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A STEP OR A MISSTEP IN COURT

Preserving the Right to Arbitration

Arbitration agreements are well respected under Singapore law. A party to an arbitration agreement can usually enforce it in a Singapore court, unless he has delivered a pleading or otherwise taken any other "step" in court proceedings (see s 6 of the International Arbitration Act). The "step" is not defined in the Act, but case law has developed around the concept of such a "step". These authorities will be examined to delineate the boundaries and characteristics of the "step".

This article will analyse some common themes under which the right to arbitration may be lost or curtailed by taking *(mis)steps* in court, and seeks to identify the overarching rationale for the "step" doctrine.

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I. Introduction

1 Section 6(1) of Singapore's International Arbitration Act[1] ("IAA") provides:

> Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, *at any time after appearance and before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter. [emphasis added]

2 Although the IAA was originally enacted in Singapore in 1994,[2] the words "at any time after appearance and before delivering any pleading or taking any other step in the proceedings" are of significantly older origin. In fact, they predate the UNCITRAL Model Law on

1 Cap 143A, 2002 Rev Ed.
2 Act 23 of 1994 passed by Parliament.

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International Commercial Arbitration[3] ("Model Law") passed in 1985. The words appeared in the UK Arbitration Act 1950,[4] and can be traced back to s 4 of the UK Arbitration Act 1889.[5]

3 Once a "step" is taken, the court's jurisdiction to grant a stay in favour of arbitration is nullified ("the step principle").[6]

4 At the outset, the step principle must be distinguished from the words in Art 8 of the Model Law, which states that a request for arbitration must be made "not later than when submitting his first statement on the substance of the dispute".

5 First, Art 8 simply provides a "long stop" date by which a request for arbitration must be made. It places a "time limit"[7] or a "deadline"[8] by which a party has to submit a request for the court matter to be referred to arbitration. Failure to assert the arbitration point by this time limit would preclude raising the arbitration agreement in subsequent phases of the court proceedings.[9] This time limit had not

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3 UNCITRAL Model Law on International Commercial Arbitration GA Res 40/72, UN GAOR, 40th Session, Supplement No 17, Annex 1, UN Doc A/40/17, UN Sales No E.95.V.18 (1985).

4 Section 4(1) of the UK Arbitration Act, 1950 (c 27) provided:

> If any party to an arbitration agreement … commences any proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the agreement may *at any time after appearance, and before delivering any pleadings or taking any other step in the proceedings*, apply to that court to stay the proceedings. [emphasis added].

5 See Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 657, note to s 4(1) of the Arbitration Act, 1950 (14 Geo 6 Ch 27).

6 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472.

7 Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 305.

8 Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 306.

9 Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 305, fn 20; see also *Seventh Secretariat Note Analytical Commentary on Draft Text of the Model Law* (A/CN9/264) (25 March 1985) at para 4, reproduced in Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 324.

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been present in the New York Convention,[10] and was introduced into the Model Law by adapting a similar time limit in the European Convention on International Commercial Arbitration.[11]

6 By contrast, the step principle seeks to delineate the *conduct of a party*, as opposed to laying down a temporal *deadline*, by which a party may lose his right to refer a litigation case to arbitration.

7 Second, being simply a "deadline", the single point in time identified in Art 8 of the Model Law (*submitting his first statement on the substance of the dispute*) is intended to be "taken literally and applied uniformly in all legal systems".[12]

8 On the other hand, for the step principle, there have been many cases deciding setting out the wide variety of circumstances under which the right to arbitration may be lost. However, as two leading authors had noted previously, "the reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings".[13]

9 Nevertheless, in recent years, there have been recent decisions clarifying important aspects of the step principle. Most notably, the recent Court of Appeal decision in *L Capital Jones Ltd v Maniach Pte Ltd*[14] ("*L Capital*") provides a good starting point for the analysis.

II. General principles

10 In *L Capital*, L Capital Jones and Maniach entered into a joint venture agreement containing an arbitration clause. Maniach sued L Capital Jones and its subsidiary in court for shareholder oppression. In

10 See Art II(3) of the New York Convention. See also Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 305 and Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 2001 companion volume) at p 271.

11 See Howard Holtzmann & Joseph Neubaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 305, fnn 18 and 19.

12 See *Seventh Secretariat Note Analytical Commentary on Draft Text of the Model Law* (A/CN9/264) (25 March 1985) at para 3, reproduced in Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 324.

