ANTI-SUIT INJUNCTIONS IN AID OF INTERNATIONAL ARBITRATIONS

A Rethink for Singapore

In an effort to enforce arbitration agreements that provide for international arbitrations seated in Singapore, the Singapore courts have on occasions granted interim or permanent anti-suit injunctions to restrain parties from commencing or continuing foreign court proceedings. At first blush, the grant of such anti-suit injunctions in aid of international arbitrations seems to be a pro-arbitration move. However, this article calls for a rethink on the source of the court's power to grant such anti-suit injunctions and suggests that the Singapore courts do not have the power to grant such injunctions, for the existence of such power would be contrary to the design of the Model Law and the doctrine of *Kompetenz-Kompetenz* enshrined in Art 16 of the Model Law.

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> Anti-suit injunctions are not to be encouraged in any type of litigation. In the context of international arbitration, they constitute even more of a nuisance.[1]

I. Introduction

1 Where a plaintiff commences proceedings in a foreign court and the defendant to those proceedings seeks an anti-suit injunction from the Singapore courts to restrain the plaintiff from continuing the foreign court proceedings, on the basis that there is an arbitration agreement between the parties to arbitrate their disputes in Singapore, do the Singapore courts have the power to grant the anti-suit injunction sought? This is an issue that frequently arises in practice and a review of the relevant Singapore jurisprudence is likely to lead one to the conclusion

* The author is grateful to the National University of Singapore, Faculty of Law, for the opportunity to pursue research for this article whilst under its Visiting Researcher Programme from January to March 2015. All errors are entirely the author's own.

1 Philippe Fouchard, "Anti-Suit Injunctions in International Arbitration – What Remedies?" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 153.

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that the Singapore courts do have such a power, given that they have on occasions granted such anti-suit injunctions, in interim or permanent form, as a remedy for breach of an arbitration agreement.[2]

2 This current position in Singapore seemingly corresponds with our judicial policy on international arbitrations,[3] as the grant of such anti-suit injunctions would at first blush appear to be a pro-arbitration move because it seeks to enforce arbitration agreements.[4] However, as Axel Baum opined, this is an overly simplistic view and the grant of such anti-suit injunctions is just "one more door opening for court interference in what is supposed to be a non-court, private procedure; it is the thin end of a new and dangerous wedge".[5] In a similar vein, this article questions whether the Singapore courts indeed have such a power to grant the anti-suit injunction sought in order to enforce an arbitration agreement to arbitrate disputes in Singapore (hereinafter referred to as "Singapore arbitration agreement").[6] Through an analysis of the *travaux préparatoires* of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law"),[7] this article shows that the Singapore courts do not have the power to grant such anti-suit injunctions because doing so goes against the fundamental principles of modern international arbitration law embodied in the Model Law.

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2 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088; *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521.

3 Singapore's judicial policy on international arbitrations was indisputably pronounced by the Singapore Court of Appeal in *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [28]:

> An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with.

4 Axel H Baum, "Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 20.

5 Axel H Baum, "Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 20.

6 The scope of this article is limited to anti-suit injunctions granted as a remedy for breach of arbitration agreements providing for international commercial arbitrations seated in Singapore only. It does not extend to: (a) arbitration agreements providing for international investment arbitrations; (b) arbitration agreements providing for international commercial arbitrations seated in jurisdictions other than Singapore; and (c) anti-arbitration injunctions sought to intervene in arbitral proceedings.

7 GA Res 40/72, UN GAOR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985).

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3 This article comprises five parts. It begins with a description of the anti-suit injunction in the context of international arbitrations, followed by a review of the relevant Singapore jurisprudence. The third and fourth parts of the article address the question of whether, as a remedy for breach of Singapore arbitration agreements, the Singapore courts have the power to grant the permanent anti-suit injunction, and interim anti-suit injunction, respectively. In the final analysis, this article concludes that the Singapore courts do not have the power to grant any type of anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, for doing so would be contrary to the design of the Model Law and derogates from the doctrine of *Kompetenz-Kompetenz* enshrined in Art 16 of the Model Law.

II. Nature of an anti-suit injunction in aid of international arbitrations

4 The anti-suit injunction is an equitable remedy and its history can be traced all the way back to the 16th century in England.[8] It was originally developed by the Courts of Chancery to restrain proceedings at common law.[9] Today, it is widely used to restrain a party from commencing or continuing foreign court proceedings, either in breach of an exclusive jurisdiction clause or arbitration agreement, or in an oppressive or vexatious fashion.[10] In granting the anti-suit injunction, the objective of the court is to protect its jurisdiction over the same parties and cause(s) of action from interference by foreign courts.[11] However, the term "anti-suit injunction" is somewhat of a misnomer because it does not restrain the foreign suit or the foreign courts *per se*, as the name suggests.[12] Rather, the restraint is directed at a party to the foreign suit in

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8 W S Holdsworth, *A History of English Law* vol 5 (Methuen & Co Ltd, 2nd Ed, 1937) at p 326. For an overview of the early history of the anti-suit injunction in England, see David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 367.

9 W S Holdsworth, *A History of English Law* vol 5 (Methuen & Co Ltd, 2nd Ed, 1937) at p 326.

10 David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 363.

11 Stephen M Schwebel, "Anti-Suit Injunctions In International Arbitration – An Overview" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 8; Julian D M Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* (International Council for Commercial Arbitration Congress Series No 13) (Albert Jan Van Den Berg ed) (Kluwer Law International, 2007) at p 188.

12 *Turner v Grovit* [2002] 1 WLR 107 at [23], *per* Lord Hobhouse; David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 365.

