

# Arbitration of Treaty of Waitangi Settlement Cross Claims Disputes

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## I Introduction

This paper discusses the arbitration and subsequent litigation of two disputes that have arisen in the context of the settlement of Treaty of Waitangi claims.<sup>1</sup> Treaty settlements are generally settled by the New Zealand Government returning land that had been wrongfully taken during the country's colonisation (or where that land is no longer in public ownership, by transferring alternative land), and paying financial compensation. Proposed and actual Treaty settlements have often given rise to further disputes in the form of cross claims between or within iwi (tribes) to the same land and resources. In some cases, the parties involved have agreed to resolve disputes in respect of the allocation of settlement proceeds through arbitration. While Māori have long participated in ordinary commercial arbitration, often as landlord in rent review arbitrations, Māori agreement to and participation in the arbitration of settlement disputes is a more recent and distinctive phenomenon.

The two arbitrations, and the public law dimensions of them in the allocation of proceeds from Treaty settlements, have been brought into view by parties seeking to challenge the awards. For convenience, I will refer to their case names from the related Court of Appeal proceedings: *Bidois v Leef* and *Ngāti Hurungaterangi v Ngāti Wabiao*. Both disputes involve long running cross claims and have led to multiple post-award litigation proceedings. The arbitration proceedings and subsequent litigation are governed by the Arbitration Act 1996 (the Act), which is largely based on the UNCITRAL Model Law.<sup>2</sup> The Act also takes

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<sup>1</sup> The Treaty of Waitangi is a treaty between the British Crown and Māori leaders that was first signed on 6 February 1840. Treaty claims typically involve Māori claimants seeking redress for breaches by the British Crown, and later the New Zealand Government, of promises made by the Crown in the 1840 Treaty to protect Māori property and other interests. There are two texts of the Treaty, one in English and one in Māori. Article 1 of the English text records that Māori cede sovereignty to the British Crown, while article 2 guarantees the protection of lands and other properties. Article 2 in the Māori text guarantees that Māori retain their unqualified chieftainship. Māori argue that, fundamentally, the Treaty has been breached by the British Crown assuming that Māori ceded sovereignty in its favour, when this is not the case under the Māori text.

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (amended 2006), enacted with some modifications in schedule 1 to the Act.

inspiration from the New York Convention 1958<sup>3</sup> (to the extent not already incorporated by the Model Law). While the Act generally applies to both domestic and international arbitrations, it enacts certain additional rules which are applicable by default to domestic arbitrations only.<sup>4</sup> The latter include a right of appeal on questions of law if the parties have adopted it in their agreement, or if one party obtains leave to appeal from the High Court or Court of Appeal.<sup>5</sup>

The arbitration of cross claims disputes has the potential to be a forerunner to wider use of arbitration for resolving intra Māori disputes, given the increasing economic interactions taking place amongst Māori<sup>6</sup> and the extensive network of land management trusts in respect of Māori land.<sup>7</sup> The paper begins by explaining the background to and procedural history of *Bidois v Leef* and *Ngāti Hurungaterangi v Ngāti Wabiao*. It then discusses some of the key issues that arise from these cases, focussing on the extent to which tikanga (Māori law<sup>8</sup>) can be accepted as law in arbitral proceedings, the availability and merits of appeals against tikanga-based awards, and the application of due process requirements in this context. I conclude that in addition to resolving disputes, arbitration should also be seen as a mechanism for securing legal expression of important Māori values. However, in order for arbitration to reach its potential, legal doctrine needs to evolve, both to give full effect to a choice of tikanga, and to ensure that appropriate standards of procedural fairness are maintained.

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<sup>3</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (1959).

<sup>4</sup> Arbitration Act 1996, s6.

<sup>5</sup> Arbitration Act 1996, cl 5(1), cl 5(5) and cl 5(6) of sch 2.

<sup>6</sup> For example, the Iwi Collective Partnership which represents the commercial fisheries interests of fourteen iwi (Māori tribes). See further <[www.iwicollective.co.nz](http://www.iwicollective.co.nz)>. These developments emerge from the rapidly expanding Maori economy, which - as measured by the value of its asset base - is currently estimated to be worth in excess of NZ\$50 billion. See Chapman Tripp *Te Ao Māori: Trends and Insights* (March 2018), available <[www.chapmantripp.com/PublicationPDFs/2018CTTeAoMaori-English.pdf](http://www.chapmantripp.com/PublicationPDFs/2018CTTeAoMaori-English.pdf)> at 2. Māori comprise approximately 15 per cent of New Zealand's population and, at 30 June 2017, was estimated to be 734,200. See Statistics New Zealand, *Māori Population Estimates*, available <[http://archive.stats.govt.nz/browse\\_for\\_stats/population/estimates\\_and\\_projections/MaoriPopulationEstimates\\_HOTPA30Jun17.aspx](http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/MaoriPopulationEstimates_HOTPA30Jun17.aspx)>.

<sup>7</sup> The potential for arbitration to be used to help resolve disputes arising from the administration of the many thousands of Māori land trusts would require amendments to Te Ture Whenua Maori Act 1993 and/or the Arbitration Act 1996.

<sup>8</sup> This is very much a shorthand description. Tikanga effectively covers both substance and process, as the Māori way of doing things. In this paper, the word tikanga is used mainly to refer to matters of substance. For more in-depth discussion, see Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast (ed) *Maori Land Law* (2nd ed, Lexis Nexis, 2004) ch 3.

## II Cross Claims Disputes

While much has been written about the Treaty of Waitangi, the focus of the literature has been on the settlement of Maori claims against the Crown and the development of the Treaty-based political and legal relationship between the Treaty partners.<sup>9</sup> The resolution of disputes between Maori claimants, as a discrete issue arising in the Treaty settlement context, has received comparatively less attention. Cross claims disputes have however been a persistent issue in the settlement of Treaty claims. As a former Minister for Treaty of Waitangi Negotiations, Hon Chris Finlayson QC, has said, “[o]verlapping claims disputes are often the hardest part of the settlement process”.<sup>10</sup> Cross claims disputes have recently come to wider attention through high profile litigation involving Auckland-based hapū Ngāti Whātua Ōrakei. The hapū is seeking judicial review of the Crown’s decision to allocate land in central Auckland to an iwi which is primarily based around the Coromandel area (but with claims to Auckland based on historic connections) as part of their settlement package.<sup>11</sup>

Processes for resolving claims against the Crown for breaches of the Treaty include inquiries before the Waitangi Tribunal,<sup>12</sup> litigation, and direct negotiations. Cross claims disputes can also be addressed in these fora, as is the case in the Ngāti Whātua Ōrakei example, where all three processes have been engaged.<sup>13</sup> The following case studies illustrate that arbitration is a further possibility.<sup>14</sup>

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<sup>9</sup> See, for example, Matthew SR Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008); Janine Hayward and Nicola R Wheen (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, 2012); Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, 2016).

<sup>10</sup> Hon Chris Finlayson QC “Treaty of Waitangi and Resolution of Indigenous Disputes” (paper presented to AMINZ-ICCA International Arbitration Day, Queenstown, 20 April 2018).

