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THE ARB-MED-ARB PROTOCOL

Promising in Concept, Problematic in Design

Since its introduction on 5 November 2014, the Arb-Med-Arb Protocol has been enthusiastically promoted by the Singapore International Arbitration Centre, Singapore International Mediation Centre and various members of the Singapore government. Arbitration practitioners in Singapore appear generally to recognise its promise and utility, but also be cautious about how it would play out in practice. Two articles have recently been published in the *Singapore Law Gazette*, addressing what their authors perceive to be some "kinks" in the design of the protocol. This article aims to take a deeper look at the design of the protocol and to evaluate and suggest possible fixes to its potential problems.

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1 At the Ninth Regional Arbitral Institutes Forum in Kuala Lumpur held on 9 May 2015, the former Attorney-General for Singapore, V K Rajah SC, delivered a speech in which he predicted that "the future [of international arbitration] belongs to hybrid dispute resolution mechanisms which marry both adversarial and consensual forums".[1] These hybrid mechanisms are more commonly known as "integrated" or "multi-tiered" dispute resolution systems,[2] in which parties contractually agree to resolve their disputes by mediation or negotiation (consensual means) before proceeding to arbitration (adversarial means).[3] Parties may also adopt a "reverse approach", starting with arbitration and proceeding to mediation.[4]

1 V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 32.

2 Arthur W Rovine, "Introduction to Session on Issues in Integrated Dispute Resolution Systems" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (Kluwer Law International, 2005) at p 439.

3 V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 18.

4 Arthur W Rovine, "Introduction to Session on Issues in Integrated Dispute Resolution Systems" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (Kluwer Law International, 2005) at p 441.

2 One of the more prominent additions to the variety of hybrid mechanisms in recent years is an innovation known as the Singapore International Arbitration Centre ("SIAC")-Singapore International Mediation Centre ("SIMC") Arb-Med-Arb Protocol (the "AMA Protocol"). By way of a quick introduction,[5] this is a three-stage process involving: (a) the initiation of arbitration proceedings under the SIAC; (b) the stay of the arbitration and submission of the case to mediation under the SIMC; and (c) the referral of the case back to arbitration for (i) the recording of a consent award, if the dispute was wholly or partially resolved in the mediation; and/or (ii) the full and final resolution of the dispute by arbitration, if the dispute was only partially or not at all resolved.[6]

3 The AMA Protocol was introduced by the SIAC and the SIMC on 5 November 2014.[7] Since its introduction, it has been enthusiastically promoted by the SIAC, SIMC[8] and various members of the Singapore government.[9] Arbitration practitioners in Singapore and the region have generally welcomed the introduction of the AMA Protocol, recognising its utility in promoting the early resolution of disputes through mediation[10] and ensuring the enforceability of mediated settlement

5 As this article will illustrate, however, the manner in which the provisions of the Arb-Med-Arb Protocol will actually operate might prove to be less straightforward than this brief description would suggest. See paras 15–17 below.

6 Singapore International Mediation Centre, SIAC-SIMC Arb-Med-Arb Protocol http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf (accessed October 2019) (hereinafter "AMA Protocol").

7 Christopher Boog, "The New SIAC/SIMC Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs" (2015) 17(2) Asian Disp Rev 91 at 93–94.

8 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at pp 8–9 (accessed October 2019).

9 See, eg, V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 32; K Shanmugam, Minister for Law and Foreign Affairs, Speech at the International Bar Association 4th Asia Pacific Regional Forum Conference (18 March 2015); Indranee Rajah, Senior Minister of State for Law and Finance, Closing Address at Global Pound Conference Singapore 2016 (18 March 2016); Indranee Rajah, Senior Minister of State for Finance and Law, keynote address at the South Asian Diaspora Convention 2016 (19 July 2016); Han Kok Juan, Deputy Secretary of Ministry of Law, keynote address at Asian Legal Business Cross-Border Dispute Resolution and Arbitration Forum (2 November 2017).

10 See, *eg*, Edward Foyle, "New Singapore International Mediation Centre and SIAC to Offer 'Arbitration/Mediation/Arbitration' Procedure" *Hogan Lovells ARBlog* (27 November 2014) ("the emphasis placed on the early resolution of disputes is expected to make the Arb/Med/Arb Protocol a popular choice for users"); Chanaka Kumarasinghe & Nathalia Lossovska, *The Best of Both Worlds in Alternative Dispute Resolution: Singapore's Arb-Med-Arb Protocol* (June 2015) http://www.hfw.com/downloads/HFW-Singapores-Arb-Med-Arb-protocol-June-2015.pdf (accessed

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agreements ("MSAs").[11] That general optimism has been tempered by a sense of cautiousness, as some practitioners seem to prefer to see how the resolution of disputes in accordance with the AMA Protocol plays out in practice before recommending its adoption.[12]

4 Although the AMA Protocol has attracted a fair amount of attention, it does not appear to have been the subject of extensive study. While there exists some literature on the AMA Protocol, much of what has been written is in the nature of client bulletins aimed at informing commercial parties about the existence and features of the protocol and educating these parties about the general advantages and disadvantages of adopting the protocol as their dispute resolution process of choice.[13] The limited number of academic papers on the AMA Protocol similarly focus on the features and general advantages and disadvantages of the

October 2019) ("It provides for a real prospect of commercial settlement before a full blown arbitration, which is what every commercial party aims for. Even if the dispute is not settled at the mediation stage, the process of mediation can narrow the issue and simplify the dispute, and may well streamline the subsequent arbitration proceedings all in turn reducing the associated costs."); Bryan Cave Leighton Paisner, "Singapore's New 'Arb-Med-Arb' Protocol: A Positive Development?" (8 July 2015) https://www.bclplaw.com/en-US/thought-leadership/singapore-s-new-arb-med-arb-protocol-a-positive-development.html (accessed October 2019) ("the SIMC-SIAC protocol has much to commend it. It brings to mediation disputes which might not otherwise see mediation attempted and this itself is a major positive"); Edmund Wan & Alex Ma, "Singapore Arb-Med-Arb Clause – A Viable Alternative?" *King & Wood Mallesons* (20 November 2017) https://www.kwm.com/en/hk/knowledge/insights/singapore-arbitration-mediation-clauses-ama-protocol-20171116 (accessed October 2019) ("the combination of mediation and arbitration is an attractive proposition for any party contemplating utilizing alternative dispute resolution").

11 See, *eg*, Edward Foyle, "New Singapore International Mediation Centre and SIAC to Offer 'Arbitration/Mediation/Arbitration' Procedure" *Hogan Lovells ARBlog* (27 November 2014) ("The ability to obtain a settlement agreement enforceable under the New York Convention … is expected to make the [AMA Protocol] a popular choice for users."); Bryan Cave Leighton Paisner, "Singapore's New 'Arb-Med-Arb' Protocol: A Positive Development?" (8 July 2015) https://www.bclplaw.com/en-US/thought-leadership/singapore-s-new-arb-med-arb-protocol-a-positive-development.html (accessed October 2019) ("The integrated mechanism within the protocol for converting a settlement into a consent award which can be enforced under the New York Convention is particularly novel for institutional rules – making the protocol a valuable addition to Singapore's dispute resolution arsenal.").

12 See, *eg*, Herbert Smith Freehills, "Singapore International Mediation Centre is launched, offering parties an "Arb-Med-Arb" process in partnership with SIAC" (11 December 2014), https://hsfnotes.com/arbitration/2014/12/11/singapore-international-mediation-centre-is-launched-offering-parties-an-arb-med-arb-process-in-partnership-with-siac/ (accessed October 2019); Dr Markus Altenkirch & Anindya Basarkod, "Arb-Med-Arb: What Is It and How Can It Help the Parties to Solve Their Disputes Efficiently?" *Global Arbitration News* (20 November 2017).

13 See, *eg*, the client bulletins cited at nn 10–12 above.

protocol.[14] Many of these bulletins and papers highlight the relative pros and cons of the protocol over other hybrid mechanisms available to parties.

5 Given the existing literature, this article will not focus on the strengths and weaknesses of the AMA Protocol as a hybrid mechanism that parties can choose. Instead, it will evaluate the AMA Protocol on its own terms and with reference to its own aims. The AMA Protocol might, in concept, be a promising alternative to existing hybrid mechanisms and a more appropriate method of dispute resolution for parties for a variety of reasons specific to the relevant parties.[15] However, if something about its design means that it is not working as intended or if there are hidden costs to its adoption, then these should be fixed. Two recent articles in the *Singapore Law Gazette* already address the issue of "kinks" in the AMA Protocol, but they are brief and possibly flawed.[16] This article aims to take a critical look at the two *Law Gazette* articles and to build on the ideas in these articles.

6 Part I[17] of this article attempts to set out an understanding of the following aspects of the AMA Protocol: its (a) nature; (b) existing design; and (c) aims. This discussion is intended to fill the gaps in the existing literature and to provide an understanding that will underpin the analysis in Part II[18] of this article. Part II identifies the shortcomings of the AMA Protocol in relation to two issues that might be expected to arise in an arbitration – (a) jurisdictional challenges; and (b) interim measures –

14 See, *eg*, Christopher Boog, "The New SIAC/SIMC Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs" (2015) 17(2) Asian Disp Rev 91.

15 Klaus Peter Berger, "Law and Practice of Escalation Clauses" (2006) 22 Arb Int'l 1 at 3–4, explaining that parties should considering multi-tiered dispute resolution clauses should consider:

> (1) the suitability of all ADR proceedings chosen for the actual project and their order on the escalation ladder; (2) the weighing up of the disadvantages possibility associated with non-successful escalation proceedings against the possible time and cost advantages that successful escalation proceedings have for the smooth implementation of the contract; and (3) the establishment of smooth transitions from one dispute resolution level to the next …

And that their considerations of these factors will be influenced by "the value, significance and the specific features of the project, the probable dominance of technical or legal questions in a possible dispute, past experiences of the parties with escalation proceedings, as well as the distribution of bargaining power".

16 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018); Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018).

17 See paras 8–30 below.

18 See paras 31–95 below.

and evaluates the proposed amendments to deal with these issues; and recommends a possible fix for these issues.

7 The increased interest in hybrid mechanisms in general, and the blend of optimism and cautiousness concerning the AMA Protocol in particular, make the protocol a subject worthy of further study. If any design flaws in the AMA Protocol can be identified and fixed, then transnational commercial dispute resolution would be all the richer for having an additional tool in their toolkit of dispute resolution mechanisms that is optimised for effective resolution. If, on the other hand, these design flaws are allowed to lie unchanged, then the consequences of such design flaws might go beyond the particular set of commercial parties first caught unawares by the problem. Instead, these design flaws might engender disillusionment on the part of the watchful community of arbitration practitioners.

I. The AMA Protocol

8 A study of the design flaws of the AMA Protocol should begin, first and foremost, with an understanding of (a) the nature of the protocol; (b) the existing design of the protocol, which provides a baseline for the evaluation of the protocol; and (c) the aims of the protocol, which provide the yardstick by which the existing protocol and any proposed amendments can be evaluated.

A. Nature of the AMA Protocol

9 What is the nature of the AMA Protocol? As its name suggests, the AMA Protocol is neither a dispute resolution clause nor a body of procedural rules, at least as those terms are conventionally understood. Instead, it is a "protocol" – a seemingly *sui generis* innovation that appears to combine elements of both dispute resolution clauses and procedural rules.

