the relevant paragraph today, "a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it," here is New Zealand law.

So the question is whether the agreement is not valid under the law of New Zealand. We know that it's at least in part not valid. Is it wholly not valid? That is the key question and the grounds in article 34 are paralleled in the refusal of recognition or enforcement grounds in article 36 it's the same test. Then Schedule 2, additional optional rules applying to arbitration and article 5 appeals on questions of law. Notwithstanding anything in articles 5 or 34 of Schedule 1, so 5 is the prohibition on intervention except as provided for in the Act, 34, the recourse against the award by setting aside any party may appeal to the High Court on any question of law arising out of an award in the certain specified circumstances. It has been agreed in advance with consent after the award or with leave. So what the parties sought to do was to amend this so that any party may appeal to the High Court on any question of law or fact but that "or fact" bit can't be added because of article 5 of Schedule 1. In effect it's invalid.

McGRATH J:

You say they knew they were trying to amend article 5?

MR GODDARD QC:

They expressly said that, if your Honour looks back –

McGRATH J:

Back, yes.

MR GODDARD QC:

– at the arbitration agreement.

McGRATH J:

Right, that's fine, thanks.

MR GODDARD QC:

What it says is, "Subject to such rights so they may possess under clause 5 of the Second Schedule but amended so as to apply to questions of law and fact." So they actively setting out to amend this and they couldn't. Momentary confusion about whether or not they were part of it perhaps.

WILLIAM YOUNG J:

Well these are provisions that are capable of amendment but they're just not capable of amendment in this particular way.

MR GODDARD QC:

I think that's a better way of putting it your Honour. There are many of these which can be amended in a range of ways but unfortunately amended attempted here is not one of those that's lawfully available.

ELIAS CJ:

Well it doesn't have the effect, I'm still slightly hung up on invalidity and ineffectiveness.

MR GODDARD QC:

I don't think there's a distinction –

ELIAS CJ:

There's probably not a distinction. It also occurred to me that the common law on invalidity drawing on the common law of mistakes may actually feed into this because the Contractual Mistakes Act is a code in terms of consequences.

MR GODDARD QC:

Seeking relief on the grounds of a mistake.

ELIAS CJ:

Yes and you're seeking to rely on the Arbitration Act provision of "invalidity" which doesn't necessarily exclude "mistake" as a ground of "invalidity."

MR GODDARD QC:

The first thing I would say about that I think is that if we look back at article 34 which tracks the language of the UNCITRAL Model Law, this is intended to be a code that operates consistently across many different legal systems. Not just New Zealand but also a whole range of common law and civil law systems and it would be quite wrong to give a narrow and technical meaning to terms like "invalid" against that backdrop.

ELIAS CJ:

Except it's "invalidity" according to the law of New Zealand, isn't it, in this case?

MR GODDARD QC:

Well yes but what's meant by "invalidity" shouldn't be distinguished on "ineffectiveness" or "unenforceability" or any of those things, that's really my point.

ELIAS CJ:

Yes, I see, yes.

MR GODDARD QC:

The point, when the word "invalid" is used it means, you know, is not legally effective, is not legally valid, does not have legal force. It must be read in that broad way, avoiding narrow jurisdiction specific quirks about what, you know, that sort of highly technical distinction. Second, your Honour is right that it's then referred to a particular law, to assess the validity, but if the law says, well this is ineffective, or its unenforceable, or its void, or it illegal, those are all the same thing for this purpose. It

means it's not a valid agreement, it's not an effective agreement, that's the enquiry by reference to that law.

ELIAS CJ:
Yes, thank you, that's helpful.

MR GODDARD QC:
I don't think that I need to go to section 5 of my written submissions to supplement what I've said on the Act, or that I need to actually – oh there's, did I just miss one thing, let me just check that. I did miss thing, I'm sorry. Coming back to the Act and Schedule 2, a final point on this, what does arbitration agreement mean? If we look at clause 7 of Schedule 2, "Extension of time for commencing arbitration proceedings." Where an arbitration agreement provides that no arbitral proceedings are to be commenced unless steps have been taken to commence the proceedings within the time specified in the agreement, the Court can extend time." So again there we have an assumption that included in the terms of an arbitration agreement maybe the sort of provision that we see, for example, in many construction contracts saying that if you want to start an arbitration you have to do so within one month or three months. So that's again the Act proceeding on the basis that an arbitration agreement may deal with steps to be taken prior to arbitration. It's not just the core submission to arbitration, and that's that another one which I omitted to specifically note in my written supplementary submissions. So I won't go to those except just to flag that they should be supplemented, which is a depressing thing to have to do to a supplement, with a reference to the two additional illustrations that I've mentioned orally today in Schedule 1, article 31(5) and in Schedule 2, clause 7.

That brings me on to section 3, item 3 of my road map, severance principles. Say, so where we've got to looking at the Arbitration Act is that clause 1.2 of the parties' agreement is invalid, ineffective, does not operate to create a legally binding right to review at least in part and what that means is that the agreement's invalid unless the invalid provision can be severed.

As I said earlier, at the heart of this argument is the submission that that issue, the issue of severance, should be approached in a principled manner consistent with core contract law principles and in a way this is a perfect issue for a final appellate Court to grapple with, to step back and say, "How can this issue be dealt with in a coherent, principled way, that brings the law in relation to severance into line with the

rest of the law of contract." The High Court of Australia came close to doing that in the one of the cases I'll take the Court to but in my submission didn't quite get there. Other Courts have put this issue in a box and dealt with it quite separately. They've severed it from the rest of the law of contract and that's not how the issue should be approached.

So that brings me to section 6 of my written submissions and I will take the Court to that if I may, beginning on page 7 of my synopsis, beginning at 6.3. Relevant principles. It seems to be more or less de rigueur to say in any judgment about severance that this is a difficult issue on which there are no general rules. But some of the complications that feature in other authorities are absent here. It's common ground but there's nothing in the parties' agreement that's illegal and there's nothing in the agreement that's contrary to public policy. So this case presents a very pure version of the question of whether a modified version of the parties' agreement can properly be enforced by one party against the other. As I said earlier, your Honour, the other situations in which this pure version arises are where a provision is ultra vires, a party. So that provision is not enforceable against them, what happens to the rest of the contract. It also arises where a provision is uncertain, so it can't be given effect by the parties, "What does that mean?" come give effect by the Court, "What does that mean for the rest of the agreement?"

Now that's at my 6.4 thinking about the issue in this way sheds light on the point noted by the High Court Judge rightly in my respectful submission that the answer may depend on who's seeking to enforce the agreement. If a party wants to enforce a version of the agreement modified in a manner that's disadvantageous only to that party it's not easy to see why the Courts would decline to do so. That's the essence of the rationale for severance given by the Privy Council in what is often identified as the leading case in this area but which really is concerned with a very special set of facts, *Carney v Herbert* [1985] 1 AC 301 (PC) and it's not easy to see why the significance of the modification matters if the only loser by it remains willing to have the agreement in force nonetheless.

It's perhaps helpful to go at this point to *Carney v Herbert*. It's in my main bundle of authorities under tab 4. It's a decision of the Privy Council on a direct appeal from the first instance decision of the Supreme Court of New South Wales, one of those historical curiosities, and it's one of the many cases spawned by the financial

assistance rules in the former companies legislation and there can be very few practicing lawyers who have not had to grapple with at least one or two of those.

The situation was four shareholders in a company, Airfoil Limited, who fell out amongst each other. The solution that was agreed was that Mr Carney would buy out the other shareholders. Mr Carney didn't have the cash to do so immediately. He said he'd pay a certain amount now and more later and he said he'd make the purchase through a company he controlled, Ilerain so Ilerain was to make certain payments in the future. The vendors of the shares in Airfoil said well we need some security for Ilerain promise to pay in the future and they got two forms of security. They got a guarantee from Mr Carney personally and they got security over the assets of a subsidiary of Airfoil, Newbridge, and that of course was the key problem from a financial assistance perspective. Newbridge, a subsidiary of Airfoil, was providing financial assistance in the connection with a purchase of shares in Airfoil.

So the shares were transferred. Mr Carney paid the first instalment and no more money was forthcoming. Meanwhile, as the judgment records, the shares were sold at a massive profit and Ilerain was wound up leaving the primary promisor, the purchaser, no longer in existence to sue. Mr Carney then, when sued on his personal guarantee, advanced what always had to be the ambitious argument that because the security given by Newbridge was illegal, breached the financial assistance rules, the personal guarantee couldn't be enforced against him and he should get to keep the shares and not pay for them. Unsurprisingly, that ambitious argument did not succeed either at first instance or on appeal.

After setting out those facts, and this is the claim on the guarantee, their Lordships describe Mr Carney's argument on page 309 of the report, claimed on behalf of the defendant, "The transactions contravened section 67 in three respects, with the happy result, for the defendant, that he and his company became entitled to retain the benefit of the shareholding in Airfoil which had been purchased without any liability for payment of the outstanding $243,000." Three illegalities relied on. Their Lordships, in agreement with the Court below, held that the second and third were not, in fact, breaches of the financial assistance provision but it was common ground that the provision of security by Newbridge was illegal and that is dealt with at line E and following. "The plaintiffs do not dispute that the mortgages were illegal and void."

Then at F, “The sale agreements, the guarantee and the mortgages are rightly to be viewed as concurrent steps in a single though composite transaction. The provision of the mortgages by Newbridge was a term forming part of the overall agreement reached between the defendant, on behalf of himself and Ilerain, and the plaintiffs. That term was illegal. A plaintiff cannot sue on an illegal agreement. The question therefore arises whether the illegality of the mortgages taints the whole transaction and prevents the plaintiff suing Ilerain upon the sale agreements and suing the defendant on the guarantee, or whether the illegal mortgages can be severed for the purposes of the action from the overall transaction, leaving intact the rights of action against Ilerain and the defendant because, by reason of such severance, a plaintiff would not need to sue on any illegal agreement. Questions of severability are often difficult. There are not set rules which will decide all cases.” I’m suggesting that the Court might venture to assist people a little more than that by identifying a couple of relevant principles at least, I’ll come back to that.

Justice Kitto, 1969, “Tests for deciding questions of severability that have been formulated as useful in particular cases are not always satisfactory for cases of other kinds,” and that I certainly agree with, at least as formulated by the Courts, but that’s really because this area is, with the greatest of respect, a bit of a muddle. Over the page, “To some extent each case must depend on its own circumstances, and in particular on the nature of the illegality.”

There’s a discussion of some colliery cases. A case where, at the foot of the page 310, *McFarlane v Daniell* (1938) 38 SR (NSW) 337 (SC) involving an actor suing for his remuneration under a contract of employment which included an invalid, restrictive covenant and the test there adopted by Chief Justice Jordan is often cited, it’s at the top of page 311, and this is really the test contended for by Gallaway is, “When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature. If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable. If the substantial promises were all illegal or void, merely ancillary promises would be inseverable.” And half way between C and D their Lordships agree with that observation and another one.

If this is the relevant test then in my submission it is met here because the agreement to review on questions of fact is so connected with the rest of the agreement as to form an indivisible whole which cannot be taken to pieces without altering its nature but in my respectful submission it's also not the easiest of tests to apply in practice. Does elimination of the promise change the extent only but not the kind of the contract? That's not a test that gives a Court much purchase on the issue. And it's also not a question that really engages with the basic principles of the law of contract and addresses squarely the question well if it's not what the party agreed to, why should it be enforced against them, which is the central question in my submission here.

So a passage that's often quoted, on page 311 beginning, "Their Lordships agree with both observations. There are therefore two matters to be considered where a contract contains an illegal term, first, whether as a matter of construction the lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; secondly, whether, despite severability, there is a bar to enforceability arising out of the nature of the illegality." That's the, the second point links back to the second passage quoted above that a Court won't enforce a promise however inherently valid and however severable if contained in a contract one of the terms of which provided for assassination, and the House of Lords has similarly used the parallel of a contract between highwaymen to divide up their spoils unlikely to be given effect, or to refer their spoils to arbitration for that matter. But the first point, whether as a matter of construction the lawful part can be severed, refers back to that question of Chief Justice Jordan in the first paragraph of the test of the extent of connection between the terms.

I don't think it's necessary to look at the discussion of the next few cases. You can turn over to page 314, half way between letters D and E, "In the light of the law as it has been developed in Australia and England, and also in Scotland, though their Lordships feel no doubt in the instant case that the illegal provision of the debentures can be severed from the composite transaction leaving the plaintiffs free to enforce the sale agreements against Ilerain and the guarantee against the defendant; and that the nature of the illegality is not such as to preclude the plaintiffs on the ground of public policy from enforcing their rights under those documents. Before, however, their Lordships further elaborate their reasons, they will refer to two cases which bear a close resemblance to the present case." The first of those is illuminating on the question of principle. *South Western Mineral Water Co Ltd v Ashmore* [1967] 1 WLR

1110, English decision at first instance by Justice Cross there were financial assistance problems and over the page 315 their Lordships say, “The importance of the case lies in this passage from the judgment of Justice Cross. I cannot take the view,” His Lordship said, “and do not take the view that the fact that the granting of this debenture would be a criminal offence by Solent made the whole of this agreement absolutely null and void so that the Courts will not allow anybody to rely on any of its provisions. No case that has been cited to me suggests that I am obliged to arrive at so ridiculous a conclusion. The position was this, I think, that if the company were prepared to waive the obligation of Solent to provide the debenture and were prepared to complete the transaction on the footing they merely had the personal undertaking of Mr Ashmore to pay over eight years, secured only by certain securities and without any charge on the assets taken over by Solent, they were at liberty to enforce the contract on that basis.” That’s the point that if you want to walk away from something that's solely for your benefit you can. “But in fact the company are not prepared to do that. They say that it is an integral part of the arrangement that there should be a debenture I think they're right on that point. It was so substantial a part of the consideration that though they could waive it and enforce the contract without it if they like, Mr Ashmore could not compel them to complete on that basis.” So severance is not independent of who is trying to sever. The company there could have proceeded without insisting on the debenture but Mr _ ”

ELIAS CJ:

Why is this important in your argument?

MR GODDARD QC:

Because it sheds light on what their Lordships meant in rejecting a “but for” test I'm going to come to in a moment which is part of this.

ELIAS CJ:

Yes.

MR GODDARD QC:

It takes a little bit of run up, I'm afraid.

ELIAS CJ:

No, no, I'm just –

MR GODDARD QC:

But it will ultimately –

ELIAS CJ:

It's very interesting. I was just wondering where it's going, but it's going somewhere?

MR GODDARD QC:

Your Honour, will have to bear with me for a moment but I –

ELIAS CJ:

Yes, I will bear with you for a moment.

MR GODDARD QC:

– at any rate am under the firm impression that I'm going somewhere –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and your Honour will be able to take a view on that shortly. So and then the next bit that I was going to go to, "Alternatively, I think that Mr Ashmore, if he was willing to waive the period of eight years for payment which was inserted obviously for his convenience and pay the [principal sum] down, he was at liberty to do that and I don't think the company could have refused to accept the money" and that's even though they wouldn't have got the debenture they'd contacted. "However, Mr Ashmore was unwilling to pay it." Their Lordships agree entirely with what fell from Mr Justice Cross. So an inquiry into who was willing to enforce and what they were willing insist on or not was seen by the their Lordships as a relevant part of the inquiry into severance and that goes also to the argument by the respondents that everything has to be assessed at the time of contract and that the position of the parties at a later date is not relevant. Plainly, that's not what their Lordships are saying. And they underscore that at letter F. "The sense of the passage is that if the company were content to continue with the contract notwithstanding that no debenture could be granted by Solent it was at liberty to do so and to enforce it on that basis."

I won't take the Court to the next case but then over the page 316 beginning just above letter B. “The contract in the present case was basically one for the sale by the plaintiffs to the defendant or as nominated company of shares in Airfoil. The mortgages like the guarantee were ancillary to that contract for the sole purpose of ensuring the due performance of the contract by the purchaser. The defendant wanted only the shares in Airfoil. The plaintiffs wanted only the purchase money. It made no difference to the plaintiffs or to the nature of the transaction what security was provided so long as it was satisfactory security. The mortgage did not go to the heart of the transaction and its elimination would leave unchanged the subject matter of the contract and the primary obligations of the vendors and the purchaser. Debenture’s therefore capable of being severed from the remainder of the transaction and its illegality does not taint the whole contract. No public policy objection enforcement of the rest.”

Then down to letter E. “One final point on this aspect of the case to which their Lordships wish to allude. It was argued by the defendant that on the true interpretation of the evidence the plaintiffs at the time when the contract was made required a mortgage on the property of Newbridge as an essential security for the payment of the purchase money and that they would have declined to enter into the contract at all if they had been told that such a mortgage would not be forthcoming. Therefore, it said, the mortgage is not severable from the remainder of the transaction since severability must be judged at the moment when the contract is concluded according to the then intentions of the parties. There's some observations in *Brew v Whitlock (No 2)* [1967] VR 803, 811-812 which might be read as given some support to this proposition.”

So pausing, this proposition was coming from the defendant. The defendant, the purchaser, was saying, “Well this mortgage was essential to the vendor when the contract was entered into,” so because it was essential to the vendor at the time the contract was entered into, the vendor can't now enforce without it. Now again that's a submission which is commendable for its courage but which would never likely as a matter of principle to appeal to a Court and what their Lordships are rejecting is that proposition, that one party can say, “Well because this was essential to the other party and at the time of contracting they wouldn't have contracted for it, they can't walk away from it now and enforce the balance against me.” And that's what their Lordships are rejecting. And in the opinion of their Lordships, and I'm at letter G, “There is no such principle applicable to the instant type of case manifest in the

mineral water case that at the date when the contract was made at the point that had arisen the vendor company would have declined to conclude the contract without the benefit of the offending debenture, because it did in fact so decline during the trial."

And then the last line, "Their Lordships do not accept the relevance of any such inquiry." So their Lordships are not saying that it's not important to inquire into the significance of the term, or its materiality to the party resisting enforcement where it was for the benefit of that party. What their Lordships are rejecting as a proposition is that the person resisting enforcement of a contract with a provision that's been severed which benefited solely the other party can rely on its essentiality to the other party to escape their obligations. And that becomes even clearer when we turn over the page to 317 where their Lordships make exactly that point. "Subject to a caveat that is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties entered into a lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision."

Now, I accept absolutely that proposition but of course that is not our case because the provision that is in issue here, the right of review on questions of law and fact, did not exist solely for the benefit of Gallaways. It existed for the benefit of both parties. So this proposition, which is really the ratio of *Carney*, doesn't assist the respondents here.

While the Court has the authorities out, let me go to the only other two cases that I'm going to take – there are three cases I'm going to take the Court too now the next one is under tab 7, *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597. This is a case which does provide some more assistance to the Court than *Carney v Herbert*. It has much more in common with the present case. It's a case about, decision of the High Court of Australia, a case about a management agreement entered into by a body corporate with a management company to provide various services including letting services in respect of the units in the development. And it was held both below and on appeal in the High Court, that the body corporate did not have power to enter into this arrangement for the provision of letting services. That was ultra vires the body corporate. The body

corporate was to pay a sum of, I think it was, $60,000 per annum to the manager by way of remuneration for a whole range of services; maintenance, supervision of the complex and this letting service. The management company sued for its remuneration and the question was whether it could recover that remuneration in circumstances where the body corporate couldn't validly contract for it to provide one of the services included in the agreement.

So first of all the joint judgment of Justice Brennan and Justice Toohey explains the facts. It notes at page 600 of the report, third paragraph, "The body corporate denies liability under the management agreement on two grounds," it's the first one we're concerned with, "that the management agreement was void ab initio... The appellants, on the other hand, assert that the management agreement is valid and subsisting... The body corporate succeeded on its first ground before the Court of Appeal," and "the appeal relates to the first ground. ... It is convenient first to consider the question whether the management agreement was invalid." The various provisions of the management agreement are recited including over on 601, (r) the letting agency provision and the Court notes immediately under that, "The remuneration prescribed by clause 8 is not apportioned among the several duties which, by the terms of the management agreement, the manager is to perform. The promise to pay was therefore made in consideration in part of the manager's promise to provide the letting agency. The submission that a body corporate's funds could not be expended in the payment of remuneration for the provision of this service found favour with the Court of Appeal."

The powers of a body corporate of this kind are discussed in the next few pages. Turning over to 604, their Honours say about a third of the way down, "In our opinion there was no statutory power authorising and no bylaw which might have authorised the respondent to conduct a letting agency for the benefit of those proprietors."

