THE NEW ZEALAND EXPERIENCE OF THE UNCITRAL MODEL LAW:
A review of the position as at 4 December 2009

by

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Introduction and Background

1 The New Zealand Arbitration Act 1996 ("the principal Act"), which is substantially based on the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), came into force on 1 July 1997. In 2007 the Act was amended in a number of significant respects by the Arbitration Amendment Act 2007, which came into force on 18 October 2007 ("the Amendment Act"). One of the amendments was the incorporation into the principal Act of the new interim measures regime adopted by UNCITRAL in 2006.

2 The text of the Act, as amended, can be downloaded from the New Zealand Government website at www.legislation.govt.nz.

3 Prior to the coming into force of the principal Act, the statutory framework of commercial arbitration in New Zealand was contained in five Acts, the first and second of which related to domestic arbitration and the third, fourth and fifth to international arbitration. These Acts were:

The Arbitration Act 1908 (as amended);
The Arbitration Amendment Act 1938 (as amended);
The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 (as amended in 1957);
The Arbitration (International Investment Disputes) Act 1979;
The Arbitration (Foreign Agreements and Awards) Act 1982.

4 The first two Acts mirrored the English legislation up to 1950 and, like that legislation, were problem-specific and ameliorative.

5 The third Act was passed to give effect to the Geneva Protocol (1923) and Geneva Convention (1927) in relation to foreign arbitration agreements and arbitral awards respectively. It was one of the suite of similar Acts passed throughout the then British Empire at or about that time.

6 The fourth and fifth Acts were passed to give effect respectively to New Zealand's obligations under the Washington Convention (1965) and the New York Convention (1958).

7 In October 1991 the New Zealand Law Commission published a Report[1], entitled "*Arbitration*", in which it recommended the replacement of the existing legislation, with the exception of the 1979 Act passed to give effect to the Washington Convention. It recommended a single, comprehensive Act, which would have as its base the Model Arbitration Law. The proposed Act would maintain the distinction between international arbitrations and domestic arbitrations but would apply the provisions of the MAL to both types of arbitration with supplementary provisions applying to domestic arbitrations unless the parties to a particular arbitration opted out of them. Provision would be made for the parties to an international arbitration to opt into those supplementary provisions if they so chose.

8 The matters which influenced the Law Commission to make its recommendations were set out clearly in paragraphs 3-5 of its Report:

> *3 Arbitration law concerns a critical balance: the balance which is to be struck between the autonomy of the parties and the law of the land. On the one side of the balance is the agreement of the parties. The parties to a contract or to a dispute agree that their disputes are to be resolved by a tribunal which they establish themselves or to which they agree. The tribunal is to follow a procedure on which the parties may agree, and is to apply the law which they may state. The parties also, in general, pay for the arbitration. That is to say, the whole process rests on the parties' consent and is their creation. But not quite. For on the other side of the balance is the significant weight of the general law of the land. The very agreement that sets up the tribunal is an agreement under some system of law. It is national law, with national courts, which can be used to require a reluctant party to submit to arbitration, and to enforce any resulting award. The law may state the procedure to be followed. The law might, as well, also be used to control the arbitrator. To what extent should the courts, enforcing their perception of the law and of*

[1] NZLC R20

procedural fairness, be free to override the decision of the arbitral tribunal and to upset the conclusions reached through that consensual process? To what extent should judicial supervision be able to undermine the advantages of informality, privacy, expedition, expertise and cost which arise from the agreement? And what matters cannot be made the subject of arbitration, that is of the parties' private ordering?

4 In settling answers to those questions and making the recommendations set out in this Report, the Law Commission has been able to draw on very valuable sources of information, advice and comment. The process has led the Commission to revise opinions it expressed on a number of important matters in its discussion paper on ***Arbitration*** *published in 1988. The detail of the changes illustrates once again the importance and value of the consultative processes which the Law Commission endeavours to apply in its work. We are greatly indebted to those individuals and organisations who responded to the discussion paper, and in many cases to several subsequent requests for advice on drafts or on particular points. In short, we have had excellent assistance from those prominent in the arbitration world in New Zealand and elsewhere. A summary of our consultative activities, including a list of those who helped us, appears in Appendix B. Our work on arbitration also owes an immeasurable debt to those who have reflected and written on the topic of arbitration and its reform in other parts of the world – expert practitioners, commentators, and those involved in law reform agencies. An indication of the scope of the relevant literature on arbitration may be found in the selected bibliography in Appendix C.*

5 That process and the related review and rewriting of arbitration statues in many parts of the world (including Australia) have led the Law Commission to a clear conviction that a new statutory regime for arbitration is highly desirable now. The increasing demands on the courts in New Zealand, as elsewhere, have generated wider interest in the full range of methods of resolving disputes. A number of those methods – conciliation or mediation, for example – require an agreed decision by the parties and not necessarily a statutory framework. Arbitration by contrast does require such a framework if it is to produce efficient procedures and final decisions. One specific development highlights the need for re-examination of the present legislation. That development is the discernible trend in favour of enhanced party autonomy and, as a consequence, restricted judicial review in arbitration legislation in various countries. The trend has been acknowledged and reflected by the Court of Appeal in ***CBI New Zealand Ltd v Badger Chiyoda*** *[1989] 2 NZLR 669. That trend involves a change from an earlier more intrusive approach. Such a changing philosophy will very likely be relevant to the interpretation and application of a new arbitration statute reflecting it. There is the more general consideration that the present New Zealand legislation is essentially that enacted in the United Kingdom in 1889 and 1934. That law has been substantially amended and supplemented in the United Kingdom and has been replaced in other parts of the Commonwealth in which it was earlier copied. As we indicate later, much of the new legislation in the Commonwealth and elsewhere is based on the UNCITRAL Model Law.*

9 The Commission's recommendations were accepted by the Government of the day in 1992; but the legislation was not passed until 1996.

Structure and key features of the Act

10 The Act as amended comprises 29 sections and 5 Schedules. The sections fall into the following groups:

(a) Section 1 - Short title and commencement;

(b) Sections 2 and 3 - Interpretation;

(c) Section 4 - Act to bind the Crown;

(d) Section 5 - Purposes of Act;

(e) Sections 6-8 - Application of Act to arbitrations;

(f) Section 9 - Arbitration under other Acts;

(g) Section 10 - Arbitrability of disputes;

(h) Section 11 - Consumer arbitration agreements;

(i) Section 12 - Powers of arbitral tribunal in deciding disputes;

(j) Section 13 - Liability of arbitrators;

(k) Sections 14-14I – Privacy and confidentiality;

(l) Section 15 - Certificates concerning parties to the conventions;

(m) Sections 16-20 - Rules, Amendments to other Acts, Repeals, Transitional provisions, and Act passed in substitution for Arbitration Act 1908.

The Schedules are as follows:

(i) Schedule 1 – Rules applying to arbitration generally (incorporating the Model Law with modifications);

(ii) Schedule 2 – Additional optional rules applying to arbitration;

(iii) Schedule 3 – Treaties relating to Arbitration (incorporating the Geneva Protocol, Geneva Convention and the New York Convention);

(iv) Schedule 4 – Enactments amended;

(v) Schedule 5 – Enactments repealed.

11 The key features of the regime established under the Act are as follows:

(a) The only limitations on arbitrability are those imposed by public policy or by any other law (s 10(1));

(b) Special formalities must be met where a person enters into an arbitration agreement as a consumer if that agreement is to be enforceable against that person (s 11);

(c) Unless otherwise agreed by the parties, an arbitration agreement is deemed to provide that an arbitral tribunal may "*award any remedy or relief that could have been ordered by the High Court*" (s 12(1)(a)) and may award interest (s 12(1)(b));

(d) An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator (s 13);

(e) There are provisions regarding privacy and confidentiality of arbitral proceedings and related Court proceedings (ss 14-14I);

(f) The provisions of Schedule 1 (incorporating a modified version of the Model Law) apply to all arbitrations the place of which is, or would be, New Zealand, whether the arbitration is a domestic arbitration or an international one (s 6(1));

(g) The provisions of Schedule 2 (containing additional optional rules applying to arbitration) only apply to an international arbitration the place of which is, or would be, New Zealand if the parties to the arbitration agree ("the opt-in provision") (s 6(1)(2));

(h) The provisions of Schedule 2 apply to a domestic arbitration unless the parties agree otherwise ("the opt-out provision") (s 6(1)(2));

(i) If the place of arbitration is not in New Zealand, articles 8, 9, 35, 36 of Schedule 1 apply (s7);

(j) If it still has to be agreed or determined whether the place of arbitration will be in New Zealand, articles 8 and 9 of Schedule 1 apply to the arbitration (s8).

12 The principal modifications of the Model Law in Schedule 1 to the Act are as follows:

(a) Form of arbitration agreement (article 7) – the agreement may be oral;

(b) Stay of court proceedings (article 8) - there is an additional ground on which a stay may be refused, viz. "*that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*";

(c) Interim measures by courts (article 9) - the powers of courts to grant interim measures are assimilated to those of an arbitral tribunal (see sub-paragraph (e) below);

(d) Appointment of substitute arbitrator (article 15) – additional, consequential, provisions;

(e) Power of arbitral tribunal to order interim measures (article 17) - adopting the amendments to the Model Law made by UNCITRAL in 2006 (with some modifications);

(f) Determination of rules of procedure (article 19) – provision conferring on counsel or expert or other person appearing before an arbitral tribunal "*the same privileges and immunities as witnesses and counsel in a proceeding before a court*";

(g) Hearings and written proceedings (article 24) – express provision for representation or appearance in person;

(h) Default of a party (article 25) – additional provision;

(i) Court assistance in taking evidence (article 27) – additional, ancillary, powers;

(j) Form and contents of award (article 31) – express provision for award to carry interest;

(k) Termination of proceedings (article 32) – additional provisions covering the death of a party;

(l) Application for setting aside (article 34) – provision for the court hearing an application to set aside an award to order that "*any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application*" (sub-article 34(5)) and the addition of the following sub-article (sub-article 34(6)) identifying particular facts which will result in an award being in conflict with the public policy of New Zealand:

> *(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii),it is hereby declared that an award is in conflict with the public policy of New Zealand if-*
>
> *(a) The making of the award was induced or affected by fraud or corruption; or*
>
> *(b) A breach of the rules of natural justice occurred-*
>
> *i. During the arbitral proceedings; or*
>
> *ii. In connection with the making of the award.*

(m) Grounds for refusing recognition or enforcement (article 36) – the second of the two provisions added to article 34.

13 Schedule 2 contains the following "Additional Optional Rules which Apply to Arbitration".

(a) Clause 1 Default appointment of arbitrators

(b) Clause 2 Consolidation of arbitral proceedings

(c) Clause 3 Powers relating to conduct of arbitral proceedings

(d) Clause 4 Determination of preliminary point of law by Court

(e) Clause 5 Appeals on question of law

(f) Clause 6 Costs and expenses of an arbitration

(g) Clause 7 Extension of time for commencing arbitral proceedings

The additional optional rules apply to all domestic arbitrations unless the parties opt out of them. They do not apply to international arbitrations unless the parties opt into them. Parties may opt into or out of individual clauses of Schedule 2 or the whole Schedule.

14 The right to appeal on a question of law arising out of an award is possible only:

(a) If the parties have so agreed before the making of [the] award;or

(b) With the consent of every other party given after the making of [the] award; or

(c) With the leave of the High Court.

(Schedule 2, cl 5(1)). The High Court may not grant leave "*unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties*." (cl 5(2)).

15 Schedule 3 contains the texts of the Geneva Protocol (1923), the Geneva Convention (1927) and the New York Convention (1958).

16 Schedules 4 and 5 are simply lists of enactments amended or repealed by the Act[2].

The 2007 amendments

17 In February 2003 the Law Commission published a second Report[3], entitled "*Improving the Arbitration Act 1996*", in which it considered a number of aspects of the Act and recommended changes to it. The topics considered in the Report were as follows:

(a) Confidentiality;

(b) Issues Arising out of Appeals from Arbitral Awards;

(c) Transitional Issues;

(d) Issues Affecting Consumers;

(e) Other Issues Raised by the Preliminary Paper published in September 2001[4];

(f) New Issues raised by Submissions.

The Report and the Parliamentary Paper are available on the Law Commission's website at www.lawcom.govt.nz.

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[2] For further information regarding the Act see my National Report in the *ICCA Handbook on Commercial Arbitration* and *Green & Hunt on Arbitration Law and Practice*

[3] NZLC R83

18 In October 2007 the Arbitration Amendment Act, based on the Law Commission's recommendations, was passed into law. It:

(a) Further strengthens the protection given to consumers under s 11 of the Act;
(b) Replaces the present single-section provision in relation to confidentiality (s 14 of the Act) with a group of 10 sections;
(c) Amends the transitional provisions section (s 19);
(d) Amends article 35 of Schedule 1 but without altering its effect;
(e) Amends clause 1 of Schedule 2 to the Act;
(f) Amends clause 5 of Schedule 2 to the Act by providing a partial definition of the expression "*question of law*".

Parliament also, on the recommendation of the relevant Select Committee, incorporated the new interim measures regime adopted by UNCITRAL in 2006 (Chapter 4A, articles 17-17M).

Judicial decisions on the Act

19 In this section of my paper I review the judicial decisions on the Act. I have elected to do this in terms of the framework of the arbitral process rather than in terms of the structure of the Act. I have not referred to every decision on the Act, only to those which I consider important or helpful as illustrations of the application of the Act. To date, of course, there have been no decisions on the Act as amended.

20 Using this framework, I deal with the decisions under the following headings:

(a) consumer arbitration agreements (s 11);
(b) extension of time for commencing arbitral proceedings (Schedule 2, clause 7);
(c) effect of article 5 of Schedule 1;
(d) staying of court proceeding in favour of arbitration (Schedule 1, article 8);
(e) the power of the courts to grant interim measures (Schedule 1, article 9);
(f) appointment of arbitrators (Schedule 1, article 11 and Schedule 2 clause 1);
(g) challenge to an arbitrator (Schedule 1, articles 12 and 13);

[4] NZLC PP46

(h) application to court to determine arbitrator's jurisdiction (Schedule 1, article 16(3))

(i) setting aside of award (Schedule 1, article 34);

(j) appeal from award on question of law (Schedule 2, clause 5);

(k) recognition and enforcement of awards (Schedule 1, articles 35 & 36);

(l) costs (Schedule 2, clause 6);

(m) confidentiality (s14-14I).

