PROMISED LAND OR FIRE SWAMP?
INTERIM MEASURES - THE NEW ZEALAND REVOLUTION

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by

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Introduction

1. There is no doubt that the recently passed Arbitration Amendment Act 2007 (”the Amendment Act”) constitutes a revolution.

2. I suspect that I am the first victim of this revolution, because I have had to recast my paper entirely because of the coming into force of the Amendment Act before rather than after today. While the new regime will challenge us all, I at least have the consolation of knowing that it will not have as profound an effect on my life as the first revolution that I lived through, the Unilateral Declaration of Independence by the Smith regime in the then Southern Rhodesia on 11 November 1965. Had it not been for that revolution, I would almost certainly not be here today presenting this paper.

3. What has happened is indeed revolutionary. Gone, to a very large extent, is the distinction between the powers of the Courts and the powers of arbitral tribunals in respect of interim measures. The wording of Articles 9 and 17 of Schedule 1 to the Arbitration Act 1996 (the Act”) has been largely assimilated the one to the other; and arbitral tribunals have, for the first time, been given power to issue orders ex parte.

4. I have divided this paper into the following sections:
   a. The position prior to the amendment of the Act by the Amendment Act
      i. The powers of the courts;
      ii. The powers of the arbitral tribunals;
   b. The position following the amendment of the Act by the Amendment Act
      i. The powers of arbitral tribunals;
      ii. The powers of the courts;

c. Summary and conclusions.

5. I have retained the description of the position under the Act before its amendment for two reasons:
    a. I had already dictated it; and
    b. It may well, at least in relation to the position of the courts, still be of some relevance under the new regime (for reasons which I will explain later in this paper).

The position prior to the amendment of the Act by the Amendment Act

(a) The powers of the courts

(i) Introduction

6. Article 9 of Schedule 1 to the Act in its pre-amendment form read as follows:

> *(1) It is not incompatible with an arbitration agreement for a party to request before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*
>
> *(2) For the purposes of paragraph (1), the High Court or a District Court shall have the same power as it has for the purposes of proceedings before that court to make--*
>
> *(a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or*
>
> *(b) An order securing the amount in dispute; or*
>
> *(c) An order appointing a receiver; or*
>
> *(d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or*
>
> *(e) An interim injunction or other interim order.*
>
> *(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.*

7. The Article did not confer independent powers on the courts to grant interim measures; their powers were those which they had in relation to proceedings before them.

(ii) Article 9(2)(a)- *Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute*

8. The first of the courts' powers was a power to make orders "*for the preservation, interim custody, or sale of any goods which are the subject matter of the dispute*".

9. The relevant High Court rules were (and are) High Court Rules ("HCR") rr 331(1) and (2) and 332, which read (and read) as follows:

> *331* ***Preservation of property***
>
> *(1) In any proceeding, the Court may make orders for the detention, custody, or preservation of any property.*
>
> *(2) An order under subclause (1) may authorise any person to enter any land or to do any other thing for the purpose of giving effect to the order.*
>
> ***332*** ***Sale of perishable property, etc***
>
> *Where in any proceeding concerning any property (other than land) or in any proceeding in which any question may arise concerning any property (other than land), it appears to the Court that –*
>
> *(a) The property is of a perishable nature or is likely to deteriorate by keeping; or*
>
> *(b) For any other reason it is desirable that the property should be sold before trial -*
>
> *the Court, on the application of any party to a proceeding, may make an order for the sale of the property, by a person named in the order, in such manner and on such terms as the Court thinks appropriate.*

10. The equivalent District Court rules were (and are) District Court Rules ("DCR") rr 349(1) and (2) and 350.

11. In this and succeeding sections of this part of this paper, I give the numbers of the relevant District Court Rules as well as those of the relevant High Court Rules but discuss only the High Court Rules.

12. HCR r331(1) provides for the Court to make orders for "*the detention, custody, or preservation of any property*". The property must be property the title to, or interest in, which is in issue or property which is relevant as evidence. (The rule is one of the foundations of the Court's power to issue *Anton Piller* orders.)

13. HCR r 332 requires no comment.

14. In *Marnell Corrao Associates Inc v Sensation Yachts Ltd*[1], Sensation Yachts terminated a contract for the construction of a yacht for Marnell Corrao Associates Inc ("MCA"). MCA contended that Sensation Yachts was not entitled to terminate

[1] (2000) 15 PRNZ 208

the contract and sought interim orders giving it access to the yacht and the ability to complete work in order to remove it from Sensation Yachts' yard. The Court found Sensation Yachts had terminated the contract knowing that the yacht needed work before it could be moved, that the yacht had been vested in MCA subject to a lien for unpaid moneys, that MCA wished to complete the yacht, and that the contract gave MCA the power to complete the yacht in Sensation Yachts' yard to the point where it could be physically moved and then to remove it. The Court made the interim orders sought, on condition that MCA gave Sensation Yachts security.

(iii)Article 9(2)(b) – *an order securing the amount in dispute*

15. The second power possessed by the courts was the power to make an order "*securing the amount in dispute*".

16. The relevant High Court rule was (and is) HCR r 331(3), which read (and reads) as follows:

> *(3) In a proceeding concerning the right of any party to a fund, the Court may order that the fund be paid into Court or otherwise secured*

17. The relevant District Court rule was (and is) DCR rr 349(3).

18. It will be seen from the wording of HCR r 331(3), that the power to make an order "*securing the amount in dispute*" rule is limited to situations in which there is a "*fund*" within the meaning of the rule The rule is not intended "*to provide a means of attachment of the unrelated worth of the defendants concerned*"[2]

19. In *Sensation Yachts Ltd v Darby Maritime Ltd*[3] the High Court made an order for the payment of an instalment under the contract, in order to preserve the position of the parties pending the arbitrator's award. (The arbitration agreement provided for the arbitration to take place in London.)