10 The AMA Protocol is not quite a dispute resolution clause, because it only takes effect if there is already a pre-existing agreement between parties to submit their dispute for resolution under the AMA Protocol.[19] This agreement can take the form of the SIAC's and SIMC's

19 AMA Protocol, para 1 ("The AMA Protocol shall apply to all disputes submitted to the Singapore International Arbitration Centre (SIAC) for resolution under the Singapore Arb-Med-Arb Clause or other similar clause (AMA Clause) and/or any dispute which parties have agreed to submit for resolution under the AMA Protocol.").

Singapore Arb-Med-Arb clause[20] ("the Singapore AMA Clause") or some other similar clause (that is, an "AMA Clause") or a specific agreement by parties to submit their dispute for resolution under the protocol ("Submission Agreement"). However, it has elements of a dispute resolution clause, in that it provides that parties "agree that any dispute settled in the course of the mediation at the [SIMC] shall fall within the scope of their arbitration agreement".[21]

11 The AMA Protocol is also unlike conventional bodies of procedural rules, in that it is not designed to be self-contained and/or standalone. While it makes some prescriptions as to the procedural steps by which a dispute between parties is intended to be resolved, it also provides that the rules applicable to the arbitration ("the Arbitration Rules")[22] and the SIMC Mediation Rules will govern some aspects of the dispute resolution process, like the constitution of the arbitral tribunal and the commencement of the mediation. In this regard, the AMA Protocol provides that the Arbitration Rules must be either: (a) the arbitration rules of the SIAC,[23] as may be revised from time to time ("the SIAC Rules") or (b) the UNCITRAL arbitration rules,[24] as may be revised from time to time ("the UNCITRAL Rules"), where parties have agreed that the SIAC shall administer the arbitration.

12 The *sui generis* nature of the AMA Protocol and the gaps in the existing literature leave unanswered many questions about the relationships between: (a) the protocol and the parties' agreement on the matter of dispute resolution (as captured in the AMA Clause or Submission Agreement); and (b) the protocol and applicable procedural rules (that is, the Arbitration Rules and the SIMC Mediation Rules).

13 If the AMA Protocol is considered to be part of, or more akin to, the procedural rules chosen by the parties, then an arbitrator and mediator might have the power and discretion under the Arbitration Rules or SIMC Mediation Rules to deviate from or add to the order of proceedings contemplated in the protocol by, for example, deciding to

20 Singapore International Arbitration Centre, "The Singapore Arb-Med-Arb Clause" http://siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause (accessed October 2019).

21 Singapore International Arbitration Centre, "The Singapore Arb-Med-Arb Clause" http://siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause (accessed October 2019).

22 AMA Protocol, para 2.

23 Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016).

24 UNCITRAL Arbitration Rules GA Res 68/109, adopted by the United Nations General Assembly, 68th Session (16 December 2013) (hereinafter "UNCITRAL Rules").

hear jurisdictional challenges or applications for interim relief before staying the arbitration. This may mean that the provisions of the AMA Protocol might be more flexibly applied depending on the specific circumstances of the dispute.

14 If, on the other hand, the AMA Protocol is considered to be incorporated into the parties' agreement to arbitrate, then the provisions of the protocol (whatever their effects are interpreted to be) might override an arbitrator's general discretion to "conduct the arbitration in such manner as it considers appropriate"[25] or "direct the order of proceedings".[26] This is because Art V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[27] ("New York Convention") states that the recognition and enforcement of an award may be refused if the arbitral procedure was not in accordance with the agreement of the parties.

B. Existing design of the AMA Protocol

15 Based on the discussion above, it is clear that the resolution of a dispute under the AMA Protocol involves an interplay of the provisions of the AMA Protocol, the Arbitration Rules and the SIMC Mediation Rules. For the most part, however, descriptions of the AMA Protocol in the existing literature seem to focus only on the provisions of the AMA Protocol without much regard to how other provisions in the Arbitration Rules and the SIMC Mediation Rules might affect the dispute resolution process.

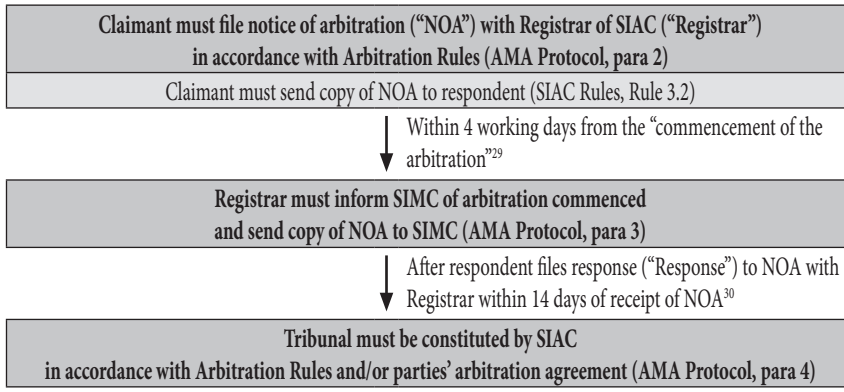
16 In order to better illustrate the mechanics of dispute resolution under the AMA Protocol, the following flowchart sets out the timeline of events contemplated by the provisions in the AMA Protocol and *the SIAC Rules*. Because the provisions in the AMA Protocol also make reference to the Arbitration Rules and the SIMC Mediation Rules, this flowchart also includes the relevant provisions in the *current version* of the SIAC Rules[28] referred to in the protocol.

17 The provisions in the AMA Protocol are set out in the dark grey boxes in the flowchart; while the relevant SIAC Rules and SIMC Mediation Rules are set out in the light grey boxes. Any ambiguities inherent in the wording of the AMA Protocol or caused by the interaction of the

25 Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016) (hereinafter "SIAC Rules") Rule 19.1.
26 SIAC Rules, Rule 19.4.
27 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).
28 6th Ed, 1 August 2016.

provisions of the AMA Protocol and the applicable procedural rules will be explained in the footnotes.

Chart 1



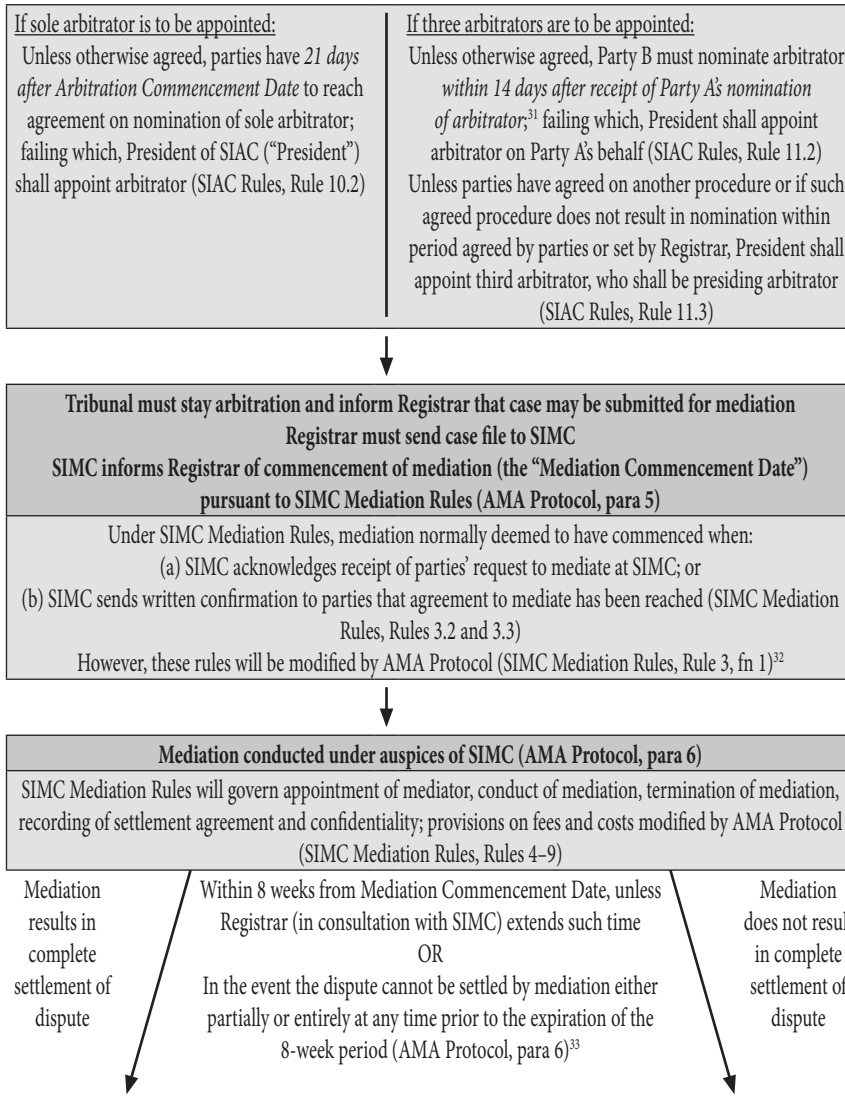
29 Rule 3.3 of the SIAC Rules deems the date of the Registrar's receipt of the complete notice of arbitration ("NOA") to be the date of the commencement of the arbitration. This date is not necessarily the same as when the NOA was first filed by the claimant, because the NOA will only be deemed to be complete when the requirements of Rule 3.1 are wholly or substantially complied with. The Singapore International Arbitration Centre ("SIAC") shall notify the parties of the commencement of the arbitration.

The AMA Protocol does not clearly state when the arbitration will be deemed to have commenced. However, para 3 of the protocol stipulates that the Registrar of the SIAC must send a copy of the NOA to the Singapore International Mediation Centre ("SIMC") and suggests that the SIAC Rules must apply so that there is a wholly or substantially complete NOA that the SIAC may send to the SIMC.

30 Pursuant to Rule 4.1 of the SIAC Rules, the respondent will normally have to file a response with the Registrar *within 14 days of the receipt of the notice of arbitration*. This response includes, among other things, the respondent's nomination of an arbitrator (if the arbitration agreement provides for three arbitrators) or the respondent's comments and/or counter-proposal to the claimant's proposed arbitrator (if the agreement provides for a sole arbitrator).

Given this, the constitution of the tribunal under the SIAC Rules should normally only happen *after* the response is filed. Although the AMA Protocol does not make this step explicit and para 5 of the AMA Protocol is confusingly worded to suggest that the tribunal will already have been constituted before a simultaneous "exchange of the Notice of Arbitration and Response to the Notice of Arbitration", most practitioners have sensibly interpreted the AMA Protocol to preserve the ordinary sequence of events under which the response is filed before the tribunal is constituted: see, *eg*, Herbert Smith Freehills, "Med-Arb, Arb-Med and the Arb-Med-Arb Protocol" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 11 ("After the filing of the Response to the Notice of Arbitration, and the subsequent constitution of the tribunal").

This must be correct, because it is difficult to see how the appointment of the arbitrators and constitution of the tribunal can occur without the response (specifying the respondent's nominated or proposed arbitrator) having first been filed.



31 Unless otherwise agreed by the parties, the notice of arbitration must include the claimant's nomination of an arbitrator if the arbitration agreement provides for three arbitrators: SIAC Rules, Rule 3.1(h).

32 Unfortunately, neither the Singapore International Mediation Centre ("SIMC") Mediation Rules nor the AMA Protocol specifies exactly how the SIMC Mediation Rules are intended to be modified and how the mediation commencement date is to be determined under the AMA Protocol.