[a] Consumer arbitration agreements (section 11)

21 Before amendment in 2007 s 11 read as follows:

> *(1)Where—*
> *(a)A contract contains an arbitration agreement; and*
> *(b)A person enters into that contract as a consumer, —*
> *the arbitration agreement is enforceable against the consumer only if—*
> *(c)The consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and*
> *(d)The separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of the Schedule 2 do not apply to the arbitration agreement.*
>
> *(2)For the purposes of this section, a person enters into a contract as a consumer if—*
> *(a)That person enters into the contract otherwise than in trade; and*
> *(b)The other party to the contract enters into that contract in trade.*
>
> *(3)Subsection (1) applies to every contract containing an arbitration agreement entered into in New Zealand notwithstanding a provision in the contract to the effect that the contract is governed by a law other than New Zealand law.*
>
> *(4)For the purposes of article 4 of the Schedule 1, subsection (1) shall be treated as if it were a requirement of the arbitration agreement.*
>
> *(5)Unless a party who is a consumer has, under article 4 of the Schedule 1, waived the right to object to non-compliance with subsection (1), an arbitration agreement which is not enforceable by reason of non-compliance with subsection (1) shall be treated as inoperative for the purposes of article 8(1) of the Schedule 1 and as not valid under the law of New Zealand for the purposes of articles 16(1), 34(2)(a)(i), and 36(1)(a)(i) of the Schedule 1.*
>
> *(6)Nothing in this section applies to a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies.*

22 Section 5 of the Amendment Act:

(a) Repealed paragraph (c) of s 11(1) and substituted the following:

> *"(c) the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it'; and".*

(the underlined words have been added to the paragraph);

(b) Amended s 11(2) by inserting the following paragraph before paragraph (a):

> *"(aa) that person is an individual".*

(c) Repealed s 11(6) and substituting the following subsection:

> *"(6) Nothing in this section applies to –*
> *(a) a lease; or*
> *(b) a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies".*

23 This section applies to all arbitration agreements entered into in New Zealand.

24 It was considered in two decisions before it was amended, both of which involved yachts:

(a) ***Marnell Corrao Associates Inc v Sensation Yachts Ltd*** [5]

(b) ***Bowport Ltd v Alloy Yachts International Ltd & Anor*** [6]

25 In ***Marnell***[7] the claim that Marnell, the purchaser of the yacht, was a consumer for the purpose of s 11 was rejected, on the ground that it had purchased the vehicle in the course of its business for use in corporate entertainment.

26 In ***Bowport***[8] the claim that Bowport, the purchaser of the yacht, was a consumer was upheld, the Court accepting that the yacht was always intended primarily for the personal use of the beneficial owner of the shares in Bowport and his family. The arbitration agreement was therefore unenforceable in terms of s 11(1) and inoperative in terms of Article 8(1) of Schedule 1 (see section [c] below).

27 Under the Act as amended, neither of these purchasers could have claimed to be a consumer because a consumer must now be an individual.

[b] <u>Extension of time (Schedule 2, clause 7)</u>

28 Clause 7 reads as follows:

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[5] (2000) 15 PRNZ 608
[6] [2004] 1 NZLR 361
[7] (2000) 15 PRNZ 608
[8] [2004] 1 NZLR 361

> *(1) Where an arbitration agreement provides that no arbitral proceedings are to be commenced unless steps have been taken to commence the proceedings within the time specified in the agreement the High Court or a District Court, as the case may be, may, notwithstanding that the specified time has expired, extend the time for such period as it thinks fit, if, in its opinion, undue hardship would otherwise be caused to the parties.*
>
> *(2) An extension may be subject to any such conditions as the justice of the case may require.*

29 The courts only have this power if the clause applies to the particular arbitration under the provisions referred to in paragraph 14 and the place of arbitration is, or would be, in New Zealand.

30 In ***W & R Jack Ltd v Fifield***[9] the Court of Appeal allowed an appeal from the judgment of Barker J[10] refusing to grant an extension of time. The Court of Appeal held that clause 7 is essentially to the same effect as s18(6) of the Arbitration Amendment Act 1938. The Court considered, first, the question of whether undue hardship would be caused to the plaintiff tenant if an extension of time were not granted (holding that it would – it would be liable to pay the rental nominated by the defendant landlord) and, then, the factors relevant to the exercise of the Court's discretion to grant an extension of time[11].

[c] Effect of article 5 of Schedule 1

31 Article 5 reads as follows:

> *In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule*

32 In ***Carter Holt Harvey Ltd v Genesis Power Ltd & Anor***[12] Carter Holt and Genesis had entered into contract for the construction and operation of a co-generation plant for Carter Holt at its timber mill. Genesis also entered into a turnkey contract with Rolls Royce for the construction of the plant. In addition to the proceedings in the High Court, there was an arbitration between Genesis and Rolls Royce under the turnkey contract. This had been instituted by Genesis on the basis that, if it had entered a cross notice to Rolls Royce in the court proceedings or had instituted

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[9] [1999] 1 NZLR 48

[10] Reported at [1996] 2 NZLR 105

[11] This decision was applied on ***Madill & Smeed Ltd v Ebert Construction Ltd*** (High Court, Auckland, CIV-2006-404-882, 9/8/06, Associate Judge Doogue), in which case the Court held that the plaintiff had failed to establish undue hardship.

[12] High Court, Auckland, CIV-2001-404-1974, 22/2/06, Randerson J

separate court proceedings against Rolls Royce, then, in the absence of consent from Rolls Royce, the court would have been obliged to stay the proceeding pending arbitration under article 8 of the First Schedule. Rolls Royce had sought a stay of the arbitration from the arbitrator; but he had declined to grant one. Rolls Royce then applied to the court for a stay. Genesis opposed the application on the ground that the court's former jurisdiction to make such an order in the interests of justice was excluded by article 5 of Schedule 1 as the situation was governed by article 8 of that Schedule. Counsel for Genesis accepted that, if article 8 did not apply, then article 5 did not exclude court intervention. The court held that article 8 did not apply to the proceeding because:

(a) Cart Holt's claims against Genesis and Rolls Royce were not subject to any arbitration agreement; and

(b) There was no cross claim between Genesis and Rolls Royce.

The Judge went on to say:

> *The mere fact that there may be some connection between the court proceeding and the matter which is the subject of an arbitration agreement is not sufficient to engage Article 8(1). There must be a direct relationship between the matter before the court and the matter which is the subject of the arbitration agreement.*

[d] <u>Staying of court proceeding in favour of arbitration (First Schedule, article 8)</u>

33 Article 8 reads as follows:

> *(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.*
>
> *(2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

34 This article applies to all arbitration agreements.

35 The effect of the decisions on this provision to date[13] is as follows:

[13] There have, of course, been further cases; but the ones quoted are, in my view, the most important.

(a) In ***Re Hall Ex parte Bank of New Zealand***[14] the Court held that there was no arbitration agreement .

(b) In ***Candida Publishers Ltd v The Ship "Contship Holland"***[15] the Judge suggested that the categories of person entitled to apply for a stay under this provision is narrower than that under the former Arbitration (Foreign Agreements and Awards) Act 1992, which incorporated the New York Convention into New Zealand law. In my text *Construction Law in New Zealand* (published in 1999 and reprinted in 2003) I suggested that this overlooks the effect of the Contracts (Privity) Act 1982 which provides for persons who are not parties to a contract but are intended to be benefited by it and to be able to enforce it to do so.

(c) There have been a number of cases in which the question of whether the matter in issue in the court proceedings was the subject of the arbitration agreement in question has been considered: see, eg, ***Online International Ltd v Online Ltd***[16], ***Worldsites International Ltd v Korving***[17], ***Alpine Infrastructure Management Limited v Queenstown Lakes District Council***[18], ***Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd***[19]. ***Allan Scott Wines and Estates Ltd v Eurowine Fine Wines (1990) Ltd*** [20], ***Lawson v Hartshorn***[21], ***Fisher & Paykel Financial Services Ltd v Credit Management Services Inc***[22], ***Sure Care Services Ltd v At Your Request Franchise Group Ltd***[23], and ***Brewer v Marlborough Airport Ltd*** [24].

(d) In ***Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd***[25] it was held that there is an initial obligation on the party applying for a stay to establish the existence of a dispute[26].

(e) There have been a number of decisions in relation to whether a particular step taken by a party constitutes "*that party's first statement on the substance of the*

[14] High Court, Auckland, CIV 2008-404-2552, 17/7/08, Robinson AJ
[15] High Court, Auckland, AD 583/91, 17/3/98, Potter J
[16] High Court, Christchurch, CP2/00, 11/4/00, Master Venning
[17] CA 220/01, 13/12/01
[18] High Court, Invercargill, CIV 2006-425-433, 25/8/06, Chisholm J
[19] High Court, Auckland, CIV 2006-404-3579, 13/10/06, Abbott AJ
[20] High Court, Wellington, CIV 2007-485-1728, 30/1/08, Gendall AJ
[21] High Court, Christchurch, CIV 2007-409-3055, 8/5/08, Christiansen AJ
[22] High Court, Auckland, CIV 2006-404-6646, 16/5/08, Rodney Hansen J
[23] High Court, Auckland, CIV 2008-404-5112, 31/7/09, Abbott AJ
[24] High Court, Blenheim, CIV 2009-406-190, 2/9/09, Simon France J
[25] High Court, Auckland, CIV 2002-404-001747,CP256-02, 27/5/03, Master Faire
[26] This is not the same issue as arises under the "added words" of article 8 of Schedule 1, for which see sub-paragraph (f) below.

dispute". In the following cases it has been variously held that the following constitute a party's first statement on the substance of a dispute:

(i) a statement of claim relating to the same dispute as is pleaded in a counterclaim, where the plaintiff seeks to obtain a stay of the counterclaim[27],

(ii) an amended statement of claim filed after an initial notice of proceeding, statement of claim and application for interim injunction[28];

(iii) a notice of opposition and affidavit in opposition to an application for an interim injunction[29];

(iv) an originating application for an order setting aside a statutory demand and a supporting affidavit[30];

(v) an affidavit in reply in a summary judgment application in which the plaintiff raises the matters which are the subject of the arbitration agreement in reliance on which the plaintiff subsequently seeks to stay proceedings brought by the defendant;

(vi) proceeding with a claim after making an application for interim relief with reference to an arbitration agreement but failing then or immediately after the resolution of the interim relief application to apply for a stay, so adopting the statement in the interim relief application as a statement on the substance of the dispute[31];

In ***Marnell***[32] the Court held that joining in a consent memorandum with respect to interim orders before applying for a stay did not amount to a statement on the substance of the dispute.

(f) There has not yet been a decision in which an agreement has been held to be "*null and void*"; but that phrase would clearly cover non-arbitrability.

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[27] *Accident Compensation Commission v Affco Holdings Ltd* (High Court, Wellington, CIV 2007-485-508, 26/9/08. Gendall AJ).

[28] *Hurihanganui v NZ Post Ltd* (High Court, Auckland, M 653/98, 3/6/98, Master Kennedy-Grant).

[29] *The Property People v Housing New Zealand Ltd* (1999) 14 PRNZ 66 and *Fisken & Associates Ltd v Frew* (High Court, Dunedin, CP 33/01, 24/8/01, Master Venning).

[30] *Anderson Switchboards & Electronics Ltd v Schneider Electrical (NZ) Ltd* (High Court, Auckland, M1215/IM00, 16/1/01 Master Kennedy-Grant).

[31] *Pathak v Tourism Transport Ltd* ubi supra. Contrast the facts of this case with those of *Opus International Consultants Ltd v Projenz Ltd* (High Court, Auckland, CIV 2003-485-1387, 17/3/04, Master H Sargisson, where it was held that the applicant's intention to seek a stay had been clear from the start and the delay in doing so was not such as to negate that intention. *Marnell* was also distinguished in *World Good Way Inc v Wasan International Co Ltd* (High Court, Auckland, CIV 2007-404-634, 8/4/08, Faire AJ).

[32] (2000) 15 PRNZ 608

(g) There have been a number of decisions in relation to the question of whether an arbitration agreement was "*inoperative, or incapable of being performed*":

(i) In ***Marnell***[33] it was held that the arbitration agreement was "*inoperative*" because it was a consumer arbitration agreement and the requirements of s 11(1) of the Act had not been satisfied. In the same case the Court also had to consider whether a requirement for prior negotiations between executives had been satisfied. It held that it had; but I suggest that, if it had made the contrary finding, the agreement would have been "*inoperative*".

(ii) In ***Concrete Structures (NZ) Ltd v New Zealand Windfarms Ltd***[34] it was held that the arbitration provisions of the contract had not been properly invoked.

(iii) In ***Montgomery Watson NZ Ltd v Milburn NZ Ltd***[35] the plaintiff applied for an interim injunction to prevent the defendant (which was one of four defendants) taking further steps in respect of a proposed arbitration. The defendant applied for a stay. The plaintiff opposed the application on the ground that the other three defendants were not parties to the arbitration agreement. The Court held that the fact that an arbitration clause may not operate conveniently did not mean that it was inoperative. The defendant's application for a stay was granted on the basis that the plaintiff could apply to have the stay lifted in relation to its claims against the other defendants.

(iv) In ***Reddy Dig Contractors Ltd v Connectics Ltd & Ors***[36] and ***Turner v Body Corporate 361510***[37] it was held that the fact that there were other parties involved in the dispute was not a bar to the granting of a stay as between the plaintiff and one defendant, between whom there was an arbitration agreement.