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question.[13] Nevertheless, its apparent affront to principles of international comity has generated much debate and attracted its fair share of critics who see the use of an anti-suit injunction as an interference with, and undermining of, the jurisdiction of the foreign court.[14] Despite this, the use of anti-suit injunctions is now accepted as an established court practice in both the common law and civil law jurisdictions.[15]

5 The anti-suit injunction may take the form of either an interim anti-suit injunction or a permanent anti-suit injunction. The difference between the two forms lies essentially in the length of its lifespan; the interim anti-suit injunction is valid until the court determines the merits of the application for the permanent anti-suit injunction, which, in turn, is valid indefinitely, subject to the terms of the court order.[16] In the context of international arbitrations, while it has been opined that the anti-suit injunction is permanent or final in nature,[17] parties typically consider seeking an interim anti-suit injunction from the courts at the outset in order to maintain the *status quo* by restraining litigation of the substantive merits of the case in the foreign court until the preliminary issue of arbitral jurisdiction has been finally determined. This is so especially where the arbitral tribunal has not even been constituted. In turn, the permanent anti-suit injunction would ordinarily be sought from the arbitral tribunal in the hope that the injunction sought would form part of the arbitral award, which can then be enforced in any state that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[18] ("New York Convention"). However, the existence of special circumstances may influence a party to seek the permanent anti-suit injunction from the courts instead of the arbitral tribunal, *eg*, where the enforcement of an arbitral award takes a long time due to the inefficiencies of the legal system of the enforcement country in

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13 *Turner v Grovit* [2002] 1 WLR 107 at [23], *per* Lord Hobhouse; David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 365.

14 *Turner v Grovit* [2002] 1 WLR 107 at [28], *per* Lord Hobhouse; Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, Inc, 2005) at pp 102–105.

15 Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions on International Arbitration" in *Pervasive Problems in International Arbitration* (Loukas A Mistelis & Julian D M Lew eds) (Kluwer Law International, 2006) at p 203; Michael Black & Rupert Reece, "Anti-Suit Injunctions and Arbitration Proceedings" (2006) 72(3) Arbitration 207; David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 451.

16 Adrian Wong, *Interlocutory Injunctions* (LexisNexis, 2nd Ed, 2010) at p 1.

17 Julian D M Lew, "Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 30.

18 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

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processing applications for service of process out of jurisdiction on a foreign party.

6 While seeking a stay of proceedings from the foreign court is typically the more straightforward and intuitive approach than seeking an anti-suit injunction from the Singapore courts, the defendant in those foreign proceedings may prefer to seek the assistance of the Singapore courts because of the following possible reasons: (a) the foreign court may not have the power to grant a stay of its proceedings;[19] (b) an application for a stay may amount to submission to the foreign court;[20] or (c) the expense and inconvenience of challenging the jurisdiction of the foreign court may outweigh that of seeking an anti-suit injunction in the Singapore courts.[21]

7 At this juncture, it would be appropriate to clarify the terminology used in this article. While some learned authors have used the term "anti-suit injunction" to refer to the restraint of foreign court proceedings as well as arbitral proceedings,[22] confusion can be avoided if the latter restraint is referred to as the "anti-arbitration injunction" instead.[23] Therefore, the term "anti-suit injunction" used in this article refers only to the restraint of foreign court proceedings.

8 Furthermore, a conceptual distinction should be made between the anti-suit injunction and the anti-arbitration injunction, which has been described as "one of the gravest problems of contemporary

19 Adrian Wong, *Interlocutory Injunctions* (LexisNexis, 2nd Ed, 2010) at p 109.
20 Adrian Wong, *Interlocutory Injunctions* (LexisNexis, 2nd Ed, 2010) at p 109.
21 Adrian Wong, *Interlocutory Injunctions* (LexisNexis, 2nd Ed, 2010) at p 109.
22 Philippe Fouchard, "Anti-Suit Injunctions in International Arbitration – What Remedies?" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 153; Axel H Baum, "Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 19; Matthieu de Boisséson, "Anti-Suit Injunctions Issued by National Courts at the Seat of the Arbitration or Elsewhere" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 65.
23 Julian D M Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* (International Council for Commercial Arbitration Congress Series No 13) (Albert Jan Van Den Berg ed) (Kluwer Law International, 2007) at p 188. For more on the anti-arbitration injunction, see generally Julian D M Lew, "Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 25; and Julian D M Lew, "Does National Court Involvement Undermine the International Arbitration Processes" (2009) 24(3) Am U Int'l L Rev 489. For the Singapore context, see Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions – A Way Forward for Singapore" (2013) 25 SAcLJ 244.

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international commercial arbitration" and even an "illegality".[24] While the aim of the anti-suit injunction in the context of international arbitrations is to enforce the arbitration agreement between the parties, the anti-arbitration agreement seeks to enjoin arbitration proceedings by effectively interfering with and restraining the jurisdiction of an arbitral tribunal.[25] As with the anti-suit injunction, the anti-arbitration injunction is made *in personam* and may be directed at any party to the arbitration, the arbitral tribunal or even the arbitral institution.[26]

III. The current state of Singapore jurisprudence

A. *Permanent anti-suit injunction*

9 The latest word on the court's power to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement lies in the High Court decision of *R1 International Pte Ltd v Lonstroff AG*[27] ("*R1 International*"). In *R1 International*, Lonstroff AG commenced court proceedings in Switzerland to claim for breach of contract for the sale and purchase of rubber.[28] R1 International Pte Ltd ("R1 International") then commenced the Singapore court proceedings to obtain a permanent anti-suit injunction to restrain Lonstroff AG from continuing the Swiss court proceedings, which were allegedly brought in breach of a Singapore arbitration agreement.[29] As the existence of an arbitration agreement between the parties was in dispute, the High Court had to determine that threshold issue first, before considering the application for the permanent anti-suit injunction sought.[30] Having found that there was no arbitration agreement between the parties, the High Court held that there was no basis to grant the permanent anti-suit injunction sought.[31] Nevertheless, as the parties had submitted

24 Stephen M Schwebel, "Anti-Suit Injunctions in International Arbitration – An Overview" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at pp 6–8. *Cf* Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions – A Way Forward for Singapore" (2013) 25 SAcLJ 244, where the author suggests that the anti-arbitration injunction is a useful remedy to regulate arbitrations.