33 Pursuant to para 7 of the AMA Protocol, the transition from the stage of mediation to that of arbitration is kicked into gear at one of the following points in time: (a) at the end of the eight-week period set aside for mediation; (b) at a date later than the

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SIMC informs Registrar of outcome of mediation Tribunal may render consent award on terms of settlement agreement, if requested by parties (AMA Protocol, para 8)	SIMC informs Registrar of outcome of mediation Registrar must inform Tribunal that arbitration shall resume Arbitration proceeding in respect of dispute (or unresolved part of dispute) resumes in accordance with SIAC Rules (AMA Protocol, para 8)

end of these eight weeks, if the deadline for mediation is postponed by the Registrar; or (c) at a date before the end of these eight weeks, if the dispute "cannot be settled by mediation either partially or entirely … prior to the expiration of the 8-week period". (Under paras 7 and 8 of the AMA Protocol, the transition from mediation to arbitration will entail the following steps: (a) the Singapore International Mediation Centre will inform the Registrar of the outcome of the mediation; (b) the Registrar will inform the tribunal that the arbitration proceeding will resume; and (c) upon the date of the Registrar's notification to the tribunal, the arbitration will resume.)

It is this last option (c) that causes most uncertainty because the AMA Protocol does not specify who shall make the determination that the dispute "cannot be settled by mediation either partially or entirely" or explain the circumstances under which this determination shall be made. Options (a) and (b) entail only the effluxion of time and can be more straightforwardly determined.

The fact that the Singapore International Mediation Centre ("SIMC") Mediation Rules has its own specific provisions on the termination of the mediation (that is, Rule 7 of the SIMC Mediation Rules) adds a further layer of complexity. How does Rule 7 interact with para 7 of the AMA Protocol?

Is option (c) intended to refer to and/or accommodate the scenario where mediation is terminated under Rule 7? After all, a dispute "cannot be settled by mediation either partially or entirely" if it is validly terminated under any of the grounds for termination set out in Rule 7 of the SIMC Mediation Rules. Or does the fact that the AMA Protocol only specifies options (a) through (c) as a trigger for the transition from mediation to arbitration mean that Rule 7 must be modified so as to be consistent with the AMA Protocol? Under this interpretation, a mediation might not be terminable solely on the grounds that: one of the parties has unilaterally given written notice of its withdrawal to the SIMC; the mediator has given written notice to SIMC and the parties that the mediation should be terminated for any reason other than his determination that a dispute "cannot be settled by mediation"; or one or more parties has not made payment of any fees due to the SIMC: SIMC Mediation Rules, Rules 7.1(b)(i), 7.1(b)(ii) and 7.1(b)(iv).

On the one hand, Rule 7 is not expressly stipulated to be "modified by the AMA Protocol" – unlike Rule 3 which governs the "Agreement to Mediate" and Rule 5 which governs "Fees and Costs". On the other hand, Rule 1.1 sets out a blanket provision that "the Rules shall be modified as necessary to be consistent with the terms of the AMA Protocol".

This ambiguity with regard to the circumstances under which mediation under the AMA Protocol is to be deemed to have been concluded so as to make way for the arbitration of the dispute will probably have to be resolved with reference to the AMA Protocol's policy concerning the enforcement of the parties' duty to mediate their dispute. Is it better for the AMA Protocol to force parties to the "mediating table" by strictly insisting that they keep trying for eight weeks before the stay of arbitration can be lifted? Or should the AMA Protocol be designed so that the parties can resume arbitration as soon as and as long as one party is unwilling to even try to mediate the dispute? These questions of what this policy is or should be and how this ambiguity should therefore be resolved are outside the scope of this article.

C. Aims of the AMA Protocol

18 Any evaluation of the existing design of, and suggested improvements to, the AMA Protocol must start with a clear identification or definition of the goals that such design is intended to achieve. How should these goals be defined? One approach is to start by recognising that commercial parties seeking the benefit of hybrid mechanisms can already pick from a mind-boggling array of different combinations and permutations of dispute resolution processes.[34] In this crowded landscape of hybrid mechanisms, what can the AMA Protocol add? How can it stand out from all the competing options?

19 On a basic level, the AMA Protocol provides parties with a tool to implement the hybrid structure known as arbitration-mediation-arbitration or arb-med-arb. This structure allows parties to reap the many benefits of mediation while avoiding its main limitation. Mediation is already a popular process[35] that has proven to be effective in the resolution of disputes.[36] However, an important limitation is that parties who wish to enforce their MSAs may face serious challenges or obstacles in trying to do so.[37] This has led to what has been referred to as

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34 For example, a mediation-arbitration ("med-arb") structure where the mediator and arbitrator are the same person; a med-arb structure where they are different; an arbitration-mediation ("arb-med") structure where the mediator and arbitrator are the same person; an arb-med structure where they are different; multi-tiered structures that incorporate negotiation, *etc*.

35 V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 21, citing an estimated 58% increase in mediations commenced in 2014 compared with 2010 in the UK, a 57% increase in the number of cases mediated by the Singapore Mediation Centre SMC from 2013 to 2014 in Singapore and a 26% increase per year in cases resolved by judicial mediation between 2008 and 2010 in China, *etc*.

36 V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 32, citing a recent study conducted by the UK Centre for Effective Dispute Resolution, "The Sixth Mediation Audit" (2014) which reported settlement rates of as high as 86%.

37 Some of the other limitations identified by commentators are that: (a) an agreement to mediate or negotiate is not readily enforceable in many jurisdictions (see V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 31); and (b) there is a risk that parties will conduct the mediation like a "mini-arbitration" (or mini-trial) so that it is almost as time- and cost-consuming as arbitration or litigation: see Christopher Boog, "The New SIAC/SIMC Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs" (2015) 17(2) Asian Disp Rev 91 at 92.

These limitations will not be discussed in this article because they are limitations that are arguably not inherent to mediation and may be avoided without having resort to a hybrid mechanism. The limitation that agreements to mediate may not be readily enforceable can be avoided either by careful drafting or by a choice of a jurisdiction that recognises the enforceability of such agreements, while the risk

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a "mediation dilemma" that evokes a "significant amount of uncertainty in potential users of mediation".[38] Commercial parties contemplating mediation face a risk that they may waste time and money going through the formal process of mediation if "a successful and enforceable outcome" is unlikely.[39]

20 The reason that there is at least a perception or belief that parties will not be able to easily enforce MSAs is that there has not historically been an equivalent of the New York Convention that makes MSAs directly enforceable in foreign courts across different jurisdictions. Some jurisdictions, like Singapore, have already enacted legislation that renders MSAs directly enforceable in courts,[40] and the European Union ("EU") has issued a directive that each EU member state should recognise and enforce MSAs that have been made enforceable in another member state.[41] There is also a new United Nations Convention on International Settlement Agreements[42] (also known as the "Singapore Convention on Mediation" or "Singapore Convention") that aims to establish a framework for MSAs to be recognised and enforced internationally[43] and was open for signature on 7 August 2019.[44] However, the Singapore Convention is still in its infancy and there remains some uncertainty as to how it will be operationalised.[45]

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that parties will conduct the mediation like a mini-arbitration or mini-trial can be managed within the context of a mediation by a skilful mediator.

38 Christopher Boog, "The New SIAC/SIMC Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs" (2015) 17(2) Asian Disp Rev 91 at 92.

39 Christopher Boog, "The New SIAC/SIMC Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs" (2015) 17(2) Asian Disp Rev 91 at 92.

40 Singapore Mediation Act 2017 (Act 1 of 2017).

41 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. V K Rajah SC, "W(h)ither Adversarial Commercial Dispute Resolution?" (2017) 33 Arb Int'l 17 at 32, fn 63: "Within the EU, Directive 2008/52/EC provides that 'the content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States.'"

42 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

43 Aziah Hussin, Claudia Kuck & Nadja Alexander, "SIAC-SIMC's Arb-Med-Arb Protocol" (2018) 11(2) NY Disp Resol Law 85.

44 Cara Wong, "46 Countries Sign International Mediation Treaty Named after Singapore" *The Straits Times* (7 August 2019).

45 Among other things, (a) the take-up rate of the United Nations Convention on International Settlement Agreements ("Singapore Convention") is still up in the air; and (b) Art 12(4) of the Singapore Convention provides that the convention shall not prevail over conflicting rules of a regional economic integration organisation (such as the European Union directive) if the mediated settlement agreement ("MSA") is sought to be relied on in a member state, and there is a question how MSAs might

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21 Until there is more certainty about how the provisions of the Singapore Convention will be implemented and MSAs enforced under its framework, arb-med-arb provides an effective means of getting around the perceived problem of enforceability (and a solution to the "mediation dilemma") because the referral of a dispute back to arbitration after mediation enables MSAs to be recorded as arbitral awards, which *are* easily recognised and enforceable across different jurisdictions under the New York Convention. The reason that the process also starts with arbitration is that under various arbitration rules, parties might not be able to get their MSAs recorded in an arbitral proceeding commenced specially for that purpose, because there would no longer be any live dispute on which to base an arbitration at that point.[46]

22 With regard to the latter point, there are a number of other reasons why parties might start with arbitration.[47] The more important of these advantages are that starting with arbitration may (a) allow for an early exchange of written statements that should enable the parties to make realistic evaluations of the strengths and weaknesses of their respective positions; and (b) enable parties to exploit the tribunal's power to "choreograph the dispute resolution process" by using tools only available to an arbitral tribunal (such as procedural orders, compulsory procedural agendas, interim awards or other tools).[48] These advantages may, in turn, facilitate the resolution of the dispute through consensual means (and are not eroded by the signing of the Singapore Convention). As this article will explain,[49] however, these reasons are less pertinent to the AMA Protocol than the fact that starting with arbitration ensures

be enforced in such states. See Iris Ng, "The Singapore Mediation Convention: What Does It Mean for Arbitration and the Future of Dispute Resolution?" *Kluwer Arbitration Blog* (31 August 2019).

46 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 8: "Often, parties who have successfully mediated under Med-Arb try to record their settlement as a consent arbitral award. Under arbitration rules, this might not be possible because there was no real dispute to begin with." See also Bobette Wolski, "ARB-MED-ARB (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of Its Parts?" (2013) 6 Contemp Asia Arb J 249 at 261–262.

47 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

48 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

49 See paras 28–29 below.

that there is a live dispute for the purposes of the arbitral proceedings to record an MSA.[50]

23 Understanding why parties might choose the arb-med-arb structure only takes us halfway toward knowing exactly what the *AMA Protocol* in particular adds to the diverse toolkit of dispute resolution mechanisms. The AMA Protocol is by no means the only tool that parties may use to implement the arb-med-arb structure. Various prominent arbitral institutions such as the American Arbitration Association ("AAA"), the International Centre for Dispute Resolution ("ICDR") and the International Chamber of Commerce ("ICC") all recognise and allow for the use of mediation during the arbitral process.

24 What makes the AMA Protocol stand out (at least for now) is its combination of the following features:

> (a) First, it is the only dispute resolution option that makes it *mandatory* for parties to undergo mediation almost *immediately* after an arbitration has been commenced. It also stays the arbitration until mediation is complete. As this article will elaborate,[51] this requirement is consistent with the thinking behind the AMA Protocol, under which the mediation process assumes a primacy that is absent in the other tools offered by different arbitral institutions. This better ensures that parties will be able to benefit from the advantages of mediation, which include the possibility of resolving their disputes quicker and at a lower cost than they would otherwise be in arbitration;[52] and the chance for each party to get a clearer idea of the other's case and to refine and clarify their own case.[53]

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50 See n 56 above.