(v) In ***Ishimaru Ltd v Page***[38] the Court held that the arbitration agreement had been superseded by a subsequent agreement which provided for the parties to litigate their dispute. In other cases[39] it has been argued that the

[33] (2000) 15 PRNZ 608.
[34] High Court, Christchurch, CIV 2009-409-2301, 24/11/09, Osborne AJ.
[35] High Court, Christchurch, CP86-00, 9/10/00, William Young J.
[36] High Court, Wellington, CP147-02, CP148-02, 12/2/03, Master Gendall.
[37] High Court, Christchurch, CIV 2009-409-307, 12/8/09, Osborne AJ.
[38] High Court, Auckland, CIV 2007-404-1342, 1/6/07, Heath J.
[39] *Allan Scott Wines and Estates Ltd v Eurowine Fine Wines (1990) Ltd* (High Court, Wellington, CIV 2007-485-1728, 30/1/08, Gendall AJ), *Sure Care Services Ltd v At Your Request Franchise Group Ltd* (High Court, Auckland,

arbitration agreement was "*inoperative*" because of an election to litigate, repudiation, waiver or estoppel. These arguments have failed on the facts.

(vi) In ***Raukura Moana Fisheries Ltd v The Ship "Rina Zharkikh"***[40] it was held that the arbitration agreement in question was "*inoperative or incapable of being performed*" in respect of an admiralty claim in rem against a ship.

(h) There is a divergence of view between members of the High Court as to the test to be applied in deciding whether there is "*in fact any dispute between the party with regard to the matters agreed*". In ***Fletcher/Brown Joint Venture v Kiwi Dairies Ltd***[41] I held that the test is "*not whether the party disputing liability is bona fide but whether it has arguable grounds for disputing liability*". In ***Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity Ltd***[42] Master Thomson took the same approach. However, in two subsequent decisions (***Todd Energy Ltd v Kiwi Power (1995) Ltd***[43] and ***Alstom New Zealand Ltd v Contact Energy Ltd***[44]) he resiled from that position and adopted a lesser test of whether there was in fact "*anything disputable*". The Court of Appeal has not considered the issue yet. In addition to the above cases, in which the question of the approach to be adopted by the Court is considered, there have been a number of decisions in which it has been held, without considering the standard to be adopted, that there is in fact no dispute.[45]

(i) In ***Central North Island Forest Partnership v Attorney-General***[46] it was held that article 8 could only be invoked before an arbitration had been commenced.

36 In its 2003 Report (see paragraph 17 above), the Law Commission considered, and rejected, submissions in response to its Preliminary Paper suggesting the deletion of the "added words" of Article 8 in Schedule 1 to the Act (ie the words "*or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*", which do not appear in Article 8 of the Model Arbitration Law).

CIV 2008-404-5112, 31/7/09, Abbott AJ), and *Turner v Body Corporate 361510* **(**High Court, Christchurch, CIV 2009-409-307, 12/8/09, Osborne AJ**).**

[40] [2001] 2 NZLR 801.

[41] High Court, New Plymouth, CP 7/98, 27/5/98

[42] High Court, Wellington, CP 179/99, 22/12/99

[43] High Court, Wellington, CP 46/01, 29/10/01

[44] High Court, Wellington, CP 160/01, 12/11/01

[45] See, eg, *Lawson v Hartshorn* (High Court, Christchurch, CIV 2009-409-3055, 8/5/08, Christiansen AJ

[46] High Court, Auckland, CL 28/99, 16/9/99, Williams J

[e] Power of the Courts to grant interim measures (Schedule 1, article 9)

37 Before amendment in 2007, article 9 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.*

38 Section 8(2) and (3) of the Amendment Act amended article 9 by:

(a) omitting the words "*of protection*" in paragraph (1); and

(b) repealing paragraph (2) and substituting the following paragraph:

> *(2) 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.*[47]

39 Article 9 applies to all arbitration agreements.

40 In its pre-amendment form, the article was applied in the following cases:

(a) ***Coastal Tankers Ltd v Port Wellington Ltd*** [48]

(b) ***Cosco (New Zealand) Ltd v Port of Napier Ltd*** [49]

(c) ***Marnell Corrao Associates Inc v Sensation Yachts Ltd*** [50]

(d) ***Sensation Yachts Ltd v Darby Maritime Ltd*** [51]

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[47] I commented on the implications of this paragraph in a paper, entitled "*Promised Land or Fire Swamp? Interim Measures – The New Zealand Revolution*", presented at the Second New Zealand Arbitration Day in November 2007. The paper is available on the Recent Papers page of my website at www.kennedygrant.com. A revised version was published at [2008] NZLJ 83-88 under the title "*Interim measures in arbitration*".

[48] High Court, Wellington, CP32/99, 18/2/99, Doogue J

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

[50] (2000) 15 PRNZ 608

[51] High Court, Auckland, M1146/SW02, 25/10/02, Wild J

(e) ***Lindow v Barton McGill Marine Ltd*** [52]

(f) ***Sensation Yachts Ltd v Darby Maritime Ltd*** [53]

and also in a number of cases in which a Mareva injunction was granted in support of an arbitration[54].

41 In ***Coastal Tankers*** and ***Cosco*** the Court applied the ordinary principles applicable to the granting of an interim injunction. In the first case an injunction was refused, in the second case an injunction was granted.

42 In ***Marnell***[55] the Court made interim orders designed to prevent the vessel deteriorating and to enable the carrying out of the work necessary before the vessel could be removed from Sensation's yard to a safe place.

43 In the first ***Darby Maritime*** case[56] the Court made an order for the payment of an instalment under the contract to preserve the position of the parties pending the arbitrator's award. The arbitration agreement provided for the arbitration to take place in London.

44 In ***Lindow***[57], which involved an international arbitration, the Court held that it had no jurisdiction to make an order requiring the provision of security for a party's costs (as opposed to an order securing the amount in dispute)[58].

45 In the second ***Darby Maritime*** case [59] the High Court declined to grant a mandatory injunction ordering the defendant to act as required by a particular interpretation of certain contractual provisions, on the ground that it was satisfied that "*for reasons of principle and for practical reasons the first decision on the interpretation point*

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[52] High Court, Auckland, CP13-SD02, 1/11/02, Salmon J

[53] High Court, Auckland, CIV 2005-404-1908, 16/5/05, Baragwanath J

[54] *Wilsons (NZ) Portland Cement Ltd v GATX-Fuller Australasia Pty Ltd* [1985] 2 NZLR 11(CA), *Leucardia National Corp v Wilson Neill Ltd* (1994) 7 PRNZ 701 (CA), and *Manzi v G D Hilton Ltd* (2007) NZHC 28, High Court, Auckland, CIV 2006-404-1513, 19.2.07, Heath J

[55] (2000) 15 PRNZ 608

[56] High Court, Auckland, M1146/SW02, 25/10/02, Wild J

[57] High Court, Auckland, CP13-SD02, 1/11/02, Salmon J

[58] Had the arbitration been a domestic one, the arbitrator would have had the power under clause 3(1)(d) of the Second Schedule to the Act unless the parties to the arbitration had opted out of that provision. See further paragraph 14 of this paper.

[59] High Court, Auckland, CIV 2005-404-1908, 16/5/05, Baragwanath J

should be that of the arbitrator chosen by the parties …"[60] The court had earlier stated[61]:

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

46 In ***Harris v Alspach***[62], where a party to an arbitration had obtained a ruling from an arbitrator that he could call the evidence of a conciliator as to what had been said to the conciliator in the course of the prior, unsuccessful, conciliation, the High Court correctly held it had no power to make an order addressed to the arbitrator but issued orders to the conciliator and to the party wishing to call him in the arbitration restraining them from giving and calling the evidence respectively. Article 9 did not apply to this situation.

[f] Appointment of Arbitrators (Schedule 1, Article 11 and Schedule 2 clause 1)

47 Article 11 of Schedule 1 reads as follows:

> *(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
>
> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5).*
>
> *(3) Failing such agreement,--*
> *(a) In an arbitration with 3 arbitrators and 2 parties, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the High Court:*
> *(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, upon request of a party, by the High Court.*
>
> *(4) Where, under an appointment procedure agreed upon by the parties,--*
> *(a) A party fails to act as required under such procedure; or*
> *(b) The parties, or 2 arbitrators, are unable to reach an agreement expected of them under such procedure, or*
> *(c) A third party, including an institution, fails to perform any function entrusted to it under such procedure,--*
> *any party may request the High Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

[60] Ibid, paragraph 25.
[61] Ibid, paragraph 22:
[62] High Court, Whangarei, M18/01, 23/6/03, Harrison J

(5) A decision on a matter entrusted by paragraphs (3), (4), or (6) to the High Court shall be subject to no appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall, in the case of an international arbitration, take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(6) In an arbitration, where--

(a) The parties have agreed to an arbitration with 2 or 4 or more arbitrators, or
(b) There are 3 arbitrators and more than 2 parties,--
and no procedure for the appointment of arbitrators has been agreed upon, the High Court may, upon request of a party, appoint the requisite number of arbitrators, having due regard to the matters referred to in paragraph (5).

48 This provision applies to all arbitrations of which the place is, or would be, in New Zealand.

49 Clause 1 of Schedule 2 reads as follows:

(1) For the purposes of article 11 of the First Schedule, the parties shall be taken as having agreed on the procedure for appointing the arbitrator or arbitrators set out in subclauses (2) to (5),unless the parties agree otherwise.

(2) In an arbitration with 3 arbitrators and 2 parties, each party shall appoint one arbitrator and the 2 arbitrators thus appointed shall appoint the third arbitrator.

(3) In an arbitration with-

(a) A sole arbitrator; or
(b) Two or 4 or more arbitrators; or
(c) Three arbitrators and more than 2 parties,-

the parties shall agree on the person or persons to be appointed as arbitrator.

(4) Where, under subclause (2) or subclause (3), or any other appointment procedure agreed upon by the parties,-

(a) A party fails to act as required under such procedure; or
(b) The parties, or the arbitrators, are unable to reach an agreement expected of them under such procedure; or
(c) A third party, including an institution, fails to perform any function entrusted to it under such procedure, -

any party may, by written communication delivered to every such party, arbitrator or third party, specify the details of that person's default and propose that, if that default is not remedied within the period specified in the communication (being not less than 7 days after the date on which the communication is received by all of the persons to whom it is delivered), a person named in the communication shall be appointed to such vacant office of arbitrator as is specified in the communication, or the arbitral tribunal shall consist only of the person or persons who have already been appointed to the office of arbitrator.

(5) If the default specified in the communication is not remedied within the period specified in the communication, -

(a) The proposal made in the communication shall take effect as part of the arbitration agreement on the day after the expiration of that period; and
(b) The arbitration agreement shall be read with all necessary modifications accordingly.

50 The provisions of this clause apply to domestic arbitrations, unless the parties opt out of it, but to international arbitrations only if the parties opt in to it[63], in each case where the place of arbitration is, or would be, New Zealand.

51 In ***Queensgate Tower Ltd v ANZ Banking Group (New Zealand) Ltd***[64] and ***The Cornwall Park Trust Board (Inc) v Brown***[65] the issue was the familiar one in relation to a rent review dispute: Should the arbitrator or, where appropriate, an umpire be a valuer or a barrister/solicitor/retired Judge? In the first case, Gendall J held that, because of the strong adversarial element to the dispute and the need for cross-examination and the assessment of the credibility or reliability of witnesses, a barrister/solicitor should be appointed. In the second case, Harrison J appointed a valuer as umpire rather than a retired Judge because:

(a) the lease provided for a two-stage process, under which the umpire only became involved in the event of disagreement between the party-appointed arbitrators;

(b) the wording of the lease pointed to the qualification required of the umpire being familiarity with valuation methodology;

(c) the case involved the ground rental assessment of a residential property;

(d) the case did not involve complex questions of fact or law.

52 In ***Harrison v Bell***[66] the Court appointed a well-known Auckland accountant as arbitrator in an accounting-related dispute arising on the dissolution of a partnership.

53 In ***Trans Pacific Fishing Ltd (in liquidation) v Haemin Corporation***[67] the issue was whether the dispute sought to be referred to arbitration came within the scope of the arbitration agreement relied on to found the application for the appointment of (in that case) two arbitrators or arose under a related contract with a separate arbitration clause.

[63] See paragraph 13
[64] High Court, Wellington M285/98, 8/9/98, Gendall J
[65] High Court, Auckland, CIV 2003-404-7934, 22/4/08, Harrison J
[66] High Court, Auckland (sic), CIV 2008-488-511, 12/8/08, Robinson AJ
[67] High Court, Auckland, CIV 2008-404-8142, 18/5/09, Randerson J

54 In ***Hitex Plastering Ltd v Santa Barbara Homes Ltd***[68] the Court held that, where clause 1 of the Second Schedule applies and there is a failure to agree as required by the clause, the parties are free (indeed, are required) to proceed in accordance with the clause and article 11 of Schedule 1 cannot be invoked.

55 In 2007 the Law Commission recommended a number of amendments to clause 1 of Schedule 2; but these were not taken up by Parliament.

[g] Challenge to an arbitrator (Schedule 1, articles 12 and 13)

56 Articles 12 and 13 read as follows:

> *12(1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by that arbitrator.*
>
> *(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to be the parties. A party may challenge an arbitrator appointed by that party or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.*
>
> *13(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3).*
>
> *(2)Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
>
> *(3)If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal, while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.*

57 These articles apply to all arbitrations the place of which is, or would be, New Zealand.

[68] [2002] 3NZLR 695

58 In ***Horizon Construction (Taupo) Ltd v Reitveld***[69] the Court held that it was not open to the applicant to challenge the arbitrator before the Court because it had failed to proceed as required by article 13(2).

59 In ***Auckland Co-operative Taxi Society Ltd v Perfacci Ltd***[70] the High Court removed an arbitrator from office in the course of the arbitration, on the ground of apparent bias. The Court held that the correct procedure for challenge had been followed.

60 In ***Banks v Grey District Council***[71], the challenge was rejected because the applicant had failed to proceed as required by article 13(2). The Court of Appeal held that the right to challenge arbitral appointments is conferred as a safeguard to arbitral impartiality.