(iv)Article 9(2)(c) – *an order appointing a receiver*

20. The third power possessed by the courts was the power to make an order "*appointing a receiver*".

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[2] *McGechan on Procedure* paragraph HR331.02, quoting from the decision of the High Court in *Rapid Metal Developments (NZ) Ltd v Rusher* (1987) 2 PRNZ 85. See also *Lewis v Poultry Processors Holdings Ltd* (1988) 3 PRNZ 167; *Lisk v Shand* (1992) 6 PRNZ 56; and *Investors Protection Co Ltd v Ray Courtney Architects Ltd* (1993) 7 PRNZ 1(C.A.)

[3] High Court, Auckland, M 1146/SW02, 25/10/02, Wild J

21. In the case of the High Court, the power of the Court to appoint a receiver was (and is) derived from the general law and not from the High Court Rules. HCR rr 337-345 apply "*whenever the Court appoints a receiver*" but do not confer the power to appoint one. The power is derived from statute, where applicable, or from the law of equity. When exercised in terms of a statute, the power is governed by the terms of the statute. When exercised in the Court's equitable jurisdiction, it will be exercised "*only where the creditor has no remedy by execution at common law, or such remedy at common law is unlikely to be effective owing to the peculiar nature of the property involved*"[4]. Appointment of a receiver will not be made generally but only of property which cannot be reached by other processes[5]. An example of the use of the power is *Slater v Mayor of Auckland*[6], where the Court appointed a receiver to receive rent pending resolution of the dispute.

22. In the case of District Courts, DCR 355 permitted (and permits) a party to make a pre-hearing application for the appointment of a receiver. The DCR were (and are) otherwise silent.

23. I am unaware of any decision in which this power has been exercised in the context of an arbitration.

(v) Article 9(2)(d) – *any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party*

24. The fourth power possessed by the courts was the power to make "*any other orders to ensure that the award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party*".

25. The most obvious example of such an order is a Mareva injunction. HCR r 239 (1) and (2) provided (and provide):

> *(1) It is declared that the Court may grant an interlocutory injunction restraining a party from moving, or otherwise dealing with, assets in New Zealand whether or not the party is domiciled, resident, or present in New Zealand.*
>
> *(2) The power to grant an interlocutory injunction of the kind described in subclause (1) does not limit the generality of the Court's power to grant interlocutory injunctions.*

26. The equivalent of HCR 239(1) in the District Court Rules was (and is) DCR r 259(1)

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[4] *McGechan on Procedure* paragraph HR 337. Intro quoting *Evans v Robertson Orr* [1923] NZLR 769 at 771-772

[5] ibid

[6] (1890) 8 NZLR 328

27. Mareva injunctions have been made in the context of arbitral proceedings in a number of cases, including *Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd* [7]and *Leucardia National Corp v Wilson Neill Ltd*[8]. The second of these arbitrations was a foreign arbitration (ie one not taking place in New Zealand).

(vi) Article 9(2)(e) – *an interim injunction or other interim order*

28. The fifth power possessed by the Courts was the power to make "*an interim injunction or other interim order*".

29. This power was two-fold:
    (a) to make "*an interim injunction*"; and
    (b) to make "*other interim order*".

30. The power of the High Court to make "*an interim injunction*" referred to in article 9(2)(e) of Schedule 1 was (and is) derived from s 16 of the Judicature Act 1908[9]. Its exercise is governed by HCR r 238, which reads as follows:

> *(3) An application for an interlocutory injunction may be made by a party before or after the commencement of proceeding, whether or not the claim for an injunction is included in that party's statement of claim, counterclaim, or third party notice, as the case may be.*
>
> *(4) The plaintiff may not make an application for an interlocutory injunction before the commencement of the proceeding except in case of urgency, and any injunction granted before the commencement of the proceeding –*
>
> > *(a) must provide for the commencement of the proceeding; and*
> >
> > *(b) be granted on such further terms that the Court thinks just.*
>
> *(5) An applicant for an interlocutory injunction must file a signed undertaking that the applicant will comply with any order that the Court may make for the payment of damages to the other party for any damage that party may sustain through the granting of the interlocutory injunction.*
>
> (6) *The undertaking must be referred to in the order granting the interlocutory injunction and is part of it.*

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[7] [1985] 2 NZLR 11 (CA)

[8] (1994) 7 PRNZ 701 (C.A.)

[9] *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104.

31. The District Court Rules equivalent of HCR r 238(3) – (6) was (and is) DCR r 258(1)-(4)

32. There have been numerous examples of the granting of interlocutory injunction by the High Court, among them *Coastal Tankers Ltd v Port of Wellington Ltd*[10]*, Cosco (New Zealand) Ltd v Port of Napier Ltd*[11] and *Breton Investments Ltd v Sensation Yachts Ltd*[12]. The Court applies the ordinary principles applicable to the granting of an interlocutory injunction, ie that there be a serious question to be tried and that the Court will consider the balance of convenience but subject always to the question of where overall justice lies[13].