51 See paras 28–29 below.

52 See Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 6.

53 See Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 6:

> Personally, I'm of the view that even if the parties do not reach a settlement through ADR, they still derive benefits from going through the process. A good mediator can get to the crux of the issues in the dispute, and help both sides get a clearer idea of what the other side is willing to accept. Parties can also speak more frankly with each other during mediation.

See also Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazett*e (June 2018) at p 2:

> Even where settlement was not reached, mediation was very useful in getting the protagonists to face each other, drawing some of the poison that has developed between them, learning more of the other's case and attitude, learning more

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(b) Second, it expressly prescribes a step-by-step procedure in accordance to which the arbitration and mediation stages of the protocol should proceed. This promotes both clarity and certainty for its users.

(c) Third, it allows parties to smoothly transition from arbitration to mediation and then back to arbitration again, and minimises the administrative burden of mediating in the middle of arbitration. It also makes for a speedier process.

(d) Finally, and perhaps most obviously, it allows parties to enjoy whatever institutional advantages are associated with arbitrating under the auspices of the SIAC and mediating under the auspices of the SIMC. Some of the institutional advantages touted by the SIAC and the SIMC as well as various commentators include: the assurance of quality provided by the SIMC's strict policy of requiring all their mediators to be certified,[54] the support of two panels of technical experts maintained by the SIAC and the SIMC to ensure that the mediation process is not stymied by technical questions,[55] and the efficient and reliable administrative case management support provided by the SIAC and the SIMC.[56]

25 The first of these features bears some elaboration. As set out above: (i) there are a number of different reasons why parties might choose the arb-med-arb structure; and (ii) the AMA Protocol is only one of many tools by which parties can implement this structure. The specific thinking behind the choice of the arb-med-arb structure may influence or dictate the differences in design of the different tools by which to implement this structure.

26 One reason why parties might choose the arb-med-arb structure is that they subscribe to the kind of "Arbitration-First" thinking that was espoused by Professor J Martin Hunter in his "Commentary on Integrated Dispute Resolution Clauses".[57] According to Hunter, adopting a multi-

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of your own case, and having to present your case to an independent person and seeing their reaction. Approaches to dispute are invariably refined after mediation by responding to what was learnt during the mediation.

54 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 7.

55 Aziah Hussin, Claudia Kuck & Nadja Alexander, "SIAC-SIMC's Arb-Med-Arb Protocol" (2018) 11(2) NY Disp Resol Law 85.

56 Aziah Hussin, Claudia Kuck & Nadja Alexander, "SIAC-SIMC's Arb-Med-Arb Protocol" (2018) 11(2) NY Disp Resol Law 85.

57 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan

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tiered system that begins with arbitration (A) allows for an early exchange of written statements that should enable the parties to make realistic evaluations of the strengths and weaknesses of their respective positions; and (B) enables parties to exploit the tribunal's power to "choreograph the dispute resolution process" by using tools only available to an arbitral tribunal (such as procedural orders, compulsory procedural agendas, interim awards or other tools).[58]

27 The rules of the AAA, ICDR and the ICC all appear to be structured around a policy of maximising the opportunity of parties to better understand the dispute and evaluate the strengths and weaknesses of their respective positions before deciding if and when to mediate.[59] These rules all contemplate that, where parties wish to choose to mediate their dispute during an arbitration (thereby adopting an arb-med-arb structure), the process of mediation can take place at *any stage of the arbitration*.[60] Compared with the AMA Protocol, this gives the parties more flexibility at the expense of certainty in the process. The rules of the AAA, ICDR and the ICC also allow the tribunal to more actively "choreograph the dispute resolution process"[61] since they all

van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005).

58 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

59 This is one of the advantages of starting with arbitration identified by Hunter: J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

60 Rule 9 of the American Arbitration Association Rules (1 October 2013) provides that: "In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration *or at any time while the arbitration is pending*, the parties shall mediate their dispute …" [emphasis added].

Rule 5 of the International Centre for Dispute Resolution International Arbitration Rules (1 June 2014) provides that: "Following the time for submission of an Answer, the Administrator may *invite* the parties to mediate … [and] *at any stage of the proceedings*, the parties may agree to mediate …" [emphasis added].

Paragraph (5)(i) of Appendix IV of the International Chamber for Commerce Arbitration Rules (1 March 2017) suggests that the tribunal may, as a case management technique for controlling time and cost, "inform the parties that they are free to settle all or part of the dispute … through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules". The paragraph does not further stipulate when exactly these other amicable dispute resolution methods should be deployed.

61 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

provide that, unless the parties agree otherwise, mediation should take place concurrently with the arbitration.[62] Indeed, the AAA's provisions on "Preliminary Hearing Procedures" envisages and suggests that the tribunal should address the matter of mediation as part of a checklist of other procedural and organisational issues at a preliminary hearing in the arbitration.[63]

28 These considerations are probably less germane to the AMA Protocol. Although the AMA Protocol begins with arbitration, it was not designed with the kind of "Arbitration-First" thinking that was promoted by Hunter.[64] Instead, it was specifically "conceived to solve the problem of unenforceable mediation settlements"[65] – and the fact that the protocol begins with arbitration is mostly (if not solely) to pre-empt the possibility that parties might not be able to record their MSAs as arbitral awards if "there was no real dispute to begin with".[66]

29 Given that this was the policy thinking behind the AMA Protocol, it makes sense that the protocol does not provide for any exploration of the issues in a dispute (beyond the brief descriptions of the issues required of the NOA and Response to NOA under the SIAC and UNCITRAL Arbitration Rules).[67] The protocol also does not give any room for the tribunal to actively manage the dispute resolution process in that the tribunal is required to immediately stay the arbitration and refer the matter to the SIMC under the protocol.[68] Instead, the commencement

62 Rule 9 of the American Arbitration Association Rules (1 October 2013) provides that: "Absent an agreement of the parties to the contrary the mediation shall take place concurrently with the arbitration …"

Rule 5 of the International Centre for Dispute Resolution International Arbitration Rules (1 June 2014) provides that: "Unless the parties agree otherwise, the mediation shall proceed concurrently with arbitration …"

63 Indeed, para (a)(i) of Section P-2 ("Preliminary Hearing Procedures") of the American Arbitration Association Rules (1 October 2013) envisages and suggests that the tribunal should address "the possibility of other non-adjudicative methods of dispute resolution, including mediation" at a preliminary hearing to maximise the efficiency and economy of the process. This will, in turn, require a consideration of "the size, subject matter, and complexity of the dispute".

64 See generally J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005).

65 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 8.

66 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 8.

67 SIAC Rules, Rules 3 and 4; UNCITRAL Rules Arts 3 and 4.

68 AMA Protocol, para 5.

of arbitration has been described as being "no more than the agreed procedure to trigger the mediation process".[69]

30 If the AMA Protocol is to maintain its relevance and attractiveness in the crowded landscape of hybrid dispute resolution mechanisms available to commercial parties, then its design should be aimed at supporting or promoting the special features and values of the AMA Protocol that have just been discussed.

II. Fixing the AMA Protocol

31 Having established the yardstick against which the AMA Protocol and any suggested amendments to the protocol should be evaluated, this article will now discuss some of the perceived problems of the protocol. These issues mainly relate to the fact that the AMA Protocol does not make express provision for a number of applications that are typically made at the outset of an arbitration – namely, (a) jurisdictional challenges; and (b) applications for interim measures.

32 These two issues may be considered problems in so far that they detract from some of the principal selling points of the AMA Protocol – namely, (i) the clarity and certainty that the protocol is supposed to provide; (ii) the efficiency of the process under the protocol; and (iii) the enforceability of MSAs and arbitral awards resulting from the use of the protocol.

A. Jurisdictional challenges

33 Jurisdictional objections are typically raised by parties at the outset of an arbitration. Indeed, most national laws require that parties raise their jurisdictional objections no later than the submission of the statement of defence.[70] Arbitrations rules similarly require parties to raise jurisdictional objections within a specified time limit – under both the SIAC Rules and the UNCITRAL Rules,[71] these should be raised no later than the statement of defence (or with respect to a counterclaim, the defence or reply to the counterclaim).

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69 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 4.

70 Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (hereinafter, "Model Law") Art 16(2).

71 SIAC Rules, Rule 28.3(a); UNCITRAL Rules, Art 23(2).

Once a jurisdictional objection has been raised, arbitrators will normally have broad discretion to determine the timing and the process by which to deal with the jurisdictional challenge.[72] In arbitrations where the AMA Protocol does not apply, both the SIAC Rules and the UNCITRAL Rules clearly empower arbitrators to decide such challenges as a preliminary question or in an award on the merits.[73] In exercising their discretion over when and how to decide jurisdictional challenges, arbitrators should consider: (a) whether the challenge is well founded or likely to be a mere tactical delay; (b) whether the challenge can be easily separated from the merits; and (c) any possible delay to the arbitral proceedings and increase of costs which may result.[74] If a challenge is well founded and can be separated from the merits, then arbitrators should normally decide on the challenge as a preliminary question.[75]

34 The AMA Protocol poses a special question for arbitrators and parties because it expressly provides that the tribunal shall stay the arbitration "after the exchange of the NOA and Response to the NOA" and submit the case file for mediation at the SIMC:[76] Does this mean that the tribunal should only decide jurisdictional challenges *after* such mediation? The language of the AMA Protocol suggests but does not make clear that this is its position.

35 The situation is even more complex in an arbitration under the SIAC Rules. Unlike the UNCITRAL Rules, the SIAC Rules provides another avenue for jurisdictional challenges to be determined by the Registrar and/or the Court of Arbitration of SIAC ("SIAC Court") *before* the tribunal is even constituted.[77] Since the AMA Protocol provides only that the tribunal shall be constituted by the SIAC "in accordance with the Arbitration Rules and/or the parties' arbitration agreement"[78] and does not contemplate any abridgement of the regular timelines for the constitution of a Tribunal, it is arguable that the parties should have a

72 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 3: Jurisdictional Challenges (2016) at p 17 (see Commentary on Article 4 – Timing and form of the decision on jurisdiction, at para 1).
73 SIAC Rules, Rule 28.4; UNCITRAL Rules, Art 23(3).
74 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 3: Jurisdictional Challenges (2016) at p 18: see paragraph headed "Factors to consider when determining whether to separate (bifurcate) the decision on jurisdiction from the merits".
75 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 3: Jurisdictional Challenges (2016) at p 18.
76 AMA Protocol, para 5.
77 SIAC Rules, Rule 28.1.
78 AMA Protocol, para 4.

window of 21 days after the arbitration commencement date[79] or even longer[80] for jurisdictional challenges to be determined.

The difficulty created by the lack of clarity in the AMA Protocol is compounded because the AMA Protocol is not obviously incorporated into either the parties' arbitration agreement or the body of procedural rules chosen by the parties. Instead, it appears to be of a *sui generis* legal nature.[81] If the AMA Protocol were obviously incorporated into the parties' arbitration agreement, then any deviation from what the protocol purports to stipulate may mean that the arbitral procedure was "not in accordance with the agreement of the parties" and may result in an award that is unenforceable under Art V(1)(d) of the New York Convention.[82] On the other hand, if the protocol were more akin to procedural rules, then any deviation from the protocol may be justified on the basis of the tribunal's general powers and discretion under the SIAC Rules and the UNCITRAL Rules.[83] How then should the ambiguity in the AMA Protocol with regard to jurisdictional challenges be resolved?

