JUDICIAL ASSISTANCE IN MARITIME ARBITRATION: A SINGAPORE PERSPECTIVE

This article examines the ways in which the Singapore courts have in recent years provided curial assistance to maritime arbitration. It focuses on the arrest of ships as a means of obtaining security for a potential arbitration award or for the enforcement of an arbitration award that has been obtained as well as the granting of Mareva injunctions in aid of maritime arbitrations.

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I. Introduction

1 It has often been said of arbitration that there should be minimum interference from the courts and that arbitrators should be allowed to conduct their hearing with the necessary degree of autonomy. However, it has also long been recognised that courts do have a role to play in facilitating and enhancing the process of arbitration, whether or not the arbitration be conducted in the same country as the courts from which curial support is sought. This is particularly so with maritime arbitration where the need to arrest a vessel or otherwise attach the respondent's assets to secure an arbitration award is often of critical importance.

2 This article examines curial assistance provided by the Singapore courts in the following ways:

(a) arrest of ships to secure a potential arbitration award;

(b) arrest of ships to obtain security for the enforcement of an arbitration award;

(c) Mareva injunction to aid maritime arbitration.

II. The statutory framework

3 The legislation governing international arbitration is the International Arbitration Act of Singapore ("IAA").[1] International arbitration is defined in s 5(2) of the IAA as follows:

> Notwithstanding Art 1(3) of the Model Law, an arbitration is international if —
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> (*a*) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
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> (*b*) one of the following places is situated outside the State in which the parties have their places of business;
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> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
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> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
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> (*c*) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4 By virtue of s 5(1) of the IAA, Pt II of the IAA applies to international arbitration as defined above. It should be noted that in considering whether or not an arbitration is an "international arbitration" for purposes of the IAA, the relevant criteria are in essence the places of business of the parties, place of performance of underlying commercial relationship and the place of the arbitration. The fact that an "international arbitration" is not to take place in Singapore does not render it any less of an "international arbitration", for the purposes of s 5(2) of the IAA. This is because, *inter alia*, the definition of "international arbitration" covers the situation where the place of arbitration is not in the same jurisdiction as the place of business of either party. There is nothing in the language of s 5(2) which mandates that the place of arbitration must be in Singapore. The relevance of this comment will be elaborated below.

5 Part II of the IAA includes ss 6 and 7, which deal with mandatory stay of proceedings commenced in defiance of arbitration agreements

1 (Cap 143A, 2002 Rev Ed).

and the powers of the court to attach orders and conditions to a stay order. In particular, s 6(3) as well as s 7(1) of the IAA empower the court, in staying proceedings in favour of arbitration to attach terms or conditions to any such stay order which relate to the preservation of property which is the subject matter of the dispute, retention of ships or any property arrested or security furnished in admiralty action or the provision of substitute security for the satisfaction of any arbitration award. For ease of exposition, these provisions are set out as follows:

> **Enforcement of international arbitration agreement**
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> **6.**—(1) 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.
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> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit,[2] staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
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> (3) Where a court makes an order under subsection (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as it may think fit in relation to any property which is the subject of the dispute to which the order under that subsection relates.
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> (4) Where no party to the proceedings has taken any further step in the proceedings for a period of not less than 2 years after an order staying the proceedings has been made, the court may, on its own motion, make an order discontinuing the proceedings without prejudice to the right of any of the parties to apply for the discontinued proceedings to be reinstated.
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> (5) For the purposes of this section and sections 7 and 11A —
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> (*a*) a reference to a party shall include a reference to any person claiming through or under such party;

2 For an example of the attachment of terms or conditions to a stay order, see *The Xanadu* [1998] 1 SLR 767.

> (*b*) "court" means the High Court, District Court, Magistrate's Court or any other court in which proceedings are instituted.
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> **Court's powers on stay of proceedings**
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> **7.**—(1) Where a court stays proceedings under section 6, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order —
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> (*a*) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or
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> (*b*) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.
>
> (2) Subject to Rules of Court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of an order under this section as would apply if it were held for the purposes of proceedings in the court which made the order.

6 Another relevant provision to the discussion at hand is s 12, which is also within Pt II of the IAA. Section 12(7) read with s 12(1) of the IAA spells out the powers of the Singapore court in relation to an international arbitration to which Pt II of the IAA applies. Sections 12(1) and 12(7) provide as follows:

> **12.**—(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —
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> (*a*) security for costs;
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> (*b*) discovery of documents and interrogatories;
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> (*c*) giving of evidence by affidavit;
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> (*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
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> (*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
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> (*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;
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> (*g*) securing the amount in dispute;
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> (*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

> (*i*) an interim injunction or any other interim measure.
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> …
>
> (7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

7 On a plain reading of ss 5, 6, 7 and 12(1) as well as 12(7), the powers of the Singapore court to make orders in relation to arbitration would not be limited to international arbitration where the venue of arbitration is in Singapore. Indeed, this was the conclusion reached by Belinda Ang Saw Ean J in *Front Carriers Ltd v Atlantic & Orient Shipping Corp*.[3] In stark contrast is the slightly earlier decision of *Swift-Fortune Ltd v Magnifica Marine SA*,[4] where an opposite conclusion, favouring a narrow reading of ss 12(1) and 12(7), was reached by Judith Prakash J, who held that the Singapore courts have no powers except in the circumstances contemplated in ss 6(3) and 7, to make any order in aid of foreign arbitration, and therefore are incapable of granting a Mareva injunction to support a foreign arbitration. The latter decision was appealed to the Court of Appeal, which heard oral submissions on 29 July 2006 and has reserved judgment.

8 Section 12(7) should also be read in tandem with Art 9 of the Model Law, which has the force of law in Singapore by virtue of s 3(1)[5] of the IAA and which is reproduced in the First Schedule of the IAA. Article 9 of the Model Law states:

> 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.

III. Arrest of vessels to secure potential arbitration award

9 Section 6(1) of the IAA provides that if an action is commenced in breach of an international arbitration agreement, such an action shall be mandatorily stayed in favour of arbitration. The application for a stay should be made at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings. The court will

3 [2006] 3 SLR 854 ("*Front Carriers Ltd*").
4 [2006] 2 SLR 323 ("*Swift-Fortune*"). The writer was counsel in this case.
5 With the exception of ch VII of the Model Law.

refuse to order a stay if it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The burden of demonstrating that the stay should be refused on these grounds lies with the plaintiff to the proceedings. The words "null and void" suggest an arbitration agreement which either did not come into existence or has become void *ab initio* through rescission. It has been suggested that the word "inoperative" is apt to describe an agreement which though not void *ab initio* has, however, ceased to have effect in the future and that "incapable of being performed" connotes an obstacle to the commencement or conduct of the arbitration up to the stage where an award is made[6] which is more than mere difficulty, inconvenience or delay.[7] As a term or condition to the order of a mandatory stay, the court may order under s 7(1) of the IAA[8] that the ship or property arrested or security furnished to prevent arrest or obtain release from arrest be retained or that equivalent security be furnished in the arbitration, in either case, for the satisfaction of any arbitration award.