13 See Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472.

14 [2017] 1 SLR 312.

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response, L Capital Jones applied[15] for (a) Maniach's claim in court to be struck out on the merits, and (b) alternatively, for the claim to be stated in favour of arbitration.

11 One of the key issues raised by Maniach was whether L Capital, by asking the court to strike out the claim on the merits, had taken a step in the proceedings which disqualified it from applying for a stay.[16]

12 The Court of Appeal held that L Capital had indeed taken such a step. First, the court held that an application to strike out the proceedings on the merits would ordinarily be a step in the proceedings.[17]

13 In the court's view, the general principle was set out in the earlier Court of Appeal decision of *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd*[18] ("*Carona*"):

> [A] 'step' is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings on their merits and/or the applicant proceeds … beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration …

14 Applying the general principle, the court held that a striking out application on the merits was an affirmation of the court's jurisdiction to resolve the matter.[19] Further, if the court had gone on to determine the striking out application in L Capital's favour, this would have created some form of estoppel or *res judicata*, precluding the matter from being relitigated before an arbitration tribunal.[20] Thus, a striking out application on the merits clearly evinces an unequivocal intention to participate in the court proceedings in preference to arbitration.[21]

15 The Court of Appeal's general principle in *Carona* is based on a party's unequivocal intention to submit to the court's jurisdiction rather than seek recourse by way of arbitration.[22] In other words, a party takes

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15 The application was made by the subsidiary but it was attributed to L Capital by the Court of Appeal because, amongst other things, L Capital has majority control over the subsidiary and the court inferred that L Capital had directed the subsidiary to make the application. See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [85]–[92].
16 See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [74]–[92].
17 See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [77].
18 [2008] 4 SLR(R) 460 at [55].
19 See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].
20 See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].
21 See *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].
22 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [7].

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a step in favour of litigation if he has made an unequivocal election to do so instead of arbitration.[23]

16 As a prerequisite of election, the party making the election must be aware of the facts which have given rise to the existence of the two inconsistent rights which he is choosing between.[24] Applied to the step principle (which is essentially an election for litigation instead of arbitration), a defendant's application for the plaintiff to produce documents referred to in the plaintiff's statement of claim is not considered a "step" in the proceedings, *if the defendant was not fully aware of all the relevant facts and, in particular, the existence of an arbitration clause*. This was held by the Singapore High Court in *Amoe Pte Ltd v Otto Marine Ltd*.[25]

17 This reasoning may appear to be in conflict with an earlier decision of the English Court of Appeal in *Parker, Gaines & Co Ltd v Turpin*,[26] which apparently rejected[27] the submission that "if a party does not know the full facts he cannot take a step in the proceedings". However, the English Court of Appeal in *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*[28] subsequently adopted the waiver analysis, together with the requisite requirement of knowledge of the material circumstances. In that decision, Lord Denning MR held:[29]

> What then is a step in the proceedings? … On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election *it must be an unequivocal act done with knowledge of the material circumstances* … [emphasis added]

18 It is submitted that there cannot be a meaningful waiver, election or affirmation, unless there is full awareness of all the relevant facts relating to the two competing options of litigation and arbitration. Hence, in so far as *Parker, Gaines & Co Ltd v Turpin* stands for the

23 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [19].
24 *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33]–[34].
25 [2014] 1 SLR 724 at [19].
26 [1918] 1 KB 358.
27 *Parker, Gaines & Co Ltd v Turpin* [1918] 1 KB 358 at 360.
28 [1978] 1 Lloyd's Rep 357.
29 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 361, *per* Lord Denning MR.

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proposition that a step can be taken *even if* a party does not know the full facts, it is respectfully submitted that it was wrongly decided.[30]

19 In summary, under Singapore law, the Singapore courts have analysed the "step" using principles of election and waiver. *First*, a party takes a step when he elects to submit to the court's jurisdiction (as opposed to arbitration), and thereby waives his rights to arbitration. *Second*, the "step" must be a step taken in court which seeks to invoke the jurisdiction of the court. In *Amoe Pte Ltd v Otto Marine Ltd*, the High Court considered whether a defendant who had applied to court to compel the plaintiff to produce documents referred to in the plaintiff's statement of claim filed in court had taken a "step" in the litigation. The court held that "were [the defendant's request] in the form of a letter, it would be considered mere correspondence between the parties and, without more, would not be viewed as constituting a step in the proceedings".[31]