61 In ***Duncan and Davies Nurseries New Plymouth Ltd v Honnor Block Ltd*** [72] the High Court held that it was not open to a party to a settlement agreement which provided for the mediator who had assisted the parties to reach the settlement agreement to act as arbitrator in relation to any disputes arising out of the settlement agreement to challenge the arbitrator, since that party was aware of the part played by the mediator in the settlement process and had consented to her appointment as arbitrator under the settlement agreement.

[h] Application to the High Court to determine arbitrator's jurisdiction (Schedule 1, article 16(3))

62 Article 16(3) reads as follows:

> *The arbitral tribunal may rule on a plea referred to in paragraph (2) [ie a plea that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

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[69] High Court, Rotorua, M64/02, 20/11/02, Master Lang
[70] High Court, Auckland, CIV 2003-404-5495, 10/10/03, Heath J
[71] [2004] 2 NZLR 19 (CA)

63 This article applies to all arbitrations of which the place is, or would be, New Zealand.

64 This article has been considered in three cases:

(a) ***Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*** [73];

(b) ***Attorney General v Feary***[74]; and

(c) ***Nalac Investment Management Ltd v Ord***[75].

65 In ***Downer Construction*** the High Court held that:

(a) "*Article 16 makes no mention of the form in which jurisdictional matters must come before the Tribunal for its provisions to apply. The provisions of article 16(3) are enlivened simply by the raising of a jurisdictional issue which the arbitrator has ruled upon*"[76];

(b) The proper approach of the Court to an application under article 16(3) "*is to reconsider the issue of jurisdiction de novo since the procedure is not by way of appeal, and since the issue before me is the threshold issue of jurisdiction*"[77].

The Court went on to hold that the arbitrator had jurisdiction.

66 In ***Feary***[78] and ***Nalac***[79]the Court was concerned only with the substantive question of whether the arbitrator had jurisdiction. In each case the Court held he did.

[i] Setting aside of awards (Schedule 1, article 34)

(i) Introduction

67 Article 34 reads as follows:

> *(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).*

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[72] High Court, Auckland, CIV 2005-404-2513, 14/6/05, Ellen France J
[73] High Court, Auckland, CIV 2004-404-4488, 26/10/04, Winkelmann J
[74] High Court, Wellington, CIV-2006-485-610, 16/6/06, Clifford J
[75] High Court, Auckland, CIV 2008-404-1510, 3/7/08, Woodhouse J
[76] *Downer*, paragraph 48
[77] *Downer*, paragraph 55
[78] High Court, Wellington, CIV-2006-485-610, 16/6/06, Clifford J
[79] High Court, Auckland, CIV 2008-404-1510, 3/7/08, Woodhouse J

(2) An arbitral award may be set aside by the High Court only if--

(a) The party making the application furnishes proof that--

(i) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Schedule; or

(b) The High Court finds that--

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand, or

(ii) The award is in conflict with the public policy of New Zealand.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if--

(a) The making of the award was induced or affected by fraud or corruption; or

(b) A breach of the rules of natural justice occurred--

(i) During the arbitral proceedings; or

(ii) In connection with the making of the award.

68 This article applies to all arbitrations where the place of arbitration is, or would be, in New Zealand.

69 I propose to consider the cases in relation to this article[80] in four groups:

(a) That dealing with the question of who has standing to bring an application under article 34;

(b) Those dealing with the procedural aspects of such applications;

(c) Those dealing with the grounds for setting aside an award;

(d) That dealing with whether article 34 can be excluded by contract[81].

(ii) Is a procedural ruling an "award"?

70 In ***General Distributors Ltd v Melanesian Mission Trust Board*** [82] the Court held that a procedural ruling is not an award[83].

(iii) Standing

71 In ***Methanex Motonui Ltd & Anor v Spellman & Ors***,[84] the Court of Appeal held that:

> "*… in the context of the Act as a whole, a person is a party to an arbitration agreement only if that person is one of the persons who has submitted the dispute to arbitration and the arbitration is in respect of a defined legal relationship which involves that person*."

(iv) Procedure

72 Procedural aspects of applications under article 34 have been considered in the following cases:

(a) ***Opotiki Parking & Coolstore Ltd. v Opotiki Fruitgrowers Co-operative Ltd (in Receivership)*** [85];

(b) ***Budget Builders Ltd v Kiore*** [86];

(c) ***Cantec Services Ltd v Pullar*** [87];

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[80] For a wider consideration of the law in relation to this article (and also article 36 of the Model Law) as at 2003 see my paper "*The Role of the Courts in Relation to Arbitration Awards*". This is available on my website at www.kennedygrant.com and also as Massey University Dispute Resolution Centre Occasional Paper Series 03/2

[81] Reference should also be made to the cases on article 36 considered at para 157 of this paper.

[82] High Court, Auckland, CIV 2008-404-4436, 21/11/08, Chisholm J

[83] The case related to an application for leave to appeal under clause 5(1)(c) of Schedule 2 to the Act; but the decision applies equally to applications under articles 34 and 36 of Schedule 1 to the Act.

[84] [2004] 3 NZLR 454 (CA)

[85] High Court, Auckland, CL 32/98, 2/11/98, Fisher J

(d) ***Acorn Farms Ltd. v Schnuriger*** [88];

(e) ***Orongo Bay Lodge and Holiday Park Ltd v Campbell*** [89];

(f) ***Kumar v MF Astley Ltd***[90].

73 In ***Opotiki***[91] the question for determination was when the 3 – month time limit imposed by article 34(3) began to run. The arbitrator published his award on 10 December 1997. The defendant applied for correction of the award under article 33(1). The arbitrator issued the correction on 26 February 1998. The plaintiff, in its turn, sought to have the arbitrator revise his figures. In doing so, it purported to rely upon the right to reasons under article 31(2) of Schedule 1 to the Act. There ensued extensive correspondence and discussions and, finally on, 2 September 1998, the arbitrator issued a document which he described as `Final Award', stating his original award (presumably as corrected) to be final. The plaintiff then applied to set aside the award. Fisher J, at first instance, and the Court of Appeal, on appeal, held that the application to set aside the award was filed out of time: the 3 month period for applying to set aside an award ran, on the most favourable view to the plaintiff, from the date of the corrected award of 26 February 1998

74 In ***Budget Builders***[92] it was held that an award of costs may be challenged in the same way as any other award.

75 In ***Cantec***[93] the Court held that the Arbitration Act 1996 does not apply to an arbitration ordered by a District Court under the District Courts Act 1947.

76 In ***Acorn Farms Ltd***[94] the Court dismissed the applicant's application for leave to appeal (on the ground that the parties had contracted out of the right of appeal) but agreed to treat the application as an application to set aside the award, as there was no prejudice to the other side in doing so.

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[86] High Court, M30/01, 10/9/01, William Young J
[87] (2002) 16 PRNZ 685
[88] High Court, Hamilton, M1136/02, 6/11/02, Heath J
[89] High Court, Auckland, M1377/02, 30/4/03, Harrison J
[90] High Court, Auckland, CIV 2005-404-6448, 20/2/06, Faire AJ
[91] High Court, Auckland, CL 32/98, 2/11/98, Fisher J
[92] High Court, M30/01, 10/9/01, William Young J
[93] (2002) 16 PRNZ 685
[94] High Court, Hamilton, M1136/02, 6/11/02, Heath J

77 In ***Orongo Bay***,[95] the Court having made an order under sub-article (5) for the provision of security and security not having been provided, the Court dismissed Orongo's application to set aside the award against it.

78 In ***Kumar***,[96] the Court considered the principles which should be applied by the Court when asked to order the provision of security.

(v) Substance : General

79 The grounds for setting aside an arbitral award are set out in article 34(2) of Schedule 1 to the Arbitration Act 1996 (see paragraph 65 above). They fall into two groups:

(a) those that will be considered by the Court only if raised by the party seeking to set aside the award (see article 34(2)(a) of the Act); and

(b) those that will be considered by the Court in any event (see article 34(2)(b) of the Act).

80 The grounds for setting aside an award may be further grouped as follows:

(a) Matters affecting the validity of the process from the commencement:

  (i) incapacity of a party (see article 34(2)(a)(i));

  (ii) invalidity of the agreement (see article 34(2)(a)(i));

  (iii) non-arbitrability of the subject matter of the dispute (see article 34(2)(b)(i));

  (iv) composition of tribunal not in accordance with the agreement of the parties or, failing such agreement, in accordance with Schedule 1 to the Act (see article 34 (2)(a)(iv)).

(b) Acts or omissions occurring during the process and affecting its validity:

  (i) applicant not being given proper notice of appointment of arbitrator or of arbitral proceedings (see article 34(2)(a)(ii));

  (ii) applicant unable to present his, her or its case (see article 34(2)(a)(ii));

  (iii) arbitral procedure not being in accordance with the agreement of the parties or, failing such agreement, in accordance with Schedule 1 to the Act (see article 34(2)(a)(iv));

[95] High Court, Auckland, M1377/02, 30/4/03, Harrison J

(iv) award dealing with dispute not contemplated by or not falling within the terms of the submission to arbitration or containing decisions on matters beyond the scope of the submission to arbitration (see article 34(2)(a)(iii));

(v) award being in conflict with the public policy of New Zealand (see article 34(2)(b)(ii)).

81 Without limiting the scope of the concept of public policy, article 34(6) of Schedule 1 to the Act provides that:

> *For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if –*
> *(a) The making of the award was induced or affected by fraud or corruption; or*
> *(b) A breach of the rules of natural justice occurred --*
> *(i) During the arbitral proceedings; or*
> *(ii) In connection with the making of the award*

(vi) Substance : grounds under article 34(2)(a)

82 There are no New Zealand decisions on the question of incapacity of a party or invalidity of an agreement [97]

83 In ***Raukura Moana Fisheries Ltd v The Ship "Erina Zharkikh***"[98] Young J raised, without deciding, the question of whether an Admiralty dispute in which the plaintiff has a statutory in rem claim can properly be subject of an arbitration.

84 There are no New Zealand decisions on the question of whether the composition of the Arbitral Tribunal was in accordance with the agreement of the parties or, in the absence of such agreement, in accordance with Schedule 1 to the Act.

85 Decisions as to whether an award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, turn on the interpretation of the particular submission and the analysis of the particular award. There is therefore

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[96] High Court, Auckland, CIV 2005-404-6448, 20/2/06, Faire AJ

[97] The former issue was discussed obiter in ***Hirstich v Khotea*** (High Court, Auckland, M 404/184 SW 02, 3/04/03, Venning J

[98] [2001] 1 NZLR 801

no decision which sets out principles to be applied or guidelines to be followed in deciding these questions.

86 The potential for overlap between the specific grounds set out in article 34(2)(a)(ii) and (iv) regarding procedural defects and the ground of breach of the procedural fairness limb of natural justice under article 34(2)(b)(ii) and (6)(b) of the Act is obvious. I consider the cases on this topic in paragraphs 116-133 below.

(vii) Substance : public policy: general

87 As noted in paragraph 78 above, the concept of public policy is not limited to the specific situations of fraud or corruption, on the one hand, or breach of the rules of natural justice, on the other.

88 The nature of the concept of public policy, in its broadest sense, has been considered in two Court of Appeal decisions:

(a) ***Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd***[99];

(b) ***Reeves v One World Challenge***[100].

89 In ***Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd***[101] the Court of Appeal held that the term "*public policy*" covered only "*fundamental principles of law and justice in substantive as well as procedural aspects*" (adopting the wording of the UNCITRAL Report of 21 August 1985). The Court also referred approvingly to the approach of the English Court of Appeal in ***Soleimany v Soleimany***[102], viz that an award whose confirmation can be seen to damage the integrity of the Court system, because enforcement would be an abuse of that system, will not be enforced.

90 In ***Reeves***[103] the Court of Appeal again had to consider the issue of public policy. The case arose out of the last America's Cup competition. Mr Reeves was a New Zealander who had worked with Team New Zealand during two previous America's

[99] [2004] 2 NZLR 614 (CA)
[100] [2006] 2 NZLR 184
[101] [2004] 2 NZLR 614
[102] [1999] QB 785
[103] [2006] 2 NZLR 184

Cup competitions. He left Team New Zealand in early 2000, joining One World as Operations Manager, a position he held until May 2001, when the parties parted company. During the time that he was involved with One World, Mr Reeves signed a number of agreements which included confidentiality provisions. When he left One World he took with him, among other things, a copy of a hull design package. One World alleged that he had offered to sell this to another America's Cup Syndicate and that he was thereby in breach of the confidentiality provisions in the various agreements he had entered into. In a proceeding in the US District Court for the Western District of the State of Washington, One World obtained various orders against Mr Reeves, including a money judgment. It then sought to enforce that judgment in New Zealand, to which Mr Reeves had returned. He defended the claim on the ground that enforcement of the judgment in New Zealand would be contrary to the public policy of New Zealand because the hull design package had in fact been taken to One World by a designer who had previously worked for Team New Zealand and was therefore not subject to the confidentiality agreements because there is "*no confidentiality in iniquity*". Mr Reeves was unsuccessful before both the High Court and the Court of Appeal, although only by a majority in the Court of Appeal. Anderson P (as he then was – he is now a member of the Supreme Court) and O'Regan J, in a judgment delivered by O'Regan J, rejected an argument that the Court's previous decision in ***Amaltal*** (see paragraph 86 of this paper) had lowered the threshold for intervention on the ground of public policy, adopted the test applied by the majority of the Supreme Court of Canada in ***Beals v Saldanha***[104] that enforcement "*would shock the conscience of a reasonable Canadian*" or would be "*contrary to our view of basic morality*" and held that "*simply because a case could be decided differently under New Zealand law was not a weighty enough factor to invoke [the doctrine of public policy]".*

91 In ***Downer-Hill Joint Venture v Government of Fiji***[105] a full Court of the High Court had to consider whether an error of law or fact in an award could cause the award to be contrary to public policy. The Court held (quoting from the Headnote):

> *A serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would*

[104] [2003] SCC 72
[105] [2005] 1 NZLR 554

> *not suffice. In order to set aside an award for erroneous factual findings it had to be shown that the factual finding complained of was not based on any logical probative evidence. It had also to be shown that even if such a breach of natural justice had occurred, the award was contrary to public policy. This required it to be shown that a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award. Such a breach of public policy would be obvious.*[106]

92 The New Zealand Courts have not had to consider the provision (article 34(6)(a) of Schedule 1 to the Act) that an award is in conflict with the public policy of New Zealand if the making of the award was adduced by fraud or corruption.