33. There is no authority on the scope of the phrase "*interim orders*" in article 9(2)(e) of Schedule 1 to the Act. It would appear apt to cover orders such as those envisaged by High Court Rules rr 333, 334 and 346B which read as follows:

> *333 Interim distribution*
>
> *Where, in a proceeding concerning property, it appears to the Court that the property is more than sufficient to answer the claims on the property for which provision ought to be made in the proceeding, the Court may allow any part of the property to be conveyed, transferred or delivered to any person having an interest in the property.*
>
> *334 Interim income*
>
> *Where, in a proceeding concerning property, it appears to the Court that the whole or any part of the income of the property is not required to answer the claims on the property or its income for which provision ought to be made in the proceeding, the Court may allow that income or part to be paid, during such period as the Court may determine, to all or any of the persons having interest in the income.*
>
> *346B Application for interim payment*
>
> *(1) The plaintiff in a proceeding may, at any time after the statement of claim and notice of proceeding have been served on the defendant and the time for filing a statement of defence by that defendant expired, apply to the Court for an order requiring that defendant to make an interim payment.*
>
> *(2) An application under this rule should be supported by an affidavit which shall-*
>
> *(a) Verify the amount of the damages, debt or other sum to which the application relates and the grounds of that application; and*
>
> *(b) Deliver any documentary evidence relied on by the plaintiff in support of the application.*

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[10] High Court, Wellington, CP 32/99 18/2/99, Doogue J

[11] High Court, Napier, CP7/99, 31/3/99, Wild J

[12] High Court, Auckland, CP451-SW 99, 21/1/00, Williams J

[13] See *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140(CA)

> *(3) The application and a copy of the affidavit in support and any documents annexed thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the date fixed for the hearing of the application.*
>
> *(4) Notwithstanding the making or refusal of an order for interim payment, a second or subsequent application may be made upon cause shown*[14].

34. The District Courts Rules equivalents of HCR rr 333, 334 and 346B were (and are) DCR rr 351, 352 and 355B.

35. The High Court recently held that the power to make "*an interlocutory injunction or other interlocutory order*" includes the power to make an order appointing representative plaintiffs under HCR r 78[15]. I have to say that I question the correctness of this decision, for two reasons:
    (a) I do not think that an order appointing representative plaintiffs is a "*measure of protection*";
    (b) I do not think that it can accurately be called an "*interim*" order.

36. Subject to any specific restrictions that might (or may) apply (for example under HCR rr 346B referred to in paragraph 33 above), the High Court had (and has) the power to grant interlocutory applications ex parte. This was a power which arbitrators did not have under the Act before it was amended. HCR r 240 sets out the requirements for the making of such an application to the High Court.

(b) The powers of arbitral tribunals

(i) Article 17 of Schedule 1 to the Act.

37. Article 17 of Schedule 1 to the Act in its pre-amendment form provided as follows:

> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.*
>
> (2) *Unless otherwise agreed by the parties, articles 35 and 36 apply to orders made by an arbitral tribunal under this article as if a reference in those articles to an award were a reference to such an order.*

38. The tribunal's power to grant interim measures was limited to interim measures of protection by a party "*in respect of the subject matter of the dispute*". It was narrower than the power of the courts, under Article 9 of the First Schedule because of the

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[14] See also High Court Rules rr 346C-J

[15] *Maranatha Ltd v Tourism Transport Ltd* (High Court, Auckland, CIV2006-404-6431, 3/4/07, Hansen J)

addition of the words "*in respect of the subject matter of the dispute*" after the words "*interim measure of protection*".

39. The tribunal's power certainly covered preservation orders in respect of goods which were the subject matter of the dispute. Similarly, if the dispute was as to ownership of land or of a specific fund, the tribunal would have been able to make orders *inter partes* in respect of the land or fund in question.

40. Did the tribunal's power extend beyond those limits?

41. There was no direct authority on the point; but, in my opinion, it did.

42. I base my view that the power was wider than the power to make preservation orders on the following considerations:
    - (a) An equivalent expression is used in article 9(1) of Schedule 1 in relation to the courts' separate power to grant orders (albeit without the restrictive phrase being added) and the powers listed in article 9(2) as powers the courts may exercise *"[f]or the purposes of [article 9](1)*" go well beyond the power to make a preservation order, as demonstrated by what I have said in paragraphs 10-3 of this paper.
    - (b) Holtzmann & Neuhaus in their monumental work "*A Guide to The UNCITRAL Model Law ... Legislative History and Commentary*" (Kluwer, 1989, 1994) state:

      > *"... the Working Group addressed several times the scope of this implied power. There was some sentiment for specifically limiting the measures that could be taken to 'measures for conserving, or maintaining the value of, the goods forming the subject-matter in dispute'; but ultimately a broader power was approved that provided for any measures of protection in respect of the subject matter of the dispute*"

      (pp 530-531; and see also pp 531-532)
    - (c) Lew et al: *Comparative International Commercial Arbitration* (Kluwer 2003) express the view that the power is wider, going so far as to state:

      > "*Some injunctive measures can be ordered by arbitrators under the Model Law ... As long as the interim measure is closely connected with the matter in dispute it is for the tribunal to decide what is necessary and justified*."

    (paragraphs 23-28 to 23-41 on pp 596-597), rejecting the contrary view of Redfern & Hunter: *Law and Practice of International Arbitration* (Sweet & Maxwell, 4th ed. 2004, paragraph 7-28) (the equivalent of paragraph 7-22 in the earlier edition to which Lew et al refer).

43. As already remarked, under the Act before amendment an arbitral tribunal could not make orders affecting third parties nor orders ex parte.