10 It is not uncommon for an arrest to be effected in Singapore for the sole purpose of obtaining security for the satisfaction of a potential foreign arbitration award. Typically, the plaintiff having arrested the vessel or obtained other form of security for the claim then applies under s 6 to stay his own action as well as seek an order for retention of any security furnished under s 7(1).[9]

11 This rather common practice presents several issues. First, should a claimant be allowed to arrest a ship solely to obtain security to cover an arbitration award, with no intention whatsoever to pursue his claim in the Singapore courts? In two decisions, *The Golden Trader*[10] and *The Cap Bon*,[11] Brandon J was firmly of the view that there is no admiralty jurisdiction to arrest or maintain under arrest a ship for the purpose of obtaining of security for an arbitration award. Such a view was rejected by Robert Goff LJ sitting in the English Court of Appeal in *The Andria*

6 *The Rena K* [1979] QB 377 at 393.
7 Sir Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) pp 464–465. But a time-barred claim does not render the arbitration incapable of being performed: *The Merak* [1965] P 223.
8 Alternatively, the power to make such an order may also be derived from the width powers given to the courts under s 6 to stay on any terms and conditions.
9 In order for the court to invoke its powers under s 7(1), there must be a stay application before the court: *The Sunwind* [1998] 3 SLR 954.
10 [1975] QB 348.
11 [1967] 1 Lloyd's Rep 534 at 547.

now renamed Vasso.[12] While the *existence* of admiralty jurisdiction does not depend on the purpose for which the plaintiff seeks to invoke it, nevertheless, the *exercise* of the jurisdiction may be so affected. With this distinction in mind, Brandon J's view that the arrest process should not be used as a means of obtaining security for any proceedings other than an action *in rem* remains arguably valid as a matter of common law. As Robert Goff LJ remarked in *The Vasso*:[13]

> On the law as it stands at present, the Court's jurisdiction to arrest a ship should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of exercise of the jurisdiction is to provide security in respect of an action *in rem* and not to provide security in some other proceedings, for example, arbitration proceedings.

12 However, in light of the powers conferred on the Singapore courts by virtue of s 7(1) of the IAA, it is hard to see how a Singapore court could regard an arrest commenced solely to obtain security for arbitration (with no intention of continuing the Singapore action once security has been obtained) as an abuse of process or somehow as an improper exercise of the court's jurisdiction. There is some tangential support for this view in *The ICL Raja Mahendra*[14] where Choo Han Teck JC (as he then was) observed:[15]

> Generally, when a party invokes a court's jurisdiction to arrest a vessel it is for the purpose of security it to satisfy a *judgment or award* which it may obtain in that jurisdiction. Sometimes, having invoked the jurisdiction the party concerned or the opposing party may, on good grounds, apply to stay the proceedings in favour of commencing or continuing proceedings elsewhere. In such circumstances, the court has the discretion whether to release the arrested vessel, and it follows, also a discretion whether to impose conditions if the vessel is to be released.
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> The purpose of invoking the court's jurisdiction in the first instance and the reason for the application for stay are relevant considerations to the court in the exercise of its discretion to release the arrested vessel. I agree that the court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an

12 [1984] 1 QB 477 ("*The Vasso*") at 490. See also *The Tuyuti* [1984] 2 Lloyd's Rep 51.
13 *Supra* n 12, at 490.
14 [1999] 1 SLR 329.
15 *Ibid*, at [21] and [22]. See the sequel to this decision, *The ICL Vikraman* [2004] 1 Lloyd's Rep 21, which dealt with an attempt to enjoin the calling of the letter of undertaking furnished pursuant to *The ICL Raja Mahendra*.

> award or judgment elsewhere. *An exception is where a party applies under s 6 of the International Arbitration Act*.
>
> [emphasis added]

13 Sections 6 and 7 of the IAA were inspired by s 26 of the UK Civil Jurisdiction and Judgments Act 1982 ("CJJA").[16] Section 26 of the CJJA was to have effected a change from the position in *The Vasso*, as Robert Goff LJ himself recognised.[17] There are therefore convincing reasons for saying that this rather restrictive position in *The Vasso* may not apply in Singapore.

14 The related question is whether a plaintiff is under a duty to disclose to the court[18] when applying on an *ex parte* basis for a warrant of arrest that he is arresting the vessel solely to obtain security for an arbitration award. There is no authority on this point. It is trite that a plaintiff does not have to disclose the existence of an arbitration agreement[19] but has to disclose any ongoing arbitration proceedings[20]. It may be argued that if the Singapore courts would allow arrest solely to obtain security for any arbitration award, that particular purpose behind the invocation of admiralty jurisdiction should not be relevant to the exercise of the court's discretion whether or not to grant the warrant of

16 1982 (c 27) (UK). See paras 46 and 48 of the Law Reform Sub-committee's Report on Review of Arbitration Law dated 31 August 1993; s 26 of the UK Civil Jurisdiction and Judgments Act provides that:

> 1. Where in England or Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the grounds that the dispute in question should be submitted to arbitration … the Court may, if in those proceedings property has been arrested … (*a*) order that the property arrested be retained as security for the satisfaction of any award or judgment which – (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and (ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or (*b*) order that the stay … be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.
>
> 2. Where a court makes an order under subsection (10), it may attach such conditions to the order as it thinks fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.
>
> 3. Subject to any provision made by rules of court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of an order made by a court under subsection (10) as would apply if it were held for the purposes of proceedings in that court.

17 See *supra* n 12, at 490. See also *The Bazias 3*; *The Bazias 4* [1993] QB 673.

18 For a discussion on the duty to disclose all material facts in an application for a warrant of arrest, see *The Rainbow Spring* [2003] 2 SLR 117 (HC), [2003] 3 SLR 362 (CA); *The AAV* [2001] 1 SLR 207; *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR 358 and *The Inai Selasih* [2005] 4 SLR 1 (HC), [2006] 2 SLR 181(CA).

19 *The Tuyuti* , *supra* n 12; *The Evmar* [1989] 2 MLJ 460.

20 *The Vasso*, *supra* n 12.

arrest. That said, it would be imprudent to overlook the common law position that arrest is a process for obtaining of pre-judgment security for admiralty actions and not arbitration and that at the time of the application to obtain a warrant of arrest, no issue of stay would yet have arisen and so there is no question at that stage of invoking s 7(1) of the IAA. The court would be entitled to assume that its power to arrest is being invoked for the purpose of obtaining pre-judgment security but if that is not in fact so, the plaintiff should as a matter of prudence inform the court so that the court in the exercise of its discretion whether to grant the warrant of arrest, may take that into account. After all, if a party actively pursues proceedings in respect of the same claim in court and in arbitration, his so proceeding may be considered at common law as vexatious and an abuse of process.[21] The court may still grant the warrant of arrest anyway, taking into account the powers under ss 6 and 7 of the IAA but the test of materiality is not whether the undisclosed fact would have led to the court making a different decision on whether to grant a warrant of arrest but simply whether it is a factor the court would take into account in making that decision.[22] Besides, there may be other circumstances which the court may take into account in addition to the fact that the arrest is solely for arbitration security. Disclosure of such a purpose behind the arrest, even if it is for the purpose of erring on the side of caution, is recommended.

15 Third, it follows that if a Singapore court allows a ship to be arrested in Singapore solely to obtain security for a potential arbitration award, the plaintiff who arrests the ship should be entitled to stay his own action. Such a conclusion is supportable on a plain reading of s 6(1) itself. Section 6(1) provides, *inter alia*, that where any party to an arbitration institutes court proceedings, "any party to the [arbitration] agreement" may apply for a stay. Significantly, s 6(1) does not restrict the party applying for a stay to the party against whom the court proceedings are commenced. In *The ICL Raja Mahendra*, Choo JC observed:[23]

> Section 6 of the said Act provides for situations where a party to an arbitration agreement commences any legal proceedings in Singapore against any party to the agreement. In such cases, *either party is entitled*, if it had not taken any other steps than entering an appearance, to apply to stay the proceedings. Unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being

21 *The Vasso*, *supra* n 12. See, however, the discussion above in relation to s 7 of the IAA and s 26 of the CJJA.
22 See *The Damavand* [1993] 2 SLR 717 at 731, [30].
23 *Supra* n 14, at [4].

