Presentation

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Enforcement of Interim Measures and Interim Awards in New Zealand and Australia: Out of step or a step ahead?

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Abstract

New Zealand and Australia have adopted the provisions in the 2006 (revised) UNCITRAL Model Law, allowing for the cross-border enforcement of interim measures, whether or not such interim measures are in the form of an award.

This paper considers the advantages and disadvantages of this expansive approach to the enforcement of interim awards and measures and whether this approach is a step ahead (or out of step) with the rest of the international arbitration community.

1. Introduction

There is no clear consensus across nations as to exactly what is meant by the terms interim, interlocutory or partial award.[2] In this paper, I use the terms interim and interlocutory interchangeably. They are used to refer to a ruling that is not final and which could be terminated, suspended or reversed later in the proceedings. By partial award, I mean a ruling that is final with regard to the issues it decides. A partial award could be an award on jurisdiction or as to the proper law of the dispute or it could finally dispose of some (but not all) of the claims brought before the tribunal.

2. Enforcement of foreign arbitral awards

2.1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The key document dealing with the enforcement of awards in international arbitration is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 – better known as the New York Convention. Over 140 nations have signed up to the New York Convention. Countries that are signatories to the Convention, commit to

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[2] See, for example, N Blackaby and C Partasides with A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, 2009) chapter 9, footnote 11: 'Some commentators have suggested that a preliminary award may be treated as "provisional". However, this concept seems to be fraught with perils; the authors suggest that any decision that is not finally determinative of the issues with which it deals should not be called an "award".'

recognising and enforcing arbitral awards made in other States[3] and agree that they will only refuse to recognise or enforce awards on the basis of certain limited grounds, which mainly relate to jurisdictional and procedural issues.[4]

The New York Convention does not contain a definition of the word 'award' and it is therefore not clear whether a country's commitment to recognise and enforce awards, in accordance with the Convention, extends to interim, interlocutory or partial awards. This issue is therefore left to the determination of the local courts and/or the local legislature.

2.2. The UNCITRAL Model Law on International Commercial Arbitration

2.2.1. Original Version of the Model Law, adopted on 21 June 1985

Many countries that are signatories to the New York Convention have also incorporated the UNCITRAL Model Law on International Commercial Arbitration into their national legislation.[5] The original version of the Model Law was adopted on 21 June 1985. It was drafted by a United Nations Committee, to assist States in reforming and modernising their laws on arbitral procedures and with the aim of harmonising arbitral laws across nations. This was considered necessary in light of the considerable disparities in national laws on arbitration and the fact that many national laws had been drafted to deal with domestic arbitration issues, rather than international arbitration. The Model Law is said (by UNCITRAL) to reflect worldwide consensus on key aspects of international arbitration practice.

The provisions relating to recognition and enforcement of awards are contained in Articles 35 and 36 of the UNCITRAL Model Law. Those Articles effectively track the provisions of Articles IV and V of the New York Convention.

As with the New York Convention, the Model Law does not contain a definition of the word 'award'. Therefore, where a country incorporates the original 1985 version of the UNCITRAL Model Law into its national legislation (without any modifications), it is not clear whether the requirement to recognise and enforce foreign awards, extends to interim, interlocutory or partial awards. Once again, that issue is left to the determination of the local courts.

2.2.2. Revised Version of the Model Law, adopted on 7 July 2006

On 7 July 2006, after lengthy debate, UNCITRAL adopted a suite of amendments to the original Model Law. The revised version of the Model Law contains an extensive revision of the provisions on interim measures. The Article dealing with interim measures in the original

[3] This can be limited to 'other contracting States', see Article 1(3) of the New York Convention. This is known as the reciprocity requirement.

[4] See, in particular, Article III which provides that 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon...'.

[5] Many with extensive modifications and additions. See Hew Dundas, 'The Arbitration (Scotland) Act 2010: Converting Vision into Reality', (2010) 76 *Arbitration* 1, at page 11 where he notes that, 'the Bermuda statute needs an *additional* 5,500 words, Singapore 7,000 and New Zealand 11,000 words to make the Model Law work'.

version of the Model Law (Article 17) was fairly brief. It simply provided that the tribunal could order any party to take interim measures of protection, in respect of the subject matter of the dispute, and that the tribunal could require any party to provide appropriate security in connection with such measures. There was no reference to the enforceability or otherwise of such orders.