<sup>11</sup> The Supreme Court granted leave to appeal the High Court’s strike out determination: *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 24. The appeal was heard by the Supreme Court in May 2018 but as at the time of writing the Court has not given its decision on the matter. By way of disclosure, I am a member of Ngāti Whātua Ōrakei.

<sup>12</sup> The Waitangi Tribunal is a standing commission of inquiry that investigates Māori claims for breach of the Treaty of Waitangi and makes recommendations to the Government as to how they may be resolved. It was established under the Treaty of Waitangi Act 1975.

<sup>13</sup> The procedural history is discussed by the Court of Appeal: *Ngāti Whātua Ōrakei Trust v Attorney-General* [2017] NZCA 554.

<sup>14</sup> For an example of parties designing a dispute resolution process that had the primary features of arbitration, but then expressly stating that the process was not arbitration, see *Te Runanga o Ngāti Manawa v CNI Iwi Holdings Limited* [2016] NZHC 1183. The proper characterisation of the process did not in the end affect the outcome in the litigation, and a ruling was not given on it.

## *A Agreed Dispute Resolution Procedures*

In *Bidois v Leef* and *Ngāti Hurungaterangi v Ngāti Wabiao*, the parties designed fairly elaborate and bespoke dispute resolution procedures for addressing their respective cross claims. Both sets of procedures reflect the cultural context of the disputes.

### *(i) Bidois v Leef*

The parties in *Bidois v Leef* were the representatives of two hapū (subtribes), Pirirakau and Ngāti Taka, of the iwi Ngāti Ranginui.<sup>15</sup> The dispute between them concerned whether Ngāti Taka had mana whenua (tribal authority) over certain land between 1840 and 1865, or whether mana whenua was held by Pirirakau on the basis that Ngāti Taka was not and never had been a hapū in its own right separate from Pirirakau. Although it seems that this had been contentious between the two groups for many years, a formal status determination was needed for the purpose of a then anticipated settlement of Ngāti Ranginui's Treaty of Waitangi claim, since that settlement would be shared amongst the iwi's hapū.

The eight hapū of Ngāti Ranginui devised an umbrella process for resolving disputes as to cross claimed resources, the “Confirmed Mana Whenua Process for Hapū of Ngāti Ranginui”. This process envisaged a staged approach starting with identification of the cross claims, negotiation, mediation, and if necessary, adjudication before a three member panel. While standard in tiered dispute resolution processes, the inclusion of negotiation at the outset recognises the “kanohi ki te kanohi” (face to face) principle of dispute resolution which is encouraged by Māori custom. Adjudication was very much a last resort. Yet cultural preferences were still relevant at this stage also; it was envisaged that any adjudication would be conducted by panel members who were “fluent in Te Reo Māori [the Māori language], and ... knowledgeable on matters of tikanga, including in particular how mana whenua is held and exercised by Hapū.” The adjudicators were expressly required to be independent of the disputing hapū.<sup>16</sup>

In the event, the only mana whenua dispute to emerge was the one between Pirirakau and Ngāti Taka. They agreed to refer their dispute to what was termed a “mana whenua

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<sup>15</sup> For discussion of tribal structure and the place of hapū within Māori society, see e.g. Erueti, above n 8, E T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago LR 449 at 451.

<sup>16</sup> See *Leef v Bidois* [2017] NZHC 36 at [24] and [52].

arbitration process” before two arbitrators. They also agreed to dispense with legal representation, and required the arbitrators:<sup>17</sup>

- (a) To listen, to question, to enquire, to consult at their discretion.
- (b) To make a decision that will be final and binding on both parties.
- (c) To ensure the process is conducted in a Rangatira ki te Rangatira [chiefly] manner.

Each party then appointed an arbitrator. One was a retired Māori Land Court judge, and the other a Māori educator at a Polytechnic. The proceedings were informal. For instance, during the hearing, witnesses were neither sworn in, nor cross-examined. Documents presented by the parties were placed on a table with no time for the non-producing party to read them, and submissions were given orally. The tribunal found that Pirirakau held exclusive mana whenua over the contested land during the relevant period and issued its award on that basis. All eight Ngāti Ranginui hapū then agreed on the allocations of the proposed settlement proceeds. Specifically, it was agreed that Pirirakau would be allocated a cash settlement of NZ\$6.56 million together with certain blocks of land and shares in land, and Ngāti Taka would be allocated NZ\$1.4 million and other blocks of land and shares. The eight hapū (including Ngāti Taka) also signed a deed of settlement with the Crown to record the proposed settlement of Ngāti Ranginui’s Treaty claim. Although it was a party to the deed, Ngāti Taka was dissatisfied with the proposed allocations, and commenced proceedings in the High Court challenging the award.

(ii) *Ngāti Hurungaterangi v Ngāti Wahiao*

The second dispute involved cross claims over the ownership of ancestral lands known as Whakarewarewa and Arikikapakapa in Rotorua, including the famed Whakarewarewa geothermal springs reserve.<sup>18</sup> The lands were previously in Crown ownership for 115 years, following “less than scrupulous” acquisitions from the former customary owners.<sup>19</sup> Ngāti Whakaue and Ngāti Wahiao (representing various hapū interests) each claimed that they were the exclusive beneficial owners of these lands. A trust was established by deed (Trust

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<sup>17</sup> See *Bidois v Leef* [2017] NZCA 437 at [13] – [14].

<sup>18</sup> Related litigation has also arisen with respect to a cultural institute on the land: *Mitchell v Mitchell and others* [2017] NZHC 1759.

<sup>19</sup> Waitangi Tribunal *He Maunga Rongo – Report on Central North Island Claims* (Wai 1200, 2008) vol 2 at 560, quoted in *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378.

Deed)<sup>20</sup> to hold the land until the ownership issues could be resolved. The Trust Deed sets out a comprehensive dispute resolution process. As with the Ngāti Ranginui umbrella process, arbitration was viewed as a final option, following after the identification of claims, then negotiation, and mediation. The Deed also provides that any arbitral tribunal will “have regard to mana whenua ... determined according to tikanga”.<sup>21</sup>

Once the parties recognised that resolution of their cross claims by agreement was unlikely, and that mediation was unlikely to assist either, they moved to establish a three member arbitral tribunal to determine which of them held mana whenua at the relevant time. The tribunal comprised a former senior appellate judge and two respected Māori elders. After a hearing that spanned over several months (with 13 sitting days), the tribunal rendered an award that apportioned the lands jointly and equally between Ngāti Whakaue and Ngāti Wahiao. It left the parties themselves to work out the practical effects of its decision, but also reserved its ability to issue further decisions or directions if the parties were unable to reach agreement on those matters.

#### *B Post Award Litigation*

The awards from both arbitrations were challenged, on different grounds, in the courts through extensive post award litigation. In both cases, the litigation involved decisions at the High Court, Court of Appeal and Supreme Court levels.