> performed, it shall order a stay upon terms and conditions as it thinks fit. [emphasis added]

16 A further, related issue is whether the court has jurisdiction to order the provision of security on specific terms. The existence of such jurisdiction was recognised by Choo JC in *The ICL Raja Mahendra* where his Honour ordered the release of the vessel against provision of club security answering to a judgment of the Singapore court *or* an award obtained by way of arbitration in London rather than that of any "court or tribunal of competent jurisdiction".[24] This latter and wider wording might be more suitable if the arbitration agreement does not specify the venue of arbitration. Choo JC went on to observe that to give effect to s 6 of the IAA, the wording of security to be provided or, if necessary, ordered by the court, must answer to an award of the agreed arbitration rather than any other jurisdiction or arbitration forum.[25] This, it is respectfully submitted, must be correct and indeed is a logical consequence of applying ss 6 and 7 of the IAA. In *The Sunwind*,[26] Kan Ting Chiu J was prepared to consider ordering security to be furnished on terms required by the plaintiff if a stay application had been before him.

17 Although the point may appear obvious, it should for completeness be mentioned that the arbitration in respect of which the action is stayed may be an arbitration outside Singapore. *The ICL Raja Mahendra* is an example of this, as the parties in that case had agreed to arbitrate in London. Interestingly, in *Swift-Fortune*,[27] Prakash J considered ss 6 and 7 to be the only limited instances where the courts in Singapore are empowered to provide assistance to foreign arbitration. Such assistance can be by way of an interim Mareva injunction or by way of arrest of a vessel, but in any event, the defendant or the vessel must be amenable to the jurisdiction of the Singapore court otherwise than by the presence of the defendant's assets in Singapore.

24 *Supra* n 14, at [24]–[26]. See also *The Benja Bhum* [1994] 1 SLR 88 on whether the security wording should cover an award or a judgment or just an award.

25 *Supra* n 14, at [24].

26 [1998] 3 SLR 954.

27 *Supra* n 4, at [50]. In *Front Carriers Ltd*, *supra* n 3, Belinda Ang Saw Ean J expressly departed from the position, see [24] of the judgment. This is discussed further below.

IV. Arrest of vessel as security for the enforcement of an arbitration award

18 When an arbitration award is made in respect of a claim arising out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship[28] or a claim in nature of salvage,[29] the question arises as to whether the enforcement of such an arbitration award is a claim that comes within the admiralty jurisdiction of the Singapore courts, *ie*, whether such a claim falls within any of the limbs in s 3(1) of the High Court (Admiralty Jurisdiction) Act[30] ("HC(AJ)A"). The position in Singapore appears to be settled after *Alexander G Tsavliris & Sons Maritime Co v Keppel Corp Ltd*,[31] in which the Court of Appeal held that a salvage arbitration award given in London comes within the scope of s 3(1)(*i*) of the HC(AJ)A, applying the decision of Sheen J in *The Saint Anna*,[32] which held that a charterparty arbitration award comes within the scope of the English equivalent of s 3(1)(*h*) of HC(AJ)A, *ie*, s 20(2)(*h*) of the Supreme Court Act 1981 (c 54) (UK).

19 The position in England retreated somewhat with the rejection of *The Saint Anna* by Aikens J in *The Bumbesti*.[33] The Malaysian position appears to be similar to *The Bumbesti*.[34] Is the position in Singapore to follow *The Bumbesti* in relation to s 3(1)(*h*) or perhaps s 3(1)(*i*) as well?

20 Again, for ease of exposition, ss 3(1)(*h*) and 3(1)(*i*) of the HC(AJ)A are set out below:

> **3.**—(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> ...
>
> (*h*) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

28 This is the language used in s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act.
29 This is the language used in s 3(1)(*i*) of the High Court (Admiralty Jurisdiction) Act.
30 (Cap 123, 2001 Rev Ed).
31 [1995] 2 SLR 113 ("*Keppel Corp*").
32 [1983] 1 Lloyd's Rep 637. *The Saint Anna* has also been judicially approved in Hong Kong: see *The Chong Bong* [1997] 3 HKC 579.
33 [1999] 2 Lloyd's Rep 481.
34 *Tamina Navigation Ltd v The Owner of the Cargo laden on board the Ship or Vessel, The Swallow* [2003] MLJU 683, a decision of Clement Skinner J of the Kuching High Court, applied *The Bumbesti*. *The Bumbesti* was cited in the New Zealand High Court in *Rankura Moana Fisheries v The Ship, Irina Zharkikh* [2001] 2 NZLR 801 but not commented upon judicially.

> (*i*) subject to section 168 of the Merchant Shipping Act (Cap. 179) (which requires salvage disputes to be determined summarily by a District Court in certain cases), any claim in the nature of salvage (including any claim arising under section 11 of the Air Navigation Act (Cap. 6) relating to salvage to aircraft and their apparel and cargo) …

21 It would be appropriate to start with an analysis of the English decisions leading to *The Bumbesti*. In *The Beldis*,[35] Merriman P held that an action to enforce an arbitration award is a common law claim upon an award and not a claim arising out of an agreement in relation to the use or hire of the ship. According to Scott LJ, the other member of the Court of Appeal in that case, given that the cause of action is a common law action, it would be incongruous for the action to attract admiralty jurisdiction. The language of the statutory provision applicable in this case[36] was not clear enough to suggest that the courts would be vested with admiralty jurisdiction for this purpose. *The Beldis* may be regarded as authority negating the existence of admiralty jurisdiction for the enforcement of an arbitration award.

22 In contrast, in the slightly earlier decision of *Bremer Oeltransport GmbH v Drewey*[37] (which was not cited to the Court of Appeal in *The Beldis*),[38] the English Court of Appeal held that for the purposes of determining service out of jurisdiction under O 11 r 1(*e*), an action for the enforcement of the arbitration award could be regarded as a breach of an implied term in the agreement to submit the difference to arbitration, out of which the award arose.

23 *The Beldis* was commented on by Brandon J in *The Eschersheim*.[39] His Lordship was not convinced about the correctness of the decision and noted in particular, that the Court of Appeal in *The Beldis* was not referred to the decision of *Bremer Oeltransport*. The next decision on the point is *The Saint Anna*,[40] which also involved the enforcement of a charterparty arbitration award against the shipowner. Faced with the

35 [1936] P 51.

36 Section 2(1) of the County Courts Admiralty Jurisdiction Amendment Act 1869 which provides: "shall have jurisdiction … to try … any claim arising out of any agreement made in relation to the use or hire of any ship".

37 [1933] 1 KB 753 ("*Bremer Oeltransport*").

38 See the observation of Brandon J on the first instance decision of *The Eschersheim* [1975] 1 WLR 83.

39 *Ibid*.

40 *Supra* n 32. See also an earlier decision of Sheen J, *The Stella Nova* [1981] Com LR 200, which relates to a ship management agreement with an arbitration agreement.

apparently inconsistent Court of Appeal decisions of *The Beldis* and *Bremer Oeltransport*, Sheen J preferred the latter and concluded that an action for enforcement of the arbitration award is an action to enforce the contract which contains the submission to arbitration, *ie*, the charterparty. Such an action clearly came within the court's admiralty jurisdiction.