The changes to Article 17 in the revised version of the Model Law were considered necessary given that interim measures are increasingly relied upon in international arbitration proceedings. The revisions include an enforcement regime for such measures, in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of actually enforcing interim measures before national courts.[6] The new provisions are contained in a new Chapter IV A (Articles 17 and 17A to J) of the Model Law.

Chapter IV A also includes the controversial new provisions allowing for tribunals to issue 'preliminary orders' on an *ex parte* basis. Preliminary orders are designed to preserve the status quo, while the Tribunal considers an application for an interim measure, on an *inter partes* basis. Preliminary orders only remain in place for 20 days (unless lifted earlier than that by the Tribunal, or unless they are converted into an interim measure, after hearing both parties). This article does not consider the Preliminary Orders regime in any further detail as, under the (revised) Model Law, such orders are not enforceable by the courts.[7]

Article 17(2) of the (revised) Model Law defines an interim measure as:

> '... any temporary measure, whether in the form of an award or in any other form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
>
> (a) Maintain or restore the status quo pending 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 process itself;
>
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.'

Article 17A (*Conditions for granting interim measures*) effectively raises the threshold for granting interim measures and requires the applicant to satisfy the tribunal that:

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[6] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration and the Amendments adopted in 2006. <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> at page 24.

[7] See Article 17C (5) of the revised Model Law which provides: 'A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award'.

- Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed; and

- There is a reasonable possibility that the requesting party will succeed on the merits of the claim.

(These requirements only apply 'to the extent the tribunal considers appropriate' where the application is simply for the preservation of evidence under Article 17(2)(d).)

Article 17E allows the Tribunal to require the requesting party to provide appropriate security in connection with the measure and Article 17G provides that the requesting party shall be liable for any costs or damages caused by the interim measure if the tribunal later determines that the interim measure should not have been granted.

The provisions relating to the enforceability of interim measures are contained in new Articles 17H and I.

Article 17H provides that national courts shall recognise and enforce interim measures issued by tribunals. There is an obligation on the applicant to inform the court if the measure is terminated, suspended or modified by the tribunal. The court where recognition or enforcement is sought may order the requesting party to provide security (if the tribunal has not already done so) or where it would be necessary to protect the rights of third parties.

Article 17I sets out the grounds upon which recognition or enforcement of an interim measure may be refused. Those grounds largely track those set out in Article 36, relating to the grounds upon which a court may refuse to recognise or enforce an award. Article 17I also allows a court to refuse to recognise or enforce an interim measure if a tribunal direction in relation to security has not been complied with or where the tribunal or 'where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted" terminates or suspends the interim measure.[8] Also, the court can refuse to recognise or enforce the interim measure if it is 'incompatible with [its] powers'. However, in those circumstances, the court can reformulate the interim measure to adapt it to its own powers and procedures.

Article 17I (2) clarifies that any determination made by a court under 17I (1) (i.e. that there is a valid ground to refuse to enforce an interim measure) shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court asked to enforce the interim measure cannot usurp the role of the tribunal in, for example, determining whether it has jurisdiction to hear the claim. Nor can that court usurp the role of a court called upon to consider whether a final award, made by the same tribunal, should be recognised or enforced.

Given that the amendments to the Model Law did not include a new definition of the term 'award' it is possible that 'partial awards' will fall between the cracks. Countries that adopt

[8] The committee drafting the amendments to the Model Law deliberately left open the question of whether it is possible to apply to a national court to 'set aside' an interim measure. This is left to the national laws of each country and/or the decisions of its national courts.

the revised Model Law provisions, commit to enforcing interim measures (i.e. temporary measures) and they also commit to enforcing awards. If those countries already have a body of case law stating that the Model Law only requires recognition and enforcement of final awards which deal with all the issues in dispute, such case law will continue to apply, even with the adoption of the new Model Law, and it will not be possible to enforce partial awards in those countries.