(1) Suggested amendments

36 Two suggested amendments have been proposed. The first is that the AMA Protocol should be amended to expressly provide that (a) a party may apply to the Tribunal to have its jurisdictional objections determined before mediation; and (b) the Tribunal may then, in its discretion, decide to hear the jurisdictional objections as a preliminary question[84] ("the Discretionary Approach"). The second is that the AMA Protocol should expressly prohibit jurisdictional challenges during a stay pending mediation, unless a jurisdictional objection is raised *bona fide* in defence to an application for interim relief[85] ("the Prohibitory Approach"). Each of these suggestions will be considered in turn.

37 Before the factors weighing against or in support of each approach can be canvassed and considered, however, there are two arguments of a more fundamental nature that must be addressed at the outset.

79 If a sole arbitrator is to be appointed (SIAC Rules, Rule 10.2).
80 If three arbitrators are to be appointed (SIAC Rules, Rules 11.2 and 11.3).
81 See discussion at paras 9–14 below.
82 New York Convention, Art V(1)(d).
83 SIAC Rules, Rule 19.1 and 19.4; UNCITRAL Rules, Art 17.1.
84 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 4.
85 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 5.

(a) Issue(s) relating to tribunal's jurisdiction

38 The first argument is that:[86]

> Where there is a challenge to whether the AMA Protocol even binds a party, it is not logical to insist that it applies in any event. As a matter of contract law, it cannot be right that a party who insists that it is not bound be compelled to act as if it were. In such cases, a tribunal should be able to decide whether it has jurisdiction before mediation on the basis of the doctrine of competence-competence.

This argument is of fundamental importance because if it is correct that the AMA Protocol cannot be presumed to apply whenever a jurisdictional challenge is made, then it does not make sense to further consider how the protocol should be designed to deal with such jurisdictional challenge. The protocol will not apply in any event, and the tribunal can simply determine the challenge on the normal basis of the doctrine of competence-competence and the arbitral rules governing the issue of jurisdictional challenges. If this argument is correct, then the proper approach will not be to amend the AMA Protocol as such to provide that jurisdictional challenges can be heard before a mediation but to simply ignore it.

39 There are at least two flaws with this argument. First, the reasoning that it is "not logical to insist that [the AMA Protocol] applies" just because there is a challenge to whether the protocol even binds a party in fact ignores the well-established doctrine of competence-competence in arbitration. In *every* case where there is a jurisdictional challenge (that is, whether or not the AMA Protocol applies), the tribunal faces the possibility that it might conclude that there was never a valid and enforceable arbitration agreement in the first place; and in such cases, then it is "impossible to assume that the parties empowered the tribunal to determine its own jurisdiction".[87] The doctrine of competence-competence is a legal fiction that was developed to avoid just this problem.

40 Under this doctrine, tribunals are granted the power to rule on their own jurisdiction. At the same time, the national laws and arbitral rules which give effect to competence-competence also empower tribunals to decide that questions of jurisdiction will only be determined at the end

86 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 3.

87 Julian Lew, Loukas Mistelis & Stefan Kröll, "Determination of Jurisdiction" in *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 332, ¶14-14.

of the arbitration when an award on the merits is rendered.[88] Consistent with this practical application of the doctrine of competence-competence, it should be open to arbitral institutions and commercial parties to design and adopt a procedure (such as the AMA Protocol) under which jurisdictional challenges are only decided at or after a particular juncture in the proceedings; and in the meantime, the procedure (that is, the AMA Protocol) will be assumed to apply. This is no different than saying that an arbitration will continue in accordance with the arbitration rules of a presumptive arbitration agreement until the relevant tribunal concludes that this presumptive arbitration agreement is not valid and enforceable. In this case, the AMA Protocol may be treated as being part of, or akin to, the arbitration rules of the presumptive arbitration agreement.

41 The second flaw with this argument is that it assumes that a party who takes the view that it should not be bound by the AMA Protocol will be "compelled to act as if it were".[89] In fact, nothing in the AMA Protocol provides that the tribunal can or should "compel" the parties to do anything. In particular, it does not empower or require the tribunal to issue any kind of order or award to impose on the parties a legal duty to mediate the dispute.[90] Instead, the protocol merely requires the tribunal to stay the arbitration (a procedural order that should be well within the scope of a tribunal's presumptive powers and jurisdiction where there is a jurisdictional challenge) and have the Registrar send the case file to the SIMC (an entirely administrative matter).

88 See, *eg*, Art 16(3) of the Model Law, Rule 28.4 of the SIAC Rules and Art 23(3) of the UNCITRAL Rules.

89 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 4.

90 Although the AMA Protocol clearly contemplates that parties should engage in mediation, a party's legal obligation to do so (if any) need not necessarily result from a tribunal's orders or awards but may spring from a contractual source.

For example, the Singapore Arb-Med-Arb Clause (see n 20 above) states that "the parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the [SIMC], in accordance with the [AMA Protocol] for the time being in force", and creates a contractual obligation for parties to mediate their dispute.

There is a valid question whether tribunals *should* also be empowered to compel parties to mediate their dispute (*eg*, through the issuance of mandatory injunctions) so that the contractual obligation to mediate may be meaningfully enforced. However, this question is outside the scope of this article. Given the justifiable concerns that the tribunal should not be seen as overreaching when its very jurisdiction is in question, it may well be that a more appropriate way of enforcing the parties' agreement to mediate their dispute is to treat that agreement as a precondition for the continuation of arbitration rather than as grounds for a mandatory injunction to be issued.

(b) Issue(s) relating to party autonomy

42 The next argument that should be addressed at the outset is that the tribunal may "lack jurisdiction to decide its jurisdiction" before the parties have mediated the dispute and the stay on the arbitration is lifted, because: (a) the tribunal's jurisdiction to decide its jurisdiction "depends on the parties' consent"; (b) the AMA Protocol must be considered to have been "incorporated into the contract [that is, the parties' agreement to arbitrate] by reference" and (c) the effect of the AMA Protocol is to "temporarily remove the dispute [including any dispute as to jurisdiction] from the Tribunal's purview" until the parties have mediated the dispute and the stay on the arbitration is lifted.[91] This arguments rests on a number of assumptions.

43 First, it is questionable that the AMA Protocol should be considered to have been "incorporated into the contract" such that the parties' must be deemed to have withheld their consent to the tribunal's determination of its own jurisdiction before the mediation. Second, it begs the question about the effect of AMA Protocol. As explained above,[92] it is not entirely clear that the effect of the Protocol (as it is currently drafted) is to make it so that any and all issues arising in the dispute – including any jurisdictional challenges – should be decided only after mediation.

(c) Potential for time and cost savings

44 Having established that neither of these arguments preclude either the Discretionary Approach or the Prohibitory Approach, this article will now consider which of these approaches should be chosen. One factor that should be considered is the effect that each approach has on the speed and cost of the overall process of dispute resolution. Those who advocate the Discretionary Approach argue that dealing with jurisdictional challenges *before* mediation may lead to time and cost savings because an early determination that there is no valid and enforceable arbitration agreement will quickly bring an end to the proceedings and save the successful respondent from incurring the "unnecessary expense of mediation and, if unsuccessful, arbitration proceedings".[93]

91 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 4.

92 See paras 31–35 above.

93 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 3.

45 This potential benefit is overstated. For starters, the Discretionary Approach does nothing to alter the risks of a successful respondent having to incur the "unnecessary expense" of the arbitration proceedings. Where parties have chosen an arb-med-arb dispute resolution process, a jurisdictional challenge may be decided: (a) as a preliminary issue, *before the mediation*; (b) as a preliminary issue, *immediately after the mediation*; and (c) as a preliminary issue or in a final award on the merits, *after part or all of the arbitration proceedings*. Whether the Discretionary Approach or the Prohibitory Approach is adopted, it is equally open to the tribunal to choose either option (b), which would save the successful respondent the expense of an arbitration, or option (c), which would not.

46 Following from the above discussion, the only expense that is really saved is that of the mediation – and even this could be minimal. As those who advocate the Discretionary Approach have themselves suggested, a respondent who strongly believes that it is not bound by the AMA Protocol or the arbitration agreement may simply choose to wait out the period set aside for mediation under the protocol.[94] This is going to be either a period of just eight weeks, or less, if a determination is made that the dispute "cannot be settled by mediation either partially or entirely at any time prior to the expiration of this 8-week period".[95] Though the Registrar has the discretion to extend the eight-week period set aside for mediation, it is reasonable to assume that this discretion will not be exercised where the respondent chooses not to participate in the mediation. If a respondent chooses to take this course of action and later succeeds in its jurisdictional challenge, then it would not have lost much in the way of mediation expenses.[96]

47 More importantly, though, the possibility that a successful respondent might save this modest amount of mediation expenses under the Discretionary Approach must be weighed against the more significant cost savings that will result if parties are required to mediate their dispute before any jurisdictional challenges are decided (that is, the Prohibitory Approach).

48 As set out above,[97] the main difference between the Discretionary Approach and the Prohibitory Approach is the possibility that the tribunal might decide any jurisdictional challenges *before the mediation*.

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94 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 4.

95 AMA Protocol, para 7. See also flowchart at para 17 above.

96 Under the AMA Protocol, the only *non-refundable* fee payable in respect of the mediation is a case filing fee of $1,000 per party: see AMA Protocol at para 10 and Singapore International Mediation Centre Mediation Rules, Appendix B.

97 See para 36 above.

If the tribunal finds that it has jurisdiction, then it will probably refer the parties to mediation under the AMA Protocol. If the tribunal finds that it has no jurisdiction, then the parties will probably have to resort to litigation. Either way, the resolution of the jurisdictional challenge will almost definitely not result in the full and final resolution of the dispute because the challenge will almost definitely not be based on the merits of the dispute. As Cameron Ford has artfully articulated in "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol":[98]

> … requiring challenges to jurisdiction to be decided before mediation under the protocol is akin to warring nations putting the peace conference on hold while they fight a small, intense, localized but indeterminate [*sic*][99] battle elsewhere. Whatever the outcome, they would either have to go to the peace conference or fight the full-scale war.

49 The Prohibitory Approach increases the likelihood that parties can achieve a full and final resolution of their dispute through mediation, and removes the expense of the "small, intense, localized … battle" over jurisdiction that would have been needlessly incurred if the parties end up successfully settling their dispute in mediation after all. Since the costs and expenses of a hearing to decide a jurisdictional challenge are likely to outweigh the costs and expenses of mediation, parties stand to save more if the Prohibitory Approach is adopted over the Discretionary Approach.

(d) Potential for successful mediation

50 Another factor that may be relevant is whether the Discretionary Approach or the Prohibitory Approach will better promote the chances that the parties will successfully settle their dispute at mediation. In this regard, those who advocate the Discretionary Approach might argue that allowing the tribunal to make a positive finding as to its jurisdiction may make for more fruitful mediation, because a respondent would "likely be more willing to settle the matter to avoid having to go through the entire arbitration".[100]

51 This argument in favour of the Discretionary Approach requires a bit of finessing. First of all, it seems to assume that, under the AMA Protocol, there can only be *one* shot at mediation that should not be

98 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 3.