20 This approach in England for the step principle is broadly similar. First, the conduct of the applicant must be such as to demonstrate an *election* to abandon his right to stay, in favour of allowing the action to proceed in court.[32] Second, the act in question must have the effect of invoking the jurisdiction of the court.[33] An extrajudicial proceeding in the legal action, such as obtaining by *correspondence* a consent to the enlargement of time for delivery of pleadings, is not sufficient.[34]

III. Clear steps which cause the right to arbitration to be lost

21 Various decisions on the step principle will now be examined, in an attempt to reconcile them according to the general principles discussed above.

30 The tension between using the concept of waiver and election to rationalise the step principle, and the suggestion in *Parker, Gaines & Co Ltd v Turpin* [1918] 1 KB 358 that a "step" can be taken in ignorance of the agreement to arbitrate, has been noted in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472, text to fn 7.

31 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [19].

32 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472.

33 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472; see also *Patel v Patel* [2000] QB 551 at 555; [1999] 1 All ER (Comm) 923 at 925.

34 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 472; see also *Chappell v North* [1891] 2 QB 252 at 256.

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22 The clearer areas will be covered first. There are some court procedures so closely associated with the litigation process that taking them clearly shows an intention to affirm the court proceedings.

A. Interrogatories and discovery applications

23 For example, a party who applies for interrogatories[35] or discovery[36] in relation to court proceedings is clearly taking a step in the proceedings. Interrogatories are one of the ways in which a party to litigation may be compelled to make disclosure of documents and facts not otherwise known or available to the other party.[37] Answers to interrogatories constitute a form of evidence. The party who applies for them is essentially seeking the production of evidence in the court proceedings which may go to the merits of the case. Similarly, documents disclosed in discovery may be used to form part of a party's substantive case on the merits in the litigation.

B. Summons for directions

24 When a party appears in court for a summons for directions, and acquiesces in the directions[38] given by the court for the trial of the action, he has taken a step in the proceedings in court and can no longer refer the case to arbitration.[39] A defendant who wishes to preserve his right to arbitration may have to object to the making of directions on the basis of the arbitration agreement.[40]

IV. Steps in litigation which do not necessarily cause the right to arbitration to be lost

25 However, not every procedure taken in court may constitute a "step" in the proceedings, which causes the right to arbitration to be lost.

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35 *Chappell v North* [1891] 2 QB 252 at 256 and 257.

36 *Parker, Gaines & Co Ltd v Turpin* [1918] 1 KB 358 at 361.

37 *Trek Technology (Singapore) Pte Ltd v Ritronics Components (S'pore) Pte Ltd* [2007] 1 SLR(R) 846 at [4].

38 Typical directions would include timelines for mutual discovery and time and mode of trial. See *Richardson v Le Maitre* [1903] 2 Ch 222 at 225.

39 See *County Theatres and Hotels Ltd v Knowles* [1902] 1 KB 480 at 482; see also *Richardson v Le Maitre* [1903] 2 Ch 222 at 225.

40 See *County Theatres and Hotels Ltd v Knowles* [1902] 1 KB 480 at 482; see also *Richardson v Le Maitre* [1903] 2 Ch 222 at 225.

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A. Notice to produce

26 The notice to produce procedure in *Amoe Pte Ltd v Otto Marine Ltd* has already been briefly examined above.[41] Under the Rules of Court,[42] a party may serve a notice to produce requiring production of documents referred to in the other party's pleadings or affidavits.[43]

27 A notice to produce can be served immediately after a defendant is served with the statement of claim or an affidavit.[44] Whether or not the service of a notice to produce amounts to a step in the proceedings depends on whether the serving party has evinced an intention to submit to the court's jurisdiction.[45] In the Singapore High Court's opinion, if a party serves a notice to produce to ascertain the nature of the claim to see if arbitration is a viable option, that act in itself is not a step in the proceedings.[46]

28 In *Amoe Pte Ltd v Otto Marine Ltd*, the defendant did not have access to a copy of the contract which the plaintiff was suing on in court. So, the defendant served a Notice to Produce for the contract to be produced. When the plaintiff provided a copy of the contract, the defendant saw that it contained an arbitration clause and applied for a stay of proceedings in favour of arbitration. The plaintiff objected on the basis that the defendant had, by serving a Notice to Produce, taken a step in the court proceedings and, therefore, was disentitled from applying for a stay.

