THE USE AND ABUSE OF ANTI-ARBITRATION INJUNCTIONS

A Way Forward for Singapore

Concomitant with the rise of international arbitrations, anti-arbitration injunctions are becoming increasingly popular as a tactical strategy. Although it may seem contrary to the policy of minimal curial intervention, this article suggests that anti-arbitration injunctions are within the jurisdiction of courts and, used in the right circumstances, are compatible with the goals of international commercial arbitration. However, the line between the acceptable use and unacceptable abuse of anti-arbitration injunctions remains fine. As anti-arbitration injunctions have far-reaching consequences, courts should tread this path with caution.

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I. Introduction

1 Singapore hosted the International Council for Commercial Arbitration Congress in 2012. It was the first time the event was held in South-East Asia, and it marks the importance of Singapore to the international arbitration community, and conversely, the importance of international arbitration to the Singapore legal and commercial communities. As arbitration continues to take root as the preferred alternative dispute resolution mechanism around the world, one question persists: to what extent should courts intervene in the arbitration process? There are many aspects to that question. This article focuses on a relatively uncharted area of curial intervention, in Singapore at least: the anti-arbitration injunction.

2 The law on anti-arbitration injunctions, described by some as "nightmare scenarios",[1] is far from consistent.[2] Deconstructed into its

* The author is grateful to his colleague, Tan Zhongshan, for sharing his thoughts on the issues addressed in this article. As usual, the author takes sole responsibility for all errors.

1 Julian Lew, "Achieving the Dream: Autonomous Arbitration" (2006) 22 Arb Int'l 179 at 180.

2 Other countries that have issued anti-arbitration injunctions are New Zealand, Malaysia, Nigeria, Israel, Indonesia and Pakistan: see Julian Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration*

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constituent elements, the law on anti-arbitration injunctions is actually a confluence of three other distinct areas of law, namely, civil procedure, conflict of laws, and arbitration. These three areas of law are in turn largely influenced by domestic statutes and rules of private international law and therefore differ from jurisdiction to jurisdiction. Seen in this light, the inconsistent positions across jurisdictions are understandable, and even expected.

3 This article will focus primarily on how the Singapore courts should address anti-arbitration injunctions in the context of international commercial arbitrations.[3] The article seeks to address two basic questions: first, whether there is a case to be made for the granting of anti-arbitration injunctions; and second, if there are good reasons to grant the anti-arbitration injunction, whether the Singapore courts have such a power. There will be aspects of the anti-arbitration injunction that, though important, cannot be addressed within the confines of this article. These include the question of whether the anti-arbitration injunction should be a freestanding injunction, as well as a detailed analysis of the factors that the court should consider in determining when it should exercise its equitable jurisdiction to grant the anti-arbitration injunction.

4 In the final analysis, it is humbly suggested that the anti-arbitration injunction is a valuable tool[4] of the supervisory court's arsenal of orders to regulate arbitrations seated within its jurisdiction, and that the supervisory court has the jurisdiction to grant such injunctions. At the same time, the courts' power to grant anti-arbitration injunction is a drastic remedy that must be exercised sparingly and with proper regard to the policy of promoting international commercial arbitration as an alternative autonomous dispute resolution mechanism. A measured approach towards the anti-arbitration injunction will ultimately yield benefits to adopters and practitioners of arbitration in Singapore.

2006: Back to Basics? International Council for Commercial Arbitration Congress Series No 13 (Albert Jan van den Berg ed) (Kluwer, 2007) at pp 198–199.

3 The article will only focus on international commercial arbitrations as opposed to domestic commercial arbitrations or investment arbitrations under the International Centre for Settlement of Investment Disputes Convention.

4 In *West Tankers Inc v RAS Riunione Adriatica de Sicurta SpA* [2007] UKHL 4 at [19], Lord Hoffmann stated that the *anti-suit injunction* is an "important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration".

II. Anti-arbitration injunction – An overview

A. Nature of an anti-arbitration injunction

5 The anti-arbitration injunction, as the name suggests, is an injunction to restrain arbitration from commencing or continuing.[5] Though it has sometimes been referred to as the "anti-suit injunction",[6] it would be more accurate to term the injunction to restrain an arbitration as an anti-arbitration injunction. The anti-arbitration injunction is an extremely flexible instrument. It may be issued against a party or even against the arbitral tribunal.[7] It may be sought before an arbitration commences, in the course of the arbitration hearing or after the substantive hearing has concluded, but before the final award is rendered. It may even be issued to prevent a party from enforcing an arbitral award.[8] The effect of the anti-arbitration injunction evidently depends on when the injunction is sought and granted, and against whom it is ordered.