25 Julian D M Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* (International Council for Commercial Arbitration Congress Series No 13) (Albert Jan Van Den Berg ed) (Kluwer Law International, 2007) at p 188.

26 Julian D M Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* (International Council for Commercial Arbitration Congress Series No 13) (Albert Jan Van Den Berg ed) (Kluwer Law International, 2007) at p 188.

27 [2014] 3 SLR 166.

28 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [16].

29 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [2] and [17].

30 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [4] and [18].

31 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [35].

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extensively on the issue of whether the court had the power to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, and the High Court was of the view that this was an issue that may arise in future cases, the High Court took the time to set out its views, which are strictly *obiter dicta*.[32]

10 In establishing the source of the court's power to grant the permanent anti-suit injunction sought, counsel for R1 International argued that s 12A(2) read with s 12(1)(*i*) of the International Arbitration Act[33] ("IAA") gave the court the power to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements.[34] These sections of the IAA state:

> **Court-ordered interim measures**
>
> **12A.** (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*i*) as it has for the purpose of and in relation to an action or a matter in the court.
>
> **Powers of arbitral tribunal**
>
> **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 –
>
> (*i*) an *interim* injunction or any other *interim* measure.
>
> [emphasis added]

11 The High Court rightly disagreed with the submissions of the counsel for R1 International as the plain language of s 12A(2) read with s 12(1)(*i*) of the IAA clearly provides for interim measures only.[35] As such, the High Court did not agree with the submission that s 12A(2) read with s 12(1)(*i*) of the IAA gave the court the power to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement.[36]

12 However, curiously, the High Court went on to state its own view that although the IAA did not give the court the power to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, there was no reason why the court could not derive such an injunctive power from s 4(10) of the Civil Law Act[37]

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32 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [36].
33 Cap 143A, 2002 Rev Ed.
34 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [38]–[40].
35 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [40].
36 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [40].
37 Cap 43, 1999 Rev Ed.

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("CLA").[38] The High Court relied on the decision of the UK Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*[39] ("*AES*") in coming to its view that the IAA did not contain any language that would abrogate the scope of the court's powers to grant a permanent anti-suit injunction under s 4(10) of the CLA.[40] A detailed analysis of this part of *R1 International* is found in Part IV below.[41] At this juncture, it suffices to note that the High Court in *R1 International* was of the view that it had the power to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, under the court's general injunctive power derived from s 4(10) of the CLA.[42]

13 On appeal by R1 International, the arguments before the Court of Appeal did not focus on the power of the court to grant a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement.[43] The Court of Appeal allowed the appeal on the basis of its finding that there was an arbitration agreement between the parties, and granted the permanent anti-suit injunction sought.[44] By granting the permanent anti-suit injunction sought, it is clear that the Court of Appeal viewed the court as having such a power in the circumstances. However, it is respectfully submitted that it was a good opportunity for the Court of Appeal to analyse the source of its power to grant the permanent anti-suit injunction, given that this issue has not been authoritatively dealt with in any local decisions. Nevertheless, it is clear from the above that the current position in Singapore is that the court has the power to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements.

B. Interim anti-suit injunction

14 As alluded to in *R1 International*, s 12A(2) read with s 12(1)(*i*) of the IAA gives the court the power to grant interim injunctions under limited circumstances.[45] By definition, such interim injunctions could arguably include the interim anti-suit injunction. In *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*,[46] the High Court maintained an interim anti-suit injunction to restrain the defendant from continuing with its Sri Lankan proceedings pursuant to s 12(6) read with

38 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [43].
39 [2013] UKSC 35.
40 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [44].
41 See paras 43–49 below.
42 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [50].
43 *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [2].
44 *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [77].
45 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [40].
46 [2002] 1 SLR(R) 1088.

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s 12(1)(*g*) of the earlier version of the IAA,[47] which are *in pari materia* with s 12A(2) read with s 12(1)(*i*) of the IAA, respectively.[48] As the High Court found that there was an arbitration agreement between the parties to arbitrate their disputes in Singapore, the High Court held that it had the power under the earlier version of the IAA to grant the interim anti-suit injunction, adding that the grant of such an injunction was in line with its duty to uphold arbitration agreements and prevent any breach of it pursuant to the New York Convention.[49] Therefore, it is clear that the current position in Singapore is that the courts have the power to grant interim anti-suit injunctions as a remedy for breach of Singapore arbitration agreements.

C. Applicable test for obtaining an anti-suit injunction

15 The fundamental principles relating to anti-suit injunctions are well settled in Singapore and are set out in the Court of Appeal's decision in *John Reginald Stott Kirkham v Trane US Inc*.[50] First, the jurisdiction to grant an anti-suit injunction is exercised when the ends of justice require it.[51] Second, the order granting the anti-suit injunction is directed against the party who brought or is threatening to bring the foreign court proceedings, and not the foreign court *per se*.[52] Third, the party to be restrained must be amenable to the jurisdiction of the Singapore courts.[53] Fourth, the jurisdiction must be exercised with caution.[54] The Court of Appeal also cited with approval the following list of elements that should be taken into account when determining whether an anti-suit injunction ought to be granted, as adopted by the High Court in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd*:[55]

> (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
>
> (b) the natural forum for resolution of the dispute between the parties;
>
> (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue; and

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47 Cap 143A, 1995 Rev Ed.