(ii) Clause 3 of Schedule 2 to the Act

44. In addition, clause 3(d) of Schedule 2 to the Act gave the arbitral tribunal power to order the "*giving of security for costs*" where that clause applied, ie, in the case of a domestic arbitration, where the power had not been excluded and, in the case of an international arbitration, where the power had been conferred on the tribunal by the parties. (This, of course, continues to be the position, as clause 3 has not been amended.)

45. The practice of arbitrators in New Zealand was to approach the question of whether to order security for costs on the same basis as the High Court would approach the question in proceedings before it. HCR r 60 provided (so far as relevant in the context of this paper):

> *(1) Where the Court is satisfied, on the application of a defendant, -*
>
> *(a) That a plaintiff –*
>
> *(i) Is resident out of New Zealand; or*
>
> *(ii) Is a corporation incorporated outside New Zealand;*
>
> *(iii) Is, within the meaning of s 158 of the Companies Act 1955 or s 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or*
>
> *(b) That there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding,-*
>
> *the Court may, if it thinks fit in all the circumstances, order the giving of security for costs.*
>
> …
>
> *(3) This rule -*
>
> *(a) May apply, if the Court thinks fit, although a plaintiff may be temporarily resident within New Zealand; and*
>
> *(b) Shall apply notwithstanding that the defendant may have taken a step in the proceeding before making its application for security.*
>
> *(4) The references in this rule to a plaintiff and a defendant shall be construed as references to the person (however described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding, including a counterclaim.*

46. The power to order security for costs covers security for costs as between the parties. It does not cover security for costs as between the parties and the arbitrator. That is a matter for the applicable institutional rules or for agreement between the parties and the arbitrator before he or she accepts appointment.

The position following the amendment of the Act by the Amendment Act

(a) Introduction

47. You may wonder why I have chosen to deal with the powers of arbitral tribunals under the new regime before I deal with the powers of the courts. The reason is, quite simply, that the powers of the courts have been assimilated under the Amendment Act to those of an arbitral tribunal.

48. The pre-amendment wording of Article 9 was as set out in paragraph 6 above. Under the Amendment Act, Article 9 is amended by:
    a. Omitting the words "*of protection*" from Article 9(1); and
    b. Repealing Article 9(2) and substituting the following paragraph:

    > *For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under Article 17A for the purposes of proceedings before that court, and that article and Article 17B apply accordingly subject to all necessary modifications.*

    In addition, Article 2 of Schedule 1 has been amended by inserting a new definition, as follows:

    > *(ba)**interim measure** has the meaning given to it by article 17.*

49. The starting point must, therefore, be a consideration of the powers of arbitral tribunals. It will, of course, be necessary to consider how well this new provision meshes with the powers which the High Court and District Courts have under their respective Rules and, in the case of the High Court, under its inherent jurisdiction. It is for this reason, as well as reluctance to discard what I had already written, that I have retained in this paper the commentary on the powers of the courts before the amendment.

(b) The powers of arbitral tribunals

(i) Introduction

50. The essential features of the new regime are that the arbitral tribunal has wide powers to grant interim measures on notice and has the power, without notice being given, to grant preliminary orders designed to hold the position pending the granting of an interim measure (a "*preliminary order*").

51. The new provisions are introduced by the expedient of repealing Article 17 in its entirety and substituting a new chapter, styled as follows:

Chapter 4A

Interim measures and preliminary orders

52. The chapter comprises the following articles:

Art 17	Interpretation
Art 17A	Power of arbitral tribunal to grant interim measures
Art 17B	Conditions for granting interim measures
Art 17C	Power of arbitral tribunal to issue preliminary order
Art 17D	Conditions for issuing preliminary order
Art 17E	Procedure for preliminary order
Art 17F	Duration of preliminary order
Art 17G	Effect of preliminary order
Art 17H	Modification, dispension, and cancellation
Art 17I	Provision of security
Art 17J	Disclosure of material circumstances
Art 17K	Costs and damages
Art 17L	Recognition and enforcement
Art 17M	Grounds for refusing recognition or enforcement

(ii) Definitions

53. Article 17 as substituted provides:

In this Chapter, unless the context otherwise requires,---

'applicant' means any of the following, as the case may be:

(a) a party who requests an interim measure:

(b) a party who applies for a preliminary order:

(c) a party who seeks or obtains recognition or enforcement of an interim measure

'Court', in articles 17L and 17M, has the meaning given to it by article 35(3)

'interim measure' means a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following:

(a) maintain or restore the status quo pending the determination of the dispute:

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings:

(c) provide a means of preserving assets out of which a subsequent award may be satisfied:

(d) preserve evidence that may be relevant and material to the resolution of the dispute:

(e) give security for costs

'preliminary order' means an order directing a party not to frustrate the purpose of an interim measure

'respondent' means any of the following, as the case may be:

> *(a) a party against whom an interim measure is requested or directed:*
>
> *(b) a party against whom a preliminary order is applied for or directed:*
>
> *(c) a party against whom recognition or enforcement of an interim measure is sought or has been obtained.*

(iii) Interim measures – specific provisions

54. The following provisions in the new Chapter 4A apply specifically to interim measures:
    a. The definition of "*interim measure*" in Article 17;
    b. Articles 17 A and B, Article 17 I(1), Article 17 J(1), and Articles 17 L and M.

55. The definition of "*interim measure*" has been set out in paragraph 53 above.

56. Articles 17 A-17 B,17 I(1),17 J(1), and 17 L- 17 M read as follows:

17A Power of arbitral tribunal to grant interim measure

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure.