24 Against this backdrop of somewhat untidy jurisprudence came the decision of *The Bumbesti*.[41] In *The Bumbesti*, two unsatisfied arbitration awards were given by a tribunal in Romania following a wrongful termination of a bareboat charterparty. The enforcement of one of these awards formed the subject matter of the claim, under which the vessel, Bumbesti, was arrested in England. The claimant relied on s 20(2)(*h*) as the basis for the court's subject matter jurisdiction. Aikens J (after reviewing the decisions discussed above) considered himself bound by *The Beldis* (which unlike *Bremer Oeltransport* dealt squarely with the question of admiralty jurisdiction to enforce an arbitration award) and accordingly held that the court had no admiralty jurisdiction to enforce the arbitration award. Apart from the binding decision of *The Beldis*, his Lordship also sought support for the conclusion from the language used in s 20(2)(*h*) itself. The enforcement of an arbitration award is only a claim arising out of the agreement to refer matters to arbitration, which is conceptually a distinct and separate agreement from the principal contract in which the arbitration agreement is found, in this case, the charterparty.[42] The agreement to refer disputes to arbitration is not an agreement that is directly "relating … to the use or hire of a ship". The latter phrase in s 20(2)(*h*) that has been narrowly interpreted to mean that there must be a reasonable direct connection or nexus between the agreement and the use or hire of a ship.[43] The arbitration agreement is at least one step removed from the use or hire of a ship.

25 The issue which arose in *The Beldis*, *The Saint Anna* and *The Bumbesti* has not directly arisen in any reported decision in Singapore so far as s 3(1)(*h*) is concerned. It will be recalled that the *Keppel Corp* decision concerns on s 3(1)(*i*), not s 3(1)(*h*). Compared with s 3(1)(*h*), s 3(1)(*i*) does not have the phrases "arising out of" or "relating to the

41 *Supra* n 33.

42 See *Heyman v Darwins Ltd* [1942] AC 356. See the comments of David C Jackson, *Enforcement of Maritime Claims* (LLP, 4th Ed, 2005) at p 74.

43 See *The Antonis P Lemos* [1985] AC 711 at 730; *Gatoil International Inc v Arkwright Boston Manufacturers Mutual Insurance* [1985] AC 255.

carriage of goods … the use or hire of a ship". Can it therefore be argued that the adoption of *The Bumbesti* is not precluded by *Keppel Corp*?

26 This calls for a close scrutiny of the reasoning in the *Keppel Corp* decision. To start with, Karthigesu JA framed the question before the Court of Appeal as one "of enforcing arbitration awards *generally* by invoking the [admiralty] jurisdiction of the court" [emphasis added].[44] This would appear to suggest that the Court of Appeal was not confining its decision to the enforcement of a salvage award under s 3(1)(*i*). His Honour then discussed the decisions of *Bremer Oeltransport*, *The Beldis* and *The Saint Anna* as well as the Privy Council decision of *FJ Blomen Pte Ltd v Gold Coast City Council*[45] which followed *Bremer Oeltransport*. All these decisions (except the last) dealt with enforcement of charterparty arbitration awards. His Honour was also in "entire agreement" with the judgment in *The Saint Anna*.[46]

27 In relation to s 3(1)(*i*), his Honour construed the words, "in the nature of salvage" to mean "arising out of salvage"[47] which effectively made the connecting phrase in s 3(1)(*i*) similar to the first of the two connecting phrases in s 3(1)(*h*), which it will be recalled, states, "a claim *arising out of* any agreement …" [emphasis added]. This led to the court's conclusion that the claim for enforcement of a salvage arbitration award was within s 3(1)(*i*):[48]

> The agreement to refer to arbitration in London the assessment of the salvage reward or remuneration payable to the salvors *arose out of* the salvage of the 'Atlas Pride' and the award of the arbitrator was the result of that reference.

28 The second, narrowly construed, connecting phrase in s 3(1)(*h*), "*relating to* the carriage of goods in a ship or to the use or hire of a ship" [emphasis added], was not and need not have been considered in *Keppel Corp* since such a phrase does not appear in s 3(1)(*i*). Sheen J in *The Saint*

44 See *supra* n 31, at 116, [8]. The issue of whether enforcement of a salvage award comes within the admiralty jurisdiction of the court was not actually an issue appealed against. It was however a question the court considered necessary to answer before addressing the precise issues raised in the appeal which relate to whether two items of the arbitration award could be claimed.

45 [1972] 3 All ER 357.

46 *Supra* n 31, at 119, [19].

47 *Ibid*.

48 *Ibid*.

Anna appeared not to have considered this phrase either.[49] As Aikens J pointed out in *The Bumbesti*, the claim to enforce an award arises out of an agreement to refer disputes to arbitration (as opposed to the principal contract, *ie*, the charterparty) and that agreement does not have a sufficiently direct connection or nexus with the use or hire of a ship. Atkins J's reasoning is not, however, beyond reproach. Jackson has described such an extended application of the principle of separateness between the arbitration agreement and the principal contract, *ie*, the charterparty as one which denies "both commercial and legal reality".[50] He suggests that the arbitration agreement in the charterparty be viewed as relating to the charter and thence, use or hire of a ship.

29 Although it may be argued that the precise point decided in *Keppel Corp* relates only to s 3(1)(*i*), there can be no denying that the reasoning adopted by Karthigesu JA was redolent of that in *Bremer Oeltransport* and *The Saint Anna*. Significantly, *The Beldis* was considered by the Court of Appeal in *Keppel Corp* and in entirely agreeing with the reasoning in *The Saint Anna* (in which Sheen J preferred *Bremer Oeltransport* to *The Beldis*), it may be inferred that the Court of Appeal had implicitly refused to follow *The Beldis*.

30 In a number of decisions relating to s 3(1), the Singapore Court of Appeal gave a wide interpretation to ss 3(1)(*f*),[51] 3(1)(*h*)[52] and 3(1)(*i*)[53] of the HC(AJ)A which indicates the trend towards expansion of admiralty jurisdiction so far as is permitted by the language of s 3(1).[54] As L P Thean JA observed in *Zarkovic Stanko v Owners of the Vessel, "MARA"*:[55]

> The approach of the courts here and in the United Kingdom has been to give a broad and liberal construction to the statutory provisions conferring admiralty jurisdiction on the courts.

49 The decision of *Gatoil International Inc v Arkwright Boston Manufacturers Mutual Insurance*, *supra* n 43, which favoured the narrow construction, came after *The Saint Anna*.

50 Jackson, *supra* n 42, at p 74.

51 *The Trade Fair* [1994] 3 SLR 827; *Zarkovic Stanko v Owners of the Vessel, "MARA"* [2000] 4 SLR 156.

52 *The Indriani* [1996] 1 SLR 305.

53 Keppel Corp itself.

54 See also the observation in Toh Kian Sing, *Admiralty Law & Practice* (Butterworths Asia, 1998) at p 40.

55 *Supra* n 51, at [15].

31 Preferring *The Saint Anna* to *The Bumbesti* in the construction of s 3(1)(*h*) might be argued to be consistent with such a trend.

32 A further point may be canvassed in support of the position in *The Saint Anna*. First, enabling the admiralty jurisdiction of the court to be invoked for the enforcement of an arbitration award would promote and facilitate the enforcement of arbitration awards.[56] After all, s 6 read with s 7(1) of the IAA contemplate that security in an admiralty action started in Singapore may be retained while the Singapore action is stayed in favour of arbitration, so that the award may be satisfied out of the security thus obtained.[57] The availability of admiralty jurisdiction to enforce an arbitration award through the arrest of the vessel would appear to be consonant with the process of facilitating and promoting international arbitration as a whole.