6 An order granting an anti-arbitration injunction acts *in personam* against the party who is being restrained ("the respondent"). As with any other *in personam* order, the anti-arbitration injunction only binds the respondent. It must be emphasised that the injunction does not negative the respondent's right to pursue its substantive rights. Indeed, the respondent may elect not to comply with the injunction and proceed with the arbitration. Nevertheless, anti-arbitration injunctions issued by courts are a powerful remedy for a party seeking to restrain arbitration ("the applicant"). A breach of an anti-arbitration injunction issued by a court amounts to contempt and the respondent may be punished by a fine or imprisonment.[9] If a judgment obtained in breach of an anti-suit injunction is unenforceable,[10] an award obtained in breach of an anti-arbitration injunction should meet the same fate. As Briggs observed of the anti-suit injunction, "[A]s an antidote to

5 See Julian Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* International Council for Commercial Arbitration Congress Series No 13 (Albert Jan van den Berg ed) (Kluwer, 2007) at pp 185–220.

6 Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in *Pervasive Problems in International Arbitration* (Loukas Mistelis & Julian Lew eds) (Kluwer, 2006) at para 10-03.

7 Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in *Pervasive Problems in International Arbitration* (Loukas Mistelis & Julian Lew eds) (Kluwer, 2006) at para 10-04.

8 See, for *eg*, *Oil & National Gas Commission Ltd v Western Co of North America* AIR (1987) SC 674.

9 *West Tankers Inc v Allianz SpA* [2009] 3 WLR 696 at [14].

10 *Toepfer International GmbH v Molino Boschi* [1996] 1 Lloyd's Rep 510; *Philip Alexander Securities and Futures Ltd v Bamberger* [1996] CLC 1757.

jurisdictional shenanigans its usefulness is second to none."[11] The same can be said of the anti-arbitration injunction.

B. Similarities and differences between the anti-suit and anti-arbitration injunction

7 The anti-arbitration injunction is a direct derivative of its more prominent sister remedy, the anti-suit injunction. The history of the anti-suit injunction is well documented,[12] and its pedigree, steeped in equity, should apply equally to the anti-arbitration injunction. Although there are similarities between the two, there are at least two key differences. First, the anti-arbitration injunction can be issued not just against a party, but against the arbitrators.[13] While it is theoretically plausible that an anti-suit injunction may be issued against a judge of a foreign court, this has never occurred and would indeed be wholly inappropriate as a matter of judicial courtesy.[14] Second, there is an undeniable element of intrusion into the foreign court's sovereignty when an anti-suit injunction is granted. Courts have been offended by the issuance of anti-suit injunctions by courts of other jurisdictions even if the anti-suit injunction is personal to the party being restrained.[15] For this reason, issuing courts are generally extremely wary when considering whether to grant the anti-suit injunction.[16] However, the anti-arbitration injunction does not offend the sovereignty of any foreign court or state machinery. Although an arbitration is subject to the curial regime of a particular jurisdiction,[17] it is hardly expressed as an extension of the State's machinery. Indeed, the curial courts are, in many instances, the very court that may be asked to issue the anti-arbitration injunction. There will be no issue of trespass of sovereignty in those cases. Thus, protests against the anti-suit injunction premised on a breach of state sovereignty are less effective in the context of the anti-arbitration injunction.

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11 Adrian Briggs, "Anti-Suit Injunctions and Utopian Ideals" (2004) 120 LQR 529 at 530.

12 David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Thomson, 2nd Ed, 2010) at paras 12.07–12.17.

13 See *Weissfisch v Julius* [2006] EWCA (Civ) 218, though the anti-arbitration injunction was not granted for reasons other than the fact that it could not be granted against an arbitrator.

14 See *Bushby v Munday* (1821) 56 ER 908 at 913; Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) at para 3.20.

15 *Re the Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320 (Oberlandesgericht Dusseldorf) C-24/02; *Marseilles Fret SA v Seatrano Shipping Co Ltd* [2002] ECR I-3383 (Tribunal de Commerce, Marseille).

16 *Barclays Bank plc v Homan* [1993] BCLC 680 at 690; *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 95E.

17 Unless one adopts the non-conventional conception of arbitrations as delocalised.

C. The emergence of the anti-arbitration injunction

8 Anti-arbitration injunctions have been around for a long time, and have been permitted for a wide variety of situations, though there is little uniformity across judicial decisions. In the late 19th century and early 20th century,[18] the bulk of the authority suggested that where a claim in arbitration fell outside an existing arbitration agreement, the court had no power to restrain it, as such an arbitration did not amount to an infringement of a legal or equitable right.[19] Notwithstanding, a party could restrain the arbitration by contending that the arbitration agreement was void or voidable, had been discharged by frustration or breach, or that the terms of the arbitration agreement were not complied with.[20] More recent authorities demonstrate that anti-arbitration injunctions have been granted in response to a breach of an agreement not to arbitrate,[21] an arbitration of an issue that is *res judicata*,[22] a breach of an exclusive jurisdiction agreement[23] and the commencement of arbitration against a third party who was not party to the arbitration agreement.[24] An applicant who maintains that it is not subject to the jurisdiction of the arbitral tribunal may seek injunctive relief from the courts to protect his right not to be subject to arbitration.[25] Ostensibly, the applicant must establish that it is not bound by any arbitration agreement with respect to the dispute in question. The applicant may do so by seeking a declaration to that effect in court.[26] If it satisfies the court that it is not subject to an arbitration agreement, the court will then have a basis on which to grant the anti