99 It is possible that Cameron Ford might have meant to say that the "small, intense, localized … battle" (*ie*, the dispute as to jurisdiction) is *non-determinative* of the "full-scale war" (*ie*, the dispute on the merits) – not that the mediation was "indeterminate" (*ie*, not exactly known, established or defined).

100 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 3.

squandered at a moment in the dispute resolution process when parties are least inclined to be conciliatory. This is a weak assumption because nothing in the AMA Protocol, SIAC Rules or the UNCITRAL Rules limits the parties in this manner. If a mediation before a jurisdictional challenge is determined proves to be unsuccessful, then it should still be open to the tribunal and the parties to agree to another mediation after the tribunal finds that it has jurisdiction over the dispute.

52 The true advantage of the Discretionary Approach is not that it would prevent the only shot at mediation from being squandered, but that it could *most effectively capitalise* on the AMA Protocol's *mandatory* provisions for the parties to mediate.

53 Under the alternative Prohibitory Approach, the parties would have to first undergo mediation, and then if that falls through, the tribunal might exercise its discretion to determine any jurisdictional challenges. If the tribunal finds that it has jurisdiction over the dispute, then the parties might conduct a second round of mediation. However, this second round of mediation would have to be voluntarily proposed by either of the parties and then voluntarily accepted by the other. At this point, counsel for the parties would have to contend with the difficulty of raising mediation as a possibility to their clients, who might perceive this as a form of weakness on the part of their lawyers, and both parties would have to contend with their strategic desire not to be seen as revealing any weakness by being the first to propose mediation or by accepting an invitation to mediate at all. This potential for an impasse might be what parties might have intended to avoid by choosing the AMA Protocol (with its mandatory provisions for mediation) in the first place.

54 Another issue that has to be considered is the psychological impact (if any) that a prior round of "unsuccessful" mediation might have on parties. More empirical studies need to be done on this issue. However, it is not difficult to imagine that a failure by the parties to reach a settlement of their dispute through an earlier round of mediation might leave the parties feeling cynical about the process or deplete any feeling of goodwill that might have existed between them. This might, in turn, mean that any subsequent attempts at mediation are less likely to be fruitful.

55 The possibility that the Discretionary Approach might prove to be a lot more conducive to the settlement of a dispute through the process of mediation is, therefore, a very real one. Those who advocate the Prohibitory Approach recognise and seem to accept this possibility,

but draw attention to the benefits of mediation that they say can be achieved – regardless of whether settlement is reached:[101]

> … it could be the case that early mediations do not produce settlements for various reasons – high emotions, beliefs in cases, costs not hurting, insufficient information and so on. This is not a reason to delay the mediation for jurisdiction challenges … [T]here is no such thing as a failed mediation. Even where settlement [is] not reached, mediation [is] very useful in getting the protagonists to face each other, drawing some of the poison that has developed between them, learning more of the other's case and attitude, learning more of your own case, and having to present your case to an independent person and seeing their reaction. Approaches to disputes are invariably refined after mediation by responding to what was learnt during the mediation.

This response might be overly idealistic. It plays up a number of nebulous benefits that may or may not eventuate (such as the "drawing … of the poison" between parties, when there is every chance that an unsuccessful attempt at mediation may actually heighten the hostility between them); and that may or may not be particularly relevant or attractive to a specific set of parties (such as where the parties already have a well-developed case before mediation). It also trivialises the very real possibility that, by prematurely mediating their dispute, parties might be jeopardising the best opportunity they might have in resolving their dispute through mediation.

56 A better response to the proponents of the Discretionary Approach may be one that takes into account the policy thinking behind and goals of the AMA Protocol. As theorised above, the AMA Protocol was not designed with Hunter's "Arbitration-First" thinking that parties can and should seek to extract from and leverage on the arbitral process as much as they can, before proceeding to mediation.[102] If that were the kind of thinking animating the AMA Protocol, then the AMA Protocol would look more like the arb-med-arb systems contemplated by the rules of the AAA, ICDR and ICC,[103] and offer the tribunal and parties much more flexibility over when the parties should proceed to mediation. This flexibility would allow the parties to choose to mediate their dispute only when they feel they are in a position where they have fully or sufficiently understood the dispute and can evaluate the strengths and weakness of

101 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at pp 2–3.

102 See paras 18–30 above.

103 See nn 72 and 74 above.

their respective positions.[104] It would also allow the tribunal to do more in the way of "choreograph[ing] the dispute resolution process".[105]

57 Instead, the AMA Protocol was "conceived to solve the problem of unenforceable mediation settlements",[106] and only begins with arbitration in order to avoid the possibility that parties might not be able to record their MSAs as arbitral awards on the grounds that there was "no real dispute" on which to base an arbitration.[107] Its main goals are to give parties an opportunity to solve their dispute through mediation as early in the dispute resolution process as possible and in so doing, minimise the cost and expense of the arbitral proceedings. It also provides both clarity and certainty for its users. To a considerable extent, these goals can only be achieved at the expense of the flexibility that would enable parties to glean the most of an "Arbitration-First" mechanism. Thus, the AMA Protocol provides that parties should mediate their dispute immediately after the exchange of the NOA and Response to the NOA.[108]

58 At the end of the day, it is probably inevitable that there will be some kind of trade-off between flexibility and the competing values of speed, cost, clarity and certainty. If the concern that "early mediations do not produce settlements … [because of] high emotions, beliefs in cases, costs not hurting, insufficient information" should be given priority over these competing concerns about speed, cost, clarity and certainty, then why stop at allowing procedural flexibility only in respect of jurisdictional challenges? Why not go all the way and allow the tribunals and the parties to decide when in the arbitration process the parties are to attempt mediation? The answer is that modifying the AMA Protocol to look more and more like the arb-med-arb systems contemplated by the rules of other arbitral institutions might erode the very features that differentiate the AMA Protocol from, and give the AMA Protocol its edge over, these other rules.

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104 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

105 J Martin Hunter, "Commentary on Integrated Dispute Resolution Clauses" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 12) (Kluwer Law International, 2005) at p 471.

106 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 8.

107 Herbert Smith Freehills, "Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre" *ADR in Asia Pacific: Spotlight on Singapore* (February 2016) at p 8.

108 AMA Protocol, para 5.

(2) Recommendation

59 For all the reasons discussed above, this article recommends the Prohibitory Approach over the Discretionary Approach. This would entail amending the AMA Protocol so that it makes clear that the tribunal should decide all jurisdictional challenges only *after* the parties have undergone mediation. The question of when exactly after mediation (that is, immediately after the mediation, in a preliminary award; or after both the mediation and the arbitration, in a final award on the merits) should remain in the discretion of the tribunal.

60 That said, there is also a "Middle-Ground Approach" that should seriously be considered. This approach would preclude the *tribunal* from deciding jurisdictional challenges before mediation under the protocol, but allow the *Registrar and/or the SIAC Court* to address challenges on a *prima facie* basis *before the tribunal is constituted*. As suggested above, this avenue of dealing with jurisdictional challenges is already available under the SIAC Rules (but not the UNCITRAL Rules). Rule 28.1 of the SIAC Rules allows the SIAC to dispose of jurisdictional challenges before the tribunal is constituted through a two-stage filtering mechanism under which (a) the Registrar shall first decide whether there is enough substance to a jurisdictional objection that it should be referred to the court; and (b) if it is referred to the court, then the court shall decide if it is "*prima facie* satisfied that the arbitration shall proceed". If the court is not so satisfied, then the arbitration should be terminated.[109]

61 Allowing the Registrar and/or the SIAC Court to address jurisdictional challenges on a *prima facie* basis under Rule 28.1 could go some way toward mitigating the concern that "a respondent who is of the view that it has credible jurisdictional objections may be less likely to enter into any settlement before its jurisdictional objections are determined".[110] A decision by the Registrar and the SIAC Court that an arbitration should proceed might signal to a respondent that his jurisdictional objections are perhaps not as strong as he might think; and that since his jurisdictional challenge might not necessarily succeed, he might as well try and settle the dispute through mediation to avoid the need for arbitration. In other words, Rule 28.1 challenges might have an important "signalling effect" on respondents which might make them more conciliatory at mediation.

62 At the same time, the fact that a Rule 28.1 challenge requires only that the SIAC Court be "*prima facie*" satisfied that the arbitration should

109 SIAC Rules, Rule 28.1.

110 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 3.

proceed means that it is likely that Rule 28.1 challenges can and should be dealt with in a quick and summary way. This means that, unlike the Discretionary Approach, the Middle-Ground Approach would not sacrifice too much of the AMA Protocol's competitive advantage in facilitating the time- and cost-efficient resolution of disputes through the prompt mediation of disputes. Since a Rule 28.1 challenge can only be raised and determined within a fixed period of time before the constitution of the Tribunal, the Middle-Ground Approach would also not sacrifice the AMA Protocol's competitive advantage in providing clarity and certainty to its users.

63 The above arguments in favour of the Middle-Ground Approach are, however, subject to two important caveats. The first caveat is that the SIAC should be committed and able to dispose of Rule 28.1 challenges in a timely manner. If not, then allowing for such challenges to be made and decided under the AMA Protocol would provide yet another means by which the dispute resolution process may be held up by a party's dilatory tactics and would detract too much from the aims and key selling points of the AMA Protocol.

64 The second caveat to this argument in favour of the Middle-Ground Approach is that a Rule 28.1 challenge might not prove to have a clear signalling effect on respondents at all. Under the previous version of Rule 28.1,[111] the applicable test was whether the SIAC Court was *prima facie* satisfied that "a valid arbitration agreement under the Rules may exist". This test was replaced by the current test, which requires a *prima facie* determination that "the arbitration shall proceed".[112]

65 It is unclear whether the amendments to the former Rule 25.1 were intended to change the substance of the test or merely to underscore the implications of the SIAC Court's determination. Most of the literature on the 2016 amendments to the SIAC Rules, including the SIAC's own announcement[113] and summary of the notable features[114] of the 2016 amendments, do not suggest that the amendments to the former Rule 25.1 were intended to be a notable or significant change to the rules. However, the plain language of the existing formulation of the test in

111 Formerly Rule 25.1 of the SIAC Rules (5th Ed, 1 April 2013).

112 SIAC Rules, Rule 28.1.

113 Singapore International Arbitration Centre, "SIAC Announces the Official Release of the SIAC Rules 2016", press release (30 June 2016) <http://siac.org.sg/images/stories/press_release/SIAC%20Announces%20the%20Official%20Release%20of%20the%20SIAC%20Rules%20%202016_30June2016.pdf> (accessed October 2019).

114 Singapore International Arbitration Centre, "Highlights of the SIAC Rules 2016" (2016) http://www.siac.org.sg/images/stories/articles/rules/SIAC%20Rules%202016_Cheat%20Sheet_30June2016.pdf (accessed October 2019).

Rule 28.1 is arguably broader than that in the former Rule 25.1 because it could take into account considerations other than the legal merits of a respondent's jurisdictional objections on the basis that there is no valid arbitration agreement. Such other considerations could include, for example, practical considerations that it is in the overall interests of the parties to quickly conduct and conclude their arbitration notwithstanding the existence of compelling jurisdictional objections.

66 Provided that these two caveats can be resolved in favour of the Middle-Ground Approach, this article argues that the Middle-Ground Approach should be adopted. If not, then the Prohibitory Approach should apply with certain modifications set out below.