V. Mareva injunction in aid of arbitration

33 It is sometimes necessary for a maritime claimant to resort to a Mareva injunction rather than the arrest of the vessel. There can be at least several reasons for this: the respondent does not own any vessel at the time action is commenced, the vessel may be lost, destroyed or broken up, the claim is not within the court's admiralty jurisdiction, the respondent's vessel does not call at arrest-friendly jurisdictions, the claim enjoys lower priority compared with other known claims against the vessel *etc*. Conceptually, arrest and Mareva injunction of course are different remedies[58] but in practical terms, they perform the similar function of ensuring that the satisfaction of an arbitration award is not frustrated by the unavailability, disappearance or untraceability of the respondent's assets.

34 The *lex arbitri* of many jurisdictions empowers the arbitrator to grant an order to freeze assets or an interim injunction.[59] However, a claimant may sometime prefer or may even be compelled by

56 See the pro-enforcement observations of Judith Prakash J in *Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd* [1996] 1 SLR 34 at 46.

57 Section 7(1) does away with the requirement in *The Rena K* [1979] QB 377 that the arresting party must show that the shipowner is unlikely to be able to satisfy the arbitration award to justify retention of the security obtained in the *in rem* action: see *Front Carriers Ltd*, *supra* n 3, at [28]. For a New Zealand perspective, see *Raukura Moana Fisheries Ltd v The Ship, "Irina Zharkikh"* [2001] 2 NZLR 801.

58 See the discussion in Jackson, *supra* n 42, at pp 454–456.

59 See, for example, ss 12(1)(*f*), 12(1)(*g*) and 12(1)(*h*) of the IAA.

circumstances to seek an order from the courts instead.[60] For example, the arbitrator may not be appointed yet,[61] the order has to be obtained in urgent circumstances which does not allow for the convening of a hearing before the arbitration tribunal, the arbitrator's order may not have the necessary coercive powers against a recalcitrant respondent, the arbitrator may not be prepared to give an order on an *ex parte* basis and so forth.

A. International arbitration being conducted or to be commenced in Singapore

35 There is no doubt that a Singapore court has the power under ss 12(1)(*g*), 12(10(*h*) or 12(1)(*i*) read with s 12(7) of the IAA to grant a Mareva injunction in an international arbitration (as defined in s 5(3) of the IAA) which is being conducted or to be commenced in Singapore.

B. Arbitration conducted or to be commenced in a foreign jurisdiction

(1) The inconsistent Singapore decisions

36 Until the Court of Appeal delivered its decision in *Swift-Fortune* recently in December 2006,[62] the issue as to whether the Singapore courts have the jurisdiction to grant a Mareva injunction to aid a foreign arbitration was shrouded in uncertainty. Prakash J in *Swift-Fortune*,[63] adopting a narrow reading of ss 12(1) and 12(7), held that the courts have no such powers under those provisions. In contrast, Ang J in *Front Carriers Ltd* found jurisdiction for such an order under ss 12(1) and 12(7) of the IAA read with Art 9 of the Model Law or alternatively, s 4(10) of the Civil Law Act.[64] In a decision which preceded these two decisions,

60 This issue is by no means confined to Singapore. It has confronted courts in Hong Kong, New Zealand, Canada and the UK. For a comparative survey, see *The Lady Muriel* [1995] 2 HKC 320; *Interbulk Hong Kong Ltd v Saferich* [1992] 2 HKLR 185; *Trade Fortune v Amalgamated Mill Supplies* (1994) 113 DLR (4th) 116; *The Tavros* [1999] FTR Lexis 1774; *Delphi Petroleum Inc v Derin Shipping and Trading Ltd* (unreported decision of Denault J of the Federal Court of Canada, 5 November 1999); *Leucadia National Corporation v Wilson Neill Ltd* [1994] 7 PRNZ 101; *Sensation Yachts Ltd v Darby Maritime Ltd* (unreported decision of New Zealand High Court, 25 October 2002) and *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

61 See, for instance, the *Swift-Fortune* decision, *supra* n 4.

62 See Postscript at paras 74 and 75 of the main text below.

63 *Supra* n 4.

64 (Cap 43, 1999 Rev Ed).

Econ Corporation International Ltd v Ballast-Nedam International BV,[65] where the issue was not the subject of much adversarial debate, the late Lai Kew Chai J granted an injunctive order to prevent a call on a performance bond while arbitration was ongoing in India. There are also *dicta* in *PT Garuda Indonesia v Birgen Air*[66] which lend some tangential support for the position reached in *Front Carriers Ltd*.

(a) *Econ Corporation International Ltd v Ballast-Nedam International BV*

37 In *Econ Corp*,[67] the plaintiffs sought, *inter alia*, an order to serve an originating summons out of jurisdiction on the defendants to restrain the defendants from calling on a performance guarantee. At the time of the action, arbitration had been ongoing in New Delhi, India. The plaintiffs pointed out that without the interim injunctive relief, payment would be made under the performance guarantee and the moneys so paid out would be dissipated instead of being used to satisfy any future arbitration award. Thus, the functional effect of the injunction sought was rather similar to that of a Mareva injunction.

38 Lai Kew Chai J upheld an order granting leave to serve out of jurisdiction an originating process seeking an interim injunction against the call of a performance guarantee. His Honour held that on the basis of ss 12(1)(*g*) and 12(7) of the IAA (formerly numbered as s 12(6)) and Art 9 of the Model Law in the First Schedule of the IAA, the High Court of Singapore does have the power to grant interim injunctions in such a case.

39 Lai J further rejected the argument that service out of jurisdiction should be refused on the basis of the Privy Council decision in *Mercedes Benz v Leiduck*[68] which held that O 11 r 1(*b*) of the Rules of Court[69] cannot be invoked where the only remedy sought is a Mareva injunction. One of the reasons for distinguishing *Mercedes Benz* was that the matter at hand was subject to the IAA and Art 9 of the Model Law, unlike

65 [2003] 2 SLR 15 ("*Econ Corp*").
66 [2002] 1 SLR 393. These decisions are now discussed in turn.
67 *Supra* n 65.
68 [1995] 3 All ER 929.
69 (Cap 322, R 5, 2006 Rev Ed). Order 11 r 1(*b*) provides that an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing).

Mercedes Benz, which concerned a Mareva injunction in aid of foreign *court* proceedings.

40 *Econ Corp* was not referred to in *Swift-Fortune*. In contrast, in *Front Carriers Ltd*, *Econ Corp* was described in an affirmative "pronouncement of the High Court's power"[70] to grant interim injunctions under s 12(1) read with s 12(7), pending arbitration in another jurisdiction.

(b) *PT Garuda Indonesia v Birgen Air*

41 The applicability of Art 9 of the Model Law to arbitration taking place outside Singapore was expressly recognised by the Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air*.[71] The Court of Appeal observed:[72]

> From arts 1(2) and 20 it will be seen unless Singapore is 'the place of arbitration' the Singapore courts can only intervene in relation to an arbitration governed by the Model Law in the instances set out in arts 8, *9*, 35 and 36. [emphasis added]

42 The case, however, did not directly concern the granting of curial assistance to foreign arbitration.

(c) *Swift-Fortune Ltd v Magnifica Marine SA*

43 The underlying dispute in *Swift-Fortune*[73] concerns the delayed delivery of a vessel, *Capaz Duckling*, sold by the defendant to the plaintiff, which led to the plaintiff sustaining substantial losses. The defendant is a one-ship company within the umbrella of a group of financially strapped companies. Prior to the sale, its sole asset was the vessel. After the sale, its only asset became the proceeds of sale which it received from the plaintiff. The proceeds of sale could be easily dissipated, leaving nothing against which any arbitration award obtained against the defendant might be enforced. Significantly, the defendant did not challenge the risk of dissipation. The sale agreement provides for arbitration in London. Legal completion of the sale of the vessel, including payment of the proceeds of sale, took place in Singapore.