29 The Singapore High Court disagreed. The court held that in filing the Notice to Produce, the defendant was genuinely seeking to investigate the nature of the contractual arrangements under which the plaintiff was making its claim in court.[47] In particular, the defendant was trying to find out whether (a) there was an arbitration clause in the contract, and (b) whether the dispute fell within the arbitration clause.[48] These matters could only be ascertained after the requested documents had been produced. The court applied election and waiver principles. The right to arbitration could not be waived until the defendant was

41 See para 19 above.
42 Cap 322, R 5, 2014 Rev Ed.
43 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 r 10; see also *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [10].
44 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 r 10; see also *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [12].
45 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [13].
46 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [14].
47 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [15].
48 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [15].

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made "fully aware" of these matters.[49] Having found out after inspection of the documents provided under the Notice to Produce, the defendant then promptly applied for a stay of proceedings in favour of arbitration. The court held that in these circumstances, the defendant had not taken a step in the proceedings or waived its right to arbitration.[50]

B. Request for statement of claim to be served

30 The Singapore High Court's reasoning in *Amoe Pte Ltd v Otto Marine Ltd*, focusing on the defendant's knowledge of the claim against him, is consistent with the earlier English Court of Appeal's decision in *Ives and Barker v Willans*.[51] In that case, the plaintiff issued a bare writ of summons against the defendant alleging breach of contract, but did not include the statement of claim. The defendant asked the plaintiff to provide the statement of claim. The plaintiff argued that the defendant had thereby taken a "step" in the proceedings. The English Court of Appeal held that the defendant had not. In the words of Lindley LJ:[52]

> Consider what the Defendant did? He had received a writ and the writ shewed him that there was a claim for breach of contract. That he knew what the contract was I do not doubt, but *he did not know from the writ what the particular breaches were in respect of which the Plaintiffs were suing him*, and, *until he did know that, at all events, how was he to form an opinion as to whether it would be desirable to apply for an order or not? He had not the materials before him to enable him to exercise his judgment in the matter, and it appears to me, therefore, that we should be doing an injustice to a defendant if we said that he must apply under the section for an order to refer before he knows what the plaintiff is suing him for … Before a man can make up his mind as to which of the alternatives he will take, he ought to know what the alternatives are, and ought to be in a position to exercise some kind of judgment in the matter*, and if we were to hold that the Defendant ought to have applied before, we should be saying that he should make his application in ignorance of material facts. [emphasis added]

31 In short, as Kay LJ put it: "it is essential to every case of election that a man who is put to election shall thoroughly understand the facts which make it necessary for him to elect".[53]

49 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [19].
50 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 at [20].
51 [1894] 2 Ch 478.
52 *Ives and Barker v Willans* [1894] 2 Ch 478 at 484.
53 *Ives and Barker v Willans* [1894] 2 Ch 478 at 494.

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C. Further and better particulars of statement of claim

32 Applying the same waiver analysis, if a statement of claim were badly pleaded and lacking in material particulars (for example, if the defendant were left in doubt as to whether the dispute fell within the scope of an arbitration clause), the defendant ought to be entitled to request (and if necessary, apply to court) for further and particulars, before making an election on whether to proceed with litigation or refer the case to arbitration. However, the reported decisions appear to be in conflict on this issue. In *Chappell v North*,[54] the court expressed (without detailed reasoning) the *obiter* view that a summons for particulars would amount to a step in the proceedings.[55] By contrast, in the subsequent decision of *Parker, Gaines & Co Ltd v Turpin*, the court held, again *obiter*, that a defendant's request for further particulars might not be a step, if the existing particulars in the statement of claim were "not very ample".[56]

33 It is respectfully submitted that the view expressed in *Parker, Gaines & Co Ltd v Turpin* ought to be preferred.[57] It is consistent with the principles of election and waiver, which requires full knowledge of the existing facts, before a meaningful election can be made. A defendant may not be able to know whether he is entitled to apply for a stay, until he has proper details of the nature of the substantive claim.[58] Furthermore, the court *itself* which is deciding a stay application will need to be informed of the existence of the arbitration agreement and of the features of the claim which bring it within the clause.[59]

54 [1891] 2 QB 252.