48 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91].

49 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91].

50 [2009] 4 SLR(R) 428 at [24]–[29].

51 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [25].

52 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [25].

53 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [25].

54 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [25].

55 *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [16]; *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [28].

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(d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings.

16 Additionally, the Court of Appeal included a fifth element to the above list, namely, whether the institution of foreign proceedings is in breach of any agreement between the parties, and elaborated as follows:[56]

> Where there was such an agreement, the court may not feel diffident about granting an anti-suit injunction as it would only be enforcing a contractual promise and the question of international comity is not as relevant.

17 Therefore, in order for the court to grant an anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, there must first be a finding of both the existence of a valid Singapore arbitration agreement and its breach. Given that the jurisdiction to grant the anti-suit injunction must be exercised with caution and should only be exercised when the ends of justice require it, it is submitted that it would be necessary for these findings of fact to be made on the basis of a balance of probabilities, rather than merely on a *prima facie* basis.

18 Although the applicable test for the grant of permanent anti-suit injunctions was not considered in both the decisions of the High Court and the Court of Appeal in *R1 International*, given the extent of the courts' inquiry on whether there was an agreement to arbitrate, it is clear from both decisions that in order for the court to grant a permanent anti-suit injunction when a breach of an arbitration agreement is alleged, the applicant would have to satisfy the court on a balance of probabilities that a valid arbitration agreement exists between the parties. The fact that this is also the test adopted in an application for an interim anti-suit injunction as a remedy for breach of an arbitration agreement, lends further weight to the present submission on the applicable standard of review.[57]

19 Having set out the current state of the Singapore jurisprudence on the court's power to grant anti-suit injunctions as a remedy for breach of Singapore arbitration agreements, we now consider if there is a legitimate basis for such a power.

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56 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [29].
57 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91].

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IV. Does the Singapore court have the power to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements?

A. The IAA and the Model Law are silent on the Singapore court's power to grant permanent anti-suit injunctions

20 When considering issues regarding the court's powers in relation to international arbitrations seated in Singapore, the first port of call is the IAA and the Model Law (which (apart from Chapter VIII thereof) has the force of law in Singapore by virtue of s 3(1) of the IAA). Unlike the extent of the court's powers in relation to its own court proceedings, the court's powers in relation to international arbitrations seated in Singapore are severely limited given Singapore's adoption of the Model Law and judicial policy of minimal curial intervention in international arbitrations.[58] As described by the learned authors of *Halsbury's Laws of Singapore*:[59]

> The courts have supportive and limited supervisory functions over arbitrations held in Singapore. These functions are those granted by statute. There are no inherent supervisory powers at common law which the court could otherwise exercise.

21 While the IAA and the Model Law empower the court to grant interim injunctions under limited circumstances, the IAA and the Model Law are silent on the court's power to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements. How should this silence be treated? The answer lies in Art 5 of the Model Law.

B. Article 5 of the Model Law precludes the Singapore court from exercising its power under another statute to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements

22 Article 5 of the Model Law lays down a fundamental principle of modern international arbitration law, *ie*, the curtailment of the supervisory court's powers in international arbitrations. Article 5 of the Model Law states:

58 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [20]; *BLC v BLB* [2014] 4 SLR 79 at [51].

59 *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.088, cited with approval by the Singapore Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [20].

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Article 5. – Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

23 A plain reading of Art 5 of the Model Law should lead one to the conclusion that in matters regulated by the Model Law, the courts have no power whatsoever unless the Model Law provides such power. It should be appreciated at the outset that the Model Law is not meant to be a "self-contained and self-sufficient legal system that would exclude the application of all other national provisions of law dealing with arbitration".[60] Therefore, in order to determine if the courts have a particular power in a given situation, one would need to ask if that situation is a matter governed by the Model Law.

24 However, what does the phrase "in matters governed by this Law" mean exactly? Pursuant to s 4 of the IAA, reference may be made to the *travaux préparatoires* of the Model Law to discern the intentions of the drafters of the Model Law in order to ascertain the meaning of this critical phrase.

25 The starting point is the Note by the UNCITRAL Secretariat to the Working Group on International Contract Practices ("Working Group", which was tasked by the UNCITRAL with the drafting of the Model Law) at its fifth session, where the UNCITRAL Secretariat introduced Art 5 of the Model Law for the first time.[61] The UNCITRAL Secretariat noted that the inclusion of Art 5 at that juncture would compel the drafters of the Model Law to express in the Model Law all instances of possible court control.[62] In response, the Working Group accepted the underlying policy of Art 5 to clarify instances of court intervention in the course of its preparation of the draft Model Law, and decided that an assessment of the eventual acceptability of Art 5 should be postponed.[63]

26 This assessment was postponed to the seventh session of the Working Group, where the prevailing view of the Working Group was to retain Art 5 as it was thought to be "beneficial to international commercial arbitration by providing certainty to the parties and the

60 UNCITRAL, *Note by the Secretariat: Model Law on International Commercial Arbitration: Some Comments and Suggestions for Consideration* (UN Doc A/CN.9/WG.II/WP.50) at p 231.

61 UNCITRAL, *Note by the Secretariat: Model Law on International Commercial Arbitration: Revised Draft Articles I to XXVI* (UN Doc A/CN.9/WG.II/WP.40) at p 80.

62 UNCITRAL, *Note by the Secretariat: Model Law on International Commercial Arbitration: Revised Draft Articles I to XXVI* (UN Doc A/CN.9/WG.II/WP.40) at footnote 8.