70 *Supra* n 3, at [23]. However, the court in *Front Carriers Ltd* observed that not much adversarial debate was before Lai J on this issue.
71 *Supra* n 66.
72 *Ibid*, at [21].
73 *Supra* n 4.

44 The plaintiff commenced the proceedings herein on 8 March 2005 by way of an *ex parte* originating summons seeking, *inter alia*, a Mareva injunction over purchase moneys for the sale of the vessel *Capaz Duckling* ("the Mareva Injunction"). Arbitration in London had not at the time of the application been commenced, although it was clearly on the cards. Judith Prakash J heard the application *ex parte* and granted the Mareva Injunction together with an order to serve the originating process as well as the Mareva Injunction out of jurisdiction on the Panamanian defendant. On 9 March 2005, the Mareva Injunction was served on and notified to the bank to whom the purchase moneys were paid and the solicitors acting for the defendant. The defendant subsequently filed an application to set aside the injunction.

45 Interestingly and significantly, the defendant challenged the Mareva Injunction on the bases that leave to serve the originating process out of jurisdiction *under* O 11 r 1 of the Singapore Rules of Court should not have been granted and that there was alleged material non-disclosure and bad faith on the plaintiff's part when making the *ex parte* application. The defendant also made the alternative submission that the quantum covered by the Mareva Injunction was excessive. It was in fact agreed by counsel for both parties that the court had jurisdiction to grant the Mareva Injunction to aid foreign arbitration. The issue of the court's jurisdiction was in fact raised by the learned judge at the hearing of the setting aside application.

46 Prakash J held that a Singapore court does not have jurisdiction under the IAA to issue a Mareva injunction in aid of a party to a foreign arbitration. Her Honour did not rule on any of the grounds initially put forward by the defendant. On the basis that jurisdiction under the IAA is absent, her Honour found that Singapore would not be the *forum conveniens* for the subject proceedings and hence this would not be a proper case for granting leave for service of the originating summons out of jurisdiction under O 69A r 4 of the Rules of Court. The leave to serve out of jurisdiction was set aside and consequentially, the Mareva Injunction was also discharged.

47 Before dealing with the more substantive point on jurisdiction to grant a Mareva injunction, a short procedural point discussed in the judgment should first be disposed off. Prakash J held that, as far as service of the writ on a foreign defendant is concerned, the applicant would have to satisfy the court that the case is a proper one for service out of the jurisdiction under O 69A r 4 of the Rules of Court if the application is commenced under the IAA. The applicant need not go further and establish that the facts of the case are within one or more of the limbs of

O 11 r 1. Not only is this conclusion justified by a plain reading of O 69A r 4, it is further buttressed by the fact that O 69A r 4 (which deals specifically with service out of jurisdiction for applications made under the IAA) would be superfluous if O 11 was intended to apply as well. What is also very telling is that O 69A r 4(3) expressly incorporates only O 11 rr 3, 4 and 6, leaving out, rather conspicuously, r 1 which set out the different limbs on which service out of jurisdiction may be grounded.

48 Her Honour adopted the first instance decision in *PT Garuda Indonesia v Birgen Air*[74] where Woo Bih Li JC (as he then was) held that the test under O 69A r 4 as to whether the case is a *proper one* for service out of jurisdiction is the same as that prescribed in O 11 r 2. Hence, the applicant must show that Singapore is the *forum conveniens* in the *Spiliada*[75] sense, *ie*, *the forum in which the case can most suitably be tried in the interests of all parties and for the ends of justice*.

49 The more substantive issue which the learned judge considered is whether the Singapore court has the jurisdiction to aid foreign arbitration under s 12(7) of the IAA.

50 The learned judge rejected a plain and ordinary reading of ss 12(7) and 5(2) (both appearing within Pt II of the IAA) which would have led to the conclusion that Singapore courts do have the power to aid a party to a foreign arbitration. In so deciding, the Honourable Judge relied on the report prepared by a Law Reform Sub-Committee on Review of Arbitration Law ("the Committee")[76] which eventually led to the passing of the IAA and Singapore's adoption of the UNCITRAL Model Law.

51 The learned judge found, in light of the Committee's comments,[77] that the primary purpose of the IAA (and the adoption of the Model Law) was to promote international arbitrations *in Singapore*. Her Honour also referred to the Parliamentary Report on the International Arbitration Bill[78] which indicated that the adoption of the Model Law would promote Singapore's role as a growing centre for international legal services and international arbitration.

74 [2001] SGHC 262.
75 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460.
76 Law Reform Sub-committee Report on Review of Arbitration Law dated 31 August 1993.
77 Particularly, paras 31, 46 and 49 of the Report.
78 Parliamentary Report on the International Arbitration Bill, dated 25 July 1994.

52 Her Honour also found support from the decision that s 12(7) could not be applied to a foreign arbitration by tracing the legislative history of s 12(7). Noting the similarity between s 12(7) and s 27(1) read with the Second Schedule of the Arbitration Act[79] (which applies to domestic, *ie*, non-international arbitrations), her Honour reasoned that when Parliament enacted s 12(6) (which was subsequently renumbered as s 12(7), it chose a form of wording which the context of the English equivalent of the Arbitration Act had long been interpreted as not giving the courts power to order in respect of foreign arbitration.[80]

53 The learned judge applied the principle that a Singapore legislation has, generally, only territorial effect and therefore unless it specifically provides otherwise, it must be read as "applying only to persons and bodies that are ordinarily subject to Singapore law".[81] An arbitral tribunal conducting an arbitration outside Singapore is not such a body. On that basis, her Honour read into the definitional provision of s 5(2) of the IAA *a further requirement* that the international arbitration must be held in Singapore because the Singapore legislature has no power to make rules relating to foreign international arbitrations. She also observed that Parliament does not appear to have considered the possible extra-territorial ramifications of the legislation during the debate in Parliament, having concentrated on encouraging international arbitrations in Singapore. No mention was made during such debates of assisting foreign arbitral tribunals.

54 The placement of sub-s (7) within s 12 was also given some weight by Prakash J. Subsections (1) to (6) deal with the powers of the arbitration tribunal of an international arbitration being conducted in Singapore. By parity of reasoning, sub-s (7) must be given the same restricted scope of application.

55 Her Honour distinguished ss 6(3) and 7(1) of the IAA, on which the plaintiff relied. Section 6(3) allows the court in the proper circumstances to make orders relating to preservation of any property which is the subject matter of the dispute. Section 7(1), as discussed above, allows the court, in certain circumstances, to, *inter alia*, order that the property (usually, a ship) arrested be retained as security for the satisfaction of any arbitration award after the Singapore action has been

79 (Cap 10, 2002 Rev Ed).
80 See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, *supra* n 60.
81 *Supra* n 4, at [44].

stayed in favour of arbitration, including foreign arbitration. Although the learned judge accepted that these sections can be invoked in respect of foreign international arbitrations in *specific situations*, she was of the view that these sections do not indicate that Parliament intended to give the courts *general powers* to assist foreign arbitrations under s 12(7). It follows in light of her Honour's reasoning, that Singapore courts would only extend its assistance to foreign arbitration if the defendant or the ship was amenable to Singapore jurisdiction and either party then applies to stay the Singapore action thereby triggering off ss 6 and 7. It would not be sufficient for this purpose if the defendant merely has assets within the jurisdiction.