55 See *Chappell v North* [1891] 2 QB 252 at 256, *per* Denman J: "[t]he second matter relied on was, that the plaintiff had taken out a summons for particulars of the counter-claim. I am inclined to think that that did amount to a step in the proceedings … It is not, however, necessary to decide the point" and at 256, *per* Wills J: "I am also of opinion that the summons for particulars of the counter-claim was a step taken in those proceedings".

56 *Parker, Gaines & Co Ltd v Turpin* [1918] 1 KB 358 at 361, *per* A T Lawrence J: "I should have been disposed to look leniently upon the respondent's application for particulars, if that had been the only step alleged, because the particulars were not very ample. But an application for discovery is a very different matter".

57 In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 363, Goff LJalso appeared to approve of this view.

58 This observation was made in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* companion volume (Lexis Nexis, 2nd Ed, 2001) at p 271.

59 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* companion volume (Lexis Nexis, 2nd Ed, 2001) at p 271.

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D. *Interim relief – Applying for and resisting injunctions*

(1) Applying for injunctions

34 A party to an arbitration agreement may apply to court for an injunction in support of the arbitration. For example, a party may require the court to make orders for the preservation of evidence or assets.

35 Article 9 of the Model Law expressly provides: "[i]t 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". This Article "codifies the dual principles that, first, *a party does not waive its right to go to arbitration by requesting (or obtaining) interim measures of protection from a national court*, and second, that *a national court is not prevented from granting such measures by the existence of an arbitration agreement*" [emphasis added].[60]

36 Singapore takes a similar pro-arbitration approach. In 2009, Singapore's International Arbitration Act was specifically amended to enable Singapore courts to order interim measures in support of foreign arbitrations,[61] as well as Singapore arbitrations.[62]

37 Nevertheless, in applying to a court for interim measures, a party to an arbitration agreement must be careful not to use such court applications to avoid or frustrate the arbitration proceedings. In *Kallang Shipping SA Panama v AXA Assurances Senegal*[63] ("*Kallang Shipping*"), cargo-owners (who were insured by AXA) had a London arbitration clause in its contract of carriage with their shipping company.[64] The cargo was allegedly damaged while being discharged in Senegal.[65] The cargo-owners applied to the Senegal courts to arrest the shipping company's vessel in Senegal, as security for their cargo claim.[66] After

60 See Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 332.

61 See K Shanmugam, "Second Reading Speech by Law Minister K Shanmugam on the International Arbitration (Amendment) Bill" in Parliament (19 October 2009) at para 5.

62 A previous Singapore Court of Appeal decision had ruled that a Singapore court could only order interim measures in support of Singapore arbitrations: *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR 629 at [59].

63 [2006] EWHC 2825.

64 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [4].

65 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [4].

66 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [6]–[8].

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arrest, the cargo-owners asked for a form of security that would require resolution of the cargo claim in Senegal (for example, a Senegal bank guarantee which required resolution of the cargo claim in Senegal).[67] The English High Court held that the cargo-owners ought to be restrained from requesting such a form of security in the Senegal courts as it was simply a means to avoid or frustrate the London arbitration proceedings,[68] and amounted to a breach of the arbitration clause.[69]

38 In *Kallang Shipping*, the applicant for security in court was restrained from applying for security in a manner intended to avoid or frustrate arbitration proceedings. It is submitted that such conduct could also be construed as a "step" in the legal proceedings, because the applicant for security is essentially seeking to invoke the jurisdiction of the court to resolve the dispute. As the court in *Kallang Shipping* concluded: "the Defendants were seeking, whether by their use of the security proceedings or otherwise, to have the cargo claim, resolved in Senegal".[70]

(2) Resisting injunctions

39 The position for resisting injunctions is comparatively simpler. In *Roussel-Uclaf v GD Searle and Co Ltd*[71] ("*Roussel-Uclaf*"), the English High Court held a defendant who merely resisted an injunction was not taking a "step". As Graham J held:[72]

> On the whole, I think that the statute [or, the English Arbitration Act] is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property which is the subject of the action in the meantime; and as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time, as or after the application for an injunction.

67 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [12]–[13].
68 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [35].
69 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [36].
70 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825 at [35].
71 [1978] 1 Lloyd's Rep 225.
72 *Roussel-Uclaf v GD Searle and Co Ltd* [1978] 1 Lloyd's Rep 225 at 231.