Down a few lines, "It was therefore beyond the powers of the body corporate to enter into a contract to procure the provision of services of the kind stipulated in clause 2(r)." Then the next paragraph, "The appellants submitted that if clause 2(r) were held to be ultra vires the body corporate, clause 2(r) is a term severable from the remainder of the management agreement which is otherwise enforceable." And a reference to *McFarlane v Daniell*. So a very similar issue. A provision that's unenforceable, invalid, the term is used interchangeably, against the body corporate. The management company says well that can be severed leaving the rest to stand.

Over on 606, about six lines down, “The appellants pointed to some evidence to show that the more burdensome tasks imposed on the manager by the management agreement related to the maintenance of the common property - a matter which fell within the duties and powers of the body corporate. But it is not possible to treat the promise to pay remuneration as divisible between purposes on which the body corporate is authorised to disburse its funds and purposes for which the disbursement of its funds is forbidden. It is not suggested that the provision of a letting agency was of such minimal significance as to be immaterial.” That’s one of the sources of the test that I am suggesting, that one has to look at materiality. So the management company is saying, “Well we accept we can’t perform this part of what we promised and you couldn’t contract for it but it’s not a very important part of the consideration. We should do everything else and you should pay us the agreed amount.” Now what their Honours are saying is, “No. It wasn’t of such minimal significance as to be immaterial.” And for that reason their Honours would dismiss the appeal.

The same result reached by Justices Deane and Gaudron in their judgment beginning on 607. The relevant passages first of all are on 608. It’s noted that, “payment of remuneration to the Manager for carrying on the letting agency was beyond the powers of the body corporate unless the payment could be justified,” for certain purposes, which it couldn’t. Over at 609, six lines down, “That being so,” the provision being unauthorised, “clause 8 of the agreement involved contravention of section 38(3) of the Act and was ultra vires the body corporate to the extent that it required the application of the funds of the body corporate in the payment of remuneration to the manager for conducting the letting agency ‘from his unit’. The material in evidence does not sustain a conclusion that the provision of the letting agency was such an insignificant component of the duties of the Manager for which the body corporate agreed to pay the base remuneration of $60,000 per annum that it can be disregarded.” So it’s not so insignificant that it can be disregarded as part of the bargain. “Nor is there any basis for a finding that a particular proposition or amount of that remuneration can be attributed to the manager’s promise to conduct a letting agency. That being so, we agree with the conclusion of the Court of Appeal that clause 8 cannot be saved by any process of severance or reading down. It follows that the clause was, in its entirely, ultra vires and void. Our conclusion that clause 8 was void in its entirety makes it unnecessary that we address the question

of the validity of other clauses of the agreement. The whole agreement necessarily falls with clause 8."

Then finally the judgment of Justice McHugh. There's a lengthy discussion of the agreement and the ultra vires issue. The passage that I want to take the Court to is the discussion of severance beginning on page 618. Then another reference to the Chief Justice Jordan passage from *McFarlane v Daniell*. Then at the top of 619, third line, "However, this is not an exclusive test. The test of severability is a flexible one. 'There are not set rules which will decide all cases.'" That's a quote from *Carney*.

"Clauses 2(r), 9 and 12 of the agreement are wholly void. They must be treated as if they were not part of the agreement. Furthermore, carrying out the letting service required by clause 2(r) was part of the consideration for the payment of $60,000 per annum to the manager provided for in clause 8. Part of the funds of the body corporate, therefore, was required to be spent on an unauthorised object. That means that clause 8 is partly invalid and, if it is to remain part of the agreement, must be read down. However, the crucial question is whether deleting clauses 2(r), 9 and 12 from the agreement and reading down clause 8 changes only the extent of the agreement or whether it changes its nature." That's the *McFarlane v Daniell* test.

Next paragraph, "The conduct of the letting service was one of nineteen specified duties listed in clause 2." Number of hours discussed. About six lines down from that, "It seems unlikely that the parties considered the duty of letting to be a dominant element of the agreement. It was not the 'heart and soul' of the agreement... if clauses 2(r), 9 and 12 could be considered independently of clause 8 they would be severable... However as the Court of Appeal pointed out the remuneration payable under clause 8 was a lump sum annual payment which was not apportionable among the various duties. If clause 2(r) was severed from the agreement the manager would be receiving the same remuneration for less work. So the critical issue is whether, having regard to the connection between clause 2(4) and clause 89, the invalid promise contained in clause 2(r) is severable from the rest of the agreement." In this case that's an obvious parallel. You can't have 1.2, review of that, what does that mean for the promise to go to arbitration which was linked to it.

Over the page, after discussing some of the cases including *Goodinson v Goodinson* [1954] 2 QB 118 (QA) – I should check that the Court's happy for me to go on one minute longer and finish this case?

ELIAS CJ:
Yes.

MR GODDARD QC:
At the foot of 620, "*Carney* is distinguishable from the present case on the ground that the provision of the mortgage security in that case was for the exclusive benefit of the plaintiffs. The defendant was not prejudiced if the agreement was enforced without the security being furnished." That really is the key point of *Carney. McFarlane* also distinguishable under that quote. Half way down the page, "*Goodinson*, however, is not readily distinguishable from the present case. It is an authority for the proposition that, if part of the consideration for the promise of a payment is void but not illegal, the promise is enforceable as long as the void consideration was not the main consideration for the promise." Just pausing there. That's because *Goodinson* was argued as a total failure of consideration case. It just didn't raise the point here.

"But if this proposition was applied generally, it might often lead to injustice. In many cases, without the void consideration, the defendant might not have entered into the agreement or promised to pay the amount of money in question. It is not just that the defendant should have to perform a promise or promises which would not have been given but for the giving of the void consideration." And that's our issue here.

"In my opinion, in cases where a provision in a contract is void, is not for the exclusive benefit of the party seeking to enforce the contract, and is part of the consideration for an indivisible promise of the defendant, the proper test for determining whether the void provision is severable from the indivisible promise is that formulated by the Full Court of the Supreme Court of Victoria in *Brew v Whitlock*. In that case, the Full Court said that... 'once the conclusion is reached that the invalid promise is so material and important a provision in the whole bargain that there should be inferred an intention not to make a contract which would operate without it,' the invalid promise should be treated as inseverable from the contract."

And again that's a familiar sort of inquiry, what can be inferred from the circumstances. It's not a reference to the subjective intention of the parties. The Court of Appeal was, in my respectful submission, wrong to characterise it in that way. It's exactly the sort of inquiry that the Court conducts whenever it asks whether

a term was expressly or impliedly agreed to be essential, for example, under the Contractual Remedies Act. It's exactly the same sort of inquiry that's conducted when asking whether to imply a term. Can we be confident that the parties would have said, "Oh yes, that goes without saying"? That inquiry, by reference not to parties' subjective intentions, but by reference to the objective manifestations of their intentions, their communications to each other, is a very familiar one and it's a perfectly proper one.

Conclusion, beginning on the sixth line of 622, "In the present case, clause 2(r) was not for the exclusive benefit of the appellants. So the question is whether the provision of the letting service was so material and important a part of the bargain between the parties that the body corporate would not have agreed to pay the sum of $60,000 per annum without that service being provided. Unless that question is answered in the negative, the promise contained in clause 2(r) must be regarded as inseverable from the promise contained in clause 8 of the agreement."

And so at the foot of the page, "Upon the evidence, it is not possible to conclude that the body corporate would have paid the manager $60,000 per annum without its promise to provide the letting service. Indeed, common sense suggests that it is unlikely that a body corporate acting rationally would have done so. The appellants have therefore failed to establish that clause 2(r) was severable."

That, in my submission, is the right approach and I'm conscious that I've gone three minutes rather than one minute longer but I'm afraid that's not the first time I've done that to the Court.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.53 AM

ELIAS CJ:
Yes Mr Goddard.

MR GODDARD QC:
Your Honour. *Humphries* was discussed recently by the New Zealand Court of Appeal in *Atrium Management v Quayside Trustee Limited* [2012] NZCA 26, (2012) 13 NZCPR 69. It's under tab 2 of my bundle of authorities. That was another case about an agreement between a body corporate for a unit title development and

a management company. But here it was the management company that wanted out of the deal because it had agreed to buy a unit and to perform management services on certain terms which included having the exclusive right to conduct a letting service for the development from its unit. And it was saying, 'well, body corporate you actually can't validly agree to give us the exclusive right so we don't want the management agreement and we don't want the unit'. And that came before the Court of Appeal, your Honour Justice Arnold presiding. The judgment of the Court was delivered by Justice Harrison and the central issue before the Court was entitlement to cancel under the Contractual Remedies Act but an incidental issue that needed to be addressed was severance because the developer was arguing that the exclusivity provision in the management agreement could be severed, even though it was ultra vires the body corporate, and that therefore the deal could proceed on the basis of a management agreement modified in that way.

The issue of severance is discussed by the Court on page 79 and following, paragraph 40, Mr Smith arguing that a Court would on Quayside's application, sever off the offending ultra vires provisions of clause 12. He proposes nine specific changes to clause 12 with the effect that it would then be intra vires. Over the page 41, "Mr Smith relies on *Humphries*. That case has similarities with this. The High Court of Australia was satisfied that the body corporate acted ultra vires in entering into a contract and unanimously dismissed the manager's argument that the ultra vires term was severable." Reference to Justice McHugh's separate judgment. Doesn't assist Quayside's case the Court said. Then the judgment is summarised. There's a very helpful passage in relation to the legitimacy of the inquiry into what the parties would have done. About half way down that paragraph the Court said, "In terms reflecting that the concept of severability is in a sense the other side of the coin of the test of essentiality, Justice McHugh noted that where the Court concludes that the invalid promise is such a material provision within the whole bargain that it cannot infer an intention not to enter into a contract without it, then the invalid promise should be treated as inseverable."

There are a lot of negatives in that but I think there might be one too many. I think it should probably read, "In such a material that it cannot infer an intention 'to' enter into a contract with it." I think that "not" is a bonus not that shouldn't be there, immediately after "intention".

"Applying the test to the facts, Justice McHugh was unable to conclude that the body corporate would have agreed to pay the remuneration without the promise to provide the letting service. We are in doubt the same conclusion must be reached here. Our analysis of the essentiality argument already provides the answer. We have concluded that Atrium's right to exclusivity was fundamental to clause 12. Severance of the offending parts of that clause would not preserve that essence. It would emasculate and render clause 12 insensible, eliminating Atrium's right to exclusivity. Mr Smith is really submitting that the High Court could rewrite or modify clause 12 on terms which he suggested would mitigate the ultra vires objection. He did not cite authority for this novel proposition. And we are satisfied that no such power exists except in special cases such as on a claim for rectification." Or under a specific discretion obviously conferred by a contract statute.

So the point, two points to take from this. The first is the reference with approval to the approach of Justice McHugh in *Humphries* and second the very helpful observation that concept of severability is in a sense the other side of the coin of the test of essentiality. Under the Contractual Remedies Act, and I've already wearied the Court enough with that in the last few weeks I think, one of the questions is whether a term has been expressly or impliedly agreed to be essential and the Court looks at both textual and contextual indications of the importance ascribed to the term by the parties. Here we have the other side of the coin. Looking at indications in the text and context, can it be said that the term is immaterial. Can it be said that the parties would, if asked, have been willing to contract without it, and that is a question that this Court, for example, in *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805, has said should be asked in the essentiality context. Would the parties have been willing to contract without the term? It's a legitimate inquiry in that context. It's also a perfectly sensible inquiry in this context and it doesn't entail, as the Court of Appeal wrongly assumed in this case, an inquiry into the subjective intentions of the parties. In the same way that the question is approached under the Contractual Remedies Act, look at the text, look at the context, for objective indications of the importance of the term. So too here one can carry out a perfectly sensible and proper inquiry looking at objective indications of the importance of the term by reference to the text of the agreement and the commercial context.

Where does that leave us in the light of principle and authorities? There are lots of other authorities on this and reading them is a good way of occupying a lot of time

but doesn't, in my respectful submission, actually help to understand the issue. The same can be said, unfortunately, for most of the texts which provide an extremely accurate reflection of the level of confusion in the cases. This is really an issue that is crying out for someone to take it by the scruff of the neck and deal with it in a principled way.

And my submission for a principled answer is found in paragraph 6.8 of my synopsis. How far can the Court go in rewriting the parties' agreement to the detriment of the person against whom it's sought to be enforced? So that's not the *Carney* situation. It's not the situation where it's being rewritten to the detriment of the person seeking enforcement. That's usually going to be fine, as their Lordships said in *Carney*, but what about the converse scenario where one party is seeking a rewriting of the agreement, by severing a provision, to the detriment of the person against whom the rewritten contract is sought to be enforced. The answer, in my submission, is that it's only an immaterial change that cannot be resisted by such a party. If the change is material then the Courts are imposing a materially different agreement on the objecting party. And that's not the role of the Courts. It's not how the law of contract works and it's inimical to the principle of party autonomy which underpins arbitration.

How does one approach this question of the materiality of a provision? As I said a moment ago one looks at text and context and asks, my 6.9, whether it can be said with confidence that the parties would have entered into an agreement modified in the manner contended for, if the invalidity had been drawn to their attention at the time of contracting. If there's doubt about this point then it can be inferred the provision was material. That's not an inquiry into the subjective willingness of any one party to contract on different terms."

There was a lot of evidence about the subjective attitudes of the parties before the High Court in this case. I accept absolutely that that's irrelevant but the test has much more in common with the essentiality test under the Contractual Remedies Act or the test that's applied in the context of ascertaining implied terms. Can the Court say with confidence that if asked at the time of contracting the parties would have said, "Oh yes, that's fine, that goes without saying. That deletion goes without saying. We're perfectly happy to have the contract without that term." No one has ever suggested that such an inquiry isn't legitimate in the context of implied terms and there's no better reason to reject it here. And I go on to explain that that's, in my respectful submission, what the High Court Judge was saying at paragraph 46 of her

Honour's judgment and that the Court of Appeal's criticism of it as a subjective inquiry, in my submission, misses the mark.

So I think I can jump past the discussion of the case law in the section 6. In my submission I've already dealt with 6.23 why *Goodinson* is not very helpful. Justice McHugh went really a long way towards saying it wasn't distinguishable and you were going to reach a different decision i.e. it's wrong, and I don't think one actually needs to say it's wrong. If the Court does look at it, and I'm not going to go there this morning, given time, the Court will see that it was run in a very absolute way, as an argument that because one promise was invalid, unenforceable, there was a total failure of consideration and the Court said, well no there's not been a total failure of consideration because there are other promises. The argument simply wasn't run in the way that I am putting this case and if it had been, in my submission, there might well have been a different answer.

I'm also not going to address now the American cases. The test in those, as I say at 6.26, last few sentences, isn't easy to reconcile with basic principles of the law of contract in New Zealand or with the Commonwealth authorities and nor is it easy to apply in practice, if I need to deal with that I'll do so in reply.

And where that leaves me is 6.30. It's not an area where a great deal of assistance can be derived from the authorities. The most helpful is *Humphries* but what the Court really needs to do here is to look to core principles which point to an inquiry into the materiality of the provision sought to be severed.

So applying that test. I think I can move past my, on my road map, over to the second page. Item 4, severance is not appropriate in this case. First of all applying the test that I am contending for, was this immaterial, the *Humphries* test. Plainly this was not an immaterial aspect of the parties' agreement. It was a deliberate addition to the arbitrator's standard form. It was italicised with the words "emphasis added" added, something I haven't seen in a contract before, but if one had to ask was something important to the parties, it's a very helpful indication, perhaps it might catch on following widespread review of this Court's judgment in this case. People will realise that they can assist the section 7(4) inquiry by italicising certain parts of their agreement.

At any rate this innovation does rather underscore its importance here. That's confirmed by both statutory and commercial context. It's confirmed in a way by the intervention of AMINZ scope of review rights matters. It's something that the legislature expressly addressed in the Arbitration Act. Limiting review rights in relation to arbitration to appeals on questions of law –

WILLIAM YOUNG J:

Just pause there. It's done in rather an odd way, isn't it? It's rather odd that the jurisdiction of the High Court should appear in Schedule 2 which are essentially terms that are implied unless changed in arbitration agreements?

MR GODDARD QC:

It probably has its base in Schedule 1, clause 5, which says the Court won't intervene except where expressly provided for.

WILLIAM YOUNG J:

I see, right.

MR GODDARD QC:

I think is the way that it's usually approached so it's article 5, I should say, of Schedule 1, which says the Court can only intervene.

WILLIAM YOUNG J:

But in matters governed by this Schedule, there's nothing in article – oh I see.

MR GODDARD QC:

In matters governed by this Schedule which I think means arbitrations to which the Schedule applies, is how that's normally read.

WILLIAM YOUNG J:

But except where so provided in the Schedule.

MR GODDARD QC:

Yes, your Honour is right, so it's hard to see how that can be intended to deal with matters in Schedule 2 –

WILLIAM YOUNG J:

Oh sorry, sorry, Schedule 1 – sorry 34 is in Schedule 1?

MR GODDARD QC:

Yes, 34 is in Schedule 1, but 5, of Schedule 2, is not in Schedule 1.

ARNOLD J:

But it's expressed to be subject to article 5, or notwithstanding anything in article 5 which suggests –

MR GODDARD QC:

It's expressed to be not subject to it, which suggests that otherwise the drafters assumed it would be –

ARNOLD J:

That's right.

MR GODDARD QC:

– yes, your Honour is exactly right, and that's the prevailing assumption and the textual point your Honour Justice Young has just put to me is not one that I'd identified before, or that I've seen in any of the commentaries. The assumption – and I think that's partly because, of course, the origin of Schedule 1 is the Model Law which is drafted as a comprehensive statement of the rules in relation to arbitration where the place of arbitration is in the legislating state and so it was certainly designed in the Model Law to be a rule of universal application and the way that the New Zealand Parliament has drafted this splitting rules into two Schedules I think has produced some drafting confusion but ultimately not too much doubt about what was intended.

WILLIAM YOUNG J:

But you can sort of see how the mistake was made.

MR GODDARD QC:

Mmm.

GLAZEBROOK J:

Because it must be said that it is slightly odd that in a system that's based on party autonomy, party autonomy is excluded in an area not in relation to natural justice or any matters that are of fundamental importance, but are in an area of appeals.

MR GODDARD QC:

Yes, but that is –

GLAZEBROOK J:

That is the situation but it's not necessarily based on the principle of party autonomy which is the whole basis of the arbitration principles.

MR GODDARD QC:

And the answer I think is found in the proposition – the justification whether it's, there are certainly arguments both ways, is that there are certain features of the institution of arbitration that one either opts into or one doesn't. So there's a minimum standard of natural justice that you can't contract out of, but you can choose not to go to arbitration but to go to an expert review which may not offer the same protections. Similarly, if you opt into arbitration the theory goes with knowledge of this regime you have emphasised the importance of finality and a desire to restrict access to the Courts. The only problem is that assumption doesn't work here.

GLAZEBROOK J:

Well it's finality, but not finality in a private sense, because you can add a private arbitration appeal.

MR GODDARD QC:

You could and if –

GLAZEBROOK J:

So there's no finality at first instance if you do that.

MR GODDARD QC:

Well finality is not an absolute concept in the legal system anyway. We talk about a final judgment from the High Court, but of course a final judgment from the High Court is subject to appeals to the Court of Appeal and with leave to this Court. Finality is –

McGRATH J:
And even then can be revisited in particular circumstances.

MR GODDARD QC:
For example, yes. Where there's a –

McGRATH J:
The rule of first instance or something kind is slated.

MR GODDARD QC:
Exactly, your Honour. And this Court has had to consider what is meant by final and what the exceptions are to finality in a number of situations including applications to reopen judgments of a Court or in challenges based on fraud to judgments below.

So it's all very well to talk about the principle of finality but one also has to subject to what and in what circumstances and a particular balance has been struck here which I agree absolutely with your Honour constrains party autonomy. As long as parties understand what they're opting into, there can be no objection to that exercise.

GLAZEBROOK J:
It was a comment.

MR GODDARD QC:
But it's helpful I think because it clearly was seen as an important feature of the 1996 Act and as a deliberate departure from the pre-1996 law so to suggest that the parties tried to add that back in, were not making a material difference, material change to the bargain is I think a challenging argument. Commercial common sense suggests the same and her Honour Justice Ellis explained the importance of context very helpfully in her judgement where she looked at the nature of the issue that was being referred to arbitration, a negligence claim and said, "Well this was always going to be a mainly factual dispute." We all know that negligence cases mostly turn on the facts and sometimes mixed questions of fact and law and so an agreement to permit appeals on questions of fact was likely to be particularly practically important in relation to this type of dispute.