17B Conditions for granting interim measure

(1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that---

> *(a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and*
>
> *(b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and*
>
> *(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.*

(2) If an interim measure of a kind described in subparagraph (d) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal of the matters specified in paragraph (1)(a) to (c), but only to the extent that the arbitral tribunal considers appropriate.

(3) If an interim measure of a kind described in subparagraph (e) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim.

(4) A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination.

17I Provision of security

(1) The arbitral tribunal may require the applicant for an interim measure to provide appropriate security in connection with the measure.

17J Disclosure of material circumstances

(1) The arbitral tribunal may require a party to promptly disclose to the arbitral tribunal a material change in the circumstances upon which an interim measure was requested or granted.

17L Recognition and enforcement

(1) An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court, irrespective of the country in which it was granted.

(2) Paragraph (1) is subject to article 17M.

(3) The applicant for recognition or enforcement of an interim measure under article 35 must promptly inform the Court of any modification, suspension, or cancellation of that interim measure.

(4) The Court may, if it considers it proper, order the applicant to provide appropriate security if---

(a) the arbitral tribunal has not already made a decision with respect to the provision of security; or

(b) the decision with respect to the provision of security is necessary to protect the rights of third parties.

17M Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only---

(a) at the request of the respondent if the Court is satisfied that---

(i) the refusal is warranted on the grounds set out in article 36(1)(a)(i), (ii), or (iv); or

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure granted by it has not been complied with; or

(iii) the interim measure has been suspended or cancelled by the arbitral tribunal or, if so empowered, by the Court of the country in which the arbitration took place or under the law of which that interim measure was granted; or

(b) if the Court finds that---

(i) the interim measure is incompatible with the powers conferred on the Court, unless the Court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set out in article 36(1)(b) apply to the recognition and enforcement of the interim measure.

(2) A determination made by the Court on any ground in paragraph (1) is effective only for the purposes of the application to recognise and enforce the interim measure.

(3) The Court must not, in making that determination, undertake a review of the substance of the interim measure."

57. An interim measure may be granted in the form of an award or in the form of a procedural order (see the definition of "*interim measure*" in Article 17, quoted in paragraph 53 above). In either case the measure can be enforced by a court in terms of Articles 17 L and 17 M (see paragraph 56 above).

58. In paragraph 41 above, I argued that even under the pre-amendment regime the power of an arbitral tribunal to grant interim measures was wider than the power to make preservation orders. Under the Act as amended, there is no question but that an arbitral tribunal's powers are wider than the making of preservation orders and, indeed, wider even than I argued for in relation to the previous powers.

59. What powers does an arbitral tribunal now have? It is difficult to answer that question precisely because:
    a. The description of at least one of the categories of orders that may be made by a tribunal under the Act as amended is in terms with which we have not hitherto been familiar; and
    b. The description of a second category is so broad that it could be interpreted as giving an arbitral tribunal greater power than our courts currently have.

60. The power to make an order requiring a party to "*maintain or restore the status quo pending the determination of the dispute*" needs no comment. The language is the standard language of interlocutory injunctions. Note, however, the requirements of Article 17B(1) (see paragraph 56 above and 71 below).

61. How are we to interpret the power to order a party to "*take action to prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings*"? The power to "*maintain or restore the status quo pending the determination of the dispute*" preserves or restores the situation "*quo ante*" so that any award can operate on, and in, an unchanged situation. The power to require a party to "*take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm of prejudice to the arbitral proceedings*" is designed to protect the integrity of the process rather than the integrity of the underlying situation. One obvious possibility is that an arbitral tribunal may make an order restraining a party to the arbitration from issuing an anti-suit injunction.[16] Another possibility is an order restraining a party from interfering with witnesses or arbitrators. What about a situation where a claimant is dependant upon payment under a subsequent contract or contracts with the respondent and the respondent is wrongfully withholding payment under those other contracts, so jeopardising the claimant's ability to finance the subject arbitration? I had a situation very like that in an arbitration I was doing in Nepal a number of years ago. Could the Tribunal issue an order to the respondent requiring it to pay the amounts due under the other contract?

62. Once again, it is necessary to consider the requirements of article 17B(1) (see paragraph 56 above and 71 below).

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[16] See in this regard the article by Sundaresh Menon and Elaine Chao: *Reforming the Model Law Provisions oT Interim Measures of Protection* (2006) 2 AIAJ 1-31 at 6

63. At first glance the power to require a party to "*provide a means of preserving assets out of which a subsequent award may be satisfied*" requires no comment. It obviously covers the standard *Mareva* injunction situation (ignoring, for the moment, the continuing inability of an arbitral tribunal to make orders affecting third parties). But is the power not potentially wider? It is not restricted on its face to the situation where assets are being dissipated. The long-standing common law refusal to make orders securing the amount claimed simply on the ground that a claim has been made is not necessarily shared by all legal systems. The power is unrestricted. Has the law been changed?

64. Once again, it is necessary to consider the requirements of article 17B(1) (see paragraph 56 above and 71 below).

65. The power to make an order requiring a party to "*preserve evidence that may be relevant and material to the resolution of the dispute*" requires no comment. In the case of the exercise of this power, it is necessary to have regard to the requirements of Article 17B(2) (see paragraph 71 below).

66. The scope of the power to order a party "*to give security for costs*" is not clear. The power is not one included in the Model Law. Three possibilities occur to me.

67. The first possibility is that it is intended to confer a general power to order security for costs against a claimant or counterclaimant in both international and domestic arbitrations, so that the tribunal in an international arbitration has the same power (unless it is excluded by agreement) as a tribunal in a domestic arbitration. If that was the intention, why has the power to order the giving of security for costs in clause 3 of Schedule 2 to the Act been retained?