56 The court below also considered the effect of Art 9 of the Model Law which has the force of law in Singapore by virtue of s 3(1) of the IAA. The learned judge concluded that Art 9 does not assist the plaintiff. She rejected the proposition that s 12(7) of the IAA may be the specific provision which gives effect to the intention behind Art 9. The learned judge's view was that if Parliament had intended to allow Singapore courts to make orders to assist foreign arbitrations, the legislation would have been clearly worded to that effect.

57 Her Honour's remarks on Art 9 of the Model Law should be contrasted with the Analytical Commentary of the Model Law prepared by the UNCITRAL Secretariat. In the *Explanatory Note to the Model Law* prepared by the UNCITRAL Secretariat,[82] Art 9 is described as "an important and reasonable exception" to the principle of territoriality which is embodied by Art 1(2), in that it is intended to apply irrespective of where the place of arbitration is and even if the place of arbitration is not yet determined. This provision thus envisages curial involvement so as to facilitate and enhance the process of international arbitration.

58 In its commentary on Art 9, the Analytical Commentary states that Art 9:

> … makes it clear that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regards to such interim measures. The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are *conducive*

82 At p 17. See also, *International Handbook on Commercial Arbitration* (Jan Paulsson gen ed) (International Council for Commercial Arbitration, Looseleaf Ed) at pp 51–53.

> *to making the arbitration efficient and to securing its expected results.* [emphasis added]

59 The Commentary goes on to state that Art 9 embodies two principles of compatibility. The first part of Art 9 confirms that a request by a party to an arbitration agreement for curial assistance is not incompatible with the arbitration agreement itself; the second part of Art 9 confirms that provision of curial assistance is compatible with the arbitration agreement, irrespective of the place of arbitration. The Commentary further states that:

> Article 9 deals with the compatibility of the great variety of possible measures by courts available in different legal systems, including not only steps by the parties to conserve the subject matter or to secure evidence but also other measures, possibility required from a third party, and their enforcement. This would, in particular, include *pre-award attachments and any similar seizure of assets.* [emphasis added]

60 The position reached in *Swift-Fortune* on Art 9 is different from the position in Hong Kong and Canada (both Model Law states) where Art 9 alone has been considered as being jurisdiction-conferring.[83]

61 Prakash J also expressed concern that allowing the application would be to subject to the risk of attachment foreign-owned assets (including funds in bank accounts) in Singapore that have been placed here for reasons that have nothing to do with any dispute between their owners and third parties, even if owners of such assets have arbitral disputes abroad with third parties.

62 The learned judge accordingly concluded that as the Singapore court did not have jurisdiction under s 12(7) of the IAA to issue a Mareva injunction to assist a party in a foreign arbitration. Singapore was not the *forum conveniens* since its courts had no power to grant the order sought. This was accordingly not a proper case for service out of jurisdiction under O 69A of the Rules of Court. The order for service on the writ on the Panamanian defendant and the Mareva Injunction were therefore set aside.

83 See *Vibroflotation AG v Express Builders Co Ltd* [1994] 3 HKC 263; *Trade Fortune v Amalgamated Mill Supplies* (1994) 113 DLR (4th) 116; *Delphi Petroleum Inc v Derin Shipping and Trading Ltd* (unreported decision of Federal Court of Canada, dated 3 December 1993). For a further comparative survey on the adoption of Art 9 in various countries, see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005) at pp 97–101.

(d) *Front Carriers Ltd v Atlantic & Orient Shipping Corp*

63 The dispute in *Front Carriers Ltd*[84] concerned the existence of a time charterparty. Arbitration proceedings in London were commenced simultaneously as the application for a Mareva injunction in Singapore under ss 12(7) read with ss 12(1)(*g*), 12(1)(*h*) and 12(1)(*i*) of the IAA. Atlantic & Orient then sought to set aside the Mareva injunction on two grounds:

> (a) Following *Swift-Fortune*, the Singapore court has no jurisdiction to grant the Mareva injunction to aid the arbitration in London.
>
> (b) There was insufficient or no evidence of a risk of dissipation of assets.

64 The Mareva injunction was set aside by Belinda Ang Saw Ean J on the latter but not the former ground. What is interesting for the purpose of this article is her Honour's decision that a Singapore court does in fact have the jurisdiction to grant the Mareva injunction to support the arbitration commenced in London, not merely on the basis of s 12(1) read with s 12(7) of the IAA, but also, alternatively, s 4(10) of the Civil Law Act.

65 The first and perhaps most significant aspect of the decision is the interpretation given to s 12(7) of the IAA. Ang J read s 12(7) as empowering the Singapore High Court to grant in the appropriate circumstances the interim measures of the types contemplated in s 12(1) in relation to an international (including foreign) arbitration, whether already began or anticipated, which the High Court could have made if the matter referred to arbitration had been tried in the High Court. The learned judge read s 12(7) as giving effect to Art 9 of the Model Law (in the same way that O 69A rr 3(1)(*c*) and 4(1) of the Rules of Court give effect procedurally to Art 9). In her Honour's view, Art 9 of the Model Law (which has the force of law in Singapore) expressly preserves the jurisdiction of the court to grant interim measures in support of arbitration proceedings, whether commenced or anticipated, and irrespective of the seat of arbitration. It is "in effect the legal basis on which a "court" may order interim measure applying its own domestic

84 *Supra* n 3. The reader is also referred to a Mareva order being made by the Federal Court of Canada in *Front Carriers Ltd v Atlantic & Orient Shipping Corp*, unreported decision dated 11 January 2006.

law"[85] provided that the court has *in personam* jurisdiction over the party against whom the interim measure is sought.

66 In coming to this conclusion on s 12(7), the court expressly departed from the narrow construction of the same provision in *Swift-Fortune*.[86] This conclusion was reached first by reference to the ambit of s 5(2) of the IAA, which is reproduced above. There is nothing in s 5(2) which limits the meaning of international arbitration to arbitration taking place in Singapore. The court derived further support from a literal (and by comparison with *Swift-Fortune*, broader) construction of s 12(7) by referring to the provisions of the Model Law. By virtue of Art 1(2) of the Model Law, curial support under the Model Law is available in respect of arbitration taking place in the same state except in four specific instances, namely, Arts 8, 9, 35 and 36 where it may be sought even if the seat of the arbitration is in another jurisdiction. This interpretation of Art 1(2) enjoys some support from the *obiter dicta* in *PT Garuda Indonesia v Birgen Air*,[87] which is discussed above. Unlike Arts 35 and 36, Art 9 of the Model Law was not amended or excluded in the IAA. If Parliament did not intend curial support for foreign arbitration, Art 9 should have been excluded when the IAA was enacted. Instead, this Article was accorded the status of having the force of law by virtue of s 3(1) of the IAA.