Her Honour, in my submission, was right as events have played out. We see exactly that. What that means is that deleting the invalid term, treating it as ineffective, as one must, makes a material difference to the parties' bargain.

There's a nice illustration of this, I won't take the Court to it, given time, I'll just note and this is my 4.4, a case that industry of my learned junior Mr Wicks has unearthed which was not referred to in any of the Courts below *Jivraj v Hashwani* [2011] UKSC 40. That was a case where parties had agreed to arbitration with the members of the panel all to be members of the Ismaili community and the argument for the Courts was that this was discrimination of a kind that was prohibited by the UK discrimination legislation. The Court of Appeal said, yes, it was prohibited discrimination and it can't be severed because it was an important part of the parties' agreement. On appeal to the Supreme Court it was held that this was not a form of discrimination to which the European regulation applied because it wasn't a contract for services in the relevant sense. An arbitrator isn't providing services to the parties. Within the scope of the regulations there was no problematic discrimination so the issue of severance didn't arise, it wasn't dealt with. The Court of Appeal was reversed on other grounds. But the Court of Appeal's discussion of the severance issue precisely in the context of a term governing the conduct of an arbitration is helpful and is a nice illustration of why rewriting the parties' carefully balanced choices about how their dispute will be resolved is not something which it's appropriate for the Court to do.

Even if one to apply, and this is moving onto section 5of my roadmap, Gallaway's test, which is the more demanding or I would say also slightly more confusing test drawn from an amalgam of authorities, the scope of review provision in this case formed part of an indivisible hole which cannot be taken to pieces without altering its nature. The indivisibility was actually underscored by the parties when they added in subject to clause 1.2. They intended this to be a package. "Yes, we will go to arbitration, but only if we have these review rights after the arbitration." You can't take one bit away without unpicking the deal as a whole, without changing an important part of the agreement of the balance they struck. As I say in 5.2, that was reflected in the way in which the agreement was recorded.

Using the language of consideration which my friend also accepts as part of the test is they're an indivisible consideration. My submission is that the consideration for the agreement to arbitrate was in part the agreement that review would be available

on questions of fact. “Yes, we will agree to go to arbitration rather than doing this in the High Court, but only if you promise in exchange that errors of fact can be challenged on appeal.” It’s not a case where the consideration can be divided and importantly it's not a case where Mr Carr has received everything material that he bargained for in exchange for agreeing to arbitrate. The Court of Appeal said in a number of points in their judgment the parties have got what they bargained for. Well with the greatest respect, they haven't. What they bargained for very deliberately, very consciously, was an arbitration process with a safeguard, the safeguard that there would be rights of appeal on questions of law and fact. To take away the safeguard is to give them something different from what they bargained for. It’s to take away the safety net under the tightrope and to say it’s the same thing you agreed to do, you were always going to walk across this tightrope, you should be willing to do it without the net.

On the basis that the agreement is invalid as a whole because it’s not possible to find part of it invalid, part of it ineffective while enforcing the rest, we move on to the discretion under article 34. The Court will recollect that the way article 34 of the First Schedule is drafted, sub clause (2) says, “An arbitral award may be set aside by the High Court.”

WILLIAM YOUNG J:
Is it may only, sorry? I've got it in front of me?

MR GODDARD QC:
“May be set aside by the High Court only if.” Yes

WILLIAM YOUNG J:
Yes. So it’s a form of restriction as much as a conferral of jurisdiction?

MR GODDARD QC:
Yes, and it’s primarily intended – well it’s actually, again, it’s a package and it both confers the power to set aside and says that there are no other grounds which are available under national law in the Model which is where the language is taken from. And although there is a discretion, it’s important to read the whole of 34(2) and realise the wide range of scenarios considered under it and turning in particular the paragraph that your Honour Justice Arnold drew attention to earlier for the composition of the arbitral tribunal or the arbitral procedure was not in accordance

with the agreement of the parties. Departures from the arbitral procedure may be very large and important or very small and the submissions of AMINZ, as intervener, identify a number of cases where there's been a procedural shortcoming but nonetheless the Court has declined to set aside an award because the Court considered that it didn't matter, the party wasn't prejudiced in any way by the departure from the agreed procedure. One can understand that, but as I say at my 6.1, it will only be in exceptional circumstances that an award will be enforced even though there was no valid agreement to arbitrate because the whole rationale for enforcement has disappeared. When might there be such circumstances? Well, where there's a subsequent agreement to proceed with the arbitration, despite a defect in the original agreement, or where a party is estopped on ordinary principles from advancing the relevant objection.

I deal with this in section 3 of my supplementary submissions. I'm not going to go through it in detail but I will take the Court very briefly to relevant passages in the decision of the Supreme Court of England and Wales in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, which is in my supplementary bundle under tab 1. The report is so long because it includes both the Court of Appeal and the Supreme Court. The Supreme Court judgments begin on page 801 of the report. This is a case about an award made against the Government of Pakistan on the basis that it was a party to a contract and an arbitration agreement. It said it wasn't, rather a statutory corporation was the party and the Government was never a party. The arbitrators found that the Government, that the Ministry of Religious Affairs of Pakistan was a party and made an award against it. That was challenged on the grounds that there was no valid arbitration agreement. Their Lordships agreed. But one of the arguments that was advanced was that even if the Government wasn't a party to the arbitration agreement, nonetheless, the award should stand and should be enforced, and that issue is dealt with by Lord Mance at page 826, under the heading "Discretion." Paragraph 67, "Dallah has a fall-back argument which has also failed in both Courts below. It is that section 103(2) of the 1996 Act and article V(1) of the New York Convention state that 'recognition and enforcement of the award may be refused' if the person against whom such is sought proves (or furnishes proof of) one of the specified matters. So, Miss Helibron submits, it is open to a Court which finds that there was no agreement to arbitrate to hold that an award made in purported pursuance of the non-existent agreement should nonetheless be enforced. In *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 I suggested that

the word ‘may’ could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused. I also suggested as possible examples of such circumstances another agreement or estoppel.”

So there’s a prime facie right in this case to have the award set aside, in that case to have recognition or enforcement refused. There has to be some recognisable legal principle which would justify an exercise of discretion in favour of the award.

“Section 103(2) and article V in fact cover a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word "may" contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award. Article II of the Convention and subsections 100(2) and 102(1) of the 1996 Act serve to underline the (in any event obviously fundamental) requirement that there should be a valid and existing arbitration agreement behind an award sought to be enforced or recognised.” That must be so. “Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word ‘may’ enabled a court to enforce or recognise an award which it found to have been made without jurisdiction,” because no valid agreement, “under whatever law it held ought to be recognised and applied to determine that issue.”

And then 69, half way down, between letters D and E, “The application of section 103(2) and article V(1) must be approached on the basis that there was no arbitration agreement binding on the Government and that the tribunal acted without jurisdiction.” So here. “General complaints that the Government did not behave well, unrelated to any known legal principle, are equally unavailing in a context where the Government has proved that it was not party to any arbitration agreement. There is here no scope for reliance upon any discretion to refuse enforcement which the word ‘may’ may perhaps in some other contexts provide.”

And I’d invite the Court to adopt that approach. On that approach, coming back to my road map, 6.3, “No basis has been identified for enforcement in this case absent a valid arbitration agreement. The Court of Appeal observation, paragraph 67(a) of its judgment, the parties should have been aware of relevant principles underpinning

arbitration falls far short of the *Dallah* test in identifying some other recognisable legal principle on which a party should be held to an agreement, another agreement or estoppel. It suggests that both parties were somewhat careless perhaps in contracting on these terms but contract on these terms they did."

ELIAS CJ:
Sorry did others in the Court deal with the question of –

MR GODDARD QC:
Oh sorry, Lord Collins is also quite helpful on this –

ELIAS CJ:
– did Lord Collins deal with it?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
And then the others seem to agree with both of them, don't they?

MR GODDARD QC:
Yes, the others agree with both so Lord Collins, I'm sorry, let me just give your Honour the reference to that –

ELIAS CJ:
It's in your supplementary submissions.

MR GODDARD QC:
So it's dealt with at two points, paragraph 102 there's a brief comment on the point, which is on page 836, referring to article V, that's of the New York Convention, safeguarding fundamental rights including the right of a party which has not agreed to arbitration to object to jurisdiction and there's a quote from van den Berg, an authority referred to by my friends, "The grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award, the invalidity of the arbitration agreement."

And then His Lordship, over on page 843 your Honour, under the heading, "Discretion" expands on that. Paragraph 126 His Lordship explains the background to the discretion. Notes at 127 that the provision in the UK Act, like ours, "Gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by van den Berg... is where the party resisting enforcement is estopped for challenge, which was adopted by Lord Justice Mance in *Dardana*... but as Lord Justice Mance emphasised at paragraph 18, there is no arbitrary discretion, the use of the word 'may' was designed to enable the Court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right o have an award set aside in the cases listed... see also *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701. Another possible example," and this I think is the point your Honour was referring to, "Another possible example would be where there has been no prejudice to the party resisting enforcement." And there's a reference to some other cases.

Then over the page, "But it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement." I adopt that. And yes, as your Honour said, the other Judges of the Supreme Court agreed with both Lord Mance and Lord Collins.

So coming back to my road map, 6.5, "It would be unjust in this case to exercise the discretion in a manner that left Mr Carr bound by the award but without the review rights, without the safeguard that Gallaways agreed he should have and that he wishes to exercise and which he has reasonable grounds for wanting to exercise. This is not obviously the place to go into the merits of the award but her Honour at first instance observed in the passage picked up by the Court of Appeal that on the arbitrator's counterfactual analysis seven minutes in a very elaborate analysis stood between the Carr interests and an award of some 12 million dollars. A seven minute miss on the time for settlement, including 10 minutes in a waiting room, and the counterfactual is analysis is something that could reasonably be challenged and that if it had been a decision of the High Court, would be challenged on appeal both as to the basic approach, should this sort of fine grain counterfactual analysis be undertaken, and as to matters of detail. Should one have assumed that certain elements formed part of the counterfactual if other matters were modified." That is precisely the argument of the – an argument sought to be advanced in good faith and on reasonable grounds but which Gallaways say cannot be advanced because the agreement by the parties that it should be available to review on such grounds isn't.

6.6 of my road map. If the parties cannot have the result they bargained for then the Court should not make a new and different agreement for them by exercising the article 34 discretion. The only fair outcome is to clear the slate and start again. Now I accept at once that that's not an ideal outcome. It involves additional cost for the parties but it's not possible for the Court to put the Carr interests in the position that the parties agreed they should be in, which is with the benefit of an award but also with rights of appeal on questions of law and fact. In circumstances where that agreed position cannot be delivered consistent with the law of New Zealand, the only just outcome that's attainable is to clear the slate and start again.

And the suggestion made by AMINZ and by the respondents that the fact that there has been arbitration with all the time and resources involved should weigh in the exercise of the discretion I think needs to be tempered by the observation that article 34 will only ever been relevant where there has been an arbitration and an award. So the discretion to set aside is premised on that being the case and nonetheless confers that discretion and for reasons given by their Lordships in *Dallah* creates a prima facie right that it be set aside.

ARNOLD J:

Can I just ask you to comment on something that arising out of article 34(2)(iv) and as you've said it does provide for setting aside where the arbitral procedure's not in corpus of the agreement of the parties and those there may be minor departures in more significant ones and that may be relevant to the discretion but it's the next passage that interests me because it expresses the qualification, "Unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate." Now what that indicates is effectively a policy that you can't set aside even though the agreed procedure was not followed where your agreement is not consistent with what the Schedule says about the provisions, about the procedures. Now, presumably one couldn't get around that limitation by trying to bring yourself within 34(2)(a)(i) and so what I wonder is this: accepting that (iv) doesn't apply literally to this situation for a number of reasons but can't one say, argue anyway that there's a policy there that where the failure is inconsistent with what the statute or the Schedules provide that is a factor relevant to the exercise of discretion.

MR GODDARD QC:

In matters of procedure, I agree absolutely with that proposition that it can be a factor which is relevant. The right to challenge on procedural grounds is very tightly confined by the Act and the most significant constraint on it is in fact the article 4 constraint that we looked at a moment ago which is that if you don't put your hand up and complain at the time you are, to use a technical term, toast. It cannot be raised again. In addition, you can't complain about a procedural feature of the arbitration which was a mandatory procedural feature that you couldn't contract out of and your inability to complain is not affected by an attempt to contract otherwise your Honour's point. But that's consistent with basic philosophy that once parties have validly agreed to arbitrate then there are certain mandatory features of the package which you can't contract out of and which will be given effect.

Now I'm not sure that it's right to say that one cannot get around that by relying on subparagraph (1). Let me deal with that first. A procedural provision about how the arbitration will be conducted in an agreement that's invalid is something which may or may not be material to the parties' agreement. If it's not material then obviously subparagraph (1) issues don't arise on my approach.

You're in 4 and you may be able to seek to have the awards set aside and reliance on that non-compliance if you haven't got an article 4 problem and provided that the feature of the agreement wasn't inconsistent with the Act, but the *Hashwani v Jivraj* case, for example, proceeded on the basis that an agreement about the composition of the arbitral tribunal could be important enough to the agreement that if it was ineffective it couldn't be severed and the result was that the whole agreement fell and the result was that subparagraph (1) applied and I wouldn't – and it seems to me that the existence of 4 doesn't preclude that argument in relation to a procedural matter although the policy of the Act that you've got to take procedural points promptly is going to make it very hard to raise that.

Another way of putting it is to say that what article 4 really reflects is the estoppel justification for exercising the discretion adversely to a party that the Supreme Court recognised in *Dallah*. And article 4 says, "Yes, if you don't take the point, you're estopped from raising it later," but where the provision that undermines the validity of the agreement as a whole is not a procedural one which you've let go along the way. There's no suggestion that's the case in this case. Then those barriers don't arise.

But I just don't want to be understood as accepting necessarily that one couldn't in relation to a particularly important procedural provision where one had to comply with article 4 run a dual argument under 1 and 4 because I haven't thought enough about that. I'm sorry, that was a very involved answer to that question.

ELIAS CJ:
I'm not sure that I entirely followed it.

MR GODDARD QC:
I could try again.

ELIAS CJ:
Well, only – you, were you saying that where article 34(2)(iv) is engaged it doesn't necessarily exclude article 34(2)(a)(i)?

MR GODDARD QC:
Yes, I'm saying that they're not necessarily mutually inconsistent –

ELIAS CJ:
Yes.

MR GODDARD QC:
– and –

ARNOLD J:
But you're also, you also have to be saying that the sort of policy reflected in (iv) it agreed procedures, even though there are agreed procedures, if they're inconsistent with, if they're in conflict with a provision of the Schedule then you cannot rely on your agreement as a basis for setting aside, you're saying that that won't apply in relation necessarily to (i)?

MR GODDARD QC:
Yes, if the procedural rule is sufficiently important like the agreement of our composition in *Hashwani* –

ARNOLD J:

It does seem to me a little odd though that you're applying one policy under (iv) and another under (i). At least any way it might arguably be relevant to discretion?

MR GODDARD QC:

I can see that it could be relevant to discretion but under (i) because obviously you don't reach the discretion under (iv). I think that your Honour's point, but I would go further and say that it's a matter which falls to be assessed in each case by asking whether the provision that's invalid is sufficiently important that it unravels the whole agreement and at the point where it unravels the whole agreement, then the basic justification for enforcing the award against a party is absent and there would need to be a very good reason for finding otherwise. Whether that very good reason could be that what was agreed was inconsistent with Schedule 1 seems to me difficult to argue if the parties didn't understand that consistency and if that misunderstanding produced something which by definition the Court has found was material to their bargain. But that one might in some cases weigh that in the balance as part of the exercise to discretion, yes, I accept that.

ARNOLD J:

Thank you.

WILLIAM YOUNG J:

Can I just ask you sort of a question out of left field? Have proceedings actually been issued in the High Court?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

They have?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And they're just sort of stayed, they've stayed.

MR GODDARD QC:

Yes, that's right, your Honour. I was worried when –

WILLIAM YOUNG J:

Because otherwise there would have been a time problem?

MR GODDARD QC:

Yes, your Honour's exactly right. Your Honour is wondering whether you can say that this is moot and therefore it doesn't need to be decided.

ELIAS CJ:

No, I don't think so at all.

MR GODDARD QC:

I'm delighted to say the answer is no.

WILLIAM YOUNG J:

No, well I was wondering that, actually, I was wondering if proceedings had been issued.

MR GODDARD QC:

Proceedings have been issued and are stayed, pending the determination of this appeal.

ELIAS CJ:

Thank you Mr Goddard.

MR GODDARD QC:

Your Honour.

ELIAS CJ:

Yes, thank you Mr McLachlan.

MR McLACHLAN QC:

May it please the Court, I, too have taken the opportunity of presenting what I probably prefer to call a topographical rather than roadmap of my submissions or perhaps more simply just an outline in two sides of one sheet of A4 and I wonder if I

could beg the indulgence of the Court to hand that up. And I might at the same time provide to the Court one additional authority which I provide, a copy which I provided to my learned friends yesterday and which is germane to my presentation this morning because it responds to some points made in the supplemental submissions. That is the decision of the English Court of Appeal in a case called *C v D* [2007] EWCA Civ 1281 in 2007.

ELIAS CJ:
Thanks.

MR McLACHLAN QC:
Your Honours, I propose to start my oral submissions to you this morning with the structure of the Arbitration Act. It's on any view central to the case before this Court which concerns the question as ordered by the Court of whether an arbitration award should be set aside a matter regulated by the Act and my submissions really take as their jumping off point at the question which his Honour Justice Arnold was addressing to my learned friend just a moment ago before my learned friend closed his submissions because in my submission it is fundamental to an understanding of the way in which the Act is intended to operate and in my submission the way in which the question before your Honours falls to be decided today to appreciate that there are two distinct questions here. One is the scope of the arbitration agreement and whether or not it is valid and the other question which is a separate and distinct question is the extent of rights of the course to the Courts of New Zealand in relation to arbitration awards.

So I make my submissions overall under the three headings indicated in my written submissions, firstly as to separability, secondly as to severance and thirdly as to discretion but what we say is that essentially separability and severance are simply two routes of getting to the same result. In our submission the clearer and more correct route is separability but nevertheless both approaches must be guided by the principles and policies of the Act which is, in our submission, the relevant Act here, namely the Arbitration Act. And what we say is that all of this starts from the definition of what is an arbitration agreement in the Act which my learned friend has already taken you to but I'm – I must beg your leave to take you back to it. It's in tab 1 of his legal authorities and it's section 2(1) of the Act. It simply says, "Arbitration agreement means," pausing there, the words that the legislative draughtsman uses when he or she means to indicate an exclusive, exhaustive

definition means, “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

What we say is that here the appellants seek to set aside both the unanimous judgment of the Court of Appeal and the award of a very experienced arbitrator rendered after lengthy proceedings not on the basis that they did not agree to submit this certain dispute to arbitration but on the basis that they cannot avail themselves of an appeal on a question of fact that the Act does not permit. For this reason it’s said that the award should be set aside because the inclusion of the provision for appeals on fact in the submission agreement invalidates the arbitration agreement.

What we submit is that that result is inconsistent with both the expressed terms and the principles supporting the Act by which the arbitration agreement is defined in separable form from other contractual terms including in particular as to rights of recourse such that an invalid attempt to exercise party autonomy to enlarge such a right does not affect a valid arbitration agreement or an award rendered on the basis of the Act. And just going back to an observation which her Honour Justice Glazebrook made a moment ago to my learned friend, it was of course integral to the scheme proposed by the Law Commission under the chairmanship of Justice Keith when they proposed the Arbitration Act in 1996 that the new regime would not only break with the past, but it would strike, achieve two objectives and I wonder if I can just refer to this briefly, it is in my submissions but so that you can see the way in which it’s put directly by the Law Commission which is in my authorities at tab 13 at paragraph 5 on page 244 in the bundle. That's respondent’s tab 13, 244. Here the Commission sets out at the very outset of their report what they are seeking to do in proposing the Arbitration Bill and in the middle of it they say one specific development highlights the need for a re-examination of the present legislation. That development is the discernible trend in favour of enhanced party autonomy and as a consequence, as a consequence, restricted judicial review in arbitration legislation.