##### *(i) Bidois v Leef*

In *Bidois v Leef*, it was disputed whether the parties had in fact agreed to submit to arbitration, or whether they had agreed on expert determination instead. Given the references to “arbitration” and “arbitrators” in their agreement, Justice Andrews ruled in favour of arbitration.<sup>22</sup> Her Honour also endorsed arbitration as a means of resolving the parties’ dispute: “there was no evidence that ‘the very nature of the dispute’ favoured the determination process being one ‘involving Māori values rather than western-type ... procedures’”, as was argued (belatedly) by Pirirakau. More significantly, it was disputed

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<sup>20</sup> Formally, the Deed to Introduce Vesting Legislation in Relation to Whakarewarewa Valley Land and Roto-a-Tamaheke Reserve Between Ngāti Whakaue, Tuhourangi Ngāti Wahiao, the Crown and the Trustees of Te Pūmāutanga o Te Arawa Trust, dated 5 August 2008.

<sup>21</sup> Trust Deed, cl 15.4 of sch 2.

<sup>22</sup> *Leef v Bidois* [2013] NZHC 1349 at [50].

whether the parties had entered into an “arbitration agreement”, which requires that their dispute be in respect of a “defined legal relationship”.<sup>23</sup> Such a relationship exists if there is the possibility of one party obtaining a legal remedy against the other.<sup>24</sup> In this case, the issue of which party had mana whenua between 1840 – 1865 in and of itself had no legal consequence, but clearly it was always intended that the decision on mana whenua would then inform the allocation of the proceeds from its Treaty settlement. The Court however reasoned that because the award could not directly determine that allocation (which was instead the subject of the separate umbrella process for all eight hapū), there was no arbitration agreement under the Act; rather, it was an agreement that provided for the resolution of a historical, cultural dispute.<sup>25</sup>

The finding that there was no arbitration agreement was sufficient to dispose of Ngāti Taka’s application, and the award was set aside. Nonetheless, the High Court briefly considered Ngāti Taka’s breach of natural justice claims. It accepted that there were grounds to challenge the award for apparent lack of impartiality and independence of Pirirakau’s appointee to the tribunal. He was married to a member of the Pirirakau hapū, and his wife’s cousin gave evidence as a witness for Pirirakau. The arbitrator failed to disclose these conflicts before the hearing. The Court also accepted that other procedural failures breached natural justice principles, including the tribunal’s failure to accord Ngāti Taka an opportunity to respond to documentary evidence, Pirirakau’s failure to provide copies of documents to Ngāti Taka, and Pirirakau’s ex parte post-hearing communications with the tribunal.<sup>26</sup>

The dispute then proceeded to the Court of Appeal, which reinstated the award. It differed from the High Court by finding that a defined legal relationship could exist in circumstances where only part of a dispute is referred to arbitration; this was particularly so because “parties may seek independent resolution by arbitration of a preliminary matter, before continuing with alternative negotiation processes”.<sup>27</sup> On this basis, the arbitration of the mana whenua issue was regarded as an integral element of the wider, agreed dispute

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<sup>23</sup> Arbitration Act 1996, s2. The Act derives the definition from the New York Convention, art II(1).

<sup>24</sup> *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 (HC) at 85; affirmed *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at [60].

<sup>25</sup> *Leef v Bidois* [2013] NZHC 1349 at [64] – [67].

<sup>26</sup> At [122] – [124].

<sup>27</sup> *Bidois v Leef* [2015] NZCA 176 at [50].

resolution process for determining the allocation of the settlement proceeds. There was therefore an agreement to arbitrate a dispute in respect of a defined legal relationship.<sup>28</sup>

Having upheld the validity of the arbitration agreement, the Court of Appeal then rejected Ngāti Taka's procedural complaints. The Court held that the right to an impartial and independent arbitrator is non-mandatory.<sup>29</sup> It then held that Ngāti Taka had waived its right to object to the apparent lack of these qualities through its failure to challenge Pirirakau's appointee within the statutory timeframes (of 15 days, for the challenge to be put before the tribunal itself, and 30 days after the tribunal's decision for a request to the High Court to decide the matter).<sup>30</sup> Other transgressions were considered insufficient to warrant interference with the award.

Ngāti Taka subsequently issued further proceedings seeking to limit the effect (rather than validity) of the award. The Court of Appeal held that the arbitration replaced the umbrella process, that the settlement deed was binding on the parties, and that in any event, the umbrella process did not provide for the adjustments that Ngāti Taka was now seeking.<sup>31</sup> Given that Ngāti Taka's challenges in respect of the award appear to have been exhausted, the next step in the settlement process is likely to be the passing of the relevant legislation giving effect to the settlement deed.<sup>32</sup>

(ii) *Ngāti Hurungaterangi v Ngāti Wabiao*

In *Ngāti Hurungaterangi v Ngāti Wabiao*, The Court of Appeal granted Ngāti Whakaue special leave to appeal the award to the High Court on four questions of law.<sup>33</sup> These included the questions whether the tribunal erred in failing to make findings supported by reasons as to

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<sup>28</sup> At [48] and [50] – [51].

<sup>29</sup> This view has been questioned. See Amokura Kawharu and Anna Kirk “Arbitration” [2016] New Zealand Law Review 615 at 625 - 629.

<sup>30</sup> *Bidois v Leef* [2015] NZCA 176 at [82]. See Arbitration Act 1996, art 13 of sch 1. In contrast to the Court of Appeal's approach, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration considers that some conflicts of interest are non-waivable according to its “Non-Waivable Red List”. These include conflicts arising from situations where there is an identity between a party and the arbitrator and where the arbitrator has a significant personal interest in one of the parties; arbitrators should decline to act in these situations. Waivable Red List conflicts include situations where the arbitrator has an interest because a close family member has a significant financial interest in the dispute; informed consent is essential in respect of such conflicts.

<sup>31</sup> *Bidois v Leef* [2017] NZCA 437 at [29].

<sup>32</sup> Tauranga Moana Iwi Collective Redress and Ngā Hapū o Ngāti Ranginui Claims Settlement Bill 84-2 (2015).

<sup>33</sup> *Ngāti Hurungaterangi and others v Ngāti Wabiao* [2014] NZCA 592. The High Court had earlier declined leave to appeal: *Ngāti Hurungaterangi and others v Ngāti Wabiao* [2014] NZHC 846; and declined leave to appeal against that determination, *Ngāti Hurungaterangi and others v Ngāti Wabiao* [2014] NZHC 2311.

beneficial ownership,<sup>34</sup> and whether the tribunal correctly applied tikanga regarding the consequences of legal title being acquired by the Crown. These two questions formed a major part of the High Court’s analysis.