B. Interim relief

67 The resolution of a dispute often takes time; and this effluxion of time can sometimes prejudice one or both parties to a dispute irreparably – assets may be dissipated, evidence destroyed and intellectual property used or disclosed.[115] Interim measures, also referred to as provisional measures, are aimed at "preserv[ing] a factual or legal situation so as to safeguard rights the recognition of which is sought from the [court or tribunal] having jurisdiction as to the substance of the case".[116] In particular, interim measures may: (a) maintain or restore the status quo pending determination of a dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.[117] Interim measures are, therefore, crucial to the functioning of a dispute resolution process in a fair and effective manner.[118]

68 Given that interim relief is intended to protect the court or tribunal's remedial authority and the parties' rights during the pendency

115 Gary B Born, "Provisional Relief in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2426.

116 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR 1 7091 at 7122, ¶37, cited in Gary B Born, "Provisional Relief in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2427 and Julian Lew, Loukas Mistelis & Stefan Kröll, "Interim and Conservatory Measures" in *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at p 585, para 23-2.

117 Model Law, Art 17(2).

118 Gary B Born, "Provisional Relief in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014).

of the dispute resolution process, it makes sense that the most critical time for seeking interim relief is often at the very outset of the parties' dispute.[119] Indeed, urgent applications for interim relief will typically arise contemporaneously with the dispute.[120]

69 Arbitral rules, such as the SIAC Rules and the UNCITRAL Rules, expressly and clearly allow parties to apply for and obtain interim relief at the early stages of an arbitration (when parties are most likely to be in need of such relief). Unfortunately, one of the perceived problems of the AMA Protocol is that it does not expressly provide for applications for interim relief.[121] This is problematic because the AMA Protocol purports to govern the early stages of an arbitration (and, indeed, seems to displace the normal procedures in favour of a stay of the arbitration immediately after the exchange of the NOA and Response to the NOA), without making clear whether it is also intended to displace or modify the procedures for parties to obtain interim relief.

70 Where parties have chosen the *SIAC Rules* but have not agreed to the AMA Protocol, they may obtain (a) emergency interim relief from an emergency arbitrator, concurrently with or following the filing of the NOA but before the constitution of the tribunal;[122] or (b) interim relief from the tribunal, at any stage of the arbitral proceedings after the constitution of the tribunal.[123] They may also obtain interim relief from the courts at any stage of the arbitral proceedings.[124] Where parties have chosen the *UNCITRAL Rules* but not the AMA Protocol, on the other hand, they may obtain interim relief from the tribunal after it has been constituted,[125] and interim relief from the courts at any stage of the arbitral proceedings, including before the constitution of the tribunal.[126]

71 The AMA Protocol's silence on the issue of interim measures raises the following questions:

119 Gary B Born, "Provisional Relief in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2451.

120 Jeffrey Waincymer, "Preliminary, Interim and Dispositive Determinations" in *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 619.

121 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 4, Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at pp 4–5.

122 SIAC Rules, Rule 30.2 and Schedule 1, para 1.

123 SIAC Rules, Rule 30.

124 SIAC Rules, Rule 30.3.

125 UNCITRAL Rules, Art 26(1).

126 UNCITRAL Rules, Art 26(9).

(a) Can the parties obtain emergency interim relief from an emergency arbitrator before the constitution of the tribunal under Rule 30.2 and Schedule 1 to the SIAC Rules?

(b) Can the parties obtain interim relief from the tribunal after the constitution of the tribunal but before the arbitration is stayed? Or does para 5 of the AMA Protocol preclude the tribunal from considering any application for interim relief by requiring the arbitration to be stayed immediately after the exchange of the NOA and the Response to the NOA?

(c) Can the parties obtain interim relief from the tribunal while the arbitration is stayed for mediation? Or does the fact that the arbitration is stayed mean that the tribunal is not in a position to consider any application for interim relief?

(d) If the parties cannot obtain interim relief from the tribunal until after the stay of arbitration is lifted, can the parties obtain such relief from the courts instead? Or will this be seen to be a waiver of the AMA Protocol? Rule 30.3 of the SIAC Rules provides that a request for interim relief made to a judicial authority is "not incompatible with *these Rules* [that is, the SIAC Rules]" [emphasis added] but it is unclear whether the AMA Protocol can be considered to be part of the SIAC Rules.

The fact that the AMA Protocol's silence on the issue of interim relief raises so many questions means that it may be considered a design flaw, because it undermines the clarity and certainty that the AMA Protocol aims generally to provide.[127]

(1) Suggested amendments

72 One suggestion is that the AMA Protocol be amended to expressly include a provision allowing the tribunal to hear interim relief applications "without prejudice to any ongoing mediation".[128] This has been understood to mean that the tribunal should be able to hear interim relief applications while the arbitration is stayed for mediation.[129]

127 See discussion at paras 18–30 above.

128 Paul Tan & Kevin Tan, "Kinks in the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (January 2018) at p 5.

129 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 1 ("Messrs Tan [*ie*, Paul Tan and Kevin Tan] also suggested clarification that a stay of arbitration does not prevent applications for interim relief in the arbitration. I agree [this] clarification is desirable").

Considering the important policy concerns underlying the issue of interim relief discussed above,[130] this suggestion seems sensible.

73 In fact, the AMA Protocol should make clear that the tribunal can hear and parties can make applications for: (a) emergency interim relief from an emergency arbitration, if this option is available, because they have chosen the SIAC Rules; (b) interim relief before the arbitration is stayed for mediation; and (c) interim relief while the arbitration is stayed for mediation. There should also be an express provision or clarification that (d) applications to the *courts* for interim relief will not be seen as incompatible with, or a waiver of, the AMA Protocol.

74 If the point of the interim measures is to ensure that the tribunal's ability to provide effective final relief is not frustrated, prevent one or both parties from suffering grave damage, or prevent the parties' dispute from being unnecessarily exacerbated,[131] then the Tribunal should absolutely not be hamstrung by the AMA Protocol from granting interim relief to parties as and when the need for such relief arises or becomes apparent. It has been said that "urgency is the *sine qua non* for interim measures"[132] and that "it is the urgency that necessitates interim protection".[133] Given this, the tribunal should not have to wait till after the mediation has concluded and/or the stay of arbitration has been lifted in order to hear applications for interim relief. Any other result would probably run counter to the parties' expectations of how their chosen dispute resolution mechanism should work since they must be presumed not to intend for their rights to potentially be prejudiced by a lack of timely interim measures.

(2) Recommendation

75 Although this article would recommend that the AMA Protocol should basically preserve the procedural regimes for the obtaining of

130 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at pp 25–26.

131 Gary B Born, "Provisional Relief in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2426.

132 Fali Sam Nariman, "Introduction" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 13 (Kluwer Law International 2007) at p 719; Kaj Hober, "Interim Measures by Arbitrators" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 13) (Kluwer Law International, 2007) at p 736.

133 Kaj Hober, "Interim Measures by Arbitrators" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 13) (Kluwer Law International, 2007) at 736: "Otherwise, one could await the final award on the merits."

interim relief under the usual SIAC Rules and UNCITRAL Rules,[134] it is worth considering whether these procedural regimes should be modified slightly to take into account the particular policy concerns underlying the AMA Protocol.

76 It has been observed that the key variations in the institutional arbitration rules empowering a tribunal to grant interim measures are in respect of: (a) the point in time when interim relief may be sought; (b) the time it takes for such an application to be resolved; (c) the criteria for the granting of relief; and (d) the form of relief that may be granted.[135] This provides a useful framework for thinking about the kind of modifications that might be necessary or desirable in light of the particular policy concerns of the AMA Protocol.

77 Applying this framework, and as this article will elaborate below, the SIAC and SIMC should not only amend the AMA Protocol to expressly provide that:

> (a) emergency interim relief and interim relief may be sought under Rule 30 of the SIAC Rules and Rule 26 of the UNCITRAL Rules *at any time in the proceedings*. It should also consider issuing the following guidelines ("the AMA Protocol Guidelines on Interim Relief") for dealing with applications for interim relief under the AMA Protocol:
>
> (b) If an application is made any before mediation is complete, then the Tribunal should issue its decision on the application *within 14 days* of the application;
>
> (c) The tribunal may consider a number of criteria before granting any relief, but should only require *prima facie findings* as to the tribunal's jurisdiction and the merits of the claimant's case; and
>
> (d) If the Tribunal is unable to make a final decision within 14 days of the application, then it should issue a *provisional order* before making an order or award after it has had the opportunity to more fully consider the application.

78 The AMA Protocol Guidelines on Interim Relief should support the AMA Protocol's goals of encouraging the time- and cost-efficient resolution of disputes through mediation by ensuring that the tribunal

134 See paras 75–79 above.

135 Jeffrey Waincymer, "Preliminary, Interim and Dispositive Determinations" in *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 623.

and the parties are not mired too deeply in time-consuming and expensive battles over interim relief before they even get the chance to mediate. Little empirical research has been done in the field of international arbitration[136] and the recent Chartered Institute of Arbitrators ("CIArb") practice guidelines on "Applications for Interim Measures" cites only to Kaj Hober's report, which provides *some* empirical data on how arbitrators deal with interim relief in practice but does not state how much time and resources applications for interim relief typically require. At least anecdotally, though, applications for interim relief can take months to resolve.

79 If the AMA Protocol does not call for a form of expedited process for dealing with interim relief applications (as the proposed guidelines above would entail), then the AMA Protocol might be undermined in at least two ways. First, an extended battle over interim relief might increase the sense of hostility between the disputing parties and diminish the prospects for the dispute to be successfully settled through mediation. Second, if the parties are nevertheless able to successfully settle their dispute at mediation, then all the time and money that they would have spent on the battle for interim relief would be all for naught.

80 The rest of this part will elaborate on the specific elements of this article's recommendations.

(a) When interim relief may be sought

81 As mentioned above,[137] the AMA Protocol should make clear that the tribunal can hear and parties can make applications for: (a) emergency interim relief from an emergency arbitration, if this option is available because they have chosen the SIAC Rules; (b) interim relief before the arbitration is stayed for mediation; and (c) interim relief while the arbitration is stayed for mediation. There should also be an express provision or clarification that (d) applications to the *courts* for interim relief will not be seen as incompatible with, or a waiver of, the AMA Protocol.

82 In other words, Rule 30 of the SIAC Rules and Art 26 of the UNCITRAL Rules apply and operate as usual so that parties should be able to request and the tribunal should be able to grant interim measures at any point in the dispute resolution process under the AMA Protocol.

136 Kaj Hober, "Interim Measures by Arbitrators" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 13) (Kluwer Law International, 2007) at p 722.

137 See para 77 above.

This is consistent with the fact that the need for interim relief might arise or become apparent to the parties at any point in the process; and whenever that need arises, it is likely to have to be dealt with urgently in order for the interim relief to be effective.