So in my submission the scheme of the Act was to both enhance party autonomy within the arbitration but also and in order to achieve that to restrict judicial review once an award had been rendered and that is the balance that was struck in the legislation.

GLAZEBROOK J:
I still can't see how it enhances party autonomy to refuse to accept party autonomy. I accept it's said there but it makes absolutely no sense whatsoever to me.

MR McLACHLAN QC:
Your Honour, in my respectful submission, it enhances – first, I have two answers. The first is it enhances party autonomy because what it does is to shore up the arbitration process itself from collateral attack, and arbitration in New Zealand and in other common law countries has become bedevilled by collateral attacks, which were often dressed up as it was in the interest of the appealing party to have it, but the net result is to undermine the very concept of arbitration in the first place.

But my second answer is, as I've just submitted to your Honours, there were two objectives here. As I shall seek to demonstrate to you in a moment, they're achieved separately under the Act. One was to deal with those matters that could be the subject of agreement in relation to arbitration and the other was to provide for limited rights of recourse, and those are actually two completely separate sets of legal issues and they're importantly separate for the purpose of this litigation.

So we say firstly that the principle of separability supports the result which we urge on this Court. We say alternatively that the provision for appeals under – on questions of fact and the statute is simply unenforceable and should be severed from a valid arbitration agreement. We say this isn't an issue – and this is common ground between myself and my learned friend – of avoidance for illegality or the agreement being contrary to public policy. We say there's no question of looking at this objective intention of the parties, and that's also conceded. We say the effect of the provision in relation to questions of fact is that it is simply ineffective because it's a kind of appeal which Parliament has not provided, and we say that that can be dealt with the principles of severance purely as a question of construction of the relevant contractual obligations in the light of the purposes and policies of this Act which provides the context within which this present issue arises, and we say the Courts have done just that in the arbitration context, and I'll take your Honours to some of the authorities in a moment. But we also say that that result is consistent rather than inconsistent with the broader framework of contract law of New Zealand and that's elaborated in part 5 of my written submissions.

We finally say that the discretion to uphold the award, even if the ground were technically made out, here should be employed because the parties did, on any view, agree to arbitrate this dispute. It would be contrary to the purposes and policies of the Act to invalidate an award on the ground of the inclusion of a provision for appeal which the Act itself does not permit, because that would be to enable the appellant to have the very thing that the Act seeks to prevent. We say you have power to avoid that result and respectfully submit that you should use it.

So turning, then, to my first set of submissions, which is on separability, I've taken your Honours to the definition, the exclusive definition of arbitration agreement in section 2 and you will note that that provision, as my friend very fairly and clearly pointed out this morning, is carried through into Schedule 1. The same definition of arbitration agreement applies to Schedule 1 as it does to the main body of the Act. That means that under the only provision which is invoked by way of recourse under article 34 of Schedule 1, it is necessary for the appellants to show that the arbitration agreement as defined under section 2 is not valid under the law of New Zealand.

WILLIAM YOUNG J:
You've really got to say on this aspect of the case that an arbitration agreement doesn't include the provisions.

MR McLACHLAN QC:
With respect, your Honour, I don't for this reason. The arbitration agreement for this purpose is, in my respectful submission, simply clause 1.1. As I'm just about to develop in a moment, the other matters dealt with in the submission agreement, which is the subject matter of the litigation, are not part of the arbitration agreement and, as I shall seek to persuade your Honours, in fact if taken to logical conclusion, as debate between my learned friend on the question raised by his Honour Justice Arnold demonstrates, it would wreck the structure of the Act if all these other procedural matters, and if in particular rights of recourse were treated as if they were part of the arbitration agreement for the purpose of article 34(2)(a)(i).

What I submit, instead, and this is point 2 under heading 2 of my topo map, is that arbitration involves three sets of legal obligations. Now, in effect my learned friend will seek to persuade you that there are only two. He would say there's an arbitration agreement and it includes everything except for the merits of the underlying

substantive contract which forms the subject matter of the dispute. I used substance of the claim in my outline and that is the correct term.

But what that leaves out of account, in my respectful submission, is the very issue which we're here to debate today, which is the role of the curial law, which is normally called an arbitration law by its Latin tag, and specifically rights of recourse to the Courts. I can make this point good most conveniently since the earlier authorities are also rehearsed there by reference to the decision of the English Court of Appeal in *C v D*, which I handed up a moment ago. This is a decision which concerned arbitration under the well-known Bermuda insurance form. The parties had expressly provided for New York law to govern the substance of their dispute. They'd also provided for London to be the seat of the arbitration.

An award had been rendered. The claimant was successful on all points. The defendant sought to challenge the award in New York on the ground that the arbitration agreement was also governed by New York law and that therefore he had rights of recourse to the Court in New York on the ground of manifest disregard of New York law. The claimant applied for an injunction to restrain him from doing so and to compel any challenge in London.

Now, the case is germane to the present discussions on both of the issues which formed the subject of the unanimous judgment of the Court of Appeal which was delivered on behalf of Sir Anthony Clark, the Master of the Rolls, and Lord Justice Jacob by Lord Justice Longmore.

The first argument is the one which is begun at paragraph 14 of the judgment, which is page 244 of the Lloyds report. Essentially what Mr Hirst QC said for the defendant was, "This arbitration agreement is governed by New York law. Therefore, I have a right of recourse under New York law and I'm entitled to go there."

What Mr Eder said in answer to that proposition was that – this is in paragraph 15 – "Once it was clear that England was the seat of the arbitration, that English law was, therefore, the curial law of the arbitration, it must follow that the parties intended only attacks which were permissible by English law and not attacks permitted by other laws, including those permitted either by the proper law by the underlying insurance contract, the substantive obligations, or by the proper law of the arbitration agreement, if different." The learned Judge then goes on to say, "I shall deal with Mr

Hirst's arguments in due course but in my judgement they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to agree that the proceedings on the award should only be those permitted by English law." It's that basis upon which he decides the case in favour of the claimants and therefore in favour of upholding the injunction. You see that at the balance of the bottom of page 245.

He then goes on to make some secondary observations which are also relevant, and I'll explain in a moment why that is so in my submission to our case, which is that the question of whether the arbitration agreement was governed by New York law at all in the first place. That's addressed on page 246 starting at paragraph 21. He refers with approval to some dicta of Lord Mustill, of course, a very notable authority in his own right on arbitration law, at first in a case called *Black Clawson International Limited v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 when he was Mr Justice Mustill, and then subsequently confirmed by him in the judgment of the House of Lord in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. What Lord Mustill said, and it's simply paraphrased in 24, is that there are three potentially relevant laws, the law governing the substantive agreement, the law governing the agreement to arbitrate in the performance of that agreement, and the law of the place where the reference is conducted.

He then goes on to say, and I simply need to read the last phrase of the citation, he says, "It does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori." He makes the same point in *Channel Tunnel Group Ltd* in 25 in the middle of the indented quote. He says, "Exceptionally, the substantive rights of the parties may differ from the national law governing the interpretation of the agreement to submit the dispute. Less exceptionally, it may also differ from the national law which the parties have expressed or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration, the curial law of the arbitration, as it is often called."

The Judge agrees with that dictum in paragraph 26, over at the next page. He says, "Although it would be rare, it's certainly possible for the two laws, the law governing the arbitration agreement and the law governing the curial law of the arbitration, to be different."

Now, what do I take from that for the purpose of this litigation? In my respectful submission, *C v D* is authority for two points of central relevance here. The first is that the question of the curial law which is fundamentally concerned with rights of recourse of the Court, is different from the arbitration agreement. In case this looks a bootstraps argument based on my own writings elsewhere, that is the classification adopted in *Dicey, Morris and Collins on the Conflict of Laws* rule 64, which you have in the respondent's bundle of authorities at tab 17. So three different things.

The second point, however, for which *C v D* is authority relevantly here is that rights of recourse to the Courts are not a matter for the arbitration agreement. They're a matter for the curial law, which will generally be the law of the seat of the arbitration, here, New Zealand.

GLAZEBROOK J:

I don't quite understand the argument in that it seemed to me, just looking at this, and obviously we've only just had it now, but that was done on the basis of the construction of the document itself so they were saying that because you have agreed to have New York law but the seat in London you've made those compromises in the arbitration agreement itself and as a matter of construction it recalls confusion and difficulties if you were thereby going to be able to add on bits and pieces from each different part and also be able to take proceedings in the two jurisdictions. But it seemed to me that that – as I say, it's read very quickly and certainly not in the way that I would wish to read it making this point in any judgment, it seemed to me to arise from an interpretation of the agreement.

ELIAS CJ:

It may be, since we're past the time to adjourn for lunch, that we should take the opportunity over lunch to look at it. But just give us another roadmap. What is the third point, I think you said, that is to be taken from this judgment for your purposes?

MR McLACHLAN QC:

I apologise for having missed the witching hours, your Honours. May I in one sentence address Justice Glazebrook's question and then add the third point and with your indulgence we'll adjourn.

With respect, Justice Glazebrook, that essentially was the second set of considerations. The primary ground upon which the judgment in *C v D* was rested

was that once you choose London as the seat of the arbitration the question of rights of recourse is a question for the curial law and not a question that's regulated by the arbitration agreement.

WILLIAM YOUNG J:
But isn't this common ground? I mean, haven't you just got to the point where it's clear that the agreement was ineffective when it purported to confer a right of appeal on a question of fact?

MR McLACHLAN QC:
That much may be common ground, your Honour, but for reasons which I shall develop after the luncheon adjournment, I fear quite a lot else isn't and this point is, in my submission, very relevant to that.

My third point, since her Honour the Chief Justice asked me to place it on record before the luncheon adjournment is that although it is possible – and his Honour Justice Arnold adverted to this point earlier this morning – for the parties to agree about many matters of procedure by contracting out of the directory provisions of Schedule 1. What they can't do is contract to amend the rights of recourse to the Courts under article 34 or contract to expand the right of appeal in Schedule 2, article 5.

ELIAS CJ:
That is what I thought was common ground.

MR McLACHLAN QC:
But that's because the extent of the rights of recourse is a matter for the law of the seat and not a matter for the arbitration agreement. So what I shall seek to persuade your Honours about after lunch is why this case, which I accept is a conflicts case, and here all the issues are domestic to New Zealand, but why it is fundamentally germane to the very issue with which your Honours are concerned. Perhaps this is a convenient moment, I could do that after lunch.

ELIAS CJ:
All right. I should say that I don't – you may need to recapitulate on why these points are distinct, because they seem to me to be really the same argument, the point of which I'm not clear on yet.

MR McLACHLAN QC:
I welcome the opportunity to do so, your Honour.

ELIAS CJ:
Yes, thank you.

COURT ADJOURNS 1.08 PM
COURT RESUMES : 2.16 PM

ELIAS CJ:
Yes, thank you Mr McLachlan.

MR McLACHLAN QC:
Thank you, your Honour. I – with your indulgence I don't wish to spend too much more time on *C v D* because in my submission the critical question here is how this analysis applies within the domestic context in a setting which we are presently engaged and as I shall submit to you in a moment the approach that I am urging on your Honours is in fact very well illustrated by the judgment of the New Zealand Court of Appeal in which your Honours Justice Young and McGrath participated in the *Methanex Motunui Ltd v Spellman* [2004] NZLR 454 (CA) case which I'll come to in a moment.

But I wonder if I can just encapsulate in a sentence why it is that in my submission *C v D* does make an important point beyond merely fact that rights of recourse are separate because in essence what *C v D* was a contracting out case. In other words, what it was said on the part of defendant was that by choosing New York law the parties have to govern their arbitration agreement, the parties had contracted to enlarge the English rights of recourse available under the English Act and that they could therefore by suing in New York add a New York law ground not allowed under the English Act, namely manifest disregard for New York law and it was held that they could do that not as a question of construction but simply because rights or recourse were matters to be dealt with by the curial at the seat and were not matters to be dealt with by the arbitration agreement. And I do submit that *C v D* stands for that at its primary conclusion but I also submit that *Methanex* illustrates exactly the same approach.

Before I get to *Methanex*, let me just –

GLAZEBROOK J:
Just pause for a second but the seat is one that's in the contract itself, isn't it?

MR McLACHLAN QC:
Yes, it is.

GLAZEBROOK J:
So it is governed to that extent by the contract or the arbitration agreement, it's just the consequences of it being governed by the arbitration agreement are that it is curial law is according to and where you can take proceedings is according to arbitration law outside of that but that will to an extent always be the case within validity, won't it? Because you don't, you don't import an invalidity into your contract. If you knew you were doing that you wouldn't put it in there in the first place?

MR McLACHLAN QC:
Your Honour, in my submission modern arbitration law allows the parties a substantial degree of autonomy of agreement between them on all three of the issues which I say are central to arbitration law. Arbitration agreement, the substance of the dispute and the question of the curial law to the extent that it permits parties to readily chose the law of the seat but in my submission that's a separate and distinct question from the arbitration agreement which is simply and solely the matter as described in section 2 of the Act. So there are three sets of areas. There is a degree of party autonomy in each of them but that does not mean in my respectful submission that rights of recourse are wrapped into a generic concept, larger concept than set out in section 2 of the Act for arbitration agreement.

Perhaps if I can just go on to develop this point because –

GLAZEBROOK J:
Just so I can understand the point, does that mean that even if you provide for a seat in the arbitration agreement that that's not part of the arbitration agreement? Is that the submission?

MR McLACHLAN QC:
That depends –

GLAZEBROOK J:

I can understand the consequences are different from the arbitration agreement, but –

MR McLACHLAN QC:

That depends, your Honour, with respect on what one is accepting is the arbitration agreement for this purpose and I think it would, it really would help if I could simply now develop this point by reference to the way my learned friend has put the case on separability because it would help to illustrate your point –

ELIAS CJ:

But is there an answer to that point? Is there –

MR McLACHLAN QC:

Yes –

ELIAS CJ:

– any easy answer to it, because I'd like to hear it if there is. If there's a, if there's a reference to the law that's to apply, does that part of the arbitration agreement?

MR McLACHLAN QC:

May I ask your Honour for clarification of the question? The law which is to apply to which issue?

ELIAS CJ:

Well it could be any of the issues.

MR McLACHLAN QC:

Well it would then be helpful and if you'll permit me the indulgence to see the way in which the matter is dealt with in *Dicey.*

ELIAS CJ:

All right.

MR McLACHLAN:

This is a chapter of which I freely admit I'm jointly responsible with Lord Collins although of course in Britain it's somewhat before the – I was instructed on this appeal. It appears in the respondent's bundle of authorities at tab 17, page 272. We really just need the rule for this purpose, rule 64. And you'll see that rule 64 deals with governing law for an arbitration in three separate respects. The first is the law governing the material, validity, scope and interpretation of an arbitration agreement which is governed by its applicable law either expressly implied and chosen or with which it's most closely connected.

The second is the arbitral proceedings, which are in general governed by the law of the seat of the arbitration, although if you go on to read the commentary you'll see that the parties also have an ability to exceptionally chose a different law to Government procedure but in general they're governed by the law of the seat and that it follows from that in answer to her Honour Justice Glazebrook's question the parties can choose a seat and thereby choose the curial law and then the third –

GLAZEBROOK J:

Is the choosing of the seat – my question was, is the choosing of the seat part of the arbitration agreement?

MR McLACHLAN QC:

No, it is a separate and distinct element from which different consequences flow.

GLAZEBROOK J:

So it's not part of – so even though in the arbitration agreement you say, "We submit this to arbitration," the seat of the arbitration – the arbitrator is – the seat of the arbitration is Y and the law is Z, all of which you're allowed to choose that those last few points, presumably the arbitrator is part of the submission to arbitration but the seat and the choice of law are not part of the arbitration agreement?

MR McLACHLAN QC:

The choice of law with respect to –

GLAZEBROOK J:

The arbitration agreement.

MR McLACHLAN QC:

– the arbitration agreement is because that's integral to the agreement but –

GLAZEBROOK J:

But the seat isn't?

MR McLACHLAN QC:

But the choice, the choice of the seat and the choice of law as to substance of the dispute are dealt with respectively in all 64(2) and (3) and they're separate and distinct and they do not – they are not specified as one of the essential exclusive elements of an arbitration agreement under section 2 of the Act. See, what my learned friend says –

GLAZEBROOK J:

So choice of law is arbitrator is, submission to arbitration is but everything else that's included in the same document is not part of the arbitration agreement?

MR McLACHLAN QC:

In my submission it's a wholly unexceptional proposition to submit that a single document can contain more than one agreement and that's exactly the position which, in my submission, we're in here. My learned friend says that separability, a doctrine which he accepts, only applies to separate an arbitration agreement from the main contract governing the substance of the dispute and it follows from the way in which he's presented his submission that it can have no application at all, no application at all to separate the arbitration agreement from any element of procedure, any provision that the parties might make as to procedure, including rights of recourse to the Court. Because he submits that the – when arbitration is provided for in an agreement of the kind of which we're presented today, the separability doctrine has no purchase and he cites no authority for that. In my submission that's contradicted both by *C v D* and also by *Methanex* to which I come in a moment and also by the structure of the Act and it's important as a matter of principle that this should be so for reasons which I'll develop in a moment. Because otherwise collateral attacks on the validity of submissions to arbitration would be very substantially increased in an impermissible matter not contemplated by article 34 of Schedule 1.

ELIAS CJ:

But isn't – I might be quite wrong with this, but isn't the principle of separability directed at ensuring there isn't the absurdity that the, that the, that whole, that because the choice of law is within the arbitration agreement it can't be determined by the arbitrator, that it all goes together. Sorry, I'm probably expressing that wrongly.

MR McLACHLAN QC:

My learned friend submits that the principle of separability only fulfils one function and he's, he says in his submissions that, in his supplemental submissions that it's only – it has no application to a submission agreement because it's only concerned with separating an arbitration agreement from –

ELIAS CJ:

A substantial –

MR McLACHLAN QC:

The substantive obligations –

ELIAS CJ:

Yes.

MR McLACHLAN QC:

– of the contract. But in my submission the principle of – the document of separability has an equally important positive function to preserve valid submissions to arbitration from collateral attacks of all kinds unless they go directly to the constituent elements of the arbitration agreement itself and that's in my submission exactly what Lord Hope, for example, said in *Fiona Trust Corp v Privalov* [2007] UKHL 40, [2007] 4 ALL ER 951. You've got to have something directly attached to the arbitration agreement. Now that – the arbitration agreement still has a very, very important role to play, even if one strips away everything else, because it's the arbitration agreement which determines two things. It firstly determines that the parties have consented to arbitration and it secondly determines what the scope of the dispute as again referred to in section 2 of the Act is to which the arbitrators – which the arbitrators empowered by that consent to decide and that's why, for example, in *Dallah*, a case which I refer to in my written submissions, there was an absolutely fundamental question to be decided because the Government of Pakistan

said, “We never agreed to this arbitration in the first place. We were never a party to the agreement.” That sort of fundamental challenge is plainly falls within the concept of arbitration agreement. But collateral challenges of all other kinds do not and perhaps I can just deal now, it was going to deal with it in a moment but let me just illustrate that by the very point that Justice Arnold raised before the luncheon adjournment, because if one looks at article 34 of the Act in Schedule 1, what one sees is that as he pointed out where the challenges as to the procedure of the parties, it’s in tab 1 of my learned friend’s authorities, it’s page 41 in the Act. “Where the challenge is to procedure, it’s a challenge that the procedure was either not – was not in accordance with the agreement of the parties unless such agreement was in conflict with the provision of this Schedule from which the parties cannot derogate.”

Well in my submission it must follow from that that you cannot set aside an award if you've included a contractual provision as to procedure which is contrary to the Act, that that's what the section says and it would be to do an end run around that to achieve the same result under subparagraph (1) because what you would be doing would be you would be achieving the very result the Act does not permit by setting aside an award for a procedural reason which may be very fundamental and material to the parties, that's why they put it in their agreement, but contrary to the mandatory provisions of Schedule 1 from which no derogation is permitted and it therefore follows from that paragraph that an arbitration agreement for the purpose of subparagraph 1 doesn’t include agreements about procedure because the manner and extent to which you –

WILLIAM YOUNG J:
Well, it does. It just may mean that the consequence of a breach of the procedure are not very serious. It doesn’t mean it’s not part of the agreement. It just limits the remedies for breach of the agreement.

MR McLACHLAN QC:
But on the hypothesis which we’re considering, Justice Young, the provision would have been very serious for the parties because they would have deliberately included something but it’s something which the mandatory provisions of the Act says you can’t contract out of. The consequences of paragraph 4 is that that is not a valid ground for challenging the award, even if you put it in your agreement.