63 UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Fifth Session* (UN Doc A/CN.9/233) at p 67.

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arbitrators about the instances in which court supervision or assistance was to be expected".[64] The Working Group further noted that Art 5 "did not itself take a stand on the extent of court supervision but merely required that any instance of court involvement be expressed in the model law".[65] Crucially, the Working Group gave its views on the phrase "in matters governed by this Law", as follows:[66]

> It was further understood that the introductory words of article 5, 'In matters governed by this Law', had a meaning which was narrower than the term 'international commercial arbitration' used in article 1(1) in that it limited the scope of application of article 5 to those matters which were in fact governed by or regulated in the model law. Article 5 would, for example, not exclude court control or assistance in those matters which the Working Group had decided not to deal with in the law (*eg*, capacity of parties to conclude arbitration agreement; impact of State immunity; competence of arbitral tribunal to adapt contracts; enforcement of courts of interim measures of protection ordered by arbitral tribunal; fixing of fees or request for deposit, including security for fees or costs; time-limit for enforcement of awards).

27 Subsequently, the UNCITRAL Secretariat stated in its *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* that the effect of Art 5 of the Model Law would be to exclude any general or residual powers given to the courts by the domestic legal system that are not listed in the Model Law.[67] Given the importance of Art 5 of the Model Law to our present discussion, the following pertinent comments by the UNCITRAL Secretariat on Art 5 of the Model Law merit quotation in full:[68]

> 1. [Article 5] relates to the crucial and complex issue of the role of the courts with regard to arbitrations …
>
> 2. It does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to *exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law*. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance

64 UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Seventh Session* (UN Doc A/CN.9/246) at p 211.

65 UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Seventh Session* (UN Doc A/CN.9/246) at p 211.

66 UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Seventh Session* (UN Doc A/CN.9/246) at p 211.

67 UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) at p 18; *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [22].

68 UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) at pp 18–19.

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is to be expected seems beneficial to international commercial arbitration.

…

4. … The scope of article 5 is, thus, narrower than the substantive scope of application of the model law, *ie* 'international commercial arbitration' (article 1), in that it is limited to those issues which are in fact regulated, *whether expressly or impliedly*, in the model law.

[emphasis added]

28 The powers of the Singapore courts in international arbitration matters are therefore listed exhaustively in the IAA and the Model Law when it comes to matters expressly or implied governed by the Model Law.[69] The fact that there is no express wording in the Model Law regarding the grant of permanent anti-suit injunctions as a remedy for breach of arbitration agreements leads us to the next question – is the grant of such injunctions an issue that is *impliedly* regulated in the Model Law? The UNCITRAL Secretariat itself had on two separate occasions acknowledged that it would not be easy to determine if an issue is one that is governed by the Model Law even though it is not expressly dealt with in the Model Law, or one that is not governed by the Model Law and therefore the Model Law does not render inoperative the courts' powers derived from another source of law.[70]

29 Nevertheless, the UNCITRAL Secretariat sought to shed light on this determination exercise with the help of two examples. First, as an example of an issue that is not implicitly governed by the Model Law, the UNCITRAL Secretariat stated that the courts would not be precluded by Art 5 of the Model Law from either empowering the arbitral tribunal to order certain interim measures of protection or enforcing such measures, because Art 18 of the Model Law governs the arbitral tribunal's ordering of such measures by implying an otherwise doubtful power, but it does not regulate the possible enforcement of such tribunal-ordered interim measures.[71] Second, as an example of an issue that is implicitly governed by the Model Law, the UNCITRAL Secretariat stated that where the Model Law grants the parties freedom to agree on a certain matter, for instance, the appointment of the arbitrator under Art 11(2), that matter

69 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [23].

70 UNCITRAL, *Note by the Secretariat: Model Law on International Commercial Arbitration: Some Comments and Suggestions for Consideration* (UN Doc A/CN.9/WG.II/WP.50) at p 231; UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) at p 19.

71 UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) at p 19.

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is "fully regulated, to the exclusion of court intervention".[72] It is respectfully submitted that these examples do not help to clarify how one should go about determining if an issue is one that is impliedly dealt with by the Model Law or not. Learned commentators have similarly critiqued that these examples were not particularly well selected and that the dichotomy between an issue that is governed by the Model Law even though it is not expressly dealt with in the Model Law, and an issue that is not governed by the Model Law, is difficult to determine.[73]

30 In the absence of a workable test to discern the matters that are implicitly governed by the Model Law from those that are not governed by the Model Law, we should retreat to first principles, *ie*, the normal rules of statutory interpretation, by taking into account the principles undergirding the Model Law.[74] In particular, it should be borne in mind that s 9A of the Interpretation Act[75] requires us to adopt a purposive interpretation that would promote the purpose or object of the Model Law.

31 It is respectfully submitted that the grant of permanent anti-suit injunctions as a remedy for breach of arbitration agreements is an issue that is impliedly regulated by the Model Law. The basis for this submission becomes clear when one considers the purpose of seeking the permanent anti-suit injunction in aid of international arbitrations – to enforce an arbitration agreement. The enforcement of an arbitration agreement, in turn, is clearly an issue that is expressly regulated by the Model Law, via Arts 8 and 16 of the Model Law. As such, the courts cannot grant the anti-suit injunction in an effort to enforce an arbitration agreement unless the Model Law allows it. Given that the Model Law does not provide the courts the power to grant the anti-suit injunction, pursuant to Art 5 of the Model Law, the courts do not have the power to grant the anti-suit injunction in order to enforce an arbitration agreement.

32 It should also be borne in mind that one of the fundamental principles of modern international arbitration law is the principle of

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72 UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) at p 19.

73 Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 98; Lord Justice Mustill *et al*, "The United Kingdom and the UNCITRAL Model Law: The Mustill Committee's Consultative Document of October 1987 on the Model Law" (1987) 3(4) Arb Int'l 278.