(b) Time it takes for applications for interim relief to be resolved

83 Pursuant to Schedule 1 of the SIAC Rules, an application for emergency interim relief that is filed before the constitution of the tribunal must be dealt with in accordance with the following expedited timelines:

> (a) The President has to appoint an emergency arbitrator *within one day* of the Registrar's receipt of a party's application for emergency interim relief and its payment of the administration fee and deposits.[138]
>
> (b) Any challenge to the appointment of the emergency arbitrator must be made *within two days* of the Registrar's communication to the parties about the appointment of the Emergency Arbitrator.[139]
>
> (c) The emergency arbitrator shall, as soon as possible but, in any event, *within two days* of his appointment, establish a schedule for the consideration of the application for emergency interim relief.[140]
>
> (d) The Emergency Arbitrator shall make his interim order or award *within 14 days* from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time.[141]

84 The emergency arbitrator procedure under the SIAC Rules has been lauded as a "true success story" that has already resulted in an "efficient emergency arbitrator process" that has made the SIAC a "role model in terms of emergency relief procedures".[142] The most recent iteration of this emergency arbitrator procedure in the 2016 version of the SIAC Rules was expected to further "enhance the efficiency and cost-effectiveness of the process".[143]

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138 SIAC Rules, Schedule 1, para 3.
139 SIAC Rules, Schedule 1, para 5.
140 SIAC Rules, Schedule 1, para 7.
141 SIAC Rules, Schedule 1, para 9.
142 Christopher Boog & Julie Raneda, "The 2016 SIAC Rules: A State-of-the-art Rules Revision Ensuring an Even More Efficient Process" (2016) 34(3) ASA Bulletin 584 at 598–600.
143 Christopher Boog & Julie Raneda, "The 2016 SIAC Rules: A State-of-the-art Rules Revision Ensuring an Even More Efficient Process" (2016) 34(3) ASA Bulletin 584 at 599.

85 Where the parties have agreed to the AMA Protocol and chosen the SIAC Rules, an application for emergency interim relief prior to the constitution of the tribunal should proceed in accordance with the usual procedure set out in Rule 30.2 and Schedule 1 to the SIAC Rules.

86 For all other applications for interim relief (that is, under Rule 30.1 of the SIAC Rules or Rule 26 of the UNCITRAL Rules), the AMA Protocol Guidelines on Interim Relief could take a cue from Schedule 1 to the SIAC rules and stipulate that the tribunal shall:

> (a) establish a schedule for the consideration of the application for interim relief *within two days* of the application; and
>
> (b) decide the application for interim relief *within 14 days* of the application.

With these guidelines, applications for interim relief should not hold parties up from attempting to resolve their dispute through mediation for too long or distract the parties from their attempts at mediation. And if the parties can successfully settle the dispute at mediation, they would not have invested much more than 14 days in the battle over interim relief.

(c) Criteria for the granting of interim relief

87 It has been suggested that, although jurisdictional challenges within an AMA Protocol should generally not be determined until after mediation, such challenges may be "raised *bona fide* in defence to an application for interim relief"; and if they are raised, then "it might be difficult for the Tribunal to avoid dealing with the jurisdictional challenge unless it was obviously without merit or the interim measure was extremely urgent".[144] Thus, the Prohibitory Approach would prohibit the determination of jurisdictional challenges at any point before mediation is complete, unless such jurisdictional challenges are raised in response to an application for interim relief.

88 This suggestion must be rejected, because it is neither necessary nor desirable for the tribunal to engage in an intensive and time-consuming consideration of any jurisdictional challenge arising as the result of an application for interim relief.

144 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 5.

89 First, it should not be necessary for a tribunal to decide any jurisdictional challenge before issuing an interim award under the AMA Protocol, because it is generally not necessary for a tribunal to decide such challenges when they arise as a response to applications for interim relief *in the ordinary course of (non-AMA Protocol) arbitrations anyway*. According to Art 2 of the CIArb's practice guidelines on "Applications for Interim Measures", arbitrators should examine the following criteria when deciding whether to grant interim measures:[145]

(a) *prima facie* establishment of jurisdiction;

(b) *prima facie* establishment of case on the merits;

(c) a risk of harm which is not adequately reparable by an award of damages if the measure is denied; and

(d) proportionality.

90 Requiring only that there be a "*prima facie* establishment of jurisdiction" is clearly different from requiring the tribunal to address all jurisdictional objections "unless [they were] obviously without merit".[146] Under the CIArb's practice guidelines, the tribunal would only have to consider the jurisdictional challenge before dealing with the application for interim measures if it considers that "there is little or no chance that they will have jurisdiction".[147]

91 Second, it is not desirable for the tribunal to decide jurisdictional challenges before issuing interim relief because such an approach would mean that an application for interim relief could easily serve as a pretext or backdoor for a respondent to raise a time-consuming jurisdictional challenge as a dilatory tactic in the dispute resolution process. This would carve out such a big exception to the general rule that jurisdictional challenges should only be determined after mediation that the principles behind that approach would be too easily and substantially undermined.

(d) Form of interim relief granted

92 Finally, the form of interim relief granted under the AMA Protocol should be considered. In this regard, there are generally three key forms of provisional measures that a tribunal can provide: (a) an order or direction, as opposed to an award; (b) an award; and (c) a provisional

145 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 4: Applications for Interim Measures (2016) at pp 5–6 (see Art 2).

146 Cameron Ford, "Purpose over Process – Empowering the SIAC-SIMC Arb-Med-Arb Protocol" *Singapore Law Gazette* (June 2018) at p 5.

147 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 4: Applications for Interim Measures (2016) at p 7.

order followed by a reasoned award that enshrines the details for the measures.[148]

93 Each of these different forms of interim measures has its own advantages and disadvantages – (i) an order or direction is generally less formal and can be issued more quickly; on the other hand, (ii) an award is more enforceable by courts. The final method of (iii) issuing a provisional order followed by a reasoned award is said to "preserve the best aspects from [orders and awards], *i.e.*, the speed of an order combined with the enforceability of an award".[149]

94 There may be situations when the suggested 14-day timeline for the consideration of interim relief applications[150] may not be sufficient for the tribunal to come to a well-reasoned decision on the application. In these situations, the AMA Protocol Guidelines on Interim Relief should provide that the tribunal should decide the application within the 14-day period anyway, but may consider issuing a provisional order before replacing such order with a reasoned order or award.[151] This provisional order can last the duration of the mediation and the time that the tribunal anticipates it will need for a fuller consideration of the application for interim relief after the mediation is complete. This solution should serve to allow the parties to proceed to mediation more expeditiously and, once mediation is underway, to focus on the mediation with some peace of mind that there is some interim measure in place to protect their rights. After all, practitioners have observed that arbitrator's interim measures "quite often are voluntarily executed by the parties [because] parties, in general, do not wish to contradict the arbitrators and prefer not to lose credibility with them".[152]

148 Jeffrey Waincymer, "Preliminary, Interim and Dispositive Determinations" in *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at pp 636–638.

149 Jeffrey Waincymer, "Preliminary, Interim and Dispositive Determinations" in *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at pp 636–638.

150 See paras 83–86 above.

151 Whether the interim relief is ultimately issued in the form of an award or order that will replace the provisional order is for the tribunal to decide based on various considerations, such as those set out in Art 6 of Chartered Institute of Arbitrators, International Arbitration Practice Guideline 4: Applications for Interim Measures (2016).

152 José María Abascal Zamora, "The Art of Interim Measures" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (International Council for Commercial Arbitration Congress Series No 13) (Kluwer Law International, 2007) at p 759.

95 The tribunal may also consider obtaining a declaration or an undertaking from the respondent that it will take steps to render the interim measure unnecessary.[153]

III. Conclusion

96 The AMA Protocol is an innovative hybrid system of dispute resolution that promises the best features of mediation and arbitration. It encourages the time- and cost-efficient resolution of disputes through the process of mediation, and allows parties to benefit from the enforceability of an arbitral award if mediation results in the parties' agreement to an MSA. If, on the other hand, mediation does not result in the full and final settlement of a dispute, then the parties can proceed quickly and seamlessly to arbitrate their dispute.

97 The devil lies in the details, though, and the AMA Protocol as it is presently drafted contains a number of ambiguities about (a) the arbitration commencement date; (b) the sequence of events leading up to the stay of an arbitration; (c) the mediation commencement date; and (d) the circumstances under which a mediation may be deemed to have been terminated so that the stay on arbitration can be lifted. Most of these ambiguities can be sorted out and clarified relatively easily. The last of these ambiguities, however, involves a more serious consideration of the AMA Protocol's policy concerning the enforcement of the parties' duty to mediate their dispute.

98 Various commentators have also identified a number of "kinks" or design flaws in the AMA Protocol. These flaws are that the AMA Protocol does not make express provision for jurisdictional challenges; and applications for interim measures.

99 With regard to the issue of jurisdictional challenges, this article's recommendations are that:

> (a) The AMA Protocol should adopt a "Middle-Ground Approach", under which jurisdictional challenges may be considered quickly and on a summary basis by the Registrar and/or the SIAC Court *before the tribunal is constituted*; but once the tribunal has been constituted, then jurisdictional challenges should only be considered after mediation under the AMA Protocol has been completed.

153 Chartered Institute of Arbitrators, International Arbitration Practice Guideline 4: Applications for Interim Measures (2016) Art 4(2).

(b) If the SIAC is unwilling or unable to dispose of jurisdictional challenges quickly and on a summary basis, then all jurisdictional challenges should be decided only after mediation under the AMA Protocol has been completed.

With regard to applications for interim measures, this article's recommendations are that:

(a) The AMA Protocol should be amended to expressly provide that the parties may apply for emergency interim relief and interim relief under the usual Rule 30 and Schedule 1 to the SIAC Rules and Article 26 of the UNCITRAL Rules at any time in the proceedings.

(b) The SIAC and SIMC should also issue the AMA Protocol Guidelines on Interim Relief to ensure that applications for interim relief can be decided on an expedited basis so that they do not hold up the process of mediation, or result in significant time and resources being expended before the parties have had a chance to settle their dispute at mediation.

100 The flaws discussed in this article are by no means the only issues with the protocol – merely the ones that are perhaps most pertinent because they relate to the applications that commonly arise at the outset of the arbitral process. Other flaws or questions that warrant some further study and consideration, but are outside the scope of this article, include: (a) the extent to which the expedited procedures under the SIAC Rules can co-exist with or must be displaced by the AMA Protocol; (b) the manner in which the parties' agreement to mediate should be enforced; and (c) potential problems converting MSAs into awards.

101 With regard to (a), the central conflict between the existing SIAC Rules and the AMA Protocol is as follows. When arbitral proceedings are conducted in accordance with the expedited procedure under Rule 5 of the SIAC Rules, the tribunal is required to issue a final award within six months from the date that it is constituted. In so far that the AMA Protocol requires the arbitration to be stayed for mediation for a period of eight weeks, however, the AMA Protocol may be incompatible with such expedited procedure. Should the AMA Protocol give way to Rule 5 of the SIAC Rules? Should parties be made to expressly elect one or the other of these options?

102 With regard to (b), the main issue is that in most multi-tiered systems involving mediation, the requirement to mediate is a precondition to the commencement of arbitration or litigation. If parties have not satisfied their agreement to mediate, then an arbitral tribunal may consider that it does not yet have jurisdiction to conduct

the arbitration. Under the AMA Protocol, however, the arbitration would have been commenced before the parties' agreement to mediate can be effected. What tools should the tribunal have for enforcing this agreement to mediate? It will probably not be able to refuse to lift the stay on arbitration on jurisdictional grounds. Should the tribunal issue an injunction for parties to mediate the dispute or is the matter best dealt with through the issuance of cost orders?

103 The specific nature of the parties' agreement (or duty) to mediate should also be considered. Under the Singapore AMA Clause, the parties have a duty to attempt to resolve their dispute through mediation "in good faith". Is a requirement of "good faith" necessary or desirable? Or is it better for parties to simply agree to a time limit for mediation, the expiration of which means that they can proceed to arbitration without either party having been in breach of any agreement to mediate?

104 All these questions remain to be answered for a system of dispute resolution that is promising in concept, but problematic in design.
