Editorial - SIR DAVID WILLIAMS KNZM, QC

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FROM MILDON TO MUGABE: THE CAREER OF NEW ZEALAND'S MOST CELEBRATED INTERNATIONAL ARBITRATOR

I am honoured to write this editorial for this Special Volume of the Auckland University Law Review, celebrating Sir David Williams KNZM, QC and his contribution to arbitration in New Zealand. Sir David is my dear friend and mentor who has taught me so much over our years of working together. I am just one of many New Zealand arbitration practitioners who owe him a great debt of gratitude. Sir David has worked tirelessly over the years to promote New Zealand and New Zealanders in the international arbitration community and to raise the profile of arbitration domestically. It is for this reason that AMINZ honours Sir David at Arbitration Day 2021, on the occasion of his 80th birthday.

It is not an overstatement to say that Sir David is a pioneer of international arbitration in New Zealand and is recognised as one of our top legal minds. He was honoured with a knighthood in 2017 for his services to arbitration law and practice in New Zealand and internationally. He is consistently rated amongst the top arbitrators in the world and has sat as arbitrator in over 150 international cases. Just how influential he has been is evident from the fact that a simple search of his name in "Global Arbitration Review" reveals 234 separate articles written about Sir David's cases, the most recent article (concerning a case arising out of the civil war in Yemen) was published on the very day of writing this editorial.[1]

Sir David's arbitral career includes many highlights. My very first interaction with Sir David back in 2008 was to phone him from London to ask if he would be willing to accept appointment as arbitrator in a major trade dispute between Canada and the United States. It was the first State-to-State arbitration filed with the London Court of International Arbitration (LCIA) and an important case in the international trade law context. In 2012, Sir David was a member of the Arbitral Tribunal in *Occidental v Ecuador* that awarded the largest

1 Cosmo Sanderson "Yemen award upheld despite terrorism claims" *Global Arbitration Review* (online ed, London, 7 October 2021).

damages sum for breach of an investment treaty granted to that date - US$1.77 billion.[2] He is currently President of a three-member Tribunal determining the largest ever claim to have been filed with the International Chamber of Commerce (ICC) Court of Arbitration in Paris, involving important matters of international law.

Throughout his career, Sir David has also been a courageous arbitrator, not afraid to make difficult decisions. He was the Chair of a three-member Tribunal that barred David Mildon QC from representing a party on the basis that he was a barrister at the same Chambers where Sir David was a door tenant and notification of his role had been made at a very late stage.[3] The decision was based on the inherent jurisdiction of a tribunal to protect the integrity of the arbitration proceedings and has often been quoted and relied upon by subsequent tribunals.[4] The IBA Guidelines on Conflicts now reflect the dangers inherent in this relationship, while acknowledging that such a situation will not always constitute a conflict.

Sir David also chaired a Court of Arbitration for Sport (CAS) Tribunal that found Floyd Landis, the 2006 Tour de France champion, guilty of doping.[5] The case was an appeal by Mr Landis against a finding of doping in an American Arbitration Association (AAA) case. This arbitration was not only significant because of the high profile nature of the applicant and the controversy around doping in cycling at that time, but also because the Tribunal imposed costs sanctions on Mr Landis for the improper manner in which his appeal was conducted including witness intimidation and making serious allegations (including fraud) without foundation.[6] Although costs are not normally awarded in CAS cases, the Tribunal felt compelled to do so given the egregious circumstances and behaviour of counsel.

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2 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (Fortier, Williams & Stern). The award was later reduced to $1.06 billion on an issue of Ecuadorian law and has since been dwarfed by the US$50 billion award in the *Yukos* arbitrations (see *Veteran Petroleum Limited et al v The Russian Federation*, Judgment of the Court of Appeal of The Hague, Civil Law Section, Case Number 200.197.079/01, 18 February 2020).

3 See *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008 (Williams, Brower & Paulsson). The late notification of Mr Mildon's role was significant in the decision (see para [35] of the Order).

4 At [33].

5 CAS 2007/A/1394 *Floyd Landis V. USADA*, Award, June 2008 (Williams, Paulsson & Rivkin).

6 CAS 2007/A/1394 *Floyd Landis V. USADA*, Award, June 2008 (Williams, Paulsson & Rivkin) see also David Williams and Anna Kirk "Fair and Equitable Treatment of Witnesses in International Arbitration – Some Emerging Principles" in David Caron and others (eds) *Practising Virtue – Inside International Arbitration* (Oxford University Press, Oxford, 2015) 357.

While the Floyd Landis case was extremely high-profile (it even has its own Wikipedia page[7]), perhaps Sir David's most sensational decision concerned interim measures applications in the case of *von Pezold v Zimbabwe,* where the Tribunal was asked to order the Zimbabwean Government (then still controlled by Robert Mugabe) "*to instruct its police force to prevent people from coming onto the Claimants' Estate, and … to cease threatening to kill the claimant in an investment treaty case.*"[8] A second application by the claimant related to an alleged plan by Zimbabwe's Central Intelligence Organisation to kill one of the claimants. The Tribunal ordered the Government to "*immediately take all necessary measures to protect the life and safety of the Claimants … from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent.*"[9]

That Sir David's career has reached such dizzying heights will not be a surprise for those who know him or have worked with him. He is dedicated, skilled, conscientious and highly respected. He has made friends and colleagues in all corners of the world. Yet, despite his momentous achievements, he remains approachable and always willing to assist young New Zealand practitioners to break into the international arbitration world. Many of the speakers at Arbitration Day have been the beneficiaries of his wisdom and training. David's protégé can be found in all corners of the globe, ensuring that his legacy will last well beyond his own personal arbitration career.