74 UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session* (UN Doc A/40/17) at p 14.

75 Cap 1, 2002 Rev Ed.

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Kompetenz-Kompetenz enshrined in Art 16 of the Model Law. As stated by the UNCITRAL Secretariat:[76]

> A. 'Kompetenz-Kompetenz' and separability doctrine, paragraph (1)
>
> 1. Article 16 adopts the *important* principle that it is *initially and primarily* for the arbitral tribunal itself to determine whether it has jurisdiction, subject to ultimate court control … Paragraph (1) grants the arbitral tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as 'Kompetenz-Kompetenz', is an essential and widely accepted feature of modern international arbitration but, at present, is not yet recognized in all national laws.
>
> [emphasis added]

33 In an application for a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement, the Singapore court has to determine whether a valid arbitration agreement exists. Given that the permanent anti-suit injunction is usually granted even before the arbitral tribunal is constituted, or before the arbitral tribunal has had the chance to determine whether it has jurisdiction, granting the anti-suit injunction would go against the fundamental principle of *Kompetenz-Kompetenz* because in deciding on the application for the permanent anti-suit injunction, the Singapore court would have thereby decided on the arbitral tribunal's jurisdiction before the arbitral tribunal itself has had the opportunity to do so.[77] Furthermore, the court's decision on the application for the permanent anti-suit injunction would operate as a *res judicata*, thus limiting the arbitral tribunal's ability to determine whether it has jurisdiction to decide on the dispute between the parties. Therefore, it is respectfully submitted that the granting of a permanent anti-suit injunction as a remedy for breach of a Singapore arbitration agreement goes against the design and fundamental principle of the Model Law.

34 Professor Frédéric Bachand, an eminent scholar on the role of the courts in international commercial arbitrations, is similarly of the view that the court's power to issue anti-suit injunctions is precluded by Art 5

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76 UNCITRAL, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264) (25 March 1985) at pp 37 and 41.

77 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [18]; Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 106.

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of the Model Law.[78] The basis of Professor Bachand's argument is that Art 5 of the Model Law prohibits judicial assistance and judicial control not provided for in the Model Law, and since the grant of anti-suit injunctions in aid of international arbitrations is an instance of such judicial assistance, Art 5 of the Model Law prohibits the national courts from issuing anti-suit injunctions in aid of international arbitrations.[79] Professor Bachand also opined that the Model Law should not provide for the court's power to grant the anti-suit injunction on comity grounds and on the basis that it is contrary to Art II(3) of the New York Convention, which gives the court seized of the merits of the dispute the exclusive right of enforcing the arbitration agreement.[80] This avoids complications such as *res judicata* and issue estoppel that are likely to arise if both the courts seized of the merits of the dispute and the courts of the place where the arbitration is seated are able to enforce the arbitration agreement.[81] Such a concern was in fact raised in *AES*, where Lord Mance stated that an order for injunctive relief formed the basis of an issue estoppel such that the parties were precluded from denying the existence or validity of the arbitration agreement in any future proceedings.[82]

35 Furthermore, it is respectfully submitted that the application of Art 5 of the Model Law is not foreign to the Singapore courts for they have in the past invoked this provision to limit the availability of powers that they would normally exercise. A classic example is *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush*[83] ("*Mitsui*"). In *Mitsui*, the plaintiff sought an injunction to restrain the arbitrator from taking further steps in the arbitration proceedings while the applications for the challenge of the arbitrator and the setting aside of the first interim award were pending before the court.[84] The primary issue before the High Court was whether it had jurisdiction to grant such an injunction.[85] Reference was made to s 4(10) of the CLA, which ordinarily gave the courts the

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78 Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 87.

79 Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at pp 100–102.

80 Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at pp 102–106.

81 Frédéric Bachand, "The UNCITRAL Model Law's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard ed) (Juris Publishing, 2005) at p 106.

82 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [18].

83 [2004] 2 SLR(R) 14.

84 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [1].

85 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [13].

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power to grant injunctions where it appears to the court to be just or convenient to do so.[86] However, the court was quick to point out that the arbitration between the parties was one that was governed by the IAA, which enacted the Model Law.[87] The court's attention was therefore drawn to Art 5 of the Model Law.[88] Counsel for the plaintiff argued that it was not relying on a general supervisory power of the court but a residual power, which the court must surely possess as the Model Law provides for the challenge of an arbitrator and the setting aside of an award.[89] Counsel for the plaintiff further argued that it would be surprising if the court were powerless to restrain an arbitrator who insisted on continuing with arbitral proceedings despite a successful challenge to the arbitrator's appointment.[90] However, the court disagreed with the plaintiff's counsel and held as follows:[91]

> 23 It seemed to me that Mitsui's argument went against the terms of Art 5 which states that in matters governed by the Model Law, no court shall intervene 'except where so provided' in the Model Law. Since the Model Law does not provide for the Interlocutory Injunction in respect of an application under Arts 13 and 24, the court does not have the power to do so. In any event, I did not rely on this view alone.

36 Similarly, since the Model Law does not provide for a permanent anti-suit injunction in respect of the enforcement of an arbitration agreement under Arts 8 and 16, the court does not have the power to grant such an injunction.

37 Subsequently, the above quote from *Mitsui* was cited with approval by the Court of Appeal in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[92] ("*LW Infrastructure*"). In *LW Infrastructure*, the Court of Appeal had to determine if it had the power to declare an arbitral award a nullity on the basis of a breach of natural justice.[93] Although the applicable statute in *LW Infrastructure* was the Arbitration Act[94] and not the IAA, the Court of Appeal stated that given the intention of the Legislature to align the domestic arbitration laws with the Model Law, it

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86 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [14].
87 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [14].
88 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [16].
89 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [17] and [22].
90 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [22].
91 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [23].
92 [2013] 1 SLR 125 at [39].
93 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [32].
94 Cap 10, 2002 Rev Ed.