68. The second possibility is that the power was intended to be used against parties seeking interim measures. It appears from the report of the Justice and Electoral Committee to the House that that was its intention in introducing this provision into the bill In the section of its report dealing with interim measures, the Committee said:

    > *In addition, we recommend amending the bill to empower an arbitral tribunal to require an applicant for an interim measures to provide security for costs. At present, in international arbitrations, the arbitral tribunal does not have the ability to order security for costs. This ability is, however, available in domestic arbitrations, and the court also has the power to order security for costs when considering an arbitral award on appeal*.

    If it was intended to confer a specific power to require security for costs from an applicant for an interim measure:

    a. It was unnecessary to do so in the definition of "*interim measure*" because the power is expressly conferred by Article 17I(1) (see paragraph 56 above and paragraph 73 below);
    b. That is not what the words used say.

69. A third possibility is that, on the proper interpretation of the power, it is one which can be used against either a claimant or a respondent, truly a revolution in thinking. Article 17B(3) lends some support to this interpretation. It reads as follows:

> *If an interim measure of a kind described in subparagraph (e) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim.*

ie, effectively, what is sauce for the goose is sauce for the gander.

70. I have to say that I do not know what the correct answer is to the question I have posed.

71. Article 17B (see paragraph 56 above) sets out the conditions for granting the various interim measures identified in Article 17:
    a. In the case of the first three powers set out in Article 17, the applicant:

       ... must satisfy the arbitral tribunal that -

       (a) *harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and*

       (b) *the harm substantially outweigh the harm that is likely to result to the respondent if the measure is granted; and*

       (c) *there is a reasonable possibility that the applicant will succeed on the merits of the claim*. (Article 17B(1))
    b. In the case of the fourth interim measure identified in Article 17 (ie the power to make an order requiring a party to preserve evidence) the standard of proof which applies to an application for any one of the first three orders applies "*to the extent that the arbitral tribunal considers appropriate*" (Article 17B(2)). That, of course, leaves the question of what level of proof a tribunal should consider appropriate. As with the matters that have to be considered in respect of an application for one of the first three interim measures identified in Article 17, the decision in any case will be fact specific.
    c. In the case of an application that a party "*give security for costs*", Article 17B(3) provides:

       If an interim measure of a kind described in subparagraph (e) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim

72. Article 17B(4) (see paragraph 56 above) provides that:

> *A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination*[17]

ie, that a finding that "*there is a reasonable possibility that the applicant will succeed on the merits of the claim*" does not bind the tribunal when it comes to the substantive hearing and award.

[17] See further regarding this provision page 8 of the article by Menon and Chao referred to in footnote 16

73. Article 17I(1) (see paragraph 56 above) gives the arbitral tribunal the power to require the applicant for an interim measure "*to provide appropriate security in connection with the measure*".

74. Article 17J(1) (see paragraph 56 above) gives an arbitral tribunal the power to require a party:

> *... to promptly disclose to the arbitral tribunal a material change in the circumstances upon which an interim measure was requested or granted*.

It would, I suggest, be good practice for an arbitral tribunal to include in its order, or at least consider including in its order, such a requirement.

75. Articles 17L-17M need no comment.

76. The power of the arbitral tribunal to grant interim measures may be excluded by agreement of the parties (Article 17A).

(iv) Preliminary orders – specific provisions

77. The new chapter 4A contains the following provisions specific to preliminary orders:
    a. The definition of "*preliminary order*" in Article 17;
    b. Articles 17C-17G, Article 17I(2) and 17J(2) and (3).

78. The definition of "*preliminary order*" is set out in paragraph 53 above.

79. The text of Articles 17C-17G, Article 17I(2) and 17J(2) and (3) is as follows:

> ***17C Power of arbitral tribunal to issue preliminary order***
>
> *Unless otherwise agreed by the parties, a party may, without notice to any other party, apply for a preliminary order when making a request for an interim measure to be granted under article 17A.*
>
> ***17D Conditions for issuing preliminary order***
>
> *(1) The arbitral tribunal may issue a preliminary order if it considers that prior disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the measure.*
>
> *(2) An applicant for a preliminary order must satisfy the arbitral tribunal of the matters specified in article 17B. That article applies to a preliminary order subject to---*
>
> *(a) the modification that the harm to be assessed under article 17B(1)(a) is the harm likely to result from the order being issued or not; and*
>
> *(b) all other necessary modifications.*

> ***17E Procedure for preliminary order***
>
> *(1) Immediately after the arbitral tribunal makes a determination in respect of an application for a preliminary order, it must---*
>
> *(a) give notice to all the parties of---*
>
> *(i) the request for the interim measure; and*
>
> *(ii) the application for the preliminary order; and*
>
> *(iii) the preliminary order issued by the arbitral tribunal (if any); and*
>
> *(iv) all other communications (whether oral or written) between a party and the arbitral tribunal in relation to the matters specified in subparagraph (a)(i) to (iii); and*
>
> *(b) give an opportunity to each respondent to present the respondent's case at the earliest practicable time.*
>
> *(2) The arbitral tribunal must decide promptly on any objection to the preliminary order.*
>
> ***17F Duration of preliminary order***
>
> *(1) A preliminary order expires 20 days after the date on which it was issued by the arbitral tribunal.*
>
> *(2) However, the arbitral tribunal may grant an interim measure adopting or modifying the preliminary order, after each respondent has been given---*
>
> *(a) notice under article 17E(1); and*
>
> *(b) an opportunity to present the respondent's case.*
>
> ***17G Effect of preliminary order***
>
> *(1) A preliminary order is binding on the parties but is not enforceable by a court.*
>
> *(2) A preliminary order does not constitute an award.*
>
> ***17I Provision of security***
>
> *(2) The arbitral tribunal must require the applicant for a preliminary order to provide appropriate security in connection with the order unless it considers it inappropriate or unnecessary to do so.*
>
> ***17J Disclosure of material circumstances***
>
> *(2) The applicant for a preliminary order must disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination as to whether to issue or extend the order.*
>
> *(3) The obligation in paragraph (2) continues until each respondent has had an opportunity to present the respondent's case, after which paragraph (1) applies.*

80. As with the power to grant interim measures, the power of an arbitral tribunal to issue preliminary orders may be excluded by agreement between the parties (Article 17C).