Under the Act, an award must “state the reasons upon which it is based”.<sup>35</sup> In addition, the Trust Deed also specifically requires the tribunal to provide a reasoned award.<sup>36</sup> Despite these requirements, and the substantial evidence that the tribunal was presented with during the hearing, the tribunal made relatively few findings in relation to that evidence, and its principal reasons were set out in only five paragraphs of its award. The High Court described the award in this respect as “undeniably sparse” and, from the perspective of resolving the dispute between the parties, “regrettable”.<sup>37</sup> Nonetheless, the High Court was prepared, in light of the nature of the dispute and issues before the tribunal, to hold that the reasons were nonetheless sufficient. Justice Moore particularly noted that some of the evidence was contradictory and that the issues would be difficult to resolve by ordinary judicial methods, especially given the sensitivities attached to examining and questioning tribunal histories.<sup>38</sup>

The issue as to whether the tribunal made an error by misconstruing tikanga was also the subject of extensive argument. Ngāti Whakaue claimed that the tribunal had incorrectly applied tikanga in finding that mana whenua had passed from it to the Crown, on the basis that mana whenua could not, as a matter of tikanga, be held by the Crown. The Court disagreed that the tribunal had made such a finding, and then held that even if it did, the question raised was one of fact rather than law and therefore outside the scope of the appeals provision in the Act. It accepted that tikanga can be recognised and given effect under the common law, but on the condition that the tikanga is proved by appropriately qualified experts (in the same way as other bodies of law which are unknown to the common law are subject to requirements of evidence and proof). The Court explained that the exception to this rule is when the custom is, by frequent proof, “notorious” to the court, in which case the court can take judicial notice of the custom.<sup>39</sup>

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<sup>34</sup> It was apparently not questioned whether the reasons issue was properly raised as an appeal on a question of law, rather than as a matter for the court to consider in an application to set the award aside, as suggested by the New Zealand Law Commission in *Arbitration* (1991) at [388].

<sup>35</sup> Arbitration Act 1996, art 31(2) of sch 1. The statutory obligation applies “unless the parties have agreed that no reasons are to be given”.

<sup>36</sup> Trust Deed, cl 15.8 of sch 2.

<sup>37</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [120].

<sup>38</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [136].

<sup>39</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [176].

As in *Bidois v Leef*, the litigation continued into the Court of Appeal, after the High Court granted leave to appeal its ruling on all four questions of law that had been the subject of the appeal to that Court.<sup>40</sup> It was clear from the outset however that the Court of Appeal would focus on the reasons issue, which it described as the “primary challenge” that was material to the High Court decision and therefore “at the heart” of Ngāti Whakaue’s appeal.<sup>41</sup> This is a pity in that the Court of Appeal did not address the High Court’s view on the important issue of the treatment of tikanga. The High Court’s view is problematic, as discussed below.

The Court agreed overall with the High Court on the general principles pertaining to reasoning in arbitral awards, and accepted that the extent of reasoning required in a given case depends on the context of the dispute and does not have to conform to a judicial standard. In this case, given the profound differences between the parties, the Court regarded the correct identification of the issues, and specific engagement with each of them, as essential.<sup>42</sup> The Court also demanded a standard of reasoning that was at least close to a judicial standard. It remarked that the appointment of a retired judge to the arbitral tribunal “reflected an expectation that the panel’s reasons would be expressed with the depth and substance necessary to mark the solemnity of the task and stamp the award with the mana [authority] of a judicial equivalent”.<sup>43</sup> The Court disagreed with the High Court’s view that the reasons in the award were sufficient, and set aside the award.

The Court of Appeal went to some lengths to explain the rationales for the obligation to give a reasoned award. Principally these are ensuring that decisions are logical and based on evidence, and enabling parties to understand why their expectations were met or not. The Court referred to English authority<sup>44</sup> to the effect that the duty to give reasons is a function of due process, and therefore justice. The Court also explained that reason giving relates to the right to appeal; reasons “must not be so economical that they deprive a party of having a question of law considered by the High Court if necessary”.<sup>45</sup> This is ironic, given the High Court view that tikanga-based awards cannot be appealed (unless the custom is notorious), as they only raise questions of fact.

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<sup>40</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 3156.

<sup>41</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429 at [7], [9] and [108].

<sup>42</sup> At [54].

<sup>43</sup> At [71].

<sup>44</sup> *Flannery v Halifax Estate Agencies Ltd* [2001] 1 WLR 377 (CA).

<sup>45</sup> *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429 at [69].

### III Substance and Procedure in Arbitration

#### *A Tikanga Māori*

The issues in dispute in the cross claims arbitrations relate to customary ownership, which can only be resolved through the application of customary law. As a result, one of the common features of the proceedings is that the parties have chosen to apply tikanga as the proper law. Ngāti Ranginui agreed that, for the purposes of mana whenua disputes, the test for mana whenua is:<sup>46</sup>

... the mana that Hapu traditionally held and exercised over the land, determined according to tikanga including the demonstration of ahi ka roa [occupation] from 6 February 1840 through to and including the Raupatu [confiscation] of more than 290,000 acres in May 1865.

In the Trust Deed for the Whakarewarewa and Arikikapakapa lands, relevant tikanga principles are listed in the dispute resolution schedule, along with possible sources of evidence, as guidance:<sup>47</sup>

- (a) Mana whenua is the mana that Iwi/hapu/individuals traditionally held and exercised over the land, determined according to tikanga including, but not limited to, such factors as: take whenua [conquest]; demonstration of ahi kaa roa, ahi tahutahu or ahi mataotao [forms of occupation];
- (b) Evidence of mana whenua may be derived from a range of sources of knowledge including: oral korero [oral history], including whakapapa [genealogy], waiata [song] and tribal history; and written sources, Native Land Court evidence and decisions, research reports, and other records;

The choice of tikanga in these cases was the obvious choice, because (as noted) the issues in dispute relate to customary ownership.<sup>48</sup> Apart from this, the choice also reflects an enduring and obvious desire for tikanga to have a meaningful role in the determination of Māori rights and responsibilities. A sense of Māori frustration about the relative inability

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<sup>46</sup> As quoted in the Court of Appeal judgment, *Bidois v Leef* [2015] NZCA 176 at [10].

<sup>47</sup> Trust Deed, cl 15.4 of sch 2.

<sup>48</sup> In addition, the underlying Treaty breach arose from the Crown's interference with Māori land that was held at the relevant time according to tikanga.

for tikanga to have that role is reflected in Moana Jackson’s comment, made nearly 30 years ago, that “colonization demanded and still requires that Maori no longer source their right to do anything in the rules of their own law”.<sup>49</sup> Since then, the New Zealand courts have endeavoured to accord tikanga legal effect. The Supreme Court has said that tikanga forms part of the “values” of New Zealand common law<sup>50</sup> given that the common law was introduced into New Zealand only “so far as applicable to the circumstances of the colony”.<sup>51</sup> Customary law therefore continues until extinguishment by consent or legislation. Customary rights to property, for example, have been recognised as pre-existing rights that are unaffected by the introduction of the common law into New Zealand. They continue to exist and are protected under the common law until lawful extinguishment.<sup>52</sup>

In situations where there has been clear statutory extinguishment of tikanga, the underlying principle may still be a relevant consideration, as has been held in relation to criminal sentencing.<sup>53</sup> Nonetheless, the specific recognition of tikanga as law within New Zealand law is subject to evidence and proof, satisfaction of certain criteria (existence since time immemorial, reasonableness, certainty, continuity and non-extinguishment), and the conditions that the particular rule or principle must not be contrary to statute or to fundamental principles and policies of New Zealand law.<sup>54</sup> If parties to litigation seek to apply tikanga, then they will face the prospect that the relevant custom will not satisfy these restrictive criteria, or will come into conflict with other competing legal principles.<sup>55</sup>

On the other hand, it is widely accepted that arbitrating parties can choose to apply non-state laws in arbitration, either in combination with national law,<sup>56</sup> or as a stand-alone

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<sup>49</sup> Moana Jackson “The Treaty and the Word: The Colonization of Māori Philosophy” in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1 at 6.