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40 The reasoning in *Roussel-Uclaf* has been approved in Singapore, most recently by the Singapore Court of Appeal in *L Capital*.[73]

E. Striking out applications

41 A defendant who is faced with statement of claim may apply to court to strike out the claim, instead of staying the proceedings in favour of arbitration. Would that striking out application be considered a "step"?

42 The answer appears to depend on the grounds under which the application is being brought.

(1) Striking out a statement of claim for its technical defects

43 In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*, the plaintiff filed a defective statement of claim that was lacking in material particulars, including failing to specify the contract that was being sued upon.[74] The defendant applied to strike out on the basis that it might prejudice, embarrass or delay the fair trial of the action. The English Court of Appeal held that the striking out application did not amount to a "step". Lord Denning MR held:[75]

> [I]n order to deprive a defendant of his recourse to arbitration, a 'step in the proceedings' must be one which *impliedly affirms the correctness of the proceedings* and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration. Applying this principle, the defendants here were presented with a writ indorsed with a statement of claim which was very defective. They applied, quite correctly, to strike it out. That was not an affirmation of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a 'step in the proceedings' such as to debar the defendants from applying for a stay. [emphasis added]

44 Goff LJ (as he then was) was of the same opinion. His Lordship noted the *obiter* view expressed in *Parker, Gaines & Co Ltd v Turpin* that where the particulars in a defective statement of claim were "not very ample", an application for better particulars would not be a "step" in the

73 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [76], agreeing in general terms with the High Court's reasoning in *Maniach Pte Ltd v L Capital Jones Ltd* at [2016] 3 SLR 801 at [114]–[122].

74 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 360.

75 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 361.

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action. If so, it followed that an application to strike out such a defective statement of claim would not be a "step" either.[76]

(2) Striking out a statement of claim on its merits

45 The position is different when a defendant applies to strike out a claim *on its merits* (as opposed to for being technically defective). In *L Capital*, the Singapore Court of Appeal held: "an application to strike out proceedings on the basis that it is unmeritorious is an act that it signifies a submission to the court's jurisdiction to resolve the dispute on the merits. Far from repudiating the court proceedings, an application to strike out a claim on its merits is an affirmation of the court's jurisdiction to resolve the matter".[77] This was an invocation of the court's jurisdiction.[78]

46 A striking out application based on the *technical defects* of the statement of claim, and a striking out application based on the *merits* of the statement of claim, carries very different consequences for the arbitration. If a statement of claim were struck out by the court for *technical defects*, the court has not made a decision on the merits and the plaintiff is not estopped from commencing an arbitration on the merits.[79] So, the arbitration tribunal's exclusive jurisdiction to determine the merits of the dispute remains unaffected.

47 Conversely, if a statement of claim were struck out on the merits, this would create a form of estoppel or *res judicata* precluding the matter from being relitigated before an arbitral tribunal.[80] So, an application to strike out a statement of claim on the merits is a step in the proceedings, because it evinces a clear intention to participate in the court proceedings in preference to arbitration.[81]

(3) Applying to strike out and applying for a stay

48 In *L Capital*, the defendant applied to (a) strike out the statement of claim on the merits, and (b) stay the proceedings in favour of arbitration. The court noted that the *primary relief* which the

76 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 363.
77 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].
78 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [83].
79 In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 360, the defendant, upon being served by the plaintiff with an application to strike out its defective statement of claim, abandoned the statement of claim and was not prevented from filing a fresh statement of claim with proper particulars.
80 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].
81 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].

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defendant sought was the striking out, and *not* the stay.[82] The defendant had prayed *first* for a striking out, and *then* the stay as an alternative.[83] According to the Court of Appeal, such conduct foreclosed any argument that the defendant had reserved its right to arbitrate the matter.[84]

49 The result in *L Capital* could perhaps have been different if the order of the applications had been reversed, by (a) applying for a stay as the primary remedy first, and (b) in the event that the stay was unsuccessful, applying to strike out the claim on its merits. This was done in *Capital Trust Investment Ltd v Radio Design AB*.[85] The defendant (i) first applied for a stay, and (ii) (before the stay application was heard) applied for summary judgment against the claimant "in the event that its application for a stay [was] unsuccessful".[86]

50 The English Court of Appeal held that the defendant's application for summary judgment was not a step.[87] The defendant had made it clear that the application for summary judgment was only advanced in the event that its application for a stay was unsuccessful.[88] In other words, the defendant was making it clear that it was specifically seeking a stay, with the result that the summary judgment application, which would otherwise be a step in the proceedings, was not so treated.[89]

V. Conclusion – Possible rationales for the step principle

51 From the above survey, some possible rationales for the step principle can be identified and are suggested below by reference to the authorities discussed.