3. Enforcement of foreign arbitral awards in NZ

New Zealand's 1996 Arbitration Act adopted the UNCITRAL Model Law of 21 June 1985 (with certain amendments and additions) as Schedule 1 of the Act. Article 35 of Schedule 1 provided for the recognition and enforcement of awards, irrespective of the country in which the award was made and Article 36 set out the limited grounds for refusing recognition or enforcement of an award. Those provisions on recognition and enforcement of awards were extended to interim awards, by virtue of the definition of 'award' in section 2 of the Act. Section 2 provided:

> '**Award** means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award".

Therefore, since the enactment of the 1996 Act, it has been possible to have an interim, interlocutory or partial award enforced or recognised in New Zealand, provided that any such award related to the 'substance' of the dispute. [9]

Compared to many other nations, this was a fairly expansive approach to the enforcement of awards. Many other jurisdictions limit the enforcement of awards to awards that finally dispose of the whole or part of the dispute.[10]

With the enactment of the Arbitration Amendment Act 2007, New Zealand was the first country to bring into law the new UNCITRAL Model Law amendments, including the provisions on interim measures. The new provisions on enforcement of interim measures are contained in Articles 17L and M of Schedule 1 (these provisions essentially track Articles17I and J of the revised Model Law).

In accordance with those new provisions, it is now possible to enforce 'interim measures' (and have them recognised), whether or not such measures are in the form of an award.
Also, there is no requirement for the interim measure to 'be a decision on the substance of the dispute'. In fact, the definition of an 'interim measure' in Article 17 of Schedule 1 (which tracks the definition in Article 17(2) of the Model Law) extends beyond orders on the

[9] See also Article 17(2) (now repealed) of Schedule 1 (applying to arbitrations in New Zealand) which provided that Articles 35 and 36 of Schedule 1 applied to orders made by an arbitral tribunal under Article 17, as if a reference in those articles to an award were a reference to such an order.

[10] See the ICC International Court of Arbitration Bulletin, 2008 Special Supplement, 'Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards', in particular the Country Answers to Question 16: 'When, if ever, can a party obtain recognition and enforcement of interim or partial foreign awards?'

substance of the dispute as it includes orders for a party to 'take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself'. This would seem to allow a tribunal to grant an 'anti-suit injunction', requiring a party to drop any court proceedings that have been taken in conflict with the arbitration agreement. Also, an interim measure ordered by the tribunal can be aimed at 'preserving assets out of which a subsequent award may be satisfied'. This appears to allow global 'freezing orders' against any funds or assets of the defendant; it is debatable as to whether such an order is a 'decision on the substance of the dispute'.

New Zealand has also added to the Model Law definition of interim measures by including orders for security for costs as a specific example of an interim measure that may be ordered by a tribunal. Arguably such measures are already allowed under '(c) provide a means of preserving assets out of which a subsequent award may be satisfied'. However, the New Zealand addition puts that issue beyond doubt.

4. Australia's provisions on the enforcement of interim awards

Prior to the recent amendments to the International Arbitration Act 1974 (Australia) (the 'IAA'), Australia's legislation was ambiguous as to whether the Australian Courts were required to enforce interim awards. The IAA simply provided for the enforcement of 'foreign awards'. The definitions of 'foreign awards' and 'arbitral awards' in the IAA, referred back to the meaning of 'award' in the New York Convention.[11] As noted above, the New York Convention does not define the term 'award' and therefore, with regard to interim awards, it was for the Court considering the application for enforcement to determine whether an interim award met the definition of 'award' in the Act for the purposes of enforcement.

In *Resort Condominiums International Inc.* v *Bolwell* (1993) 118 ALR 655,[12] the Supreme Court of Queensland indicated that it did not consider that interim awards were enforceable in Australia and stated that an award 'must determine finally at least some of the matters in dispute before the parties before it will be considered an award within the meaning of the New York Convention'.[13]

Australia did have an additional provision, to which the parties to an arbitration agreement could 'opt-in', allowing for the enforcement of interim awards. Section 23 of the IAA provided:

> 'Chapter VIII of the Model Law [*Articles 35 and 36, relating to recognition and enforcement of awards*] applies to orders by an arbitral tribunal under Article 17 of the Model Law requiring a party:

[11] Section 3 of the IAA provides that '***foreign award*** means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies' and that '***arbitral award*** has the same meaning as in the Convention'.