<sup>50</sup> *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias J. Tikanga may also form part of New Zealand law through statutory incorporation, as under the Te Ture Whenua Maori Act 1993.

<sup>51</sup> The English Laws Act 1858, s1 and English Laws Act 1908; preserved in Imperial Laws Application Act 1988, s5.

<sup>52</sup> *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [85]-[86] per Elias J. See also e.g. Tipping J at [183], customary title “was integrated into what then became the common law of New Zealand”; *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 167.

<sup>53</sup> See *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

<sup>54</sup> *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95] per Elias J.

<sup>55</sup> Infamously, it was held in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 that “there exist no known principles [of Māori law] whereupon a regular adjudication can be based” (at 78 per Prendergrast CJ). Although this view is discredited, it remains uncertain whether or when tikanga will be viewed by the courts primarily as law or as a relevant consideration. The latter approach was evident in determining a procedural issue of standing (therefore a matter of the court’s own process) in *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423. See further Jones, above n 1, ch 2 and ch 4.

<sup>56</sup> As in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafra* [2006] EWCA Civ 1529, [2007] 1 Lloyd’s Rep 193, discussed below at n 91 and accompanying text.

system of “rules of law”.<sup>57</sup> The same is true for tikanga, as a form of non-state law. Opting for arbitration, and choosing tikanga as the applicable proper law, means that parties can avoid having to establish the recognition of tikanga according to New Zealand legal standards. That is, disputing parties would not have to prove that a particular principle of tikanga meets the common law rules for recognition by that law, they can apply it directly in its own right as an independent system.<sup>58</sup>

The application of tikanga in arbitration has clear parallels with religious arbitrations in which the tribunal is tasked to apply religious codes in order to resolve disputes between members of the particular religion. The Beth Din courts have operated in this manner for over 100 years in England,<sup>59</sup> relying on the Arbitration Act 1996 (Engl) and its predecessors to make binding decisions in respect of civil disputes applying Jewish law.<sup>60</sup> In 2012, the Kuala Lumpur Regional Centre for International Arbitration launched its i-Arbitration Rules in order to provide a Shari’a compliant arbitral process for resolving disputes arising from the significant Islamic finance industry.<sup>61</sup> In religious arbitrations, the party autonomy principle that underpins arbitration law enables parties to opt out of mainstream litigation and instead rely on their own rules and procedures for resolving disputes. Yet as Michael Helfand notes, religious arbitrations “are more than expedient attempts to resolve a particular controversy; they are embedded in a much larger communal infrastructure and incorporate shared values into the selected method of dispute resolution”.<sup>62</sup>

The application of tikanga in arbitration also has parallels with the application of international business principles or (new) *lex mercatoria* in international commercial arbitration, although the use of this particular form of non-state law has given rise to a substantial academic debate. In 1964, Berthold Goldman wrote a celebrated article in which he described and promoted the concept of *lex mercatoria* as a collection of transnational rules of contract. He identified arbitral tribunals as having an important role

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<sup>57</sup> E.g., UNCITRAL Model Law, art 28(1).

<sup>58</sup> Arbitration Act 1996, art 28(1) sch 1.

<sup>59</sup> See Maria Reiss “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should be Non-Binding” (2009) 26 *Arizona J Int’l & Comp L* 739 at 740. The parallels between tikanga and religious arbitrations are discussed further in Bret Gower *Arbitral appeals on questions of law: the treatment of tikanga* (University of Auckland LLB Hons dissertation, January 2018).

<sup>60</sup> Arbitration Act 1996, s 46; *Halpern v Halpern* [2007] EWCA Civ 291, [2008] QB 195, [2007] 3 WLR 849: “if parties wish some form of rules or law not of a country to apply to their contract, then it is open to them to so agree, provided that there is an arbitration clause”, at [38] per Waller LJ.

<sup>61</sup> Discussed in Mel Andrew Schwing “The KLRCA I-Arbitration Rules: A Shari’a Compliant Solution to the Problems with Islamic Finance Dispute Resolution in Singapore and Malaysia?” (2017) (3) *J Int’l Arb* 425.

<sup>62</sup> Michael A Helfand “Arbitration's Counter-Narrative: The Religious Arbitration Paradigm” (2015) 124 *Yale LJ* 2994 at 2999.

in the ascertainment and development of these rules.<sup>63</sup> In later writing, Goldman defined the *lex mercatoria* according to its objects and its sources, both of which had to be transnational, and its customary and spontaneous nature.<sup>64</sup> Some writers have defined the sources more widely,<sup>65</sup> or the “law” itself as a method of decision making that requires arbitrators to undertake a comparative analysis of national laws.<sup>66</sup> Others have doubted the existence of laws outside of the law making framework of the state, questioned the capacity of the *lex mercatoria* to adhere to jurisprudential ideals about law, and questioned whether the *lex mercatoria* can anyway serve the functions of law.<sup>67</sup> In practice, commercial parties do not often choose the *lex mercatoria* to govern disputes, although it appears increasingly to have a role as background law, reflecting the internationalising instincts of international arbitrators.<sup>68</sup>

One of the specific criticisms of the *lex mercatoria*, recently in the context of claims to arbitration’s existence as a legal order,<sup>69</sup> has been that without a system of arbitral precedent the rules will be applied inconsistently, in conflict with the rule of law principles that rules must be known in advance, and that like cases must be treated alike.<sup>70</sup> Under this view, although arbitrators may habitually apply trade usages and customs, those usages and customs lack the qualities that are required of law. Other commentators have argued that in practice reasonable consistency in arbitral decision making (whether based on *lex mercatoria* or national law) is achieved either through a practice of persuasive precedent,<sup>71</sup> or through the common culture that exists amongst international arbitrators.<sup>72</sup>

In the case of *tikanga*, Goldman’s conception of the *lex mercatoria* as being customary and spontaneous (that is, uncodified) probably reflects a fairly common understanding of the way that Māori custom operates. Sources of *tikanga* include both oral and written sources.

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<sup>63</sup> Berthold Goldman “Frontières du droit et *lex mercatoria*” (1964) *Archives de philosophie du droit* 177.

<sup>64</sup> Berthold Goldman “The applicable law: general principles of law – the *lex mercatoria*” in Julian D M Lew (ed) *Contemporary Problems in International Arbitration* (Springer Science+Business Media, Dordrecht, 1987) 113 at 113-114 and 116.

<sup>65</sup> Ole Lando “The *Lex Mercatoria* in International Commercial Arbitration” (1985) 34(4) *ICLQ* 747.

<sup>66</sup> Emmanuel Gaillard “Transnational Law or a Method of Decision Making?” (2001) 17(1) *Arb Int’l* 59 at 70.

<sup>67</sup> E.g. F A Mann “The Proper Law in the Conflict of Laws” (1987) 36 *ICLQ* 437 at 447-448.

<sup>68</sup> See Joshua Karton *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, Oxford, 2013) at 128-131.

<sup>69</sup> Notably, by Emmanuel Gaillard *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010).