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was required to have regard to the scheme of the IAA and the Model Law for guidance in interpreting the Arbitration Act.[95] In this regard, the Court of Appeal's starting point was Art 5 of the Model Law, which the court elaborated on as follows:[96]

> 36 The effect of Art 5 of the Model Law is to confine the power of the court to intervene in an arbitration to those instances which are provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law … The *raison d'être* of Art 5 of the Model Law is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to when court action is permissible'.
>
> …
>
> 39 In short, in situations expressly regulated by the [Arbitration] Act, the courts should only intervene where so provided in the [Arbitration] Act …

38 As the plaintiff's grievance was breach of natural justice, and the Arbitration Act did provide a specific relief for such a grievance, the Court of Appeal held that it had no jurisdiction to order otherwise:[97]

> It follows from the fact that the [Arbitration] Act does make provision for seeking relief in such circumstances, that there is simply no basis for finding that there is any residual or concurrent jurisdiction for the court to make a declaration as to the validity of the Additional Award.

39 Similarly, given that the grievance of an applicant seeking a permanent anti-suit injunction in aid of international arbitration has to be the breach of an arbitration agreement, the relief for which is provided in the Model Law in the form of a stay of court proceedings via Arts 8 and 16 of the Model Law, the courts have no jurisdiction to order otherwise, including the grant of a permanent anti-suit injunction.

40 The Court of Appeal also took the opportunity in *NCC International AB v Alliance Concrete Singapore Pte Ltd*[98] ("*NCC International*") to set out its views on the proper role of the court in the context of international arbitrations. This time, the Court of Appeal was concerned with the provision of interim relief when arbitration proceedings were pending or in progress. Again, the starting point was Art 5 of the Model Law, which the Court of Appeal explained as having the effect of statutorily circumscribing the court's powers to intervene in arbitration proceedings, to the extent that such powers are listed

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95 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [34].

96 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [36] and [39].

97 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [42].

98 [2008] 2 SLR(R) 565.

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exhaustively in the IAA where matters governed by the Model Law are concerned.[99] The drafting history of ss 12(1) and 12(7) of the IAA was considered and reference was made to the Report of the Law Reform Sub-Committee on Review of Arbitration Laws that was tasked with the drafting of the IAA ("Sub-Committee").[100] Importantly, the Sub-Committee recommended that the powers of the courts to grant interim orders should be limited "*to the extent that curial intervention is allowed in respect of international arbitrations*", which the Sub-Committee explained as follows:[101]

> The [Sub-Committee] recommends that there should be provision to empower the court to grant injunctive relief and other orders for the interim preservation of property pending the making of an award in an international arbitration. *Such applications should not be answerable by stay applications and should not be considered as an abuse of judicial process.* [emphasis added]

41 It is therefore the clear intention of the drafters of the IAA that the courts do not have the power to grant injunctive relief where such applications can be dealt with by stay applications. This buttresses the present submission that the Singapore courts do not have the power to grant anti-suit injunctions as a remedy for breach of Singapore arbitration agreements, for such applications can be dealt with by stay applications in the foreign courts.

42 A common theme can be discerned from the aforementioned cases. In all of the cases, the starting point of the courts was always to identify the grievance complained of by the applicant seeking the anti-suit injunction, before determining if the remedy for the identified grievance (provided that the alleged grievance is not frivolous, as was the case in *NCC International*) has already been provided for, either expressly or impliedly, in the IAA or the Model Law. It is respectfully submitted that this is a sound approach that should have similarly been adopted in *R1 International*.

C. Section 4(10) of the Civil Law Act does not empower the court to grant permanent anti-suit injunctions

43 Having found that the IAA does not provide the courts with the power to grant permanent anti-suit injunctions as a remedy for breach of

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99 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [23] and [26].

100 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [31].

101 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Sub-committee on Review of Arbitration Laws* (August 1993) at para 47 (Chairman: Giam Chin Toon).

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Singapore arbitration agreements, the High Court in *R1 International* stated that the courts could still exercise that power pursuant to s 4(10) of the CLA.[102] In coming to this view, the High Court relied on the decision of the UK Supreme Court in *AES* and held that there was no clear language in the IAA that would abrogate the scope of the courts' powers under s 4(10) of the CLA.[103]

44 At this juncture, it would be paramount to understand s 4(10) of the CLA to determine if that section is applicable in an application for a permanent anti-suit injunction. Section 4(10) of the CLA provides as follows:

> *Injunctions and receivers granted or appointed by interlocutory orders*
>
> (10) A Mandatory Order or an injunction may be granted or a receiver appointed by an *interlocutory order* of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.
>
> [emphasis added]

45 A plain reading of s 4(10) of the CLA shows that it only pertains to interlocutory injunctions and does not provide for the power to grant permanent injunctions. This distinction was also pointed out by the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA*[104] ("*Swift-Fortune*"), where it held that s 4(10) of the CLA gave the court the power to grant only interlocutory injunctions; the power to grant permanent or final injunctions is found in para 14 of the First Sched to the Supreme Court of Judicature Act[105] instead. As such, it is respectfully submitted that reliance on s 4(10) of the CLA was misplaced by the High Court in *R1 International*.

D. The English position

46 Given that "the Singapore legal system continues to have an umbilical relationship with English law",[106] it would be prudent to consider the English authorities and determine if they provide persuasive guidance to the Singapore courts. It would be useful to point out at the

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102 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [43].

103 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [44].

104 [2007] 1 SLR(R) 629 at [64], subsequently followed in *Petroval SA v Stainby Overseas* [2008] 3 SLR(R) 856 and *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000.