[12] In this case, the parties had concluded a licensing agreement for the use of knowhow and trade-marks in relation to time-sharing. A tribunal, with its seat in the United States, issued an interim award requiring the respondent to refrain from using the knowhow covered by the licensing agreement.

[13] (1993) 118 ALR 655, at para 37.

(a) To take an interim measure of protection; or
(b) To provide security in connection with such a measure;
as if any reference in that chapter to an arbitral award or an award were a reference to such an order'.

As this was an additional 'opt in' provision, it would only apply where parties who had chosen Australia as their seat, also chose to include this provision in their agreement to arbitrate, either before or after a dispute arose. It is unclear whether there was much take-up of this provision in Australia. However, given that dispute resolution clauses are often the 'midnight provision',[14] it seems unlikely that this opt-in provision made its way into many arbitration agreements.

In June 2010, the Australian Parliament passed the International Arbitration Amendment Bill, which is intended to ensure that Australia's legislation on international arbitration remains at the forefront of international arbitration practice.[15] The Bill amends the IAA by adding the majority of the provisions from the 2006 revision of the Model Law. There are also amendments and new provisions to: 'provide greater guidance to the courts in interpreting the IAA'; to 'provide additional optional provisions to assist the parties to a dispute'; and to 'improve the overall operation of the IAA'.[16]

The Model Law, as revised in 2006, is incorporated into the Australian legislation as Schedule 2 of the IAA. Pursuant to Section 16 of the IAA, the (revised) Model Law has the force of law in Australia (subject to the amendments and additions included in the IAA). The provisions on interim measures (and enforcement of interim measures) in the revised Model Law have, for the most part, been incorporated into the Model Law. However, the provisions allowing for tribunals to issue *ex parte* preliminary orders have specifically been excluded.[17]

In accordance with this new legislation, Australian courts will be required to enforce interim measures issued by an arbitral tribunal in the context of an international commercial arbitration, in accordance with Articles 17H and 17I of the revised Model Law.

5. The Pros and Cons of enacting the Model Law amendments on the enforcement of interim measures

[14] Meaning one of the last provisions added by the parties (or their advisers) once all the other commercial terms have been negotiated and agreed.

[15] R McClleland, 'Second reading speech: International Arbitration Amendment Bill 2009', House of Representatives, *Debates*, November 2009, p. 12791.

[16] Parliament of Australia, Department of Parliamentary Services, Bills Digest, 7 June 2010, no. 163, 2009-10,'International Arbitration Amendment Bill 2009' at p 2.

[17] There is a new Section 18B which provides that, despite Article 17B of the revised Model Law (allowing tribunals to grant ex parte preliminary orders): '(a) no party to an arbitration agreement may make an application for a preliminary order directing another party not to frustrate the purpose of an interim measure requested; and (b) no arbitral tribunal may grant such a preliminary order.'

Arguably, enacting the revised Model Law provisions on the enforcement of interim measures could lead to an increase in arbitration cases before the New Zealand and Australian courts (a boon for New Zealand and Australian lawyers) with claimants seeking to enforce their interim awards in Australasia. However, New Zealand has allowed the enforcement of interim, interlocutory and partial awards since the 1996 Act came into force and there has been no great stampede of claimants seeking to enforce their interim awards before our courts.

It is likely that that is because New Zealand is not where the world's recalcitrant defendants are keeping their assets. Another reason could be that, in the past, parties did not often ask for (and tribunals did not often grant) interim measures and awards. However, as more countries adopt the revised Model Law, with its new definition of interim measures, there may be an increase in parties asking for (and seeking to enforce) interim measures and arbitrators may have more willingness to grant such measures.