<sup>70</sup> E.g. Thomas Schultz “The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences” (2011) 2 *JIDS* 59 at 75-76, and 77.

<sup>71</sup> See e.g. Fabien Gélinas “Arbitration as transnational governance by contract” (2016) 7(2) *Transnational Legal Theory* 181.

<sup>72</sup> See e.g. Joshua Karton *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, Oxford, 2013).

To some extent it varies across different tribal territories, and it evolves over time, but there are also “large areas of commonality” and agreement on fundamental principles.<sup>73</sup> Ad hoc arbitration seems well suited to the tasks of identifying and applying the applicable tikanga, partly because arbitrators do not carry the same public obligations of judges to apply law consistently with precedent, but mainly because parties can appoint people who are knowledgeable about tikanga as arbitrators to analyse the sources within the relevant context.

Another frequent criticism has been that the *lex* lacks sufficient content to be regarded as a proper “system” of law. For instance, Lord Mustill wrote skeptically in the mid-1980s that the 20 key principles he could discern from the initial 25 years of experience with the *lex mercatoria* was a “modest haul”.<sup>74</sup> Since then however, detailed rules have developed around the core ideas of *lex mercatoria* through scholarship and comparative law projects.<sup>75</sup> With respect to Māori custom, tikanga encompasses the norms and principles that are necessary for regulating human relationships.<sup>76</sup> It is a “genuine body of law, entitled to respect as such”.<sup>77</sup> In the cross claims disputes between hapū, the relevant norms are a more limited sub-set of norms associated with rights to land. As noted earlier, in both the arbitrations discussed in this paper, the relevant tikanga principles were referred to or explained in the documents underpinning the arbitral processes, and were known and accepted by the parties in advance. These experiences of utilising tikanga through arbitration may support the re-vitalisation of Māori law and enable new principles to be built up around the system’s central norms.

It is difficult to see what principled or practical objections there might be to the use of tikanga in the arbitration of disputes amongst Māori. Choosing to be governed by tikanga is an expression of indigenous self-determination. The scope of the right to self-determination of indigenous peoples is contested and is sometimes perceived as a threat to national sovereignty.<sup>78</sup> Challenges to the jurisdiction of the courts based on self-

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<sup>73</sup> Durie “Will the Settlers Settle?”, above n 15 at 451. Compare New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [10].

<sup>74</sup> E.g., Michael Mustill “The New Lex Mercatoria: The First 25 Years” (1988) 4 Arb Int’l 86. Gaillard thought that even if the *lex mercatoria* is not a genuine legal system, then it can at least perform the functions of one, above n 66.

<sup>75</sup> See e.g. <[www.trans-lex.org/](http://www.trans-lex.org/)>.

<sup>76</sup> Durie “Will the Settlers Settle?”, above n 15 at 451 - 452.

<sup>77</sup> *Leef v Bidois* [2017] NZHC 36 at [50] per Heath J. See further Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005) 330.

<sup>78</sup> See the discussion in Moana Jackson “The face behind the law: the United Nations and the rights of Indigenous peoples” (2005) 8(2) Yearbook of New Zealand Jurisprudence 10.

determination arguments have been consistently rejected by the courts as being inconsistent with their powers.<sup>79</sup> In arbitration however, the view that non-state laws unacceptably interfere with judicial powers of supervision has long since given way to the wide latitude that parties now enjoy in terms of what law governs their relationships. This change in attitude was necessary to respect party autonomy and encourage arbitration.

### B *Mandatory laws and choice of law*

Although parties may freely choose to apply tikanga in an arbitration, their choice raises the prospect of conflict with New Zealand law. In *Ngāti Hurungaterangi v Ngāti Whāhiao*, one of the questions raised in the High Court appeal was whether the arbitral tribunal had contravened s348 of Te Ture Whenua Māori Act 1993 (TTWMA). Section 348 TTWMA provides that decisions of the former Native Land Court (NLC) must be treated as finally resolving ownership issues regarding Māori land. As the NLC allocated title to the Whakarewarewa and Arikikapakapa lands over a century ago, Ngāti Whāhiao argued that the tribunal's award contravened s348 and thereby erred in law; it also claimed that the NLC decisions gave rise to an issue estoppel. Under the Trust Deed however, the parties had not dealt with the application of New Zealand law – on the face of it, the parties had agreed that their disputes would be resolved according to customary concepts of land tenure only. On this basis, the provision in the TTWMA was irrelevant to the tribunal's task, and there was no basis for pleading it in the appeal, as it was not part of the law the tribunal was directed to apply.

The extent to which tribunals in international commercial arbitration have an implied duty to apply mandatory provisions of national law (if different from the chosen law) remains controversial and unresolved.<sup>80</sup> Concerns have also been raised about the use of religious law in religious arbitration to the extent that it conflicts with statutory protections of human rights,<sup>81</sup> leading to calls for arbitration legislation to be expressly subject to anti-discrimination law and / or deem family disputes to be non-arbitrable.<sup>82</sup> From an enforcement perspective, the solution is for national courts to refuse enforcement if an award's enforcement would conflict with public policy – but this takes place within a

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<sup>79</sup> See e.g. *Wallace v R* [2011] NZSC 10.

<sup>80</sup> See e.g. George A Bermann *International Arbitration and Private International Law* (Collected Courses of the Hague Academy of International Law, 2017) ch VII, at [450].

<sup>81</sup> See Reiss, above n 60.

<sup>82</sup> E.g. in England, the Arbitration and Mediation Services (Equality) Bill [HL], cl 3 and cl 4 (2011) (the bill was not enacted).

setting aside or enforcement proceeding, and not an appeal on a question of law.<sup>83</sup> The test for establishing a conflict with public policy is a deliberately high one, and an error of law by itself is nowhere near enough to meet it.<sup>84</sup> In the event, the High Court held that the TTWMA was directed at protecting legal titles, which were not at issue in the dispute.<sup>85</sup>

### C *Appeals on questions of law*

Parties that choose to apply tikanga in an arbitration may also encounter difficulties in bringing an appeal against any award, if it is disputed whether the tikanga is “notorious”. Given that tikanga is not widely recognised within the common law, these difficulties seem rather likely. In *Ngāti Hurungaterangi v Ngāti Wabiao*, Ngāti Whakaue claimed that the tribunal’s alleged error in applying tikanga raised an appealable question of law, either because tikanga was the “applicable law” in respect of the dispute, or because tikanga is part of New Zealand common law. The High Court did not address the first argument; instead, it based its decision regarding the availability of appeal rights on the status of tikanga under the common law. As noted, it delineated between customs that remain evidence-based questions of fact, and customs that have become notorious and no longer require proof. Only the latter were regarded as raising questions of law that are capable of being the subject of an appeal.

The possibility that some tikanga is not able to be appealed is problematic. In the first place, it denies Māori arbitrating parties who choose to apply tikanga the same access to judicial review that is available to all other parties to domestic arbitrations in New Zealand.<sup>86</sup> It imposes a hurdle on Māori disputants that is not applied to non-Māori, and treats (local, indigenous) tikanga as a secondary (foreign!) source of law. In 2007, a new sub-clause was added to the appeals provision in the Act so as to make clear that factual questions cannot be appealed. The intention of the 2007 reforms was to clarify that particular types of factual issues, which are in some situations regarded as questions of law, are only factual questions for the purposes of arbitral appeals – these are the questions whether findings of fact are supported by sufficient evidence, and whether the tribunal

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<sup>83</sup> Arbitration Act 1996, art 34(2)(b)(ii) and art 36(1)(b)(ii) of sch 1.