(viii) Substance : public policy: natural justice: introduction

93 There are numerous decisions on the question of whether there has been a breach of natural justice under article 34(6)(b) of Schedule 1 to the Act.

94 At its simplest, the concept of natural justice may be seen as directed, first, to the person of the judge or arbitrator and, secondly, to the conduct of the litigation or arbitration. The judge or arbitrator is required to be independent and impartial and the procedure is required to be fair.

95 Both aspects of the concept of natural justice are provided for in the Arbitration Act 1996:

(a) the requirements of independence and impartiality on the part of the arbitrator are incorporated in articles 11(5) and 12(1) and (2) of Schedule 1 to the Act;

(b) the requirement of procedural fairness of the arbitration is set out in article 18 of that Schedule.

(ix) Substance : public policy: natural justice: independence and impartiality

96 Independence and impartiality are different concepts, though the same facts may give rise to questions both of independence and impartiality.

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[106] See also *Downer Connect Ltd v Pot Hole People Ltd* (High Court, Christchurch, CIV-2003-409-2878, 19/5/04, Randerson J), in which the issue was touched on but not decided, *Steele& Anor v Maclair Ltd* (High Court, Greymouth, CIV 2004-418-26, 14/9/05, Fogarty J) and *Kumar v MF Astley Ltd* (High Court, Auckland, CIV 2005-404-6447, 18/12/06, Andrews J). Also of interest are the following articles: Hwang & Lai: *Do egregious errors amount to a breach of public policy?* (2005) 71 *Arbitration* 1-24 and Hwang: *Do egregious errors amount to a breach of public policy?- Further Developments* (2005) 71 *Arbitration* 364-367

97 In a paper entitled "*A Real Danger of Confusion? The English Law relating to Bias in Arbitrators*"[107], Gillian Eastwood of the International Arbitration Group, Freshfields Bruckhaus Deringer, London approached the question of the definition of the two concepts as follows:

> *Much academic debate has centred on attempts to define these two concepts and the extent to which they inter-relate and overlap. It is not within the scope of this article to rehearse these arguments in detail, but it is submitted that the difference between them is perhaps easier to grasp by considering the opposite concepts of dependence and partiality. Broadly speaking, dependence raises questions relating to the existence of a relationship (whether financial, social or otherwise) between the arbitrator and the parties; it is thus more tangible and is effectively an objective standard. The concept of partiality, in contrast, is concerned with bias or prejudice in relation to the subject-matter of the dispute or one of the parties. It is therefore a more abstract concept which, because it refers to a state of mind, presents difficulties in identification and measurement, and may require subjective evaluation*

98 This is, I suggest, a helpful analysis of the difference between the two concepts.

99 The question of whether a judge or arbitrator lacks independence (in the sense described by Ms Eastwood) is a very fact-specific issue in each case.

100 When considering the question of whether a judge or arbitrator lacks impartiality, it is necessary to make a distinction between those cases in which there is an actual lack of impartiality and those cases in which there is only a perceived lack of partiality.

101 Cases of actual lack of impartiality are rare. In each case it is a matter of fact whether there is such a lack of impartiality.

102 It is far more common for allegations of bias to be based on the perception of bias rather than on actual bias. Subject to a contrary decision by the Supreme Court in a future case[108], the New Zealand Courts have finally, after a period of uncertainty, adopted the ***Porter v McGill***[109] test of apparent or perceived bias. In ***Auckland Casino Ltd v Casino Control Authority***[110] and ***Man O'War Station Ltd v Auckland City Council***[111] the Court of Appeal followed the then English authority[112] and held

[107] (2001) 17 *Arbitration International* 287-312
[108] The Supreme Court left the question open in *Taunoa v Attorney General* [2006] NZSC 94
[109] [2002] AC 357 (HL)
[110] [1995] 1 NZLR 142
[111] [2001] 1 NZLR 552
[112] *R v Gough* [1993] AC 646 (HL)

that the test was whether there was a "*real danger of bias*". In ***Erris Promotions Ltd v Commissioner of Inland Revenue***[113] the Court of Appeal acknowledged (without deciding whether it was necessary to apply the revised English test or otherwise amend the test in New Zealand) the fact that the English test had been reformulated[114] as being "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". In ***Muir v Commissioner of Inland Revenue***[115] the Court of Appeal came down firmly in favour of the ***Porter v McGill*** test.

103 The question of whether grounds exist for a finding of perceived bias has been considered in the following New Zealand cases:

(a) ***Auckland Casino Ltd v Casino Control Authority***[116];

(b) ***Bell v Disciplinary Committee of the Pharmaceutical Society of New Zealand*** [117];

(c) ***Riverside Casino Ltd v Moxon***[118];

(d) ***Lawrence v R***[119];

(e) ***Man O'War Station Ltd v Auckland City Council***[120];

(f) ***T v Wellington Newspapers Ltd***[121];

(g) ***Wiseline Corporation Ltd v Hockey***[122];

(h) ***Samuels v Ministry of Fishery***[123];

(i) ***Erris Promotions Ltd v Commissioner of Inland Revenue***[124];

(j) ***Ngati Tahinga Trust v Attorney-General***[125];

(k) ***Creser v Creser***[126];

(l) ***New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd***[127];

(m) ***Chatha v Wanganui Gas Ltd***[128];

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[113] (2003) 16 PRNZ 1014
[114] In *Porter v McGill* [2002] 2AC 357 (HL)
[115] [2007] NZLR 495 (CA), [2007] NZCA 334
[116] [1995] 1 NZLR 142 (CA)
[117] High Court, Wellington, CP 265/00, 8/12/00, Doogue J
[118] [2001] 2 NZLR 78 (CA)
[119] Courts Martial Appeal Court, AP 84-SW00, 29/8/01
[120] [2001] 1 NZLR 552 (CA) and [2003] 3 NZLR 577 (PC)
[121] High Court, Wellington, CP 11/02, 22/1/02, Wild J
[122] High Court, Auckland, M 383/IM02, 25/6/02, Nicholson J
[123] [2003] 1 NZLR 552
[124] (2003) 16 PRNZ 1014 (CA)
[125] (2003) 16 PRNZ 878 (CA)
[126] High Court, Wellington, CIV-2002-485-208, AP 277/02, 22/6/04, Goddard J

(n) ***Attorney-General v Payne***[129];

(o) ***Accent Management Ltd v Commissioner of Inland Revenue***[130];

(p) ***Gollan v Ministry of Economic Development***[131].

(q) ***Geary v Psychologists Board***[132];

(r) ***Official Assignee v Bassett***[133];

(s) ***Muir v Commissioner of Inland Revenue***[134];

(t) ***Todd Taranaki Ltd v Energy Infrastructure Ltd***[135];

(u) ***Wang v Cornwell***[136];

(v) ***Todd Pohokura Ltd v Shell Exploration NZ Ltd***[137];

(w) ***Saxmere Company Ltd v Wool Board***[138].

104 In ***Auckland Casino***[139], two of the members of the Authority and the wife of one of them held shares and convertible notes in a company which had an 80% shareholding in one of the applicants for a casino licence in Auckland. The Court of Appeal held that, had there not been waiver of the right to object, the larger shareholdings of the one member of the Authority and of his wife would have been sufficient to invalidate the Authority's decision.

105 In ***Bell***[140], the Court held that it would be inappropriate for the Chairman of the Committee to sit on proceedings against the plaintiff before the Committee when, following his advice to the Council of the Society (which was the second defendant) as to its power to revisit its prior decision not to proceed against the plaintiff, the Council decided to bring the proceedings against the plaintiff. The Court did so because it was of the view that there was a reasonable apprehension that the

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[127] [2004] 2 ERNZ 131
[128] High Court, Palmerston North, CIV 2004 454 408, 14/4/05, Ronald Young J
[129] High Court, Wellington, CIV-2004-485-1723, 25/5/05, Associate Judge Gendall
[130] High Court, Auckland, CIV 2003-404-2966, [2006] NZHC 59, 13/2/06, Venning J
[131] High Court, Hamilton, CRI 2005-419-165, [2006] NZHC 455, 4/5/06, Baragwanath J
[132] High Court, Wellington, CIV 2005-485-1562, 28/5/07, R Young J
[133] High Court, Auckland, CIV 2005-404-5380, 8/6/07, Doogue AJ
[134] [2007] 3 NZLR 495 (CA), [2007] NZCA 334
[135] High Court, Wellington, CIV 2007-485-2684, 19/12/07, Dobson J
[136] High Court, Auckland, CIV 2007-404-7006, 4/6/09, Priestley J
[137] High Court, Wellington, CIV 2006-485-1600, 21/10/09, Dobson J
[138] [2009] NZSC 72 and 122
[139] [1995] 1 NZLR 142 (CA)
[140] High Court, Wellington, CP265/00, 8/12/00, Doogue J

Chairman's advice had been not only that the Committee could revisit its earlier decision but that it should.

106 In ***Riverside Casino***[141], the Court of Appeal held that the conduct of a member of the Casino Control Authority did not give rise to a real concern as to bias but was no more than forceful "interventions by an experienced member of the Authority bringing to public sittings [of the Authority] both his considerable experience in the field and familiarity with the written material already considered". Nor did the fact that he incorrectly stated the applicable law in the course of the proceedings indicate bias.

107 In ***Lawrence***[142] The majority of the Court (Potter J and Brown DCJ) held that the decision of the Courts Martial Appeal Court upholding the plaintiff's conviction on two charges of sexual violation was not invalidated by reason of the fact that one of the members of that court had previously advised (although not represented) the plaintiff's commanding officer who had been one of the defendants in judicial review proceedings brought by the plaintiff in relation to the decision to charge him. The officer in question had, in fact, decided that the plaintiff should not be charged. The plaintiff was posted to another command by the Maritime Commander and the decision to charge him made by his new commanding officer). Fisher J dissented, holding that there was a real possibility that the member of the court in question was subconsciously affected by bias arising from his former client's concern with regard to his reputation, he having held there was insufficient evidence to bring charges on a matter of public interest whereas other officers had held there was sufficient evidence.

108 In ***Man O'War Station***[143] The Court of Appeal and the Privy Council held that the facts that the judge knew the witness, that the judge's former firm had acted for many years for the witness' firm and that the witness' father had been the judge's "former employer, long term partner and mentor for some 30 years" did not, in the absence of evidence of a close association between the judge and the witness, give rise to a real danger or possibility of bias.

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[141] [2001] 2 NZLR 78 (CA)
[142] Courts Martial Appeal Court, AP84-SW00, 29/8/01
[143] [2001] 1 NZLR 552 (CA) and [2003] 3 NZLR 577 (PC)

109 In ***T***[144] the Court held that a District Court Judge had not disqualified himself by reason of bias when, in an earlier hearing involving the applicant and her former husband and allegations of sexual abuse of their children by the husband, he had been robust in his testing of the evidence of the applicant and her witnesses.

110 In each of ***Wiseline***[145], ***Creser***[146], ***Chatha***[147], ***Payne***[148], ***Accent Management***[149], ***Gollan***[150], and ***Geary***[151], the question was whether prior decisions of the judge in relation to the proceeding or in other proceedings gave rise to a justified perception of possible bias.

111 In ***Samuels***[152], a case in which Mr Samuels had been charged under the Fisheries Act 1983 with selling fish or being in possession of fish without a permit, a fisheries officer, who believed that the judge in the lower court was displaying improper bias in favour of the accused, wrote a letter of complaint to the Chief District Court Judge. By mistake, the letter was forwarded to the trial judge before he delivered his decision. The complaint was then withdrawn. The judge informed the parties of the letter and heard submissions regarding it. He determined that in the circumstances no reasonable person would conclude that the complaint would have any material bearing on his decision. Mr Samuels was convicted and appealed on the basis, inter alia, of bias on part of the judge. The High Court held that the judge had correctly concluded that there was no real danger of bias.

112 In ***Erris Promotions Ltd***[153], the trial judge had, when in practice, been briefed as counsel in respect of parties closely associated with the trial of the proceeding before him. The proceeding was significantly connected with the issues involved in the former brief. When similar circumstances had arisen in the past, the judge had

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[144] High Court, Wellington, CP11/02, 22/1/02, Wild J
[145] High Court, Auckland, M 383/IM02, 25/6/02, Nicholson J
[146] High Court, Wellington, CIV-2002-485-208, AP 277/02, 22/6/04, Goddard J
[147] High Court, Palmerston North, CIV 2004 454 408, 14/4/05, Ronald Young J
[148] High Court, Wellington, CIV-2004-485-1723, 25/5/05, Associate Judge Gendall
[149] High Court, Auckland, CIV 2003-404-2966, [2006] NZHC 59, 13/2/06, Venning J
[150] High Court, Hamilton, CRI 2005-419-165, [2006] NZHC 455, 4/5/06, Baragwanath J
[151] High Court, Wellington, CIV 2005-485-1562, 28/5/07, R Young J
[152] [2003] 1 NZLR 552
[153] (2003) 16 PRNZ 1014 (CA)

recognised sufficient justification for disqualifying himself. The Court of Appeal held that there was a real danger that he might, even unconsciously, be affected in his impartiality. The appeal against the judge's refusal to disqualify himself was accordingly allowed.

113 In ***Ngati Tahinga Trust***[154], leave to appeal out of time against a judge's decision, on the ground of apparent bias, was dismissed by the Court of Appeal. The grounds relied on were the alleged connection of the Anglican Church to the subject matter of the dispute and that the Judge was the brother of the Assistant Bishop of the Diocese. The Court of Appeal upheld the Judge's decision that, on the facts, the reasonably informed observer would not think that his impartiality might have been affected.

114 In ***New Zealand Air Line Pilots Association***[155], the Employment Court had to consider a dispute between the plaintiff and the defendant concerning the holiday entitlements of certain employees. Objection was taken to the composition of the Court on the ground that one of the judges had acted for the defendant prior to his appointment to the Bench. The judge declined to disqualify himself, on the ground that none of the matters on which he had previously acted for the defendant involved the interpretation of the relevant holiday legislation and its effect on the existing national award nor had he given any advice on the provisions of the national award relating to holiday entitlements.