It is likely that a further reason that parties have not sought to enforce interim awards in New Zealand is that they (or their counsel) were simply unaware of the fact that it was possible to do so. One advantage of having enacted the revised Model Law is that it is now easier for foreign lawyers and parties to establish that interim awards and measures can be enforced in New Zealand (and in Australia, once the International Arbitration Act Amendment Bill receives Royal Assent). They can simply look at the UNCITRAL website, which sets out the 'Status' of the Model Law and notes those countries that have enacted legislation based on the Model Law and/or the revised Model Law.[18]

In New Zealand, it has been said that a further advantage of adopting the revised Model Law is that it will ensure that New Zealand's arbitration legislation remains consistent with arbitral legislation in other jurisdictions. Indeed, that was one of the reasons cited by the Justice and Electoral Committee for adopting the revised Model Law provisions.[19] Whether that rationalisation for adopting the Model Law amendments holds true, will depend on whether other countries choose to adopt the amendments, when they introduce new arbitration legislation. Certainly all but one of those countries that have enacted legislation based on the Model Law since 2007 have opted for the revised version of the Model Law rather than the original version.[20] However, apart from Australia, few of New Zealand's major trading partners have adopted the revised Model Law. New Zealand currently sits in the company

[18] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[19] Justice and Electoral Committee Report, 'Arbitration Amendment Bill' (2007), page 2.

[20] The exception is the Dominican Republic which, in 2008, enacted arbitration legislation based on the original Model Law provisions. Scotland is also arguably an exception. Scotland's new Arbitration Act of 2010 repeals the previous Act which was based on the 1985 Model Law and adopts a new suite of provisions, picking and choosing from various international and domestic sources. See the article by Hew Dundas, 'The Arbitration (Scotland) Act 2010: Converting Vision into Reality' (2010) 76 *Arbitration* 1, 2-15. The Arbitration (Scotland) Act 2010 does not incorporate provisions for the enforcement of foreign interim measures, nor does it include provision for a tribunal to issue *ex parte* preliminary orders.

of Australia,[21] Florida, Ireland, Mauritius, Peru, Rwanda and Slovenia in having adopted the revised provisions.

Given the controversy surrounding the provisions on *ex parte* interim measures in the revised Model Law, it is not at all clear that countries such as China, Italy or the UK would be willing to adopt the revised Model Law provisions.[22] Also, countries that overhauled their arbitration laws just prior to 2006 (in favour of the original version of the Model Law or otherwise) may not be willing to dedicate legislative time to further revise their arbitration laws in order to adopt the revised Model Law.

It will be interesting to see whether the courts of those countries that have adopted the revised Model Law provisions (including New Zealand and Australia) take a pro-enforcement approach to applications to enforce interim measures. That is clearly the policy behind the new provisions (which track closely the enforcement provisions applying to final awards). However, in most cases the interim measures will have been granted under some time pressure and without the tribunal having access to full information. It will therefore be tempting for national courts to seek to reassess the underlying issues, particularly if new information on the substance of the dispute has become available since the interim measure was ordered. Nevertheless, it is not the role of the enforcement court to consider that new evidence; the substance of the dispute should be debated before the tribunal, not the enforcement court.

Although it is unlikely that all of the major trading nations will adopt this expansive approach to the enforcement of interim measures, I believe that New Zealand and Australia are a step ahead, rather than out of step with the international approach. Given the speed at which business is now done (particularly in fields such as telecoms and finance) it is likely that more and more tribunals will be asked to grant interim measures to preserve property or evidence or to maintain what, according to the applicant, is the "status quo". In highly contentious international arbitrations, parties that obtain such interim measures are unlikely to wait and see whether the other party complies. They are likely to seek to enforce such measures, wherever the other party's assets can be found; even more so where the relevant national courts have committed to the enforcement of interim measures.

[21] As noted above, Australia has excluded the new provisions on *ex parte* Preliminary Orders.

[22] See the Article by Amokura Kawharu, '*New Zealand's Arbitration Law Receives a Tune-Up*' (2008) 24 *Arbitration International* 405, at pages 415-416 and references cited therein.