81. The purpose of a preliminary order is to prevent the frustration of "*the purpose of a interim measure*", ie to prevent an interim measure, if made, being ineffective (Article 17). An application for a preliminary order is made when making a request for an interim measure to be granted (Article 17C). It is made without notice to the other party (Article 17C). An applicant for a preliminary order must satisfy the tribunal of

the same matters that an applicant for an interim measure is required to satisfy it of, subject to the obvious difference that the matters in issue have to be considered in the context of the order, which is short-lived (see paragraph 85 below), and not the related interim measure, which is capable of being enforced (see paragraph 56 above).

82. An applicant for a preliminary order has an obligation to make disclosure of all relevant circumstances (Article 17 I (1)). The obligation continues until each respondent has had an opportunity to present its case (Article 17 J (3)).

83. A tribunal from which a preliminary order is sought must require the applicant to provide security in connection with the order "*unless it considers it inappropriate or unnecessary to do so*" (Article 17 I(2)).

84. Under Article 17 E(1) (see paragraph 79 above) a tribunal which has made a determination in respect of an application for a preliminary order is under a duty "*immediately after [making the] determination*" to give notice of the prescribed matters to all parties and to give an opportunity to each respondent to present that party's case "*at the earliest practicable time*". The prescribed matters include the request for the interim measure, the application for the preliminary order, the preliminary order issued (if any), and, importantly:

> *all other communications (whether oral or written) between a party and the arbitral tribunal in relation to the above matter*

The tribunal has a further duty to "*decide promptly on any objection to the preliminary order*".

85. A preliminary order expires "*20 days after the date on which it was issued by the arbitral tribunal*" (Article 17F(1)) but may be replaced by an interim measure which adopts or modifies the preliminary order (Article 17F(2)). Before granting any such interim measure, the tribunal must give each respondent notice under Article 17E (see paragraphs 79 and 84 above) and an opportunity to present the respondent's case.

86. A preliminary order is binding on the parties but:
    a. is not enforceable by a court; and
    b. does not constitute an award.

(Article17G)

(v) Interim measures and preliminary orders – common provisions

87. The new Chapter 4A contains the following provisions applicable to both interim measures and preliminary orders:
    a. The definitions of "*applicant*" and "*respondent*" in Article 17;

b. Articles 17H and17K

88. The text of the definitions of "*applicant*" and "*respondent*" are set out in paragraph 52 above

89. The text of Articles 17H and17K is as follows:

> ***17H Modification, suspension, and cancellation***
>
> *If the arbitral tribunal grants or issues an interim measure or a preliminary order, it may modify, suspend, or cancel the measure or order---*
>
> *(a) on the application of a party; or*
>
> *(b) on its own initiative, but only in exceptional circumstances and after giving prior notice to the parties.*
>
> ***17K Costs and damages***
>
> *(1) An applicant for an interim measure or a preliminary order is liable for any costs and damages caused to any party by the measure or order if the arbitral tribunal later determines that, in the circumstances, the measure or order should not have been granted or issued.*
>
> *(2) The arbitral tribunal may award those costs and damages at any time during the arbitral proceedings.*

90. Two points should be noted about Article 17H:
    a. The power may be exercised either on the application of a party or on the tribunal's own initiative, in the latter case "*only in exceptional circumstances and after giving prior notice to the parties*";
    b. The power to modify a preliminary order provided by the Article is additional to, and different from, the power of a Tribunal to grant an interim measure adopting or modifying a preliminary order under Article 17F(2) (see paragraph 85 above).

91. Article 17K needs no comment.

<u>(c) The powers of the courts</u>

92. There is no doubt that the intention of Parliament was to assimilate the powers of the courts to issue interim measures to those of arbitral tribunals. There are, however, three comments I would make or questions I would ask:
    a. The new Article 9(2) could have been better worded;

b. How well do the provisions of the amended Act mesh with the existing High Court Rules and District Courts Rules;

c. Do the opening words of Article 17A ("*Unless otherwise agreed by the parties*") apply also to the courts?

93. With regard to the first point made in paragraph 92 above, I question whether the wording of the new Article 9(2) is entirely felicitous. For convenience, I repeat it here:

> *For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under Article 17A for the purposes of proceedings before that court, and that article and Article 17B apply accordingly subject to all necessary modifications.*

The words "*for the purposes of proceedings before that court*" have been retained from the original wording of Article 9(2). They should, I suggest, have been omitted, so that the paragraph would read as follows:

> *For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under Article 17, and that article and Article 17B apply accordingly subject to all necessary modifications.*

The clause would then have been perfectly clear: the courts have the same powers as an arbitral tribunal and must approach their exercise in the same way as an arbitral tribunal, ie by reference to the matters set out in Article 17A-17B.