The other point I make, Sir, about subparagraph 4 is that, of course, it uses the expression "agreement of the parties", not "arbitration agreement" and I say designedly so because you can – and very frequently do – in arbitration make agreements about procedure, all sorts of agreements about procedure, during the course of the arbitration. In fact, normally one of the first things that one does is to reach a procedural agreement, if possible, with the parties about the manner in which it's to be conducted. That's not part of the arbitration agreement for this purpose.

For other reasons which I'll develop in a moment, the submission which has been advanced by my learned friend that really everything else that's in the submission agreement is just all part of something which we could colloquially call an arbitration agreement and therefore if any element of it falls the whole must fall is contrary to the scheme of the Act. But I think I can best illustrate this by reference to the treatment of this very point in the unanimous judgment of the Court of Appeal in *Methanex Motonui Ltd v Spellman* which is in the bundle of authorities at tab 3.

Now, what happened in *Methanex*, if one turns to paragraph 15 of the judgment in the first instance on page 459, so what happened in *Methanex* was that there had been Court proceedings in Wellington and then those proceedings were the subject of a settlement agreement. It's pursuant to that settlement agreement that there was a clause for arbitration. You get the arbitration clause itself set out on page 463 at paragraph 19, clause 6. It's said to be conducted as an arbitration under the Act and the Court held that despite the use of the term "independent expert" this was, in fact, an arbitration.

So this, if you like, is a standalone agreement. It's not an arbitration agreement within the underlying contracts, which were to be the subject of any dispute. It's a standalone agreement after the dispute has arisen which is entered into, and within that there's a provision for arbitration.

Now, the Court then proceeded to construe it. If we can go right through to paragraph 51 in the judgment on page 469, the Court decided that the critical question was whether *Methanex* was a party to the arbitration agreement and that the dispositive provision of the Act on which this all hung was the meaning of arbitration agreement. That's confirmed in their treatment of exposition of the law over the page at paragraph 56 where the Court observes that all the parties to this litigation were parties to the settlement agreement but in order to be a party for the

purposes of the Act a person needs to be a party to the arbitration agreement as defined in the Act.

Then they go on, at line 15, “Whether the dispute has already arisen or is of a class which the parties recognise may arise in the future, it may be a dispute which is between them and must be a dispute in respect of a defined legal relationship.” So they're saying, therefore, that the definition of arbitration agreements applies whether or not one’s concerned with a clause in a contract or a subsequent agreement after the dispute has arisen. When they then apply that to the facts of this case of *Methanex*, they say at paragraph 68 that what’s required is that there must be a dispute in respect of a defined legal relationship, and it’s only the parties between whom that dispute is arisen or may arise – you can submit the dispute to arbitration, and the conclusion at paragraph 82 on page 475 is that the only parties to the settlement agreement are agreed to submit to arbitration disputes which have arisen between them were the seller and the Crown. The consequences that although the DGUs were also parties to the settlement agreement, which was the document under which the submission to arbitration took place, only the seller and the Crown were parties to the arbitration agreement, only the seller and the Crown were parties. In our view, *Methanex* falls outside the definition of “party”. We conclude it has not established a tenable case that it was a party.

So the first point decided by *Methanex* is that the question whether it arises in a standalone agreement or in a main contract as to whether or not you fulfil the requirement of an arbitration agreement has to be determined by reference to a strict application of a definition in the Act.

But then the second issue which is decided in *Methanex* is just as germane to the issues before this honourable Court, and that’s the question of natural justice. Your Honours will recall that if we go back to the arbitration agreement on page 463 at paragraph 19, there’s an agreement in addition to the submission that there shall be no appeal against any decision of the independent expert except if the decision was induced or effected by fraud or corruption. So the consequence, or what was said was, that therefore excluded any right of recourse for breach of natural justice because the parties had expressly by contract provided no recourse except in these two categories, and that was it.

But what the Court holds at paragraph 102 in the judgment is that it's not open to the parties to exclude articles 18 and 24 of Schedule 1, which at least broadly might be a statement of the principles of natural justice because those are mandatory provisions of the Act. They can't be contracted out of. Article 34, as they say at 105, is expressed in exclusionary terms. It specifies the only grounds. Accordingly, it's not open to parties to a submission to arbitration to confer by contract a more extensive jurisdiction on the Court, for example, to review for factual error, as we know. Then over the page they accept that there were good commercial reasons for exclusion of the review, so here's the practical argument. This is what the parties wanted or it's quite fundamental to them, that they should achieve a higher degree of finality than that permitted under the Act. But then at 108, "Despite the considerations referred to above, we have concluded that the law does not permit the parties to exclude review based on the grounds specified in article 34."

So what I say in submission about the relevance of *Methanex* to this appeal is that two things flow from it. The first is that an arbitration agreement is separate, separable, from the settlement agreement, or here submission agreement of which it forms a part. And although it's clear from the judgment that the article 34 grounds could not validly be amended by inclusion or exclusion. Nevertheless, the Court still treated both the arbitration agreement and the consequent award as valid. What they did was then to say, "But the process is subject to our review for natural justice." So the fact that such a clause had been included did not result in the invalidation of either the award or the agreement. It merely had the result that the Court maintained its fundamental rights of review as provided for under the Act.

I say that that same submission that arbitration agreements do not include rights of recourse for the Court is consistent with and certainly not contradicted by the overall structure of the Act. The first point is that the definition is expressly exclusive and it applies to rights of recourse under article 34. So in the normal case there being complete clarity in the statute as to what the constituent elements of an arbitration agreement are and those having been carried through by the draughtsmen into the First Schedule in article 34 that would be an end of the matter. It doesn't need to look to other provisions in the Act but it's worth also recalling that here we're only concerned with the extent of rights of recourse to the Courts against an award after the arbitration process has been completed by an award and with respect none of my learned friends' supplemental submissions suggest that the parties can agree about

the rights of recourse under Schedule 1. Of course, they can't. That's what *Methanex* says.

WILLIAM YOUNG J:

I mean the argument that is advanced by Mr Carr could have been advanced in *Methanex*, but it wasn't. It wasn't argued that the whole agreement was bad because there'd been an attempt to exclude natural justice. That's right, isn't it?

MR McLACHLAN QC:

The record doesn't indicate the point was taken. My submission is that the approach of the Court is entirely consistent with if the fact that it had been taken it would have been hopeless.

WILLIAM YOUNG J:

Well, I'm not so sure.

MR McLACHLAN QC:

Well I suppose that's what we're here to determine. I mean, you're here to determine today, your Honour, but –

WILLIAM YOUNG J:

You see, I mean, one of the things that sort of you haven't got on to and that sort of intrigued me really was the references by Mr Goddard to various provisions in the Act which talk about an arbitration agreement and its provisions suggesting that an idea that the arbitration agreement includes what's agreed to as to the nature, form, et cetera, of the arbitration.

MR McLACHLAN QC:

And that's exactly what I propose with your indulgence to get onto right now, your Honour. We are for reference purposes at paragraph 3(b) of my topographical map. I'm about to deal seriatim with the provisions to which he referred as in – in support of his proposition that all these other things can be wrapped up. My prefatory point was that what he doesn't say is that what can be wrapped includes rights of recourse because he can't possibly say that. All he can go – all he can say is that internal matters of procedure within the arbitration while the arbitration is still continuing are included and that that in some way gives the lie to my central proposition that the arbitration agreement is simply clause 1.1 in this case.

GLAZEBROOK J:
But you can include rights of appeal in an arbitration agreement. And in fact that is specifically provided for under Schedule 2. You can say, as much as you like, that there are rights of appeal but you just can't say there are rights of appeal in respect of fact.

MR McLACHLAN QC:
Well let's have a look exactly then at Schedule 2, your Honour, because with respect in my submission is doesn't go or doesn't deal with the matter quite in the way that your Honour is putting to me.

The text of article 5, Schedule 2, which is on page 51 in the statute says that, "Any party may appeal to the High Court on any question of law arising out of an award—if the parties have so agreed before the making of that award; or with the consent of every other party given after the making of that award; or with the leave of the Court." Now that is not, with respect, language which refers to the arbitration agreement and indeed it contemplates that an agreement about appeals on question of law could be arrived at at any moment right up until the making of the award as a separate agreement.

GLAZEBROOK J:
Well so it's inclusive rather than exclusive though? The same thing that you can say with the agreements on procedure in 34(2)(iv). It assumes that you're not necessarily going to be tied at any particular point. You could have made procedural agreements at any stage but that doesn't exclude the fact that you may have made them in an arbitration agreement, does it? It certainly doesn't exclude the fact you may have made it in the same document?

MR McLACHLAN QC:
It certainly doesn't exclude the fact that you may have made it in the same document, I certainly endorse that proposition, your Honour. The reason why I don't, with respect, endorse the proposition that it therefore if you choose to do it in that way makes it part of the arbitration agreement can be rather well –

GLAZEBROOK J:
I understand that argument.

MR McLACHLAN QC:

But it can be rather well illustrated also and here if I may I'll deal with the question posed to me by Justice Young about the use of the term and other clauses of the Act can be rather well illustrated by some of those other clauses. It's probably better rather than just, as it were, going straight to the, to take them in the order that they were taken because in my submission none of these are inconsistent with my proposition. They're all consistent with them.

Section 12 of the Act provides that an arbitration agreement is deemed to provide for – to provide that an arbitration Tribunal may award any remedy or relief. I say precisely so; that is exactly that kind of thing that is the subject matter of the dispute that is referred to the Tribunal. It's a core function of the arbitration agreement in other words and it's not procedural but the point can be rather better illustrated, the answer to –

GLAZEBROOK J:

I'm sorry, I think I missed what you were referring to at that stage?

MR McLACHLAN QC:

Section 12 of the Act, your Honour.

GLAZEBROOK J:

So perhaps if you can just repeat the point, because I think I missed it, I wouldn't like to have missed it.

MR McLACHLAN QC:

In my submission that is not a procedural question, it is a question about the scope of the matters referred to the arbitrators for decision and therefore is within the definition of an arbitration agreement under section 2. The point is well illustrated by section 14, which my learned friend spent some time and that's the confidentiality provision. Two points about section 14 or the code included from section 14 all the way through to section 14I and that is that it is only a code, in my submission, which is operable on the basis that the seat of the arbitration is in New Zealand. And therefore it is concerned with procedural matters occurring within the context of a New Zealand-seated arbitration. If my learned friend was right and a contracting out of the section 14 provisions under section 14 in the parenthetical was part of the arbitration

agreement the consequence would be that if the parties had validly agreed to submit their dispute to arbitration and no challenge could be made to that but they had for some reason made an invalid provision in relation to confidentiality, the consequence of my learned friend's submission would be that that invalidates the entire arbitration agreement and therefore the award.

WILLIAM YOUNG J:
But how can they make an invalid agreement as to confidentiality?

MR McLACHLAN QC:
Well –

WILLIAM YOUNG J:
Can you postulate one that might be invalid?

MR McLACHLAN QC:
There could be very good reasons of public policy why arbitration – why sweeping provisions of confidentiality which exceed, which attempt to operate as a cloak for, or other misconduct would not permitted by the Courts.

WILLIAM YOUNG J:
Are you saying an agreement that is more extensive than what's provided in the suite of sections might be contrary to public policy?

MR McLACHLAN QC:
Yes. My simple proposition is that –

WILLIAM YOUNG J:
But might that not be –

MR McLACHLAN QC:
– none of that should invalidate the initial exercise of the arbitrators should strip them of jurisdiction to invalidate their initial exercise of deciding on the validity of the confidentiality and making their own ruling, nor should it invalidate ipso facto in award read it on that basis. But the more procedural provisions that you hang, you strap into the concept of an arbitration agreement, the consequences to do the very thing

which the doctrine of separability seeks to avoid which is to enable the fundamental submission to arbitration to be collaterally attacked.

ELIAS CJ:

But why is it sufficiently addressed by the concept of materiality? Why is it – it's awfully minute, this argument. It's rather difficult to grasp.

MR McLACHLAN QC:

Well, your Honour, many issues of procedure may be minute. Rights of recourse to the Courts are not.

ELIAS CJ:

No.

MR McLACHLAN QC:

And my fundamental point is that I don't need to go to address all of these – this stuff in the middle between the arbitration agreement at the one end and rights of recourse to the Court at the other because in my respectful submission nothing one can say about the breadth of definition of arbitration agreement is sufficiently wide to include rights of recourse to the Court but in the middle many of these issues may well – some of them may be de minimis but others may be quite important and the question of confidentiality is one.

ELIAS CJ:

It does matter, of course, how you phrase it, doesn't it? Because you're characterising this as rights of recourse to the Court but it could equally be described as bearing on the finality of the arbitral award and there's no – it's difficult to see that if that one could either stipulate for or go to the default position where it is final but once you're into opting for a further look, well why's that not integral to the whole purpose of your submission to arbitration? Why's it not – I mean characterising it as procedural seems to me perhaps to be minimising the strength of the argument you face here?

MR McLACHLAN QC:

I don't seek to minimise the argument, your Honour. On the contrary, I seek by these submissions to argue that a right of recourse to the Court is a fundamental right which is mandatory in scope. It's only subject to enlargement to the limited extent

permitted separately by section 5 in Schedule 2 and therefore it is not a matter which is integral to the arbitration agreement. That is my submission. And the point is illustrated or confirmed by those cases which I'll come to in a moment which my learned friend did not deal with in his oral opening this morning which treat attempts to by the parties to change rights of recourse to the Court by contract as severable.

WILLIAM YOUNG J:

Well, did they? Was it argued in those cases that these provisions rendered the entire submission to arbitration invalid?

MR McLACHLAN QC:

Yes.

WILLIAM YOUNG J:

Was it? I've only read one of them, this *Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478 (CA) one, I didn't think it was overly fair.

MR McLACHLAN QC:

The point is best made good by the judgment of the United States Supreme Court in *Hall Street Associates, LLC v Mattel, Inc* 128 S Ct 1396 (2008), your Honour and the cases on which it relies but there's a sequence there which I will happily take you to.

GLAZEBROOK J:

Before you do the argument that people would be trotting off to the Courts at very little procedural defect actually is provided for in clause 32(2)(iv) isn't it? Because if it's not in accordance with the agreement of the parties to the procedure then it's a ground for setting it aside subject to obviously the discretion to do so. So as long as they haven't put anything in there that's contrary to any of the procedural matters it could be the smallest little procedural matter that would enable them to come before the Court validly under article 34(2)(iv) whether they'd get much traction in the Court, of course, is another matter, but...

MR McLACHLAN QC:

Unless the agreement was in contract – in conflict with the provision of the Schedule for which the parties –

GLAZEBROOK J:
No, but I'm assuming –

MR McLACHLAN QC:
– delegate.

GLAZEBROOK J:
– it's not, but it could be the smallest little procedural thing that somebody that wasn't allowed to speak before the other person or that they weren't allowed to have their junior in the room or some matter that may be thought of relatively insignificant but it would still enable them to come before the Court.

MR McLACHLAN QC:
Your Honour, where my learned friend needs to be in order to prevail in my submission is to establish that everything, including rights of recourse to the Court is included in the arbitration –

GLAZEBROOK J:
No, I understand that point, it's just that you were postulating the terrible thing where everybody would be before the Courts for everything small, little procedural defect if that was included in the arbitration agreement, but in fact it doesn't need to be included in the arbitration agreement and that's exactly what article 34(2)(iv) allows parties to do, subject to it not being a forbidden procedural matter.

MR McLACHLAN QC:
Your Honour, if –

GLAZEBROOK J:
That doesn't derogate from the argument that it's not part of the arbitration agreement and I understand that argument. It's just that it does derogate from the dire consequences that you were postulating if it were.

MR McLACHLAN QC:
I wonder whether this point is better assisted or further assisted by reference to the key provision about separability which is article 16 of Schedule 1 because the submission of my learned friend was that that provision only deals with a case where the arbitration clause is in the main contract, the substantive contract. But in my

submission that's not so because the fundamental rule in article 16 is as my learned friend rightly said the competence-competence rule which is that the Tribunal's got jurisdiction to rule on its own jurisdiction in relation to any – including any objection with respect to the existence of validity of the arbitration agreement.

Now that is the principal purpose of article 16. That applies to all arbitration agreements whether they are within a larger contract dealing with substantive matters or here in a submission agreement and the positive reason for including it is not just the negative reason that my learned friend refers to at paragraph 2.9 of his supplemental submissions but the positive reason that in determining its scope of its jurisdiction which the arbitral tribunal is empowered to do it should look only to the arbitration agreement as defined. So your Honour is putting to me the proposition, "Oh well, but at the end of the day one could always go to the Court on procedural defects." In my submission, if that – if my learned friend's proposition is right it would also affect the jurisdiction of the Tribunal to decide on its own jurisdiction because in his submission article 16's got nothing to do with the very case that we're in where we have a submission agreement. Otherwise defects in process would infect the validity of the – or the defects in contractual provisions as to process would infect the validity of the submission to arbitration.

GLAZEBROOK J:

And the arbitrator just gets to decide on that in the same way as the courts but it certainly wouldn't be limited there I would have thought, because if, for instance, one of the parties said, "Well I only signed this because I had a gun to my head and they said if I didn't sign that, that would be the end of me," you can obviously look outside or that, "I thought I was signing my will and it turned out that it was an arbitration agreement."

MR McLACHLAN QC:

Those are all things that go precisely within the formulation as enunciated by Lord Hope in *Fiona Trust* at tab 16 in the AMINZ volume 2 of the AMINZ authorities at paragraph 35 where he says, "Allegations – the doctrine of separability requires the direct impeachment of the arbitration agreement before it can set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreements. Allegations that are parasitical to a challenge to the validity of the main agreement will not do."

ELIAS CJ:

Sorry, what tab was that?

MR McLACHLAN QC:

That was –

GLAZEBROOK J:

Well I would have thought a gun to my head is hardly parasitical but do you agree with that?

MR McLACHLAN QC:

Yes, because that goes to the very question of the formation.

GLAZEBROOK J:

But it's outside of the arbitration agreement. Sorry, I just didn't understand quite – maybe I didn't understand the submission on article 16.

MR McLACHLAN QC:

That goes to the central question posed by the definition, within the definition of arbitration agreement as to whether or not there was an agreement by the parties to submit to arbitration or certain disputes, on your hypothesis, your Honour.

GLAZEBROOK J:

No, I understood what you were saying on my hypothesis because it seems self-evident, but I didn't understand – well, maybe I just didn't understand the submission on article 16 but if it's really important, you perhaps better repeat it.

MR McLACHLAN QC:

My submission on article 16 is that article 16 applies to arbitration agreements whether or not they are in a main contract or in a subsequent submission agreement, and the reason for adopting a narrow definition or adopting the definition prescribed in the Act to determine what is an arbitration agreement for that purpose is not simply because of its effect on rights to recourse to the Courts after the order has been rendered, but also to ensure that the only questions with which the Tribunal is concerned in determining its jurisdiction at the outset are questions which go to the root of the arbitration agreement itself.

GLAZEBROOK J:
And the seat doesn't go to the root of the arbitration agreement itself.

MR McLACHLAN QC:
Seat is a provision about a determination of which law is to be the curial law.

GLAZEBROOK J:
That would seem relatively fundamental if you were deciding on an arbitration, isn't it? It's as fundamental as the choice of law if it has those consequences you're suggesting.

MR McLACHLAN QC:
Yes, your Honour. All three, to the extent that the law permits, aspects of party autonomy dealt with in the rule of *Dicey* to which I took you to are all fundamental but they're all separate. It's not necessary for the validity of an arbitration agreement that one makes any provision as to seat, for example, which is a regrettably common occurrence in practice, nor is it necessary that one makes any choice of law as to the substance of the contract, for that matter. None of those matters, if they're left entirely out of the agreement, affect the validity of the arbitration agreement itself, provided it meets the constituent elements of the definition in the Act.

Turning, then, if I may, to part 3 of my submissions, which deals with severance. The first point on this is that it is again common ground that the appeal provision does not raise any question of legality or public policy or tainting or anything of that kind. There was some discussion this morning based on questions which her Honour the Chief Justice raised with my learned friend about whether there was some distinction between invalidity and ineffectiveness. I've used the expression "invalidity" in my topographical map to distinguish it from illegality or public policy but the point we make is simply set out in my written submissions at paragraph 5.4(d) on page 12 of my written submissions in which we say that the offending provision is neither illegal nor void. It's simply not possible, as the Court of Appeal observed in *Methanex*, for the parties to confer on the Court a more extensive jurisdiction of review and the necessary consequence, we say at 5.5, is that the remaining provisions of the agreement are unaffected.