105 Cap 322, 2007 Rev Ed (current version).

106 The Honourable the Chief Justice Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" (2014) 26 SAcLJ 23 at [9].

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outset that, unlike in Singapore, the Model Law does not have the force of law in England.[107]

47 It is respectfully submitted that the English case of *AES* is instructive in buttressing the present submission of this article. As with the High Court in *RI International*, the UK Supreme Court in *AES* had to decide whether it had the power to grant a permanent anti-suit injunction to restrain the continuation or commencement of court proceedings brought in another forum in breach of an arbitration agreement. The UK Supreme Court had to consider whether the English Arbitration Act 1996[108] ("English Arbitration Act") limited the English courts' general power contained in s 37 of the English Senior Courts Act 1981[109] ("Senior Courts Act") to grant an interlocutory or final injunction, so that s 37 of the Senior Courts Act was no longer available as a source of power for the English courts to injunct foreign proceedings begun or threatened in breach of an arbitration agreement.[110] In deciding that s 37 of the Senior Courts Act remained available to the English courts to grant a permanent anti-suit injunction as a remedy for breach of an arbitration agreement, the UK Supreme Court stated that any intended inapplicability of s 37 would have been made very clear in both the Report on Arbitration of the Departmental Advisory Committee (which was tasked with analysing whether to adopt the Model Law in England) ("1996 DAC Report") and the English Arbitration Act.[111] As there was no such carve out for the application of s 37 of the Senior Courts Act in the DAC Report and the English Arbitration Act, the UK Supreme Court held that the English courts had the power to grant permanent anti-suit injunctions as a remedy for breach of arbitration agreements.[112] However, does England have the equivalent of Art 5 of the Model Law? While the English Arbitration Act contains s 1(c), which is fairly similar to Art 5 of the Model Law, there lies a critical difference between the two provisions. Section 1(c) of the English Arbitration Act states as follows:

> 1. General principles
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> …

107 David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at p 346; Robert Merkin & Louis Flannery, *Arbitration Act 1996* (Informa, 4th Ed, 2008) at p 77.

108 c 23.

109 c 54.

110 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [55].

111 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [57].

112 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [60].

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> (c) in matters governed by this Part the court *should* not intervene except as so provided by this Part.
>
> [emphasis added]

48 The change in wording from "shall" in Art 5 of the Model Law to "should" in s 1(c) of the English Arbitration Act was not incidental or without thought. The UK Supreme Court highlighted this change as follows:[113]

> The use of the word 'should' in section 1(c) was also a deliberate departure from the more prescriptive 'shall' appearing in article 5 of the UNCITRAL Model Law … it is clear that section 1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention.

49 Indeed, in the first report of the UK Departmental Advisory Committee on Arbitration Law under the chairmanship of Lord Mustill ("Mustill Report"), concerns were expressed as to the precise scope of court involvement under the Model Law regime, given the absolute language of Art 5 of the Model Law.[114] The 1996 DAC Report agreed with the Mustill Report on this point and decided to replace the word "shall" in Art 5 of the Model Law with "should" in the English Arbitration Act.[115] The purpose for this change in wording was clearly to extend to the English courts the flexibility of acting in appropriate circumstances where it is unclear if a particular matter is governed by the Model Law. It is therefore respectfully submitted that it was this lack of absolute prohibition in the English arbitration regime that allowed the UK Supreme Court to reach its conclusion that the power under s 37 of the Senior Courts Act to grant the permanent anti-suit injunction in aid of international arbitration remained available to the English courts. Had s 1(c) of the English Arbitration Act been replaced with Art 5 of the Model Law, it is respectfully submitted that the UK Supreme Court would not have been able to avail itself of the general injunctive power found in s 37 of the Senior Courts Act, as that power would have been abrogated by the clear words of Art 5 of the Model Law. As such, *AES* neatly illustrates the present submission that Art 5 of the Model Law precludes the Singapore courts from exercising its power under other statutes to grant permanent anti-suit injunctions as a remedy for breach of Singapore arbitration agreements.

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113 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [33].

114 Lord Justice Mustill, "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law" (1990) 6 Arb Int'l 3.

115 United Kingdom, The Departmental Advisory Committee on Arbitration Law, *Report on Arbitration Bill 1996* (February 1996) (Chairman: Lord Justice Saville) at paras 20–22.

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V. Does the Singapore court have the power to grant an interim anti-suit injunction?

50 The above arguments in relation to permanent anti-suit injunctions apply equally to interim anti-suit injunctions, notwithstanding the fact that s 12A(2) read with s 12(1)(i) of the IAA empowers the court to grant interim measures. As mentioned, it is the clear intention of the drafters of the IAA that the Singapore courts do not have the power to grant injunctive relief where such applications can be dealt with by stay applications. As such, it is respectfully submitted that the Singapore courts do not have the power to grant interim anti-suit injunctions as a remedy for breach of Singapore arbitration agreements.

VI. Conclusion

51 Although the Singapore jurisprudence as it stands supports the position that the courts have the power to grant permanent or interim anti-suit injunctions as a remedy for breach of Singapore arbitration agreements, none of the relevant cases has addressed the issue head on, apart from the High Court in *R1 International*, whose views are strictly *obiter dicta*. This article has called for a rethink of this current position in the jurisprudence and questioned the basis for the courts to exercise such a power, by analysing the interplay between Art 5 of the Model Law and the relevant statutory provisions that the courts would ordinarily draw its injunctive powers from. Not only would the grant of an anti-suit injunction lead to a spiral of further court applications for anti-anti-suit injunctions and provide an opportunity for parties to use the court processes to delay and avoid arbitral proceedings, the main objection against the courts having the power to grant the anti-suit injunction as a remedy for breach of an arbitration agreement is that it ultimately goes against the design of the Model Law and derogates from the doctrine of *Kompetenz-Kompetenz* as envisioned by the drafters of the Model Law.

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