115 In ***Bassett***[156], the question was whether Mr Bassett, who had subsequently been bankrupted, had made a voidable gift before his adjudication. The Associate Judge had heard evidence and at the conclusion of the evidence had directed the filing of written submissions by the Official Assignee and Mr Bassett. Unfortunately, the Associate Judge overlooked the fact that the time for submissions by Mr Bassett had not elapsed and, after receiving the Official Assignee's written submissions, issued a judgment finding against Mr Bassett. The Associate Judge recalled his judgment on this fact being pointed out to him. When he came to reconsider the matter, Mr Bassett submitted that he should recuse himself. The Associate Judge applied the test

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[154] (2003) 16 PRNZ 878 (CA)
[155] [2004] 2 ERNZ 131
[156] High Court, Auckland, CIV 2005-404-4380, 8/6/07, Doogue AJ

adopted in ***Man O'War Station***[157](The Bassett decision was delivered before the Court of Appeal's decision in Muir (see above)). He recused himself on the basis, as he had made findings as to credibility, it would be "*a reasonable perception on the part of a reasonable person that I would not be able to approach matters again on the basis that Mr Bassett [or another named witness] were potentially reliable witnesses*".

116 In ***Todd Taranaki***[158], adopting the two-stage enquiry mandated by the Court of Appeal in ***Muir***[159] , the Court held that the factual basis for an allegation of bias had not been made out.

117 In ***Wang***[160], a case in which there were likely to be credibility issues, it emerged in the course of the hearing that there was a close connection between a particular witness and a third party who was a personal friend of the Judge. The Judge declined to recuse himself because he had no interest in the outcome of the proceeding nor had the third party, the third party was not involved in the proceeding, and the Judge did not know the plaintiff or the witness, had not discussed the matter with the third party, and had not displayed any bias during the two and a half days of the hearing to that point.

118 In ***Todd Pohokura***[161], a Commerce Act proceeding, the plaintiff sought an order that the lay member of the Court not sit on the matter, because of prior involvement with, and expression of opinion on, matters likely to arise in the proceedings. having considered the arguments, the Judge held that the plaintiff had established a sufficient, reasonable apprehension in the mind of a fair and fully informed observer that the lay member would be unable to bring an impartial mind to the resolution of the issues before the Court.

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[157] [2001] 1 NZLR 552 (CA) and [2003] 3 NZLR 577 (PC) (The Bassett decision was delivered before the Court of Appeal's decision in Muir (see above))
[158] High Court, Wellington, CIV 2007-485-2684, 19/12/07, Dobson J
[159] [2007] 3 NZLR 495 (CA), [2007] NZCA 344
[160] High Court, Auckland, CIV 2007-404-7006, 4/6/09, Priestley J
[161] High Court, Wellington, CIV 2006-485-1600, 21/10/09, Dobson J

119 In ***Saxmere***[162], there was a business relationship between a member of the Court of Appeal and counsel for one party. On the information available to the Supreme Court on the first occasion, the Court held that the appellant had failed to establish a reasonable apprehension of bias. Further facts emerged in the course of the hearing of an application for recall of that judgment; and, in its second judgment, the Supreme Court found that there were grounds for reasonable apprehension of bias.

(x) Substance: public policy: natural justice: procedural fairness

120 Turning from the independence and impartiality aspect of natural justice to the procedural unfairness limb, the leading New Zealand decision on this point is ***Trustees of Rotoaira Forest Trust v The Attorney-General***[163]. In that case the Trustees sought to have the award set aside or remitted on the ground that they had not been given an opportunity to be heard as to the basis for valuation adopted by the arbitrators. Fisher J referred to article 18 of Schedule 1 and reviewed the relevant cases before going on to state (at 463/1-46) the principles which needed to be applied. The passage reads as follows:

> *The principles which need to be applied in the present case therefore appear to be the following:*
>
> *(a) Arbitrators must observe the requirements of natural justice and treat each party equally.*
>
> *(b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.*
>
> *(c) As a minimum each party must be given a full opportunity to present its case.*
>
> *(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.*
>
> *(e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.*
>
> *(f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.*
>
> *(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick*

[162] [2009] NZSC 72 and 122
[163] [1999] 2 NZLR 452

and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

(j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.[164]

121 The following are some of the other cases in which New Zealand courts have ruled on questions of procedural fairness:

(a) ***Helleur v Helleur*** [165]

(b) ***Redcliff Estates Ltd v Enberg*** [166]

(c) ***Sharma v Paramount Services Ltd*** [167]

(d) ***Sundarji v Peita*** [168]

(e) ***Graham Tunbridge Builders Ltd v Eldrac Holdings Ltd*** [169]

(f) ***Sinke v Remarkable Residential Homes Ltd*** [170]

(g) ***Mackintosh v Wear*** [171]

(h) ***McKernan v Spicer*** [172]

(i) ***Acorn Farms Ltd v Schnuriger*** [173]

(j) ***A's Company Ltd v Dagger*** [174]

(k) ***Santa Barbara Homes Ltd v Cozzolino*** [175]

(l) ***Downer Connect Ltd v Pot Hole People Ltd*** [176]

(m) ***Alexander Property Developments Ltd v Clarke*** [177]

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[164] This passage was described as "*perhaps the most thorough and perceptive conspectus on [the] issue*" by Rajah JA in delivering the grounds of decision of the Court of Appeal of Singapore in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SCCA 28, [2007] 3 SLR 86. For a recent example of the application of the principles in *Rotoaira* see *Todd Petroleum Mining Company Ltd v Shell (Petroleum Mining) Company Ltd* (High Court, Wellington, CIV 2008-485-2816, 17/7/09, Dobson J).

[165] [1998] 2 NZLR 205

[166] High Court, Christchurch, M150/99, 22/7/99, Panckhurst J

[167] High Court, Auckland M1544-im99, 9/2/00, Laurenson J

[168] High Court, Auckland, M841/00, M965/00, 27/7/00, Randerson J

[169] High Court, Wellington, AP53/99, 16/2/00, McGechan & Wild JJ

[170] High Court, Wellington, CP274-98, Durie J

[171] High Court, Auckland, M786-SD01, 13/12/01, O'Regan J

[172] High Court, Wellington, CP 222/02, 17/3/03, Durie J

[173] [2003] 3 NZLR 121

[174] High Court, Auckland, M1482-SD00, 5/6/03, Baragwanath J

[175] High Court, Auckland. CIV-2002-404-2577, 12/5/04, Rodney Hansen J

[176] High Court, Christchurch, CIV-2003-409-2878, 19/5/04, Randerson J

(n) ***Whata v Gosling*** [178]

(o) ***Parts & Services Ltd v Brooks*** [179]

(p) ***Steele & Anor v Machair Ltd***[180].

122 In ***Helleur***[181] it was sought to set aside an award on the grounds, among others, of the arbitrator's admission of inadmissible evidence, giving of too much weight to certain evidence, failure to permit cross-examination and making of findings of fact contrary to the weight of the evidence. The first, second and fourth grounds were held not to have been made out. In regard to the third ground, the Court held that limiting cross-examination as to credibility to facts directly in issue between the parties does not breach the rules of natural justice.

123 In ***Redcliff Estates***[182] the arbitration agreement provided that the parties would each make written submissions to the arbitrator and that he "[*could] request comment from either party on any particular submission made by the other*". The parties acted as agreed. The defendant's submission included evidence of a conversation in which a director of the plaintiff had made damning admissions. This was not referred to the plaintiff for comment and was relied on by the arbitrator in his award, which was adverse to the plaintiff. Panckhurst J held that there had been "*a breach of natural justice at a basic level*". He set the award aside.

124 In ***Sharma***[183] two grounds were relied on in support of an application to set aside the award:

(a) failure to ensure full and appropriate discovery by the other party

(b) refusal to grant an adjournment

The first ground was rejected on the facts. The second ground was upheld, the circumstances being that the applicant's solicitors had withdrawn because of "*unsatisfactory arrangements with our clients*" and the arbitrator gave notice that the arbitration would proceed the next day as scheduled instead of granting an

[177] High Court, New Plymouth, CIV-2004-443-89, 10/6/04, Baragwanath J
[178] High Court, Auckland, CIV 2005-404-84, 9/5/05, Williams J
[179] High Court, Rotorua, CIV 2005-463-431, 25/11/05, Cooper J
[180] High Court, Greymouth, CIV 2004-418-26, 14/9/05, Fogarty J
[181] [1998] 2 NZLR 205
[182] High Court, Christchurch M150/99, 22/7/99, Panckhurst J
[183] High Court, Auckland M1544-im99, 9/2/00, Laurenson J

adjournment to enable the applicant to obtain advice or, at the very least, notifying him that he would be given an opportunity the next day to apply for an adjournment.

125 In ***Sundarji***[184], the application to set the award aside was made on the specific ground that the applicant had been unable to present its case. The argument advanced was that the statement of the plaintiff's case had not been sufficiently clear to enable the defendant to know what case it had to meet and that, for that reason, it had been deprived of the "*full opportunity of presenting [it's] case*" to which it was entitled under the Act. The argument was rejected , as was the alternative argument that there had been a breach of natural justice in this respect.

126 In ***Graham Tunbridge Builders***[185] each party had made an undisclosed communication to the arbitrator. The Court held that the arbitrator's failure to ensure that these communications were made known to the other party in each case amounted to a breach of natural justice. The High Court specifically (and not surprisingly) rejected the approach of the District Court Judge that, because each party had communicated with the arbitrator without disclosing that fact to the other, there had been no breach of natural justice.

127 In ***Sinke***[186] it was alleged by the applicant that he did not have a fair chance to put his case, that the inspections were not proper hearings, that there was no hearing following the inspections, that he did not have respondent's submissions during the inspections, and that his final submissions were not properly heard. All allegations were rejected by the Court.

128 In ***Mackintosh***[187] it was alleged that a party had not been given the opportunity to cross-examine. The allegation was held not to have been made out.

129 In ***McKernan***[188], the Court dismissed the application because the applicant had failed to raise in the arbitration the points he now wished to raise and there had, therefore,

[184] High Court, Auckland, M841/00, M965/00, 27/7/00, Randerson J
[185] High Court, Wellington, AP53/99, 16/2/00, McGechan & Wild JJ
[186] High Court, Wellington, CP274-98, Durie J
[187] High Court, Auckland, M786-SD01, 13/12/01, O'Regan J
[188] High Court, Wellington, CP 222/02, 17/3/03, Durie J

been no failure to give him a full opportunity of presenting his case: "*the opportunity one has to present one's case is no larger than an opportunity to present the case that one has put in issue*".

130 In ***Acorn Farms***[189] the Court rejected a submission that the plaintiff had thought it was engaged in a mediation or conciliation and not an arbitration.

131 In ***A's Company***[190] the Court held that the plaintiff had been prejudiced by late delivery of vital material presented without adequate notice and had been prevented from putting in new material itself. The award was set aside[191].

132 In ***Santa Barbara Homes***[192] the Court set the award aside on the ground that it had been decided on a basis not pleaded nor argued.

133 In ***Downer Connect***[193] the Court held that the basis on which the arbitrator determined the matter could have been reasonably foreseen and declined to set the award aside.

134 In ***Alexander Property Developments***[194] the Court held that the first of two breaches of natural justice complained of (failure to give the parties an opportunity to consider and respond to a quantity surveyor's report commissioned by the arbitrator) had been waived but that the second (the arbitrator's actions in visiting the site and having telephone discussions with the structural engineer involved in the project in relation to which there was a dispute without advising the parties of these facts and giving them an opportunity to comment) had not been waived. The Court remitted the dispute to the arbitrator to hear the parties' submissions on the second point.

135 In ***Whata***[195], a rental valuation award, the dissatisfied landlord alleged that the Tribunal was in breach of the rules of natural justice in the following respects:

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[189] [2003] 3 NZLR 121
[190] High Court, Auckland, M1482-SD00, 5/6/03, Baragwanath J
[191] This judgment is also of interest because of the Judge's discussion of the concept of *amiable compositeur*
[192] High Court, Auckland. CIV-2002-404-2577, 12/5/04, Rodney Hansen J
[193] High Court, Christchurch, CIV-2003-409-2878, 19/5/04, Randerson J
[194] High Court, New Plymouth, CIV-2004-443-89, 10/6/04, Baragwanath J
[195] High Court, Auckland, CIV 2005-404-84, 9/5/05, Williams J

(a) regarding an award published in another rental arbitration in the same general area as relevant to, and admissible in, the arbitration in question;

(b) giving weight to expressions of discontent expressed by other lessees of the landlord; and

(c) after the conclusion of the hearing and without giving the parties an opportunity to comment, making investigations into a matter which was relevant to the arbitration and relying on those investigations in the awards.

The court rejected each of these three criticisms of the arbitrator's actions, the first and second on principle, the third on the facts.

136 In ***Parts & Services Ltd***[196] the Court set an award aside on the grounds that the plaintiff had been unable to present its case, that the award had dealt with a dispute not contemplated by nor falling within the terms of the submission to arbitration, and that there had been a breach of natural justice where a Tribunal, notwithstanding the clear provisions of the contract between the parties, the acceptance of those provisions by both parties in argument and the terms of an interim award, reduced the rate of interest to less than that provided for in the contract, without prior notice to the parties.