WILLIAM YOUNG J:

What's the difference between void and ineffective? Here's a clause in the submission to arbitration which cannot be given effect to. Does it matter whether you call it ineffective or void?

MR McLACHLAN QC:

It would only matter – it wouldn't matter, your Honour, were it not for the submissions of my learned friend on the effect.

WILLIAM YOUNG J:

You say it's not illegal or void but merely ineffective. I don't understand the difference.

MR McLACHLAN QC:

In my submission, the consequence of a finding of ineffectiveness is that there is no good legal reason why the Court should not proceed to enforce the arbitration agreement as defined under the Act and therefore the award rendered on the back of it, and that is exactly what has happened in those cases where ineffective attempts to deal with rights of recourse to the Courts have arisen.

So if we take *Czarnikow* the first case that your Honour mentioned to me a moment ago, which is in my submissions at tab 6, I should say immediately I don't rely on this case for its treatment on ouster clauses because it's long superseded in both the UK and New Zealand on that provision. It's quite clear now that rights of appeal on questions of law may be excluded. We know that. Also the case stated procedure which was at issue in *Czarnikow* has long been abolished since 1979 in the United Kingdom. But what happened in *Czarnikow* was that even though the Court decided that the ouster clause was contrary to public policy because, in its view, it was ousting the jurisdiction of the Court, it set aside the award but the reason for that was because in its view the arbitral tribunal was obliged to, and failed to state, a case within the course of the arbitration to the Courts on a question of law.

The reason why I rely on this case is because it's relevant and, indeed, cited as good law on the law of severance. If you look at the judgment of Lord Justice Banks at page 486, what he says, about 10 lines down, is that, "So much of rule 19 provides that neither party should apply for a special case when incorporated into an agreement is unenforceable and void," but then Lord Justice Scrutton at 490 –

ELIAS CJ:

That's probably the answer to Justice Young. Unenforceable and void. Take your pick.

MR McLACHLAN QC:

My submission is that the fact that an agreement in relation to rights of recourse to the Courts is unenforceable does not affect the validity of the rest of the arbitration agreement or the award. That's exactly what happened in *Czarnikow*.

WILLIAM YOUNG J:

But it doesn't seem to have been argued there, that the submission to arbitration was involved. I agree that all the Court has done, effectively, is strike down rule 19.

MR McLACHLAN QC:

And then referred the matter back to the tribunal, and it follows from that – and you see that from Lord Justice Scrutton's judgment.

WILLIAM YOUNG J:

I understand that. I understand that the result is that in effect rule 19 was severed, but no one argued to the contrary, did they?

MR McLACHLAN QC:

As I said in answer to your Honour's question when you put that to me on the last occasion, this comes most clearly from the way in which the point is being argued in the US authorities. It's simply, I accept, assumed but nevertheless not doubted that the rest of the clause is valid and that's why Lord Justice Scrutton refers the matter back to the arbitrators for further decision. If there were no valid arbitration agreement, he couldn't have done that.

The same approach is adopted in US law on much closer facts to our own.

ELIAS CJ:

That's because the public policy could be – the offence against public policy could be removed. It's a very different case by adopting that process. There's no offence if that course is taken in a particular case.

MR McLACHLAN QC:

Is your Honour referring to *Czarnikow*?

ELIAS CJ:

Yes. It's just an appropriate response in the circumstances of that case, whereas in this case it's being suggested that the only appropriate response is to set aside the award.

MR McLACHLAN QC:

That's right your Honour.

ELIAS CJ:

Well I'm just, I'm sorry, I'm just really indicating that I don't find it very much on point.

MR McLACHLAN QC:

It only – it is – it only goes to show that when the English Courts have had to address the question of severance in the context of a clause relating specifically to rights of recourse to the Court in arbitration, an authority which is still cited as good law on the law of severance, the answer has been we disregard that provision but we do not invalidate the rest of the arbitration agreement. That's all I say it stands for.

ELIAS CJ:

Yes, thank you.

MR McLACHLAN QC:

But the point was expressly taken in America in the *Kyocera Corp v Prudential-Bache Trade Services Inc* 341 F 3d 987 (9th Cir 2003), which you have in my learned friend's bundle of authorities at tab 8, on facts which are much closer to our own. Now there have been a series of cases in *Kyocera* and it's important to recognise that this decision, which my learned friend has helpfully included in his authorities, represents where the 9th Circuit Court of Appeal finally got to on the point reversing its previous jurisprudence.

ELIAS CJ:

Well its previous jurisprudence was reversed was it?

MR McLACHLAN QC:

Yes. Yes your Honour, because in an earlier judgment, also by the Court of Appeal, the opposite answer had been given. But it's this judgment which is approved by –

ELIAS CJ:

Sorry, I thought the other – you're not referring to the Californian Court of Appeal? Was there an earlier line of authority, federal line of authority that this differs from?

MR McLACHLAN QC:

The point is succinctly summarised in the short extract from *Redfern and Hunter* that we have included in our own set of authorities at tab 15. So I refer you, I don't need to read it all out, but I refer you to those two pages there which summarises the course of events. But for my purposes I simply rely on the fact that this decision, which my learned friend has exhibited, is the controlling authority. And what it – if one looks at that case one can see that the arbitration agreement at page 990 in the report, and you'll see that the parties expressly agreed that there would be the right of recourse to the Courts based on any of the grounds in the Arbitration Act. Then going over to 991, two, where the arbitrator's findings of fact are not supported by substantial evidence or the arbitrator's conclusions of law are erroneous.

So here is an arbitration agreement rather like ours where the parties have said, in addition to agreeing to arbitration, we want these following rights of recourse including one on fact. And the decision on the validity of that clause is reached at page 1000 in the report and if one looks at the left-hand column, this may be helpful in relation to a point your Honour the Chief Justice was putting to me a moment ago, the Court observes in the middle of that paragraph on 1000, "Pursuant to *Volt* parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs including review by one or more appellate arbitration panels," the point that my learned friend made this morning. "Once a case reaches the Federal Courts, however, the private arbitration process is complete and because Congress has specified standards for confirming an arbitration award, Federal Courts must act pursuant to those standards and no others. Private parties' freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing Federal Court review."

So there's the finding that this is something the parties cannot do because it's a question of a right of recourse to the Court. And then the Court then turns to deal with the question which was germane here, which was severability, under heading C. What, because what *Kyocera* said, in paragraph 6, was that it was integral to any agreement. "That it would never have agreed to arbitrate at all if expansive review were precluded." Pretty much the submission my learned friend made this morning. "Thus it asserts the arbitration clause should be invalidated and the parties returned to the 1987 status quo. We find it more appropriate in this case, however, simply to sever the offending terms from the dispute resolution provision that's otherwise valid."

And they then go on to hold that in doing that they're applying Californian state law and they apply the case of *Little v Auto Stiegler* Inc 29 Cal 4th 1064 (2003), which you also have in the bundle, and the decision of *Armendariz* also a Californian state decision and hold that the valid arbitration clause should be severed from the invalid review clause.

ELIAS CJ:
Was there any discussion about the importance of the provision?

WILLIAM YOUNG J:
It's pretty limited isn't it, it just says that *Kyocera* says it was important but there's no evidence to support that.

MR McLACHLAN QC:
Yes but I'll show your Honours in a moment that that point was raised in *Hall Street*, which is the case that went all the way to the United States Supreme Court, and held not to be a material distinction.

GLAZEBROOK J:
They do seem to assume that it's part of the arbitration agreement, don't they, for these purposes. So they don't make your distinction between separability and severability?

MR McLACHLAN QC:
Well my only submission to your Honours was that these were two routes to the same end. In my submission separability is the leading correct one under – as a

matter of arbitration law, but of course I'm equally content with severance. But the passage I've just taken your Honours to back at page 1000 does support my proposition that rights of review to the Court are a separate and distinct question from any matter in relation to the internal procedure of the arbitration. But that's about as far as I can take that point your Honour.

ELIAS CJ:

Say that again, that rights of recourse to the Courts are?

MR McLACHLAN QC:

A separate and distinct, that's the passage at 1000 on the left-hand column, your Honour, where they say the parties have got complete freedom to contractually modify the arbitration process by designing whatever procedures they think. But then once a case reaches the Federal Courts the private arbitration process is complete and because Congress has specified standards for confirming an arbitration award, Federal Courts must act pursuant to those standards.

ELIAS CJ:

But is that – I'm just struggling to see that this makes such a point of this being a question of recourse. Isn't it simply saying that the Federal Courts have to apply the statutes, what the statute has provided?

MR McLACHLAN QC:

Absolutely your Honour.

ELIAS CJ:

So – well one would think that all of us have to. I'm just not sure why it's – I fully understand the other points you're making about this case. It's just at the time you took us to that passage I wasn't sure whether it was just a statement of the obvious but that it wasn't, it wasn't even key, that it was in the context of a recourse provision.

MR McLACHLAN QC:

What the Court is saying is that this is not something you can contract about.

ELIAS CJ:

Well you can't contract against statutes which the Courts have to apply, that's really all it's saying, isn't it?

MR McLACHLAN QC:
I rely on the case for what it says about severance.

ELIAS CJ:
Yes, of course, yes.

MR McLACHLAN QC:
And the finding in relation to severance is at 1002, on the left-hand column, where they observe that the *Little* Court, and that's the decision in the Canadian – I beg your pardon, the Californian Supreme Court that one has in the following tab –

ELIAS CJ:
So it does record that it has to be not sufficiently central to the purpose of an arbitration process to defeat severability. Well that's the issue really here, isn't it?

MR McLACHLAN QC:
And the answer that they give is that it is not central because rights of recourse are a separate matter.

WILLIAM YOUNG J:
I thought the answer they gave was that it was because there wasn't evidence?

MR McLACHLAN QC:
Well let me then take you to *Hall* which went to the Supreme Court where that distinction was not said to be as positive.

GLAZEBROOK J:
Well they do go on a bit in fairness to say that it would be unfair in any event because the rest of the arbitration process had no infinity, they're quoting from someone I think. They're quoting from another case.

MR McLACHLAN QC:
In *Hall*, which you have in my authorities at tab 7, this is the leading decision of the United States Supreme Court currently in the field of arbitration generally.

ELIAS CJ:

Sorry, what tab?

MR McLACHLAN QC:

Tab 7 in the respondent's authority.

ELIAS CJ:

Thank you.

MR McLACHLAN QC:

Would your Honours give me one moment? So in *Hall*, as appears from the report at 1400, right-hand column, what we're concerned with is as appears from the report at 1400, right-hand column, what we're concerned with is an arbitration agreement entered into in a submission agreement after the dispute had arisen. And you see that from the right-hand column. In fact, the agreement was entered into following event to trial before the United States District Court for the District of Oregon and after an unsuccessful attempt at mediation the parties then draw up an arbitration agreement and then one paragraph the agreement provides, "The Court shall vacate, modify or correct any award, one, where the arbitrators' findings of facts are not supported by substantial evidence or the arbitrators' conclusions of law are erroneous."

Now the central issue which – and the 9th circuit Court of Appeal's applies *Kyocera* on severance. And you see that from the right-hand column of 1401 holding that under *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.

WILLIAM YOUNG J:

Sorry, what page?

MR McLACHLAN QC:

1401, your Honour, right-hand column, the first full paragraph.

WILLIAM YOUNG J:

But that wasn't an issue in this case, was it? Or was it? Looking at footnote 15(a), I think it's footnote 15(a). No, it's not, it's footnote 6, sorry.

MR McLACHLAN QC:

I'm sorry, Your Honour.

WILLIAM YOUNG J:

Yes, it didn't seek, certiorari of the 9th circuit severability analysis.

MR McLACHLAN QC:

That's correct, your Honour. The *Hall Street's* authority for the proposition that the rights of recourse provided for under the Federal Arbitration Act are exclusively and they can't extend it, but it is, in my submission and this is the way we put it in our submissions implicit in the way in which the Court approached the matter but firstly the 9th circuit Court of Appeal's followed its own jurisprudence and held that severance was possible and secondly it's implicit in the way in which the US Supreme Court approach the matter –

WILLIAM YOUNG J:

But if you look at page 97, are you aware of the bit I'm referring to?

MR McLACHLAN QC:

Can I first make the point before we get there to address an earlier concern raised by your Honour. I don't have the copy of the 9th circuit decision in Court. I'm looking at the time.

ELIAS CJ:

No, it's all right.

MR McLACHLAN QC:

But we make the point at paragraph 5.20(b) on page 19 of our submissions referring to the 9th circuit Court of Appeal that evidence was called in that case that the parties wouldn't have agreed to arbitration without the extended review clause but that was held not to be strong enough to distinguish the case from *Kyocera.*

WILLIAM YOUNG J:

So that's in the Court of Appeal?

MR McLACHLAN QC:

Yes. And in the – the Supreme Court I accepted the severance point wasn't taken.

WILLIAM YOUNG J:

Well it's recorded at page 97 of your – at the bottom of that footnote, end of that footnote.

MR McLACHLAN QC:

Yes, and we don't contend otherwise, your Honour, in our submissions but the point is that the majority by the procedural solution that it adopted – adopted an approach that was consistent with what the 9th circuit had already decided. Now I accepted the point wasn't addressed in argument and I'm not contending that it was but by remitting the case back all that again operates as in *Czarnikow* on the assumption that the arbitration agreement remains valid as the 9th circuit held. That's about as far as I can take it, but I should add that my learned friend relies on various other earlier Californian State Court decisions. My learned friend relies on *Crowell v Downey Community Hospital Foundation* (2002) 95 Cal App 4th 730 on the basis that it is said to be close to our case but in my submission the Federal Court of Appeals in *Kyocera* applied state law after *Crowell* and found resolving a dispute on the authorities what the correct approach was to take and the approach was that the attempt to expand the review had the power to deal with questions of fact was invalid and the appropriate course was to sever that clause from the valid arbitration agreement.

Now my submission, all of that, those cases are the closest your Honours have in terms of authority to the specific issue which you have to decide. They're all consistent with case advanced on behalf of the respondents to this appeal and they're inconsistent with the submissions advanced by my learned friend. Would this be a convenient moment, your Honour –

ELIAS CJ:

Well we would not normally break, we'd sit through till four, but maybe I'll make some enquiry of my colleagues, because I don't imagine we're going to finish at four. Do you want to take a break? Happy to go on? Okay, thank you.

MR McLACHLAN QC:

If one looks at the matter not simply as a question of arbitration law and rights of recourse from arbitration awards which is in my submission the way one ought to look at the matter, but by reference to the broader principles of contract law in my

submission one gets to the same result in relation to severance. And we've summarised by reference to the authorities what in our submission are the key principles in relation to the general common law rules on severance in paragraph 5.12 of my written submissions starting at page 15.

And we say that those relevant principles can be summarised in five points. The first is the question of construction. The essential question is whether the invalid provision can be excised without fatally undermining the contract. Severance will not be appropriate where the invalid promises are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature. Illegal provisions will only contaminate valid provisions if they're inseparable from and independent – dependent upon one another.

The second factor that we say is relevant is the nature of the contract. If the excision of the invalid provision changes the extent only but not the kind of the contract, the valid promises are severable. Where the invalid provision does not go to the heart of the overall transaction and leaves unchanged the subject matter of the contract and the parties' primary obligations, then severance will be appropriate.

Thirdly we say – and my learned friend accepts – that subjective intentions are irrelevant and the Court is not permitted to ask whether they would have concluded the contract but for the conclusion of the invalid term because that's exactly the inquiry that the Privy Council found in *Kearney v Whitehaven Colliery Co* [1893] 1 QB 700 (CA) was not relevant.

The fourth consideration we say is consideration. There must be good consideration in the form of the remaining promise after the invalid promise has been severed. Where the consideration cannot be attributed between them the whole agreement must fail, which is essentially what happened in *Humphries* and also in the *Quayside* case and then waiver, the Court will generally permit a party to waive an invalid provision where it's inserted for their benefit, and my learned friend laid some stress on the fact that this was the context for the decision of the Privy Council in *Kearney* but in our submission the authorities don't support the reverse proposition that severance is only available where the party for whose benefit the clause was inserted seeks it.

We say that the judgments of the High Court of Australia in *Humphries* are consistent with these principles because the consideration for the management services and the letting agency were indivisible in that case, and there was no basis upon which apportionment could be conducted.

To the extent that Justice McHugh could be said by his judgment to endorse the “but for” test we say on true construction he didn't, but if he did he isn’t speaking for the majority of the Court.

Instead, the way my learned friend now puts the case, which is different from the way in which it was put in the Court of Appeal, is on the basis of materiality and he relies on what he puts as a thought experiment to ask whether or not with confidence the parties would have entered into the agreement as modified if the issues had been pointed out to them at the time of contracting.

But we say that the thought experiment is nothing more than the “but for” test until another name. In particular, we submit that the implied terms analogy for which there is no authority is inapplicable. It’s actually contrary to the approach adopted in the authorities on severance and makes no sense in principle in the context in which severance arises, namely, the excision of an express term. Because by definition, this term was included deliberately in the contract. It’s there. So if you pose the test of an express term in the same way that you pose it of an implied term, the answer is always going to be yes. We put the term in our contract and therefore the test may lead conveniently to the result which my learned friend urges upon you, but in our submission it’s addressing a completely different issue in the implied term context which is not appropriate for severance. The question in severance is simply whether an admittedly invalid express provision may be excised so as to preserve the balance of the parties’ agreement which is otherwise unaffected by the validity and that, we say, is simply a question of construction. It’s not a matter of applying implied terms and the like.

My learned friend made some considerable play this morning with – about the need to construe the provisions here in the context of general contract law. But in my submission, if you look at other provisions of New Zealand contract law, you come to exactly the same result. Because this is most clearly illustrated with the provisions by which her Honour the Chief Justice began her questions of my learned friend this morning, and those are the provisions of the Contractual Mistakes Act, which my

learned friend very fairly accepted couldn't be relied upon as to which no appeal had been pursued because it's quite clear in that Act – and I have copies if your Honours would find it useful to have the text of the Act in front of you.

ELIAS CJ:

Yes, please. Thank you.

MR McLACHLAN QC:

So it's common ground here that the parties made a mistake. But it's equally common ground that that is a mistake for which no relief is available and deliberately so under the Contractual Mistakes Act. You'll see from section 4 of the Act that although the Act doesn't deal with matters other than mistakes – you see that from section 4(2) – it nevertheless under section 5 is a code in place of the rules of the common law and equity governing the circumstances in which relief may be granted on the grounds of mistake.

Section 6 provides that relief may be granted if in entering into the contract – so it's at the time the contract is entered into – the parties are influenced by the mistake and, turning over to page 4, (b) the mistake or mistakes, as the case may be, resulted at the time of the contract in a substantially unequal exchange of values. At the time of this contract, neither party knew what the outcome of the arbitration would be. Both parties agreed to submit their dispute to arbitration and therefore they both equally took on that burden and benefit and at that point therefore there was no substantial unequal exchange of values. Therefore the Contractual Mistakes Act is simply inapplicable to the context of this case.

ELIAS CJ:

Well, as a source of relief.

MR McLACHLAN QC:

That's correct, your Honour, but in my submission, the submission that I'm meeting here is that in some way my learned friends' submissions are consistent with general principles of New Zealand contract law. But actually when you look at all of the other statutory provisions which deal with – to the extent that Parliament has spoken about analogous relief and in particular the very type of situation with which we are concerned here, which is a mistake – you find a deliberate decision that there should

be no relief unless there's a substantial unequal exchange of values, which was a reversal of the previous common law position.

WILLIAM YOUNG J:

That would be very material if the mistake had not been recorded in the contract. I mean, if there'd been a pattern of, "Oh, we don't need to do anything about appeals because of course there's a right of appeal on questions of fact and law," so then the only way you could look at the case would be in terms of mistake and it would have the outcome that you've contended for. But here you've got a particular provision in the contract that isn't effective and it's really then what impact does that have on the contract as a whole.

MR McLACHLAN QC:

We say that the relevant statutory provisions for that purpose are the Arbitration Act and simply the Arbitration Act.

ELIAS CJ:

But that's the relief that's sought. So the Contractual Mistakes Act wouldn't be sufficient basis for relief but the relief is sought in the setting aside of the award under the Arbitration Act and is not the common mistake made by the parties evidenced in their agreement something that one has to assess the materiality of that? That's the issue, isn't it?

MR McLACHLAN QC:

In my submission, it's not a question of materiality. It's simply a question of firstly what is the arbitration agreement and secondly whether or not – if you're not with me on that, whether or not the right of recourse to the Courts is severable from the undoubtedly valid submission in and of itself to arbitration in clause 1.1.

ELIAS CJ:

Yes.

MR McLACHLAN QC:

Now, I could go on and make other points about the other statutes but that –

GLAZEBROOK J:

So materiality, severability under your test is materiality of moment or not? I understand you say a "but for" test isn't sufficient.

MR McLACHLAN QC:

Your Honour, by definition these were terms that were provided for expressly. We say that the correct approach in terms of the law of severance is not to deal with it by reference to materiality but simply to deal with, to ask yourself whether as a matter of construction these two provisions can be separated one from the other. We make –

WILLIAM YOUNG J:

Does it matter that it's an emphasis and that it appears in italics with emphasis added?

MR McLACHLAN QC:

No.

WILLIAM YOUNG J:

What's the significance of it? Do we just ignore that?

MR McLACHLAN QC:

In my submission it doesn't go to any legally relevant question in relation to severance.

WILLIAM YOUNG J:

Doesn't it suggest that regard is jolly important. I mean isn't that the most obvious, you know, we're putting it in lights. Quite why you would but I'm not sure.

GLAZEBROOK J:

I'm just wondering about an analogy with the law of frustration so we have a reserved judgment on this, I don't want to say too much in respect of it, but it's – if you had a material point that was frustrated, so say for instance you had a material term of the contract that was frustrated, would that frustrate the whole contract or would you require them to box on and claim damages? So an essential term, it's probably just picking up on Mr Goddard's submission on it being the flip side of essentiality.

MR McLACHLAN QC:

I can certainly deal with that latter point your Honour. I'm not sure whether I can help you on frustration but in relation to it being a flip side of essentiality of course it – it was seen in that way in the case to which my learned friend referred because the primary argument that was advanced in that case was precisely for relief under the Contractual Remedies Act where that is the test. But nobody – the Contractual Remedies Act is simply not available here –

GLAZEBROOK J:

I'm sorry, which case was –

MR McLACHLAN QC:

My learned friend developed his submissions this morning on this in relation to *Atrium Management* which is in his authorities at tab 2.

GLAZEBROOK J:

Thank you.

MR McLACHLAN QC:

And you'll see that the principal issue in that case, or the principal relief sought, was summary judgment on the basis that Quayside couldn't perform an essential provision in the terms of the Contractual Remedies Act, section 7, and it was only by way of subsidiary submission that the invalid provisions could then be, it was said, severed. But the Contractual Remedies Act, of course, expressly uses the language of essentiality because the question is whether or not the contract can be cancelled. But nobody is here contending that the contract is or – could be cancelled, and in my submission it's a mistake to transpose across from the question which arises at, only at the stage where it said there's been a breach and I'm entitled to cancel, to transport that, those concepts back to the question of whether or not ab initio you have an agreement, one piece of which can be severed.

So the approach that we say should be taken in this case on severance is set out at paragraph 5.23 in our written submissions. We say that severance of the provision for an appeal on questions of fact doesn't do violence to the rest of the parties' agreement because it doesn't change the essential nature of the parties' agreement to submit their dispute to arbitration and doesn't require the remaining terms to be rewritten.

WILLIAM YOUNG J:

Well it does, doesn't it? I mean it's not just a simple blue pencil change, is it?

MR McLACHLAN QC:

In my submission it is your Honour.

WILLIAM YOUNG J:

Is it?

MR McLACHLAN QC:

And I develop that in paragraph 5.23(a) because –

GLAZEBROOK J:

Can I just postulate a situation with the letting? Say, for instance, they had indicated in the contract that the letting was the main reason that they'd entered into the contract, that none of them would have entered into the contract otherwise, and then had actually split the consideration between the two, very easy to put a red – well even leaving aside why this is very important to us, they had split the consideration between the two and the letting consideration was 900,000 and the other consideration was the, 100,000 say. Well you can easily put a red line through the 900,000 and the illegal part, or the unlawful part of the contract, but is it really sensible to say that – because, and they're not necessarily linked it's easily set out – is it sensible to say well you have to box on with the rest anyway? When quite clearly the main part of the contract was the letting agency, of course, that wouldn't be the case, and I'm just taking it is because we have the facts in front of us.

MR McLACHLAN QC:

I observe your Honour it was in both *Atrium* and indeed in the decision of the High Court of Australia. The fact that the consideration couldn't be divided, and hadn't been divided, was fundamental to the judgment.

GLAZEBROOK J:

Well yes, so it could be divided, you're saying you just put a red line through it even if the consideration was one dollar and 999 thousand.

MR McLACHLAN QC:

In my submission that is consistent with the judgment of the English Court of Appeal in the Goodman case – *Goodinson*. We can look at that if need be but that's what I would rely on in answer to it, because the Judge –

GLAZEBROOK J:

Well it's rather an extraordinary proposition so you have to actually go and move into the manager's house and work for a dollar when the main reason, quite clearly, you entered into the contract was for nothing of the sort.

MR McLACHLAN QC:

In my submission –

GLAZEBROOK J:

In fact you have to buy the manager's house and live in it and manage.

MR McLACHLAN QC:

I realise your Honour is putting this purely to me on a hypothetical basis but in my submission that's a million miles from our case.

GLAZEBROOK J:

Oh no I understand that. I'm trying to get at the principles –

MR McLACHLAN QC:

Because in our case the principle is that the fundamental agreement is the agreement to arbitrate.

GLAZEBROOK J:

No, I understand the submission, I'm just – all I was saying is that I just cannot see that the principles that you set out are the case because they would have the result. But it seems to me to be absurd that somebody is held to a contract where clearly the main benefit of the contract has actually gone. Now it might be they can cancel under – they can say frustration or they can cancel under the Contractual Remedies Act, but if you can sever them off then maybe you can't say the contract is frustrated and maybe you can't cancel under the Contractual Remedies Act, no you might be able to –

MR McLACHLAN QC:

You would be able to your Honour. I think the answer to your Honour's hypothetical is that Your Honour has given yourself which is that all of those cases, all of those cases the Court's provide an obvious straightforward remedy. But that is not this case.

GLAZEBROOK J:

So you can only use severance where there's not another remedy?

MR McLACHLAN QC:

Severance has always arisen in slightly unusual factual circumstances but one circumstance in which it certainly has arisen, as I've shown your Honours, has been in the relationship between the submission to arbitration on the one hand – an arbitration agreement on the one hand and a right of recourse to the Courts, and that is the case that we are here to determine. And to adopt a general test of materiality or immateriality for that purpose would, in my submission, in this context, subvert the purposes of the Act, the Arbitration Act. Your Honour, Justice Young, put to me a moment ago that it's not a simple blue pencil exercise.

WILLIAM YOUNG J:

No, it is, I agree.

MR McLACHLAN QC:

I don't think I need to take your Honours to it, but *Goodinson v Goodinson* is a case in which the kind of point her Honour Justice Glazebrook is putting to me was put and objected is – and in my submission is good law.

GLAZEBROOK J:

I'm not sure of the dates but that may be at the time when people thought frustration needed a total failure of consideration. But what is the date of the case? I don't know whether that's linked in but – of course, I can't remember the date that those cases –

MR McLACHLAN QC:

1954 I'm told by my learned junior.

GLAZEBROOK J:
Maybe.

MR McLACHLAN QC:
It's in any event an English Court of Appeal decision. I – that's all I need to say by way of oral submissions on severability although I stand on but many don't repeat everything that I've also said about that in written submissions. So finally I need to turn to discretion, which is the final of the three grounds on which the respondents contend that even if the Court were to find that it was not with me on points 1 and 2 it nevertheless could and should uphold the award.

The first point is common ground and that is that the Court does have a discretion to uphold awards. It's a one way discretion. In other words, one can't – one doesn't have a discretion to enlarge the grounds of review under article 34 but one does have a discretion even if one finds that such a ground has been laid out, nevertheless to uphold an award and there's no limitation in the Act itself or in the international instruments from which article 34 is drawn which are, of course, the Model Law of UNCITRAL and then before that the identical language in the New York Convention on recognition of enforcement of arbitral awards. There's no limitation in any of those provisions on the discretion.

And so my first submission is that the Court should not engraft onto section 34, paragraph 1 a gloss on the statute that's not there and it would be especially undesirable to do so because as my learned friend very fairly pointed out, the grounds under article 34(2) deal with very various sets of matters in which different considerations may come into play and therefore the circumstances in which you might need to be able to use your residual discretion are difficult to envisage simply because we're concerned with one clause and not the others.

McGRATH J:
Mr McLachlan, I know you're coming to *Dallah*, but I wondered whether the word "may" hadn't there been interpreted not as a source of discretion but an indication that discretion lay outside of article 34, the use of it wouldn't be precluded in these circumstances. So what I want to put to you is do you – your view is "may" means "may" and confers the discretion, is that right?

MR McLACHLAN QC:
Yes, your Honour.

McGRATH J:
I'd be interested to tend to see how you justify – how you see that as linking up with the views of Lord Collins and Lord Mance.

MR McLACHLAN QC:
Which I shall turn to forthwith, your Honour. The travaux préparatoires which you have in the AMINZ bundles of authority show that the intention of the framers of the New York Convention and the UNCITRAL Model Law was to maintain a discretion that leaves of course the question on what basis and in what circumstances should that discretion be exercised.

Now the point about *Dallah* is this. I referred to *Dallah* in my written submissions in order to make the point that *Dallah* is the very kind of case in which the Court is centrally concerned with the right of recourse provided for in paragraph 1. Because the whole question in *Dallah* was: is the Government of Pakistan a party to the arbitration agreement on the basis of which this award was rendered or ain't it? And of course if it were not that fundamental, most fundamental element of consent on which arbitration is premised would have been absent. So – and the remarks of both Lord Mance and Lord Collins are very much made in that context. If you go first to Lord Collins at paragraph 127 in his judgment –

GLAZEBROOK J:
Can you just remind us where it is, sorry?

MR McLACHLAN QC:
Dallah is in my learned friend's appellant supplementary bundle of authorities at tab 1. It's 2011, one Appeal Cases 763 and the point on discretion is dealt with in Lord Collins' judgment at page 843, paragraph – starts at 126 but the passage that I wanted to refer your Honours to is at 127.

So he accepts following Lord Justice Mance's comments in *Dardana* that may was designed to enable the Court to consider other circumstances which might on some recognisable legal principle affect the prima facie right to have an awards set aside and then he gives another example would be where there'd be no prejudice to the

party resisting enforcement but he says it's not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement, which of course was exactly the decision which their Lordships had reached in *Dallah* because they found that the Government had not acceded to it.

But neither that passage nor the earlier passage of Lord Mance which you have at page 826 of the report starting at paragraph 67 purports to set out a general statement of all the principles that might be applicable in determining how such a discretion would be exercised and of course it doesn't, in my respectful submission because what they were concerned with was the specific case before them and the specific question of whether this party had consented to this arbitration agreement and it's entirely explicable in those circumstances that they would decide that it's difficult to see a basis upon which you could still exercise the discretion if you'd found that the party before you hadn't been a party to the arbitration agreement at all.

But in my respectful submission to the extent that it said that the remarks in *Dallah* do set forth some more general code of approach, there are dangers in that. After all, the arbitration Tribunal in *Dallah* itself had taken the opposite view about whether or not the Government of Pakistan was a party to this arbitration agreement and the English Courts in *Dallah* were only an enforcement Court. The award was rendered in Paris and had been – and was therefore subject or the arbitration agreement was subject to French law. after the Supreme Court judgment in *Dallah* the Paris Court of Appeals being the Court of the seat in the same position as your Honours' Court is today in relation to this case, took the opposite view of the – to that of the House of Lords on the question of whether or not Pakistan was a party to this agreement and upheld both the agreement and the award. I haven't burdened your Honours with the French judgment but the point is made sufficiently in *Dicey* at respondent's authorities, tab 17 of the last page, page 278, footnote 34.

GLAZEBROOK J:
What do we take from that? Are we looking at the footnote, are we?

MR McLACHLAN QC:
Well, I'm simply making the point, your Honour, that the United Kingdom Supreme Court came to a very clear view about the question that was before them and held that they shouldn't exercise their discretion to take a different view and uphold the

agreement and the award. But the Courts at the seat of the arbitration took the opposite view.

McGRATH J:
But isn't that on the main argument in the case? That's not on the fallback argument, is it?

MR McLACHLAN QC:
My submission is that that demonstrates the danger of taking too restrictive a view on discretion. The argument made in the literature following the judgment of the Supreme Court is that they ought to have given more deference to the original decision of the arbitration tribunal about the question of whether or not they had jurisdiction and they could have done that by means of the discretion and they didn't do so.

McGRATH J:
I suppose I hear what you say in relation to what's happened in Paris, but I'm particularly interested in the passage in Lord Collins' judgment at page 843 when he says that it may designed to enable the Court to consider other circumstances which might arise in some recognisable legal principle. Now, one gathers from the earlier case that estoppel was an important consideration in that respect, so I am wondering whether at least according to Lord Collins in two cases the word "may" is looking for an outside source such as estoppel, which may allow us to be taken into account, if you like. Now, that would be rather contrary to the argument you're advancing which is very much saying the word "may" is there. This is discretion conferred.

MR McLACHLAN QC:
Well, I'm grateful to your Honour for raising this because it was and is the final point that I'm intending to make by way of my submissions under subheading 2 of part 4 on the topographical map. In my submission, it is too narrow a reading of the judgments of the Supreme Court to suggest, if that's what been put to me, that that recognisable legal principle must be found somewhere else in the law outside the Arbitration Act because, for example, that wouldn't deal with the question of materiality or immateriality. In any event, the estoppel principle itself, as my learned friend mentioned this morning and took you to the provision in the Act, is a provision in the Act. That's why we have the provision requiring parties to take procedural points when they arise.

My submission is I don't dissent from the proposition that a principled approach should be taken to the exercise of the discretion. But in my submission, the proper place to look for those principles is the Arbitration Act. Here, if the award and the agreement was struck down, it would be on a basis that's directly contrary to the scheme of the Act because there was, in my submission, an agreement to arbitrate this dispute. There's no dispute about clause 1.1. There's no dispute about the arbitral process or the manner in which it was conducted. The only dispute is about the effect of a clause that the Act does not permit. So if you were to strike down the award on that basis, the consequence would be that the car interest would be achieving the very thing the Act does not allow and that would be contrary to the principles and policies of the Act and that result should, if it cannot be avoided in any other way, be avoided by use of the discretion.

So in conclusion –

ARNOLD J:
There's a reference and I haven't been able to find it since, but there was something that was read out to us by Mr Goddard this morning suggested that the approach of Lord Mance and Lord Collins was consistent with the travaux in relation to something of ...

MR McLACHLAN QC:
Your Honours have that in your bundle in the authorities. It's certainly the case, and I accept immediately, that estoppel is one example which was given from the start of a basis upon which the discretion might be exercised. I don't dissent from that. I merely submit that it's not the only basis on which the discretion can be exercised and was never stated in the travaux to be so. In fact, we could go back and look at it but you do have all the material in the bundle. In fact –

GLAZEBROOK J:
Do we have travaux from the New York Convention as well?

MR McLACHLAN QC:
You have van den Berg in relation to the New York Convention which is simply regarded as the earliest and most authoritative commentary. It's not strictly travaux. That's at tab 13. Then you have the Holtzman and Neuhaus guide to the UNCITRAL

Model Law commentary at tab 5, which is an authoritative compendium of the otherwise rather extensive travaux. I hope I don't do injustice to those learned commentators if I summarise them by saying that there was no agreement on any particular context to be ascribed to the discretion. Some particular problems, such as estoppel and immateriality were identified but it was felt that the way in which that could be best coped with was by leaving a general residual discretion and leaving the courts to develop that in cases where they felt awards, nevertheless, ought to be upheld.

So in conclusion, I simply seek an order affirming the unanimous judgment of the Court of Appeal and dismissing this appeal.

Unless there are other further questions with which I can help your Honours, those are my submissions for the respondent.

ELIAS CJ:
Thank you, Mr McLachlan. Mr Williams, we'd like to hear from you, if that's all right. We'd like to hear from you in particular, perhaps, on the question of "may", if you had anything to add on that. But we'd be grateful, given the hour, if your submissions can be relatively compressed so that Mr Goddard can have a right of reply.

MR WILLIAMS QC:
When the appellants produced their supplementary submissions, we did prepare some notes in response to that. I provided them yesterday to Mr Goddard and indicated that if the opportunity arose I would either leave them with the Court or now maybe I can speak briefly to them. He did not rise in anger against the proposition.

If the Court pleases, the first thing I have to say is that I have no wish on behalf of AMINZ to address the issue of how you exercise the discretion. We have tried to confine our observations to interpretative matters concerning the Arbitration Act and also the discretion factor.

The points that we make about the arbitration agreement, let me begin by saying that I'm afraid the search for complete logicality with that definition is going to be probably fruitless. Why do I say that? Because what we have in this Act is in the First Schedule with modifications, the UNCITRAL Model Law. Although there are differences and slight modifications, the Law Commission was at pains to try and

make the First Schedule as close as possible to the Model Law. For that reason, obviously, the definition of arbitration agreement was exactly as it is in the Model Law.

There are some modifications to the Model Law, especially in the First Schedule and more radically in the Second Schedule, which is completely non-Model Law stuff, where any kind of consistency about the definition is departed from. I shouldn't be too critical. It may be the case that in some instances the Law Commission was wanting to be different. Let me indicate, for example, the question that we've been focusing on.

If we start with the definition –

ELIAS CJ:
So your submission is that the definition is used inconsistently through the Schedules and the legislation?

MR WILLIAMS QC:
Yes. For example, if you take the definition that is in section 2 and then look at article 34(4), you'll see article 34(2), of course, refers to the invalidity of the arbitration agreement. Article 34(4) represents that it is the agreement of the parties which has not been obeyed. Then if you pass over –

GLAZEBROOK J:
But isn't that because there could be agreements on procedure that are advised during arbitration?

MR WILLIAMS QC:
Correct. So that one is reasonably understandable.

The next version you have, if you go to article 5 of the Second Schedule, it does not say in clause 5.1(a) if the parties in their arbitration agreement have agreed before the making of the award. I'll come back to that because there may be an explanation which is in a separate Schedule, and the thing that I respectfully suggest is extremely important to recall is that nothing in the Second Schedule comes from Model Law, so that in relation to appeals on the questions of law the Model Law made no provision at all for that. The Law Commission, as many of you will recall, decided that because

we have a lot of arbitrations with lay arbitrators there needed to be some protection against wayward rulings on law, but also because it was thought that the continuing access to the jurisprudence of the Court on legal matters of arbitration from a precedential point of view was relevant.

ELIAS CJ:
Just looking at clause 5, that isn't dealing with the definition?

MR WILLIAMS QC:
No, but it's – if you get to the issue that's being debated about what is the – in this case, what is the arbitration agreement, we could – it's possible to argue that the submission to arbitration that they eventually agreed has an arbitration agreement in it and it also has an agreement as to appeals. In other words, you can – the departmental advisory committee that drafted the English Act had exactly these words as to what constituted an agreement and it was said, because someone asked the question, "Does this mean you have to put it in the arbitration agreement?" Answer, "No, it can be any kind of agreement anywhere."

Now, that, I think, is relevant when you are being invited to set aside the award on the ground that the arbitration agreement is invalid, and one of the issues I think you need to confront is whether, in fact, you have two agreements here within that submission. Indeed, I think it's right to say that the Court of Appeal identified two agreements. If you look at volume 1 of the case on appeal, and I'm looking at page 79, which is the judgment at paragraph 43, you'll see they said the operative part – I should preface this by saying that they speak of the arbitration agreement. But they then identify the two elements of the agreement. The first is the agreement not to go to Court but to go to arbitration before Mr Fisher and the second is the question of appeals under the Second Schedule.

The dilemma, if I can call it that, that you're confronted with is that when you come back to article 34(2)(a) it specifically says "the invalid arbitration agreement". The definition section says that arbitration agreement means – and then the definition follows, so that a key first question that seems to me, with respect, is there an invalid arbitration agreement as opposed to a separate agreement to appeal not made under the First Schedule but in the separate optional provisions, which are found in the Second Schedule.

GLAZEBROOK J:

If we did have common mistake creating an invalidity, which we would do if we were anywhere other than New Zealand under the Contractual Remedies Act, that's assuming that the Contractual Remedies Act means what it says, which I am by no means certain about that, as I've indicated earlier. But let's assume we're anywhere else other than England. If there was a common mistake of this kind, even if there are two different agreements, but they are ones that are intrinsically linked so that you wouldn't have entered into the arbitration agreement without the common mistake in respect of the other agreement, then under the law of anywhere else, Britain, you would have a common mistake, presumably, and therefore an invalid agreement, whether you say they're two agreements, one agreement or Uncle Tom Cobley because a common mistake can affect entering into another agreement, can't it, without it actually being part of the agreement itself? So anywhere other than New Zealand we would have invalidity, so it can't be contrary to the arbitration provisions themselves or to UNCITRAL, if in fact in Britain this would actually be something that would create an invalid contract, arbitration agreement.

MR WILLIAMS QC:

That may be so but I think the Court has to apply the New Zealand Act –

GLAZEBROOK J:

Well we might do –

MR WILLIAMS QC:

These –

GLAZEBROOK J:

– but isn't the submission –

MR WILLIAMS QC:

These –

GLAZEBROOK J:

– that this is contrary to –

MR WILLIAMS QC:

Could I just finish my sentence please?

GLAZEBROOK J:

I'm sorry.

MR WILLIAMS QC:

These matters may come out at the discretionary stage. I perfectly accept that and that's one of the reasons why we are not attracted, with respect, to the narrow propositions that you have seen articulated by Lord Mance and Lord Collins because it seems that the kind of issues which are obviously of importance, that you've raised, may be far better considered when one gets down to the discretion and there are things that have cited from other jurisdictions about how the discretion can be influenced. If, for example, you conclude that in a certain case the parties got what they asked for, you can often say that any technical errors on the way will be, even if a ground was established, will not be allowed to upset the award. On the contrary, if you were to find that in relation to the discretion in this case, the whole thing miscarried because of this unfortunate and total widespread misunderstanding of the prohibition on appeals on questions of law, you may find that the bargain that was struck has not been achieved and that it's appropriate to exercise a discretion. So this is one of the reasons why we are rather firmly against the narrowing of the discretion in the way that Lord Mance and Lord Collins approached the matter –

ELIAS CJ:

You mean the suggestion that it would be highly unusual and probably impossible to give validity to a – where the arbitral agreement was invalid?

MR WILLIAMS QC:

Yes and that that coloured the whole approach because when you think about it the – what the supplicants were doing in the *Dallah* case was rather extraordinary. They were saying even if you find that Pakistan is not party to the arbitration agreement, you should exercise your discretion to uphold the award. Many people have wondered why on earth they went to England instead of France. Just as an aside, as the legend goes, one of the arbitrators was Lord Mustill in that case who made the, perhaps unfortunate, remark that, "I'm not quite certain about whether Pakistan was a party but I'm proposing to go along with my brethren," which was a very strong indication that he didn't think they were a party. But it's by the by.

All I'd like to do to try and bring this together is to tell you the outline we have here covers two matters. What is the meaning of "arbitration agreement" and whether – and how you take into account the fact that the definition of "arbitration agreement" has been used in – well the phrase "arbitration agreement" has been used in article 34(2)(a) and also that the Second Schedule allowing appeals on questions of law is a stand alone section granting an optional right to appeal. Of course with domestic arbitrations it's there automatically, unless excluded. With international arbitrations it's there unless you write it out. But to signify that the appeals matter stands outside the main body of the Act, it's worth remembering that the Act itself, as was pointed out earlier, has a prohibition against Court intervention unless it's expressly provided for in the First Schedule, and that's article 5. And article 34 says that it is the only avenue for setting aside an award. It says, "Recourse to the Court against an arbitral award may only be made by an application." So that what you are seeing here is a restriction on judicial intervention but the addition of the option from the Second Schedule of appeals. The rest of this first part of this outline we – and in an appendix, we have commented in the various provisions that my learned friend Mr Goddard points to, to try to establish that there are provisions in the First Schedule which appear to proceed on the basis that the arbitration agreement is something more expansive than the definition. With the greatest of respect we're not entirely convinced by his examples but I don't need to take you through that, especially at this hour.

What I would like to do is just to turn to paragraph 6 and repeat what I said earlier, and this is 6(b), that in our respectful view it would be unwise, to put it mildly, to adopt as a guiding principle under the discretion in article 34, what was said in the *Dallah* case because that would be dramatically narrowing the general scope of the discretion, unspecified discretion, that's in article 34. Take for example what Justice Arnold referred to, and it's very important in reference, to article 34(2)(a)(iv), "The composition of the tribunal was not in accordance with the agreement of the parties unless such agreement was in conflict with the provision of this Schedule from which the parties cannot derogate." Now if you were to take the Lord Collins view, and you looked at this contention that this arbitration agreement is invalid, you might be precluded from bearing in mind that what had happened here was something that was impermissible under this arbitration law in which is signified in article 34(2)(a)(iv) to be something that's unattractive to the legislature –

ELIAS CJ:

I wonder whether that's just overstating it because there does seem to me in article 34 to be some structure so that although you can apply to set aside if the procedure that you've agreed, or the composition of the arbitral tribunal under subclause 4 is not complied with, and it may well be that the discretion is quite wide there, it's a different matter where you've got an agreement which is not valid under the first provision and then that joins hands, it seems to me, with article 36 about which we've heard very little really but – which makes the award arguably unenforceable, so it does seem that if you are in the area of invalidity of the arbitral –

MR WILLIAMS QC:

You mean it's a more serious matter?

ELIAS CJ:

Yes, yes.

MR WILLIAMS QC:

I think the problem with that argument is that if you look at article 34(2)(a)(iv), which speaks of not being in accordance with the agreement of the parties, 34(2)(b) goes on to say that the award – it's also a ground for setting aside if the award is in conflict with public policy –

ELIAS CJ:

Yes.

MR WILLIAMS QC:

– and then over at the very end of article, of this article, it says that, "A breach of the rules of natural justice occurred, if that occurred during the proceedings, that's against the public policy of New Zealand." So it has elevated that rather more highly by saying that a breach of natural justice against the public policy of New Zealand. But I take your point. I mean if you have an arbitration agreement which, forgive me for having to say this, in itself is invalid, yes, it would be a more serious matter. But that's the problem when you start saying that arbitration agreement includes a whole lot of ancillary matters.

ELIAS CJ:

Yes I understand the argument about the, what is the content of the arbitration agreement.

MR WILLIAMS QC:

Yes, yes.

ELIAS CJ:

My point was simply that what is said in that case, the name of which escapes me, by Lord Mance and Lord Collins, may not be as restrictive because they were talking about the case where the arbitration agreement was invalid.

MR WILLIAMS QC:

True. It's just that if you, putting it colloquially, by judicial legislation said that the Collins' proposition was a key point in the exercise of discretion, it might be somewhat limiting. We've referred to a number of cases where there are other illustrations of how the discretion has been approached. It includes such things as the magnitude of the alleged procedural error; whether the departure from the agreed procedures in the end really mattered; whether the award would have been different, even if the proper procedure had been followed; all of which seems to signify an openness here so that all relevant factors, including the objectives of the Act, which are spelt out very carefully, are in play.

ELIAS CJ:

I certainly would accept, and I think they were careful to leave – well, to observe the never say never. They didn't say that it could never be, it just was that it would be extremely unusual and quite unlikely if the arbitral agreement was invalid, that one wouldn't exercise the discretion.

MR WILLIAMS QC:

Right. May I just briefly look at my note and see whether there's anything else I quickly want to mention? I think in terms of the general understanding, both in New York Convention, and the Model Law, with the discretion was to deliberately refrain from spelling out criteria and one needs to recollect that another reason for that is that both of those instruments are international instruments, so it would be a pretty dangerous thing to be trying to specify and advance what might be relevant in one jurisdiction and not another.

ELIAS CJ:

Are you referring there to something like invalidity through common mistake or something of that sort?

MR WILLIAMS QC:

No I was thinking that the way in which invalidity might occur in other places might be dramatically different to what it might be here. For example, if you had an arbitration agreement in a Muslim country, which involved a contract involving the payment of interest, that would become a matter of public policy. What I'm saying is that the New York Convention, and the Model Law left, as I think the travaux shows, the discretion uncontained and I think –

ELIAS CJ:

Doesn't it leave it to be a matter of the law applied?

MR WILLIAMS QC:

Yes it does but then you'd have to go back to the beginning of the New Zealand Act which specifies the number of objective. You, I am sure, will be reflecting on the extent to which what has happened here is inconsistent with some of the objectives of the Act including, for example, one of the objectives was to redefine and clarify the limits of judicial review of the arbitration process and arbitral awards. The factual appeals question, just for the record, was one where it was a common understanding, referred to by the Law Commission, that you couldn't appeal on purely factual grounds. What happened was that a student and genius lawyers then started saying that if there was absolutely no evidence, or if there'd been a wrong evaluation of the evidence, that would be an appeal on a question of law. The Law Commission looked at that in their review and decided that that was wrong and the statute was amended so as to catch those variations of appeals on questions of law. So it's right from the outset I think it's fair to say –

ELIAS CJ:

So that's the 10, is it?

MR WILLIAMS QC:

The 2007 amendment. It inserted the last phrase –

ELIAS CJ:

Yes, yes.

MR WILLIAMS QC:

– which you see in subsection (9).

ELIAS CJ:

Yes, and (10).

MR WILLIAMS QC:

And (10). Those were the key points that we put in our note and I'm grateful to the Court for listening to us and indeed for allowing us to be interveners. We're very happy to leave you to decide the hard parts of the case.

ELIAS CJ:

Thank you Mr Williams. Thank you for your helpful submissions. Mr Goddard?

MR GODDARD QC:

Your Honour. Just a few quick points. First this question of meaning of "arbitration agreement" under the Arbitration Act. In my submission the only sensible way that can be read, consistent with the way in which the term is used in the Act, and in particular contexts such as article 4 of Schedule 1, as including the whole of the agreement, such as the one we have here in the first few pages of volume 3 of the case on appeal. But I want to pick up a very important point that your Honour Justice Glazebrook made which is that actually it doesn't matter for the purposes of this case whether one says that for the purposes of the Arbitration Act there are two agreements in this one contract. Why is that? Well that's because of the point that your Honour made. What we have here is a single agreement entered into by the parties, the terms of which are obviously inter-dependent. Clause 1.1 is described as subject to clause 1.2. Obviously the terms –

ELIAS CJ:

Well they're also in the same clause which I would have thought was –

MR GODDARD QC:

One might, but even if one said that for Arbitration Act purposes, for some limited statutory purpose you had to pretend they were separate, first of all you have to do

contract law and work out whether they're binding or not. Article 34 sends us back to the law of New Zealand to ask whether you've got a valid arbitration agreement. So even if we were just reading 1.1 we have to ask whether it's valid for the purposes of the law of New Zealand. If 1.2 is invalid then one takes the approach that your Honour Justice Glazebrook put to my learned friend of looking at the whole of the parties' agreement, even if it's expressed in more than one document, as in *Carney v Herbert*, where there were separate mortgages and sale contracts and guarantees, and you say well, this is one transaction, one clause of it is invalid, is it severable. You go through the inquiry I've suggested on severability, you conclude that it's not, the answer is therefore that the whole of the parties' agreement is invalid including, if you want to see it as a separate arbitration agreement, in my submission that would be the wrong approach, clause 1.1 of this document. So clause 1.1 is still as a matter of the law of contract of New Zealand invalid. Then we come to apply article 34. We have an invalid arbitration agreement even if the narrower sense contended for by AMINZ and by the respondent and so all the consequences follow. So it's a fascinating interpretation exercise in relation to the Arbitration Act. I've made submissions about what I think is the better reading. My friends have made a different submission but actually at the end of the day it doesn't matter because it doesn't affect the contract law analysis of the validity of the whole of this, every limb of this contract.

Second point, C and D. Now there's a terrible risk that any case in which my learned friend Mr McLachlan and I appear in will turn into a private international law case even if anyone else in the world reading it might have thought it wasn't but I accept unhesitatingly that it is possible to have multiple laws in play including the law that governs the substance of a dispute, the law that governs an arbitration agreement, and the curial law.

But *C v D* is not authority for the proposition that the provisions of this agreement that govern arbitral procedure and the extent of recourse against the award don't form part of the arbitration agreement, and I would have thought that it was in fact better understood as supporting that proposition. The question one has to ask is, suppose there's a dispute about the interpretation of a provision in a contract that provides for arbitration, a provision governing procedure at the arbitration. Suppose it's uncertain what it means. You have to interpret it by reference, obviously, to the applicable law. What is the applicable law? The applicable law, when you come to interpret a

provision about the procedure to be followed is going to be the applicable law of the arbitration agreement.

That, of course, may run into some mandatory rules in the curial law, but when you're interpreting the agreement you look at that applicable law, and the same applies to a provision concerned with the application of article 5. Again, suppose you have an international contract. It's an international arbitration, so article 5 of the Second Schedule doesn't apply by default but you can opt into it, and suppose that the drafting is obscure and the question is whether the agreement is to have appeals without leave or to have appeals, but only with leave. That interpretation question in relation to that part of the arbitration would be governed by the law applicable to the arbitration agreement, and I don't want to spend more time on this because I really don't think it's going to be an important part of my argument, but I did want to address it briefly.

Third point, *Methanex*. Two reasons why that doesn't support the appellant's case. The first, your Honour Justice Young made this point. It just wasn't argued by any party that if clause 6 was invalid then the arbitration agreement was invalid. The Court just wasn't considering this issue.

But second, one of the reasons that everyone might have moved over it so quickly is that there's every reason to think that the exclusion of review on grounds of breach of natural justice was not material to the parties' agreement to arbitrate in that case. If one were to ask oneself, well, suppose that the parties have been told you can't exclude natural justice review of an arbitrator would they still have agreed to go to arbitration? It seems almost obvious, given the context where they wanted to keep it away from the Courts and have it as confined as possible. They would have said, well, that's a shame but we'll go with arbitration and the narrowest, legally available recourse against the award. So the context is very different. There is every reason there to think that that choice would have been made, but I don't want to make too much of that, again, because the short point is that case is not authority for any proposition in relation to severance because the point wasn't argued. My learned friend is right that the question of severance was addressed but there are two reasons why that case won't assist this Court. The first is that it's quite clear from the statement of the state law test for severance generally as a matter of contract law on page 1001 of the report – I don't need to go there – that it's a very different test from

the New Zealand contract law test. Whether it's the test I contend for or the test my friend contends for, it's a very different approach so it doesn't really help here.

Second, the point Justice Young made, it's recorded on page 1002 that there was no evidence at all to support the contention that that provision was important to it or to the parties.

WILLIAM YOUNG J:
If you look at the submission to the arbitration agreement at page 144 and compare it to the draft at 243, the words "subject to clause 1.2" have been added.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
It does sort of add emphasis to it, that yes, we're submitting this to the decision of Mr Fisher which shall be final, subject to us having a right of appeal.

MR GODDARD QC:
Yes, that's an important part of my argument.

WILLIAM YOUNG J:
Because that's subject to can't apply to the first two, the undertaking to carry out the award, it must apply only to the rights of challenge.

MR GODDARD QC:
Exactly your Honour and that's why I emphasised that that had been added was because –

WILLIAM YOUNG J:
I must have missed that.

MR GODDARD QC:
Sorry, because it underscores the deliberate linkage the parties were making between their willingness to arbitrate and the qualifications to the finality of the resulting award. So that, it would be pretty obviously linked anyway, because of the

point her Honour the Chief Justice made, that they're only consecutive clauses of the same contract, but the parties didn't rest with –

ELIAS CJ:
Subclauses.

MR GODDARD QC:
Subclauses of the same clause, your Honour is exactly right.

WILLIAM YOUNG J:
But the important thing is the finality is made subject to a right of appeal.

MR GODDARD QC:
Yes and they emphasise that by expressly providing for the scope of the right of appeal and by expressly providing that their commitment to finality was subject to that. So it really was, I'm prepared to walk across this rope if the net's there. Not I'm prepared to walk across the rope, oh, by the way is there a net. So yes that's an important part of my argument on the inter-connectedness of the two clauses and on the importance to the parties to the scope of review rights.

Next point, other contract statutes. My learned friend referred to the Contractual Mistakes Act. I don't think I need to deal again with the proposition that there are alternative forms of relief that are often available in the context of a mistake which gives rise to various defects in a contract. But to the extent that my learned friend was suggesting that in that Act and other contract statutes there can be powers to validate contracts despite a defect. Obviously that's so whether power is expressly conferred by statute but there's no such power available here and in my submission this is not, if this had been dealt with under the Contractual Mistakes Act this wouldn't have been, if the threshold for its application were met, a question this Court doesn't need to decide, and I think from what your Honour Justice Glazebrook has said, is likely to decide not to decide, then there would have been compelling reasons not to exercise the remedial discretion in a way which gave effect to a contract that was materially different from what the parties sought to agree, in circumstances where there could be no adjustment, no quid pro quo, to offset that.

It might well be that I could, in that context, have contended either that the contract should be completely set aside or that it could be rewritten to provide for an appeal before a suitable arbitral tribunal, and the Court would have that flexibility at least under the remedial discretion, it's not available in this case because we're outside those legislatively conferred discretionary powers.

Just two more points. First, in the light of the submissions made by my learned friend Mr McLachlan about article 34(2)(a)(iv), and I thought I might attempt to state more concisely my submission in response to the question from Justice Arnold this morning because I think it became a little blurred in the course of the exchange what the appellant's position is. Subparagraph (iv) deals with complaints that the procedure that was followed was not appropriate either because the agreement wasn't complied with or in the absence of an agreement because the Scheduled wasn't complied with. With the carve out that you can't complain about failure to give effect to the agreement if the agreement was in conflict with a mandatory provision of the Schedule, that's unsurprising when one pauses to think about it. It's not a very convincing complaint about the way the arbitrator conducted the arbitration that they failed to give effect to a provision of the agreement which was inconsistent with a mandatory provision of the Schedule. To say that the arbitrator followed an inappropriate procedure makes no sense if the arbitrator was required to follow that procedure by the Schedule. So that's a complaint, (iv) is a complaint that the arbitrator followed an inappropriate procedure and you can't make that complaint where they have no choice because the Schedule told them what to do. But it leaves open, and this is the point I was trying to make but I don't think I made as clearly as I should have earlier, it leaves open the possibility of an argument that the way in which the arbitration was conducted in accordance with the Schedule was so different from what was agreed that there's no valid arbitration agreement, in other words, that the Schedule requires a procedure so different from what the parties agreed that you can't understand them to have agreed to arbitrate in the way required by the Act. So that would be something you'd deal with under 1, and those are perfectly compatible possibilities.

Now, if you're talking about provisions in relation to procedure, it's going to be hard to succeed with that because you've got to grapple with the waiver regime under article 4, but if the point is taken and objection is made to say, "Well, no, this is not in accordance with our agreement," and the arbitrator says, "But I have to do this because it's in the Schedule," then a party can say, "Well, now that I understand that

our agreed procedure can't be implemented I say that there's no valid arbitration agreement," and the arbitrator would have to deal with that argument. Then in turn if an award was made contrary to the interests of that party the Court would have to deal with it, so these are two distinct issues and it's possible, although the cases on which it arises will be exceptional, that inability to give effect to an agreed procedure would mean that there was, in effect, no agreement to arbitrate.

Lastly, the scope of the discretion under article 34. In my submission, the Court can adopt an approach similar to the data approach here and deal with the scope of the discretion only in the context of an invalid arbitration agreement, because that's the case that the Court is considering here, as in data where there was no contract binding the Government of Pakistan. In that context, where there's no valid agreement to arbitrate, it's very difficult to see how the exercise of the discretion to uphold an award could ever be appropriate unless effectively you had another agreement to proceed in that way or an estoppel from raising the issue. In other contexts, it's possible that the discretion may be somewhat less restricted. That's a point your Honour the Chief Justice made in questions to my learned friend. But that's not an issue that this Court needs to decide here. What we're concerned with is the most extreme form of defect in relation to an award which is that the party against whom it's sought to be enforced never entered into a valid arbitration agreement.

Unless there's anything else I can assist the Court with, those are all the points I intended to deal with in reply.

ELIAS CJ:

Thank you, Mr Goddard. Thank you, counsel, for your help with the excellent submissions. We'll reserve our decision in this matter. Thank you.

COURT ADJOURNS 4.54 PM