94. With regard to the second point made in paragraph 92 above, there is a question, in my opinion, as to how well the provisions of the Arbitration Act, as amended, mesh with the existing High Court Rules and the District Courts Rules. Whereas, under the Act before amendment the High Court or a District Court had "*the same power as it has for the purposes of proceedings before [it]*" to make the specified types of orders, so that one clearly had to look at the rules of the relevant court to determine the nature and extent of the power to grant interim measures, under the Act as amended the courts have to look to the Arbitration Act for their powers to grant interim measures in support of an arbitration. I have already commented upon certain aspects of the powers of arbitral tribunals under the Act as amended which arguably go beyond the existing powers of the courts. Are the courts now to have those powers, notwithstanding that they do not arise from either the Court's inherent jurisdiction in the case of the High Court, or the relevant rules, in the case of either the High Court or a District Court? On the flip side of the coin, it may be that under the new regime, the courts no longer have some of the powers that they previously had. For example:

a. There is nothing in the definition of "*interim measure*" in the new version of Article 17 which would give the courts the power to appoint a receiver, as used to be possible under Article 9(2)(c) before amendment;

b. The definition of "*interim measure*" in the amended Article 17 does not include any reference to, or any reference that is capable of being interpreted as a reference to, interim orders other than interim injunctions, so that the courts will no longer, in the context of an arbitration, be able to make interim

distribution or interim income or interim payment orders under HCR rr 333, 334 and 346B and DCR rr 351, 352 and 355B.

If I am right in what I have just said, it appears to me to follow that, instead of having a single set of interim measures which courts are able to grant whether dealing with proceedings before them or dealing with applications for interim measures in support of arbitrations, the courts will be required to operate under two different systems, one for proceedings before the courts and the other for applications in support of arbitrations.

95. With regard to the third point made in paragraph 92 above, there is a question as to whether the opening words of Article 17 A ("*Unless otherwise agreed by the parties*") apply also to the courts. Traditionally, the courts have struck down agreements to exclude their jurisdiction, although eventually accepting the appropriateness of matters being referred to arbitration by agreement between the parties rather than to the court. If parties to an arbitration agreement agree that they will not have the right to ask for interim measures either from the arbitral tribunal or from the courts, will the courts accept that, so far as their powers are concerned, or will they strike it down? Or if they agree to exclude the courts' powers but to retain those of the tribunal? The new wording of Article 9(2) provides as follows:

> *For the purpose of paragraph 1, the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under Article 17A for the purposes of proceedings before that court and that article and Article 17B apply accordingly subject to all necessary modifications*

Under the Article:

a. a court "*has the same power as an arbitral tribunal to grant an interim measure under Article 17 A*";
b. Articles A and B "*apply accordingly subject to all necessary modifications*".

Is it a "*necessary modification ...*" to Article 17 A, when applying it to the court situation, to disregard the words "*Unless otherwise agreed*"? In favour of excluding the words is the courts' traditional refusal to recognise agreements ousting their jurisdiction. In favour of retaining the words (and thereby entitling the parties to exclude the jurisdiction of the courts to grant interim measures) is the modern recognition by the courts of the importance of arbitration as an agreed method of resolving commercial disputes and of the primacy of the parties' arbitration agreement. Again, I do not know the answer to the question I have posed.

Summary and conclusions

96. There is no doubt that, as already suggested, the new regime for interim measures introduced by the Arbitration Amendment Act 2007 is revolutionary. It considerably widens the powers of arbitral tribunals, both as to the type of order that they can make and as to their ability to make orders ex parte. It also, as I attempted to explain in the previous section of this paper, affects the powers of courts to grant interim measures.

97. What is clear is that the need for parties to apply to the courts for interim measures has been significantly reduced as a result of the conferring of the new powers on arbitral tribunals, although there will obviously be a continuing need to apply to the courts where it is necessary to affect the rights of third parties. The relationship between the courts and arbitral tribunals described in the two passages which follow has been made even clearer by the amendments to the Arbitration Act:

    a. *Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are ceized of the dispute, the baton is in the grasp of the Court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At that point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.*[18]

    b. *In short, the purpose of interim measures is to complement and facilitate the arbitration, not to forestall or substitute for it. The [courts'] role is ancillary, to be exercised only to the extent that it is not possible or practicable for the arbitrator to deal with the issue.*[19]

98. The amendments to the Act create opportunity and carry risk. There are two ways in which AMINZ can and, I suggest, should assist us all to take advantage of the opportunity and to manage the risk. The first thing is, either by itself or together with the New Zealand Law Society, put on a seminar on the new interim measures regime, as it affects both tribunals and the courts. The second thing is to establish, and encourage its members (both arbitrators and advocates) to contribute to, a data base of interim measure orders and preliminary orders. We are entering unknown territory. We will be trailblazers, not only in the local context but in the worldwide context, because New Zealand is the first country to adopt these measures. Trailblazers not only make the trail but mark it, so that others may follow. We have, and should take, the opportunity to do this.

99. I urge the Institute to take the initiative on both fronts.

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For further information, including my CV, see my website at www.kennedygrant.com

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[18] Lord Mustill "*Comments and Conclusions*" in *Conservatory and Provisional Measures in International Arbitration* 9th Joint Colloquium (ICC Publication, 1993) as quoted in Redfern & Hunter: *Law & Practice of International Commercial Arbitration* paragraph 7-05

[19] *Sensation Yachts Ltd v Darby Maritime Ltd* (High Court, Auckland, CIV-2005-404-1908, 16/5/05, Baragwanath J). See also *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 and *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681