137 In ***Steele***[197], one of the issues raised in a dispute between a farm owner and a sharemilker was the compensation to be paid to the owner for grazing costs. The arbitrator was a valuer and farm consultant. In an application to set the award aside on the ground that there had been a breach of natural justice, the Court held that the arbitrator had erred in law (in that he had unilaterally developed a formula for assessing the compensation to be paid to the owner) but declined to set the award aside, saying:[198]

> *The conclusions of this Court can be framed in the alternative, both of which result in the same outcome. The reasoning of the arbitrator can be seen as a breach of natural justice, if the requirements of natural justice are imposed strictly, but not sufficiently important breach to trigger a finding that enforcement of the award would be against public policy. Alternatively the conclusion of this Court can be framed on the basis that the process that the parties entered into envisaged a degree of robustness, comforted by the fact that the arbitrator was an expert within the industry. Accordingly, it is inappropriate for the parties*

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[196] High Court, Rotorua, CIV 2005-463-431, 25/11/05, Cooper J
[197] High Court, Greymouth, CIV 2004-418-26, 14/9/05, Fogarty J
[198] Paragraph 40 of the judgment

to expect a refined application of the rules of procedure and so there was no breach of natural justice. It follows there is no basis for the award to be set aside.[199]

(xi) Inviolability of right to apply to set aside an award

138 In ***Methanex Motonui Ltd v Spellman*** [200] the Court of Appeal held that article 34 was not capable of being excluded by a contractual provision.

[j] Appeal from award on question of law (Schedule 2, clause 5)

139 Prior to amendment in 2007, clause 5 of the Second Schedule to the Act read as follows:

(1) Notwithstanding anything in articles 5 or 34 of the First Schedule, any party may appeal to the High Court on any question of law arising out of an award--
(a) If the parties have so agreed before the making of that award; or
(b) With the consent of every other party given after the making of that award; or
(c) With the leave of the High Court.

(2) The High Court shall not grant leave under subclause (1) (c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

(3) The High Court may grant leave under subclause (1) (c) on such conditions as it sees fit.

(4) On the determination of an appeal under this clause, the High Court may, by order,--
(a) Confirm, vary, or set aside the award; or
(b) Remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new arbitral tribunal has been appointed, to that arbitral tribunal for consideration,--
and, where the award is remitted under paragraph (b), the arbitral tribunal shall, unless the order otherwise directs, make the award not later than 3 months after the date of the order.

(5) With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court under this clause.

(6) If the High Court refuses to grant leave to appeal under subclause (5), the Court of Appeal may grant special leave to appeal.

(7) Where the award of an arbitral tribunal is varied on an appeal under this clause, the award as varied shall have effect (except for the purposes of this clause) as if it were the award of the arbitral tribunal; and the party relying on the award or applying for its enforcement under article 35 (2) of Schedule 1 shall supply the duly authenticated original order of the High Court varying the award or a duly certified copy.

[199] This case is also relevant to the issue discussed in paragraph 95 of this paper.
[200] [2004] 3 NZLR 454 (CA)

(8) Article 34 (3) and (4) of Schedule 1 apply to an appeal under this clause as they do to an application for the setting aside of an award under that article.

(9) For the purposes of article 36 of the First Schedule,--
(a) An appeal under this clause shall be treated as an application for the setting aside of an award; and
(b) An award which has been remitted by the High Court under subclause 4 (b) to the original or a new arbitral tribunal shall be treated as an award which has been suspended

140 The clause only applies to an international arbitration taking place in New Zealand if the parties have agreed that it should. It applies to domestic arbitrations unless the parties have agreed to exclude it.

141 Questions sometime arise as to whether:

a. there is any evidence to support or justify a finding of primary fact; or
b. whether an inference (or what might be called a finding of secondary fact) drawn from primary facts found is one which could reasonably be drawn[201].

142 Are these questions of law or fact for the purpose of clause 5 of Schedule 2 to the Act?

143 There is no doubt that in some areas of the law they are questions of law. However, there was, until the passage into law of the Amendment Act, a real issue as to whether they were questions of law in the context of appeals from arbitration awards.

144 The New Zealand Law Commission, in its 2003 Report "***Improving the Arbitration Act 1996***"[202], had argued against their characterisation as questions of law and recommended that the Act should be amended to state expressly that they do not constitute questions of law. In support of this view the Commissioners referred inter alia to the doubts expressed by the Court of Appeal in the ***Doug Hood***[203] case and to ***Mustill & Boyd***[204]. ***Russell on Arbitration*** to the same effect[205].

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[201] See, in this connection, *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 at 87/45 – 90/14 and 90/16 – 91/50, and also *Mustill and Boyd: The Law and Practice of Commercial Arbitration in England* (2nd ed, 1989 at pp 591-594.
[202] NZLC R83 at pp 54-59
[203] At paragraph [55] of the judgment
[204] At pp 592-593 and 596
[205] 22nd edn, 2003 paragraph 8-058

145 In ***The Capital Letter*** of 1 April 2003[206] the editor supported the contrary view. The arguments advanced by Michael Hwang, SC and Amy Lai in the papers referred to in footnote 88, also applied, it could be argued, by parity of reasoning to the appeal situation.

146 There were also two cases in which, albeit in unusual situations, Judges of the High Court of New Zealand treated these questions as questions of law: ***Steedman v Stan Ash Builders Ltd***[207] and ***Hela Pharma AB v Helen Pharma Australasia Ltd***[208]. Also of relevance was the decision of a Full Court of the High Court in relation to the same question in the context of applications to set aside awards (see paragraph 88 above).

147 The issue has now been determined by s 9 of the Arbitration Amendment Act 2007, which provides as follows:

> *Clause 5 of Schedule 2 is amended by adding the following subclause:*
> *"(10) For the purposes of this clause, question of law-*
> *"(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but*
> *"(b) does not include any question as to whether –*
> *"(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and*
> *"(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts."*[209]

148 We have clear guidance from the Court of Appeal on the approach to be adopted by the High Court in deciding whether to grant leave to appeal under paragraph (1)(c) of the article. In ***Gold & Resource Developments NZ Ltd v Doug Hood Ltd***[210] the Court said:

> *[11] Clause 5(2) is, as the respondent submits, framed in a negative way: that the Court shall not grant leave unless the determination of the question of law concerned could substantially affect the rights of parties to the arbitration agreement.The substantial affecting of rights is but a precondition to the granting of leave under clause 5, designed to ensure that disputes will not be referred to the High Court if, as between the immediate parties, the matter is largely academic (Ipswich Borough Council v Fisons PLC [1990] Ch 709, 721).There remains however an important discretion to be exercised by the Court in determining whether, once this precondition is met, leave to appeal should then be granted.*
> *...*
> *[54] Once the statutory threshold has been passed, the Court should in each case exercise its discretion in a disciplined way.The following are factors to be considered.Other than the first,*

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[206] 26 TCL 11 p1
[207] High Court, Auckland, M 865,866-IM01, 18/7/02, Priestley J
[208] High Court, Wellington, M 173/02, AP 270/02, 8/4/03, Durie J
[209] For a case in which this new provision was applied see *Nixon v Walker* (High Court, Auckland, CIV 2007-404-1372, 12/12/08, Keane J).
[210] [2000] 3 NZLR 318

which is the most important, they are not listed in any particular order.As a matter of caution, it should be said that there may be other considerations which should be taken into account in the circumstances of a particular case.They are to be seen as guidelines to, rather than as governing, the exercise of the discretion.

(1) The strength of the challenge/nature of point of law

The Court should consider in a preliminary way, as discussed in paras [56] and [57], the strength of the argument that there has been an error of law and the nature of that point. If it is a one-off point, in the sense that it is unlikely to occur again and cannot be seen as having any precedent value, either generally or to the parties on another occasion, then unless there are very strong indications of error leave should rarely be given. In other cases, the Court will be looking for a somewhat less stringent assessment. In those cases a strongly arguable case would normally be required for leave to be granted. The existence of conflicting decisions will also be relevant.

We have put the matter in this way not to indicate any basic departure from the Nema guidelines but because we are not comfortable with the conclusory way in which Lord Diplock expressed himself in stating when leave ought to be given in respect of an alleged one-off error of law.To say that the Judge must be persuaded that the award is "obviously wrong" seems to us, with respect, to be inappropriate.Plainly the House of Lords in The Nema considered that the granting of leave in respect of an alleged one-off error should not be a common event, but, while that can be accepted, we think it is better to say that what must be shown, on a preliminary view, is that the applicant has a very strongly arguable case that the arbitral tribunal has erred in law.

So, instead of speaking of a "strong prima facie case that the arbitrator was wrong" or "obviously wrong", which are only labels intended to indicate that there is a high or very high threshold, we would, without intending any lowering of the barrier faced by an applicant for leave, substitute a test of a strongly or very strongly arguable case.

(2) How the question arose before the arbitrators

The Court should consider whether the question of law arose incidentally, or whether it was the very point of the arbitration. Although it may be undesirable for an arbitrator who is not legally qualified to deal definitively with the law, where the parties have chosen, with full knowledge that the dispute centres on a question of law, to submit that dispute to arbitration rather than asking a court to determine the question, they should generally be held to their choice. The parties in that situation clearly took the risk that the lay arbitrator would not get the law completely right. In such a case, it will be harder to obtain leave to appeal. But if only during the arbitral process has a legal issue emerged as crucial to the decision, rather than being at the forefront from the beginning, leave will be more readily granted.

(3) The qualifications of the arbitrators

Where the arbitrator chosen by the parties is legally qualified, it will be harder to obtain leave to appeal the arbitral decision on a question of law. As Lord Donaldson MR stated in Ipswich Borough Council v Fisons PLC [1990] Ch 709, 724, if the chosen arbitrator is a lawyer and the problem is purely one of law, the parties must be assumed to have had good reason for relying on that lawyer's expertise.

(4) The importance of the dispute to the parties

Where the dispute has great significance to the parties, it may be easier to obtain leave to appeal, because the effect on them of an incorrect ruling will be all the greater. In this context it is to be remembered that some disputes referred to arbitration may involve more than just a question of money.

(5) The amount of money involved

Where a very substantial amount of money is involved in the arbitration, the cost of an arbitrator's mistake is obviously much greater. In that situation, it may be somewhat easier for the parties to obtain leave to appeal in order to ensure that an injustice is not done by leaving intact an incorrect ruling.

(6) The amount of delay involved in going through the courts

This factor is to be balanced against the previous one. If the amount of money involved is not so substantial, and the delay likely to be occasioned by submission of the dispute to the court system is great, it may be that the cost of correcting the alleged error of law is disproportionate to the amount in dispute. In this situation, it will be more difficult for the applicant to get leave to appeal. A fortiore if the situation is one of urgency as in The Nema itself (see para [18]).

(7) Whether the contract provides for the arbitral award to be final and binding

Where there is such a clause, it will not be determinative, but it will be an important consideration. It will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award. The High Court should lean towards giving effect to the stated preference of the parties for finality.

(8) Whether the dispute before the arbitrators is international or domestic

Under the Arbitration Act, parties to an international arbitration can opt in to clause 5; they can expressly choose to have clause 5 apply to their arbitration. If they do not opt in, then their recourse to the Court is limited to the setting aside of the arbitral award on the grounds set out in Article 34 of Schedule 1 (covering things like incapacity of parties, irregularity of procedures or failure to follow the rules of natural justice). However, if they do opt in, then it is clear that they did intend the possibility of recourse to the Court in the event of an error by the arbitrator on a question of law.

149 The application of the time limit for appealing, or applying for leave to appeal, prescribed in clause 5(8) of the Second Schedule was considered in ***Rosser v Global Construction Services Ltd***[211].

[k] Recognition and enforcement of awards (Schedule 1, articles 35 and 36)

150 Article 35, as originally worded, and article 36 read as follows:

35. Recognition and enforcement--

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy and, if recorded in writing, the original arbitration agreement or a duly certified copy. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language.

36. Grounds for refusing recognition or enforcement--

[211] High Court, Auckland, CIV 2004-404-2564, 10/8/04, Randerson J

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only--

(a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that--

(i) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of the country where the award was made; or

(ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that--

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or

(ii) The recognition or enforcement of the award would be contrary to the public policy of New Zealand.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1) (b) (ii), it is hereby declared that an award is contrary to the public policy of New Zealand if--

(a) The making of the award was induced or affected by fraud or corruption; or

(b) A breach of the rules of natural justice occurred--

(i) During the arbitral proceedings; or

(ii) In connection with the making of the award.

151 Article 35 was repealed by s 8(5) of the Amendment Act and the following article substituted:

35. Recognition and enforcement--

(1) An arbitral award, irrespective of the country in which it was made, -

(a)must be recognised as binding; and

(b)on application in writing to a Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36.

(2)The party relying on an award or applying for its enforcement must supply—

(a)the duly authenticated original award or a duly certified copy of the award; and

(b)if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and

(c)if the award or agreement is not made in the English language, a duly certified translation into the English language of either or both documents.

*(3)For the purposes of this article, **Court** means—*
(a)the High Court; or
(b)a District Court in any case where the amount of any money made payable by the award does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases.[212]

152 Articles 35 and 36 apply to all arbitrations whether the place of arbitration is in New Zealand or not.

153 Article 35 as originally worded, was considered in two cases:

a. ***Simpson v Heyhoe Builders Ltd***.[213]
b. ***Illichivsk Trading Seaport v Finex Maritime Corp*** [214]

154 In ***Simpson***[215] the plaintiffs applied to set aside a judgment of the High Court and consequential charging orders based on that judgment. The judgment was based on an arbitral award and had been obtained as a result of the defendant lodging with the Court a certificate of judgment to which was attached the arbitral award relied upon by the defendant. Doogue J held that the procedure which had been adopted did not comply with article 35 and declined to remedy the defect under r11 of the High Court Rules. He held, obiter, that an application to enforce an award could be made by way of statement of claim or by way of an originating application[216].

155 In ***Illichivsk*** [217] the High Court held, not surprisingly, that the court had no jurisdiction to make an order dismissing an application under article 35(1) on the application of the party in whose favour the award had been made (as opposed to the party "*against whom it is invoked*"[218]).

[212] In *Cheung v Plastertech Ltd* (High Court, Wellington, CIV 2009-485-630, 3/7/09, Mackenzie J) the Court held that article 35(3) should not be read disjunctively and the High Court is an appropriate Court even where the amount in issue is within the jurisdiction of the relevant District Court.
[213] High Court, Wellington CP 226/98. 31/8/98, Doogue J
[214] High Court, Auckland, CIV 2005-404-2886, 3/6/05, Ellen France J
[215] High Court, Wellington CP 226/98. 31/8/98, Doogue J
[216] The position is now governed by Part 26 of the High Court Rules 2008.
[217] High Court, Auckland, CIV 2005-404-2886, 3/6/05, Ellen France J
[218] Article 36(1)(a)

156 Because of the close similarity between the grounds for setting aside an award under article 34 and the grounds for refusal of recognition or enforcement of an award under article 36, decisions under the former article (see paragraphs 79-138 of this paper) are relevant also in relation to article 36[219].