One of the hallmarks of Sir David's career has been the strong relationships he has nurtured. For example, since gaining is LLB in 1965 from the University of Auckland, he has been a proud Auckland Law School alumnus and maintained a close relationship with the University. Sir David often tells the story of how his father told him and his younger brother, Michael Williams SC, that he had decided to enrol them at law school. It is clear Sir David's father was a wise man - both of his sons have become highly successful lawyers. Sir David clearly cherished his time at Auckland Law School, joining the teaching faculty on his return from Harvard University in 1966. He later taught International Arbitration to post-graduate students and remains an Honorary Professor at the University to this day.

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7 Wikipedia "Floyd Landis doping case" (22 December 2021) Wikipedia <www.en.wikipedia.org>.

8 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No.4, 16 March 2013 (Fortier, Williams & Hwang). The interim measure was not granted on the basis of undertakings given by the Respondent that its police force was protect the Claimants.

9 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No.5, 3 April 2013 at [65] (Fortier, Williams & Hwang).

Sir David's time at Harvard University also shaped the career he would eventually forge. Sir David undertook an LLM there when post-graduate study for New Zealand lawyers was still relatively rare, and especially post-graduate study in the United States. He took papers in international law and became particularly interested in environmental law. On returning to New Zealand, Sir David helped to establish the Environmental Defence Society, which celebrates its 50th Anniversary this year. The case of *Huntly Borough v Williams*[10] attests to his dedication to this cause. Environmental law was also the subject of his first book, published while he was a partner at Russell McVeagh.[11]

Sir David was involved in many high-profile cases while at Russell McVeagh, including advising Air New Zealand during the investigation into the Erebus disaster. It was also at Russell McVeagh and in his early career at the Bar that Sir David first became involved in arbitration. He was counsel in *CBI NZ Ltd v Badger Chiyoda*, an ICC arbitration arising out of the construction of the Marsden Point oil refinery in Whangarei. The case later went to the Court of Appeal.[12] He was also counsel in New Zealand's first and only investment arbitration, *Mobil Oil v New Zealand,* which was heard at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington DC.[13]

In the early 1990s, Sir David spent two years as a Judge of the High Court of New Zealand and it was on his retirement from the Bench that his international arbitration career really accelerated. It is no small undertaking to build a reputation as an international arbitrator when based in New Zealand. While Sir David will often modestly attribute the beginning of his career as an arbitrator to "luck", there is no doubt that his reputation as one of the world's top arbitrators is based purely on skill and hard work.

Sir David has been a member of Bankside Chambers throughout his arbitral career and has contributed so much to helping Bankside become the largest chambers in New Zealand, with a thriving arbitration and mediation offering. It was at Bankside Chambers, ten years ago, that Sir David published the second textbook of his career with Amokura Kawharu, *Williams & Kawharu on Arbitration*. It is no exaggeration to say that this book, now in its

10 *Huntly Borough v Williams* [1974] 1 NZLR 689 (CA).

11 David AR Williams *Environmental Law in New Zealand* (Butterworths, Wellington, 1980). The book is now in its seventh edition, edited by Derek Nolan QC (*Environmental and Resource Management Law,* LexisNexis).

12 *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA).

13 *Mobil Oil Corp. v New Zealand* ICSID Case No. ARB/87/24 (ICSID Reports 140). The case was settled. See also *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 (HC).

second edition, is the authoritative text on arbitration in New Zealand, frequently relied upon in arbitration-related Court cases. I am lucky enough to have been involved in producing both editions of the book, having initially been employed by Sir David on my return from London to assist in completing some of the chapters. It was a truly monumental effort to which Sir David devoted many years and of which he is rightly very proud.

Over the past 25 years, Sir David has served on the boards or governing councils of many of the world's largest and most respected arbitral organisations. He was on the IBA Working Group that devised the first edition of the IBA Guidelines on Conflicts of Interest and to this day remains on the Advisory Board of the International Council for Commercial Arbitration (ICCA). In doing so, however, he has never neglected his home jurisdiction. Sir David has always been a great friend of AMINZ – he was President of AMINZ in 2003-2004 and has been a member of the AMINZ Appeals Tribunal from its inception until earlier this year. He has given countless hours to the Institute, including advocating on behalf of AMINZ for the amendments to the Arbitration Act in 2007, 2016 and 2019. He represented AMINZ (as Intervenor) in the Supreme Court in *Carr v Galloway Cook Allan*[14] and was instrumental in bringing the biennial ICCA Conference "down under" in 2018, when Queenstown hosted a major one-day Conference after the main Sydney event. Sir David's contribution to the growth, professionalism and mana of AMINZ cannot be underestimated.

Those of us who know Sir David well will also know of his affiliation with the Cook Islands. Not only did Sir David write the Cook Islands' Arbitration Act, he has also been a Judge of the Cook Islands High Court and Court of Appeal for more than 20 years. Over that time, he has served as Chief Justice and President of the Court of Appeal. His final sitting in the Court of Appeal took place in October 2021.

Yet, for all his pre-eminence in the legal world, at his core Sir David is a family man. His dedication to Lady Gail, Nick, Melissa and his grandchildren is obvious to all those who know him. Perhaps this strong family grounding has been why Sir David has remained approachable and genuinely happy to assist his fellow New Zealand arbitrators, despite his phenomenal international career. AMINZ will always be grateful for everything Sir David as done for the Institute and for arbitration in New Zealand more generally.

14 *Carr v Gallaway Cook Allan* [2014] NZSC 75.