<sup>84</sup> See *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA).

<sup>85</sup> *Ngāti Hurungaterangi v Ngāti Wabiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [70] – [75]. Also in the Court of Appeal, *Ngāti Hurungaterangi v Ngāti Wabiao* [2017] NZCA 429 at [91].

<sup>86</sup> The exception would be the very rare case where parties authorise the tribunal to decide *ex aequo et bono* or according to considerations of fairness. See *Eagle Star Insurance Co Ltd v Yuwal Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 362.

drew the correct inferences from the primary facts.<sup>87</sup> The provision otherwise permits appeals on questions of law arising from the interpretation of the “applicable law”. In this light, the High Court’s analysis in *Ngāti Hurungaterangi v Ngāti Wahiao* seems overly technical. In effect, “applicable law” is understood to mean “New Zealand law”, rather than the law chosen by the parties as applicable to their dispute. Although the judgment relates only to appeals, the Court’s analysis creates an impression that arbitrations involving the application of tikanga are not really legal disputes.

Under the English Arbitration Act 1996, a question of law is expressly defined to mean a question of “the law of England and Wales”.<sup>88</sup> Given the right to appeal under that Act also extends to international arbitrations, the limitation in the definition makes sense in that it ensures that English courts are not burdened by appeals on foreign law.<sup>89</sup> This prospect is limited in New Zealand, where the right to appeal extends by default only to domestic arbitrations.<sup>90</sup> Practically, the only law being excluded is tikanga. That said, the need to apply foreign and non-national laws may arise in other contexts, and this too raises the question whether New Zealand courts could adopt a more flexible attitude towards tikanga appeals from arbitral awards. For example, in *Svenska Petroleum Exploration AB v Lithuania*,<sup>91</sup> the parties had chosen a combination of lex mercatoria and Lithuanian law to govern their contract.<sup>92</sup> The main issue before the English Court of Appeal was whether, for the purpose of award enforcement, the Government of Lithuania was a party to the contract and therefore bound by the arbitration clause within it. To answer the jurisdiction point, the Court contemplated applying transnational laws in order to construe the true extent of the contract. The Court examined the authorities cited by Lithuania in an effort to establish a requirement for express consent to arbitrate, based on international practice. The Court had no difficulty addressing those authorities, although it held that none of them actually assisted Lithuania’s argument.<sup>93</sup>

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<sup>87</sup> Arbitration Act 1996, cl 5(1) of sch 2; New Zealand Law Commission *Improving the Arbitration Act 1996* (2003) at [125].

<sup>88</sup> Arbitration Act 1996 (Engl), s82(1).

<sup>89</sup> See *Schwebel v Schwebel* [2010] EWHC 3280 (TCC); [2011] 2 All ER (Comm) 1048 at [14].

<sup>90</sup> *NH3 Refrigeration Ltd v Refrigeration Engineering Co Ltd* [2018] NZHC 318 is the only New Zealand case I am aware of where parties to an international arbitration have agreed and then acted on a right of appeal.

<sup>91</sup> *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafsta* [2006] EWCA Civ 1529; [2007] 1 Lloyd’s Rep 193.

<sup>92</sup> Article 35(2) provided that the agreement was to be governed by the laws of Lithuania, “supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania”.

<sup>93</sup> *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafsta* [2006] EWCA Civ 1529, [2007] 1 Lloyd’s Rep 193 at [81] - [82].

Limitations on the ability to appeal a tikanga-based award may be regarded as a drawback of choosing tikanga to govern a dispute which is arbitrated. However, this conclusion should be considered in light of the overall merits of the ability to appeal awards in the first place. The question whether New Zealand should retain a right of appeal on questions of law continues to be the subject of discussion, given the significant intrusion into arbitral finality. The New Zealand Law Commission initially proposed following the Model Law approach of not providing for appeals. It then changed its mind, after submissions highlighting concerns about the possible risks of non-lawyer arbitrators getting the law wrong.<sup>94</sup> In the case of arbitrations involving the application of tikanga, arbitrators who are knowledgeable in tikanga may be rather less likely than judges to get it wrong. At least, the policy reason for retaining appeals in domestic arbitrations is of limited application to cases where tikanga is chosen as the proper law.

#### *D The requirements of due process*

In *Bidois v Leef*, the parties deliberately eschewed any role for lawyers in designing and then implementing their dispute resolution process. This was understandable, in the sense that the parties wanted to control the process as much as possible themselves. Choosing arbitration also enabled the parties to incorporate Māori norms of dispute resolution into their process, such as inclusiveness, harmony and respect (as through the relaxed approach towards witness participation, and the expectation that the process be conducted in a “Rangatira ki te Rangatira” or chiefly way). Although it is not clear whether they did or not, the parties could also have physically located the arbitral hearings at a marae (place of gathering for the hapū), and applied marae protocols. Arbitration’s potential in this respect had been recognised earlier when, in 2007, the Māori Party (a political party focussed on promoting the Treaty of Waitangi and indigenous rights in New Zealand) supported the enactment of modernising reforms to the Arbitration Act through Parliament. Its then leader Hon Te Ururoa Flavell explained the Party’s position as follows:<sup>95</sup>

The Māori Party believes that the process of arbitration as a consensual method of disputes resolution is particularly aligned with kaupapa Māori [loosely, Māori values and practices], particularly the attainment of kotahitanga—the oneness of purpose.

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<sup>94</sup> New Zealand Law Commission, above n 34, at [93] – [97].

<sup>95</sup> Hon Te Ururoa Flavell (October 2007) 642 NZPD 12181.

However, in choosing to arbitrate, the parties also bargained for a process that by definition involves minimum legal standards of natural justice, adherence to which is necessary to legitimise the binding effect of the tribunal's decision. It is evident that Ngāti Ranginui wanted a fair process for resolving cross claims disputes, in light of the requirement in its umbrella process that adjudicators be independent.<sup>96</sup> Given the extent and severity of the procedural mishaps, it is surprising that the Court of Appeal upheld the award. Although the parties' desire for informality may well justify less procedural rigour than might be expected in other settings, it is difficult to accept the process that was adopted in this case as being consistent with even basic standards of procedural fairness.

It is also difficult to reconcile the Court of Appeal's approach to due process in *Bidois v Leef* with its later and much firmer position on due process in *Ngāti Hurungaterangi v Ngāti Wabiao*. The obligation to give reasons is non-mandatory under the Model Law in that it can be contracted out of, unlike equal treatment. The Court also accepted that the scope of the duty to give reasons depends on context. Despite this acceptance, the Court drew on cases arising from commercial arbitrations and the decision of the tribunal in the *Abyei Arbitration*<sup>97</sup> to develop its view about the requirement for reasons. In *Abyei*, the tribunal determined that a boundary commission that had been tasked with determining the boundaries of the Abyei area was required to state its reasons. Although there are some similarities with the context of *Abyei*, such as the "years of uncertainty" and need for a decision to "definitively determine" boundaries,<sup>98</sup> the need to avoid further armed conflict would also compel relatively extensive reason giving in that case. In *Ngāti Hurungaterangi v Ngāti Wabiao* it may have been more constructive for the Court to consider, instead, how the Waitangi Tribunal explains its decisions with respect to contested Māori evidence.