67 This aspect of the decision is succinctly expressed by the learned judge in the following manner:[88]

> The *framework of the IAA*, including Arts 1(2) and 9 of the Model Law, recognises that parties to an international arbitration may require curial support by way of interim measures from the High Court even though the seat of arbitration is outside Singapore. The nature of the assistance which the High Court may grant is restricted to applications for interim measures of the types listed in s 12(1) as s 12(7) stipulates. [emphasis added]

68 Apart from adopting a literal and broader construction of s 5(2) and s 12(7), the court in *Front Carriers Ltd* also differed (by parity of reasoning) with the conclusion in *Swift-Fortune* that the court's power to grant Mareva relief over foreign arbitration is limited to ss 6(3) and 7(1) of the IAA. Section 6(3), it will be recalled, gives the court power to grant,

85 *Supra* n 3, at [17].
86 See *id*, at [14] and [19].
87 *Supra* n 66, at [21].
88 See *supra* n 3, at [20].

inter alia, interim protection orders in relation to the subject matter of the dispute, when a mandatory stay order is made under s 6(1). It would be "illogical"[89] to say that a party who *complies with* the foreign arbitration agreement (by starting arbitration) is unable to obtain any form of curial assistance whereas a party who *breaches* that agreement by commencing legal proceedings in Singapore (and therefore faces a mandatory stay of the proceedings) should be able to avail himself of curial assistance under s 6(3). Ang J further observed in contrast with a Mareva injunction, s 7 deals with a conceptually different remedy, that of arrest of vessels and the retention of security thus obtained.

69 Both *Swift-Fortune* and *Front Carriers Ltd* are, however, unanimous as regards the relevant provision for service outside jurisdiction in respect of an application made under the IAA. That provision is O 69A r 4 and not O 11 r 1 of the Rules of Court.[90] There is therefore no need for the applicant seeking interim relief under the IAA to bring himself within one of the limbs of O 11 r 1. Service out of jurisdiction under O 69A of the Rules of Court would confer *in personam* jurisdiction over the defendant, enabling the court to grant interim orders under s 12(7) of the IAA. However, for a Singapore court to grant leave for service out of jurisdiction under O 69A r 4, it must be satisfied under r 4(2) that the case is a "proper" one for service out of jurisdiction. This according to *Swift-Fortune*, is an embodiment of the *forum conveniens* criterion. *Front Carriers Ltd* adds another factor to this criterion. As Ang J puts it:[91]

> Of relevance to the issue of *forum conveniens* is the additional factor that the forum and place of arbitration are member countries of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"). An overall aspect of a "proper case" relates to the requisite nexus between the arbitral forum and the subject matter of the ancillary matter in dispute and the extent of the territorial reach of the relief to be ordered in terms of enforcement of the potential award.

70 Thus, in *Front Carriers Ltd*, if a Mareva injunction had not been discharged, the London arbitration award would have been enforceable in

89 *Id*, at [24].

90 There is yet a minor difference in construction of the phrase "whether or not the arbitration was held or the award was made within the jurisdiction" in O 69A r 4(1). *Swift-Fortune* confines the arbitration referred to in the phase to "completed arbitration" whereas *Front Carriers Ltd* considered the arbitration to include foreign arbitration, whether commenced or anticipated.

91 *Supra* n 3, at [39].

Singapore under Pt III of the IAA which gives effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the latter being reproduced in the Second Schedule of the IAA.

71 Two other significant points were decided in *Front Carriers Ltd*. First, as an alternative to s 12(7) of the IAA, Ang J regarded s 4(10) of the Civil Law Act as a possible statutory basis for conferring on the court the power to grant Mareva relief. She was prepared to read s 4(10) with Art 9 of the Model Law.

72 Second, her Honour tackled, heads on, the notorious *Siskina*[92] difficulty as to the grant of a free standing Mareva injunction where the substantive dispute is not being adjudicated in the same jurisdiction on which the Mareva injunction is sought. Could (or perhaps, should) the principle be extended to cover the situation where the substantive dispute is being arbitrated aboard rather than litigated before Singapore courts, from which only Mareva relief is sought? To that question, the court gave a resoundingly negative answer, for two reasons. First, as re-interpreted by the majority members of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[93] there is in fact no such requirement that the injunction must be ancilliary to the claim for substantive relief being pursued in the courts of the same jurisdiction where the injunction is sought. All that is required is that the claim itself must be justiciable under English law, *ie*, the substantive right must be one that English law would recognise.[94] However, the substantive claim itself need not be brought in the English (or Singapore) courts since the parties have agreed to arbitration. Besides, *The Siskina*,[95] (or for that matter, the Singapore Court of Appeal decision in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*[96]) is not a decision in which the courts were asked to grant an injunction in support of pending arbitration elsewhere, which is a remedy in Art 9 of the Model Law envisages.

92 See *The Siskina* [1979] AC 210.

93 *Supra* n 60.

94 The recent Singapore Court of Appeal decision of *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 at [45] left this particular point undecided although it applied *The Siskina*, *supra* n 92, in deciding the courts in Singapore cannot assume jurisdiction over a foreign defendant under O 11 r 1(*b*) if all that is sought before the Singapore court is a Mareva injunction against the defendant's assets in Singapore while the substantive dispute is adjudicated in another jurisdiction.

95 *Supra* n 92.

96 *Supra* n 94.

VI. Conclusion

73 In recent years, Singapore has been promoting itself as a premier centre for international arbitration including maritime arbitration[97] within Asia. It will therefore be interesting to see if the Singapore courts will take a pro-arbitration approach when confronted with issues arising in the three areas examined above. So far as arrest of ships to secure a potential arbitration award or for the enforcement of an arbitration award is concerned, adopting a pro-arbitration approach would be to permit such arrest to the extent possible under the relevant statutory provisions. It is submitted that the promotion of Singapore as the centre for international arbitration should not be at the expense of Singapore courts lending curial assistance to arbitrations that are conducted abroad. In this regard, the Court of Appeal decision in *Swift-Fortune* will cast much needed clarification on the extent (if at all) to which Singapore courts are empowered to assist foreign arbitration, particularly in the granting of Mareva injunctions over assets of a respondent which are located in Singapore.

VII. Postscript

74 After the completion of the first draft of this article, the Court of Appeal handed down its judgment on 30 November 2006, dismissing the appeal.[98] It ruled that s 12(7) of the IAA does not vest the Singapore courts with any statutory power to grant Mareva injunctions in aid of foreign arbitration. The court placed considerable emphasis on the legislative background leading to the enactment of the IAA in arriving at the conclusion that s 12(7), like other provisions of the IAA, was enacted to promote Singapore as a centre for international arbitration. It was not intended by Parliament or the Law Reform Committee (whose recommendations Parliament accepted) that Singapore should be the "universal providers" of interlocutory relief in respect of foreign arbitrations. The Court of Appeal, like Prakash J below, preferred a purposive rather than literal interpretation of s 12(7). A literal interpretation may result in the Singapore courts granting orders which would unduly interfere with the conduct of foreign arbitration and "cut across the grain of the chosen curial law", particularly given the variety of orders that could be made under s 12(1) read with s 12(7). The court also

97 For example in 2004, the Singapore Chamber of Maritime Arbitration was set up being one of the only two specialist maritime arbitration chambers in Asia.

98 See [2006] SGCA 42.

held that Art 9 of the Model Law does no more than clarify that resolving the substantive dispute through arbitration is not incompatible with seeking curial assistance. It neither confers jurisdiction on the court to grant a Mareva injunction nor has any bearing on the construction of s 12(7).

75 If the power to grant a Mareva injunction in aid of foreign arbitration exists at all, it would be under s 4(10) of the Civil Law Act, which is the alternative basis of jurisdiction relied upon in *Front Carriers Ltd*. Whether or not this statutory basis is valid was expressly left undecided as an appeal on the *Front Carriers Ltd* decision is pending. Section 4(10) could not in any event apply as the court found that the plaintiff in *Swift-Fortune* never had an accrued or justiciable cause of action, which is a feature that distinguishes this decision from that of *Front Carriers Ltd*.