157 The following further cases, decided under article 36, are worthy of note:

(a) ***Shady Express Ltd v South Star Freightliner Ltd***[220], in which the issue was as to the adequacy of the arbitrator's Reasons for the award; and

(b) ***Coromandel Land Trust Ltd v Milkt Invest Ltd***[221] and ***Swisher Hygiene Franchise Corporation v Hi-Gene Ltd***[222], in both of which the issue related to the fairness of the arbitral tribunal's refusal of an adjournment or granting of a lesser adjournment than sought.

158 In ***Chatham Island Shipping Services Ltd v Hawkes Bay Stevedoring Services Ltd***[223], in which the applicant sought an order setting aside a statutory demand served on it by the respondent in reliance on an arbitral award, Master Thomson rejected an argument that article 35 necessitated an application to the High Court before any steps could be taken in reliance on the award.

[l] Costs (Schedule 2, clause 6)

159 This clause reads as follows:

> *(1) Unless the parties agree otherwise,--*
>
> *(a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the First Schedule, or any additional award under article 33 (3) of the First Schedule; or*
>
> *(b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.*
>
> *(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,--*

[219] And vice versa.
[220] High Court, Wellington, CIV 2008-485-26, 14/3/08, Dobson J
[221] High Court, Hamilton, CIV 2009-419-232, 28/5/09, Andrews J
[222] High Court, Auckland, CIV 2009-404-1573, 2/12/09, Duffy J
[223] High Court, Wellington M349/98, 30/11/98, Master Thomson

(a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and
(b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where--
(a) An arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and
(b) An application has been made under subclause (3),--
the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

(5) An application may not be made under subclause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

160 The clause only applies to an international arbitration taking place in New Zealand if the parties have agreed that it should. It applies to domestic arbitrations unless the parties have agreed to exclude it.

161 The cases on this clause fall into two groups:

(a) that in which the clause has been interpreted; and

(b) those in which the clause has been applied.

162 In ***Casata Ltd v General Distributors Ltd***[224] the Supreme Court held that an award in which the arbitrators failed to deal with the question of costs was an incomplete award, notwithstanding that neither party had expressly sought an order as to costs, and that it was therefore open to the successful party to request the arbitral tribunal to deal with the question of costs in an additional award and obligatory on the tribunal to do so. The decision of the Supreme Court was a majority decision (3-2) and has been the subject of considerable criticen.

[224] [2006] 2 NZLR 721

163 The following are some of the cases in which the clause has been applied:

(a) ***The Marble and Granite Centre Ltd v Emery*** [225]

(b) ***Bayne v Kumar*** [226]

(c) ***Tek Travel Ltd v Schwass Trust Investments Ltd*** [227]

(d) ***Ambler Homes Ltd v Powell*** [228]

(e) ***Young v Kerr Construction (Whangarei) Ltd*** [229]

(g) ***Rosser v Global Construction Services Ltd*** [230]

164 In ***Marble and Granite Centre***,[231] the Court held that an award of costs of $21,000, excluding the hearing fee, was out of proportion to the amount at issue in the claim, which was a little over $15,000, and that the arbitrator should have given the party against whom he proposed to award costs an opportunity to address him on the point before making the award of costs. The Court declined to remit the matter back to the arbitrator and made an order fixing costs at $12,000.

165 In ***Bayne***,[232] the Court upheld the arbitrator's fee of $4,912.50 in respect of an interim award (being the amount remaining outstanding after taking into account the security deposit provided) and ordered payment of $1,000 in respect of the continued arbitration (this was not concluded because of the bankruptcy of the claimant). In addition to these amounts, which strictly speaking related to the arbitration, the Court also dealt with applications by the arbitrator for costs in respect of his involvement in appeal proceedings improperly brought in the District Court by one of the parties to the arbitration and in respect of the application before the High Court for an order for the payment of his costs in respect of the arbitration.

166 In ***Tek Travel***,[233] the Court refused to interfere with the arbitrator's award of $4,220 costs to the plaintiff, notwithstanding that the plaintiff's actual costs and

[225] High Court, Auckland M1384/98, 30/9/98, Robertson J
[226] High Court, Auckland M1440/97, 20/10/98, Paterson J
[227] High Court, Auckland M1020-sd99, 18/8/99, Morris J
[228] High Court, Auckland M1618-sw99, 3/11/99, Nicholson J
[229] (2002) 16 PRNZ 311
[230] High Court, Auckland, CIV 2004-404-2564, 10/8/04, Randerson J
[231] High Court, Auckland M1384/98, 30/9/98, Robertson J
[232] High Court, Auckland M1440/97, 20/10/98, Paterson J
[233] High Court, Auckland M1020-sd99, 18/8/99, Morris J

disbursements were of the order of $25,000. The ground on which the Court came to this decision was that, contrary to the plaintiff's submission, the arbitration resulted, not in a "*win*" for the plaintiff, but in a '*scoreless draw*".

167 In ***Ambler Homes***,[234] the Court held that there was no reason to depart from the normal rule that costs follow the event.

168 In ***Young***,[235] the Court held that the same principles apply in determining whether an allocation of costs is unreasonable for the purposes of clause 6(3) as apply in respect of the exercise of the Court's discretion to award costs.

169 In ***Rosser***,[236] in which the arbitrator had awarded costs of $28,864 in respect of an award of $23,298 plus interest, the High Court held that the arbitrator was entitled to decline to follow either the High Court scale of costs or the District Court scale of costs and refused to interfere in the order of costs. The court stated[237]:

> *This court will not lightly interfere with costs awards made by an arbitrator unless it is plainly shown that the award was unreasonable in all the circumstances. This court will not interfere merely because it would have arrived at a different conclusion. If the award accords with principle and if it is one which would reasonably be made by an arbitrator in all the circumstances, this court will not interfere.*

[m] Confidentiality (sections 14-14I)

170 Before amendment in 2007, s 14 read as follows:

> *(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.*
> *(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection -*
> *(a) If the publication, disclosure, or communication is contemplated by this Act; or*
> *(b) To a professional or other adviser of any of the parties.*

171 The following cases have been decided under this section in its then form:

c. ***Television New Zealand Ltd v Langley Productions Ltd*** [238];

[234] High Court, Auckland M1618-sw99, 3/11/99, Nicholson J
[235] (2002) 16 PRNZ 311
[236] High Court, Auckland, CIV 2004-404-2564, 10/8/04, Randerson J
[237] ibid at paragraph 28
[238] High Court, Auckland CL 7/99, 7/2/00, Robertson J

d. ***O v SM***[239];

e. ***Cullen Investments Ltd v Watson & Anor***[240].

172 In ***Langley Productions Ltd*** [241] the Court held that the confidentiality attaching to the arbitration process does not extend to subsequent proceedings in the Court.

173 In ***O v SM***[242] the Court provided the parties with some degree of confidentiality by substituting initials for the parties' names.

174 In ***Cullen Investments Ltd***[243] the Court refused to make an order that the court proceedings remain confidential, on the grounds of the public interest in open justice, the media interest in the decision, the public knowledge that the parties had in fact been in arbitration and that an award had been made, and the fact that any such order would require drastic censorship (effectively "emasculation") of the judgment.

175 The three cases referred to in paragraphs 161-163 above deal with the position in relation to subsequent Court proceedings between the parties to the arbitration. In ***Beattie v Attorney-General***[244] the High Court had to consider the effect of s14 on other parties. The plaintiffs had been provided with a copy of an interim award in an arbitration to which they were not a party. The person who provided it to them had been an expert witness for one of the parties to the arbitration. There had been an express confidentiality agreement between the parties to the arbitration but no express undertaking had been required of the witnesses in the arbitration. The plaintiffs in the present case submitted that they were free to make use of the document. The Court rejected that submission, on the following grounds:

> *[17] Section 14 of the Act imposes an implied term in every arbitration agreement, unless the parties expressly contract to the contrary, requiring confidentiality in the terms expressed in the section …*
>
> *[18] Having regard to the presumption created by statute (not by contract) in s14(1) of the Act, I am of the clear view that any person who receives an interim award in the circumstances disclosed in this case is under an obligation to inquire what agreement has*

239 [2000] 3 NZLR 114
240 High Court, Auckland, M908-IM01, 27/9/01, Chambers J
241 High Court, Auckland CL 7/99, 7/2/00, Robertson J
242 [2000] 3 NZLR 114
243 High Court, Auckland, M908-IM01, 27/9/01, Chambers J
244 High Court, Auckland, CIV2003-404-3166, 11/6/04, Heath J

been reached between the parties to the arbitration before treating it as within the public domain.

[19] In my view, there was no basis whatsoever for a document supplied by someone known to be an expert witness before an arbitrator to be treated as in the public domain without such an inquiry being made. …

[20] If inquiry had been made it would probably have revealed one of the following responses. It is possible that [the expert] would have said that he knew that express confidentiality agreements were in place. It is also possible, had he thought this, that he might have said that the confidentiality provisions set out in s14 had been expressly overridden. He might also have said, if his knowledge was such, that there were no confidentiality provisions at all. Alternatively, and most likely, he might have said he did not know. Had he said he did not know, the obligation to inquire further would have been clear and the issues that has (sic) arisen about the subsequent use of the documentation would have been avoided.

176 The Arbitration Amendment Act 2007 repealed s 14 and substituted ss 14-14I, which read as follows:

14 Application of sections 14A to 14I
Except as the parties may otherwise agree in writing (whether in the arbitration agreement or otherwise), sections 14A to 14I apply to every arbitration for which the place of arbitration is, or would be, New Zealand.

14A Arbitral proceedings must be private
An arbitral tribunal must conduct the arbitral proceedings in private.

14B Arbitration agreements deemed to prohibit disclosure of confidential information
(1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

(2) Subsection (1) is subject to section 14C.

14C Limits on prohibition on disclosure of confidential information in section 14B
A party or an arbitral tribunal may disclose confidential information—
(a) to a professional or other adviser of any of the parties; or
(b) if both of the following matters apply:
(i) the disclosure is necessary—
(A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or
(B) for the establishment or protection of a party's legal rights in relation to a third party; or
(C)for the making and prosecution of an application to a court under this Act; and
(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
(c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
(d) if both of the following matters apply:
(i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
(e) if the disclosure is in accordance with an order made by—
(i) an arbitral tribunal under section 14D; or
(ii) the High Court under section 14E.

14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances

(1) This section applies if—

(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d)); and

(b) at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned.

(2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

14E High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality

(1) The High Court may make an order allowing a party to disclose any confidential information—

(a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with article 32 of Schedule 1; or

(b) on an appeal by that party, after an order under section 14D(2) allowing that party to disclose the confidential information has been refused by an arbitral tribunal

(2) The High Court may make an order under subsection (1) only if –

(a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and

(b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).

*(3) The High Court may make an order prohibiting a party (**party A**) from disclosing confidential information on an appeal by another party (**party B**) who unsuccessfully opposed an application by party A for an order under section 14D(2) allowing party A to disclose confidential information.*

(4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard.

(5) The High Court may make an order under this section—

(a) unconditionally; or

(b) subject to any conditions it thinks fit.

(6) To avoid doubt, the High Court may, in imposing any conditions under subsection (5)(b), include a condition that the order ceases to have effect at a specified stage of the appeal proceedings.

(7) The decision of the High Court under this section is final.

14F Court proceedings under Act must be conducted in public except in certain circumstances

(1) A Court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A Court may make an order under subsection (1) —

(a) on the application of any party to the proceedings; and

(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

(3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.

(4) In this section and sections 14G to 14I,—

__Court__—

(a) means any court that has jurisdiction in regard to the matter in question; and

(b) includes the High Court and the Court of Appeal; but

(c) does not include an arbitral tribunal

***proceedings** includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).*

14G Applicant must state nature of, and reasons for seeking, order to conduct Court proceedings in private

An applicant for an order under section 14F must state in the application—

(a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and

(b) the applicant's reasons for seeking the order.

14H Matters that Court must consider in determining application for order to conduct Court proceedings in private

In determining an application for an order under section 14F, the Court must consider all of the following matters:

(a) the open justice principle; and

(b) the privacy and confidentiality of arbitral proceedings; and

(c) any other public interest considerations; and

(d) the terms of any arbitration agreement between the parties to the proceedings; and

(e) the reasons stated by the applicant under section 14G(b).

I Effect of order to conduct Court proceedings in private

(1) If an order is made under section 14F,—

(a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and

(b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings.

(2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.

There have been no decisions to date in relation to the new provisions.

The new interim measures regime

177 As noted in the opening paragraph of this paper, one of the amendments made to the principal Act in 2007 was the incorporation in Schedule 1 (with some modifications) of the new UNCITRAL interim measures regime. This amendment has been effected by repealing the original article 17 and substituting a new article 17 and additional articles 17A – 17M, as follows:

17 Interpretation

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

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.

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.

***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.

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.

(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

(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.

(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.

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.

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."

178 There have been no decisions to date in relation to the new provisions. I reviewed the provisions in a paper presented at the New Zealand Arbitration Day 2007 .[245]

Conclusion

179 The New Zealand experience of the Model Law has generally been a happy one. So far as the provisions derived from the Model Law are concerned as opposed to those which are entirely "home-grown", such as those relating to consumer contracts and confidentiality, it is articles 34 and 36 which have attracted, and will continue to

[245] This is available on the Recent Papers page of my website at www.kennedygrant.com entitled *Promised Land or Fire Swamp? Interim Measures – The New Zealand Experience*. A shortened version has been published at [2008] NZLJ 83-88 and 92 under the title *Interim measures in arbitration*.

attract, the most litigation, for obvious reasons. In that regard, the decisions will usually turn on the facts, because the principles are well established. The effect of the new interim measures regime is awaited with interest.

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