52 First, the step principle maintains the exclusivity of arbitration as a process for dispute resolution and discourages the conduct of court proceedings in parallel to arbitration proceedings. As the drafters of the Model Law have commented, the purpose of an arbitration agreement is

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82 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [79].
83 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [80].
84 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [80].
85 [2002] EWCA Civ 135; [2002] 2 All ER 159.
86 *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135; [2002] 2 All ER 159 at [59].
87 *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135; [2002] 2 All ER 159 at [60].
88 *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135; [2002] 2 All ER 159 at [60].
89 *Capital Trust Investment Ltd v Radio Design AB* [2002] EWCA Civ 135; [2002] 2 All ER 159 at [60].

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to settle any dispute by arbitration, to the exclusion of normal court jurisdiction.[90] Parties should not be allowed to conduct parallel proceedings in court and arbitration.[91]

53 So, a party to an arbitration agreement who takes substantive steps in litigation like applying for discovery,[92] or taking directions for a court trial,[93] will no longer be able to insist that the case be referred to arbitration. He will not be allowed to conduct litigation and arbitration in parallel.

54 Second, the step principle discourages a party from using a step in litigation to circumvent the arbitration process.

55 Hence, a party who has taken a step in court (such as a striking out application on the merits) that could have a substantive impact on the arbitral proceedings via estoppel or *res judicata* will no longer be able to refer the case to arbitration.[94] A party cannot use litigation steps in this manner to "hedge" between litigation and arbitration.

56 Conversely, a defendant who is simply using the litigation process to find out more about the claim in court, so as to enable it to make a meaningful election between litigation or arbitration, is not taken to have waived its right to arbitration (for example, a party who serves a notice to produce in relation to a statement of claim).[95] Such steps do not advance the merits of the defendant's defence in court, and are very unlikely to have any impact on the arbitration.

57 Third, the step principle ensures that the power of the courts to grant interim measures in support of arbitration is not abused.

90 See *First Secretariat Note on Possible Features of a Model Law* (A/CN9/207) (14 May 1981) at para 59, as reproduced in Howard Holtzmann & Joseph Neubaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 309.

91 See *Fourth Secretariat Note, Comments and Suggestions on the Fourth Draft of the Model Law* (A/CN9/WGII/WP50) (16 December 1983) at para 15, as reproduced in Howard Holtzmann & Joseph Neubaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 319.

92 *Parker, Gaines & Co Ltd v Turpin* [1918] 1 KB 358 at 361, discussed at para 23 above.

93 See *County Theatres and Hotels Ltd v Knowles* [1902] 1 KB 480 at 482; see also *Richardson v Le Maitre* [1903] 2 Ch 222 at 225. Both cases are discussed at para 24 above.

94 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78].

95 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724, discussed at paras 26–29 above.

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58 In recent years, Parliament has amended the International Arbitration Act to grant the Singapore courts greater power in this regard.[96] At the same time, Parliament has emphasised that the policy remains that of "minimal curial intervention in arbitration proceedings".[97]

59 So, while a party may legitimately use the curial process to maintain the status quo pending an arbitration award (for instance, by preserving assets),[98] a party is not allowed to use security proceedings in court to frustrate the arbitral process by attempting to "transfer" jurisdiction from the arbitration tribunal to the court ordering security.[99]

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96 See para 36 above.
97 See K Shanmugam, "Second Reading Speech by Law Minister K Shanmugam on the International Arbitration (Amendment) Bill" in Parliament (19 October 2009) at para 6.
98 See Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Lexis Nexis, 2nd Ed, 1989) at p 473; see also K Shanmugam, "Second Reading Speech by Law Minister K Shanmugam on the International Arbitration (Amendment) Bill" in Parliament (19 October 2009) at para 7.
99 *Kallang Shipping SA Panama v AXA Assurances Senegal* [2006] EWHC 2825, discussed at paras 37 and 38 above.

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