Nonetheless, even allowing for context, the tribunal's reasons in *Ngāti Hurungaterangi v Ngāti Wabiao* were compressed and left too much to the parties to figure out themselves. While it is possible to extract reasons from the award, those reasons do not identify the applicable tikanga, nor how the tribunal's overall conclusions relate to the evidence summarised earlier in the award and the different land blocks that that evidence is relevant to. While joint beneficial ownership of land is not uncommon amongst hapū (and indeed

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<sup>96</sup> See above, n 16.

<sup>97</sup> *Sudan v The Sudan People's Liberation Movement/Army (the Abyei Arbitration)* (Final Award, 22 July 2009) XXX RIAA 145.

<sup>98</sup> See *Ngāti Hurungaterangi v Ngāti Wabiao* [2017] NZCA 429 at [67].

was expressly provided for as an option for the tribunal to consider in *Bidois v Leef*<sup>99</sup>), the tribunal's decision to allocate joint beneficial ownership in this case, in view of the brevity of its explanations, leaves the impression that the solution it was imposing on the parties was a diplomatic one rather than one grounded in any tikanga.

From this impression, it may have seemed to the Court of Appeal that its only option was to set the award aside. However, two other options were possible. The first is that the Court could have determined the case itself.<sup>100</sup> The other is that the Court could have remitted the award back to the tribunal in order to give the tribunal the opportunity to elaborate on its reasons for awarding joint ownership, including by explaining how that outcome is consistent with the applicable tikanga principles.<sup>101</sup> (By way of comparison, for example, in *Bidois v Leef*, the tribunal's award began by explaining the tribunal's understanding of the applicable tikanga, its views on the specific evidence that had been presented, and then its conclusions regarding mana whenua.<sup>102</sup>) Remission was at least worth consideration, given the tribunal's credentials and the efforts already expended in the arbitration proceedings, and the fact that the issue was over the adequacy of reasons (rather than a case of there being no reasons in the award at all).<sup>103</sup> Instead, the award was simply set aside. This meant that, unless the parties could reach an agreed settlement of their dispute, an entirely new tribunal would have to be constituted to repeat the process and determine the issue of beneficial ownership.<sup>104</sup>

#### IV Conclusion

Apart from ordinary commercial arbitration, Māori have not taken a strong interest in arbitrating disputes in the past. Perhaps it was perceived as a basically Westernised process that had little to offer. Yet, it is not hard to see how the choice of arbitration, albeit as a last resort, made sense with respect to the resolution of the cross claims disputes arising

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<sup>99</sup> Agreement for the Confirmed Mana Whenua Process, cl 6.14.

<sup>100</sup> Arbitration Act 1996, cl 5(4)(a) of sch 1.

<sup>101</sup> Had the case been brought as an application to set the award aside, the Court of Appeal could have remitted the award back to the tribunal in order to allow the tribunal an opportunity to eliminate the grounds for setting aside: Arbitration Act 1996, art 34(4) of sch 1; New Zealand Law Commission, above n 34, at [388]. Although the case was brought as an appeal, the Court could still have remitted the award to the tribunal, together with its "opinion on the question of law", to give the tribunal an opportunity to reconsider its position: Arbitration Act 1996, cl 5(4)(b) of sch 1.

<sup>102</sup> There is a summary in the High Court judgment, *Leef v Bidois* [2017] NZHC 36 at [29] – [31].

<sup>103</sup> One of the arbitrators had passed away by the time of the litigation proceedings, but could have been replaced.

<sup>104</sup> This was in fact suggested by the Court of Appeal, *Ngāti Hurungaterangi v Ngāti Wabiao* [2017] NZCA 429 at [110].

from Treaty of Waitangi settlements discussed in this paper. Features of arbitration, including the flexibility of the arbitral process and the parties' ability to retain some control over it, the unique choice of law flexibility, neutrality, and the enforceability of the outcome,<sup>105</sup> are all attractive features for the resolution of these disputes. They have particular force regarding the ability to directly apply tikanga and to appoint people with expertise in tikanga as arbitrators, and the ability to adapt procedure to incorporate cultural norms of dispute resolution. For these reasons, arbitration in this context should be seen as not only an efficient alternative to litigation, but also as a mechanism for securing other important values. In particular, through arbitration, the legal system can accommodate Māori law in a way that is not likely to happen through mainstream law, but without the need for tikanga to be accepted for all purposes, nor subjected to restrictive common law tests. The dominant model in New Zealand for accepting tikanga as law has been one of incorporation, but through a vertical hierarchy of norms with tikanga perennially looking upwards. This risks a hollowing out of tikanga, or a romanticizing of it as part of our shared "values".<sup>106</sup> With arbitration, the law seeks to manage diversity through a horizontal framework instead. It has proven itself to be a workable framework, provided that arbitration lives up to its own inherent procedural ideals.

The courts have supported the arbitrability of these disputes, and on some issues, have been quite pragmatic – for instance, by accepting that arbitration of a mana whenua issue may form a part of a wider dispute resolution process. At the same time, the arbitrations discussed in this paper have not lived up to the parties' expectations and have instead resulted in extensive post-award litigation. The litigation should prompt some consideration about the merits of arbitral appeals for parties to intra-hapū claims, who may be better off excluding appeals in their arbitration agreements. There is also a risk that tolerance of an unfair process, or (conversely) the imposition of judicial or rigorous standards, will deter further use of arbitration by Māori, either for cross claims or for disputes arising from the increasing interactions amongst iwi and hapū. On these issues, the post-award litigation in *Bidois v Leef* and *Ngāti Hurungaterangi v Ngāti Wahiao* suggests that achieving the right balance is still a work in progress. In *Ngāti Hurungaterangi*, the Court of Appeal's interest in the *Abyei* award reflects the long-standing influence of international

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<sup>105</sup> Interestingly, procedural justice research challenges conventional wisdom that disputants would rather opt for non-adversarial dispute resolution if given the choice. In one leading study, it was found that people prefer procedures that allow them to maintain process control but cede binding decision making authority to a neutral third party (see John Thibaut and Laurens Walker "A Theory of Procedure" (1978) 66 Cal L Rev 541).

<sup>106</sup> I thank Andrew Erueti for discussions on this point.

arbitration on New Zealand arbitration law. For the future, perhaps the key to successfully accessing international practice for these arbitrations lies in asking when and how difference matters. For example, the experiences of international commercial arbitrators who sit together but are often trained in different jurisdictions may contribute insights into how conflicts between legal traditions and expectations can be managed. Similarly, the (possibly resigned) acceptance of the application of non-state law in international commercial arbitration, despite certain challenges in terms of legal theory, illustrates the wide autonomy exercised by arbitrating parties on substantive matters and the extents to which national law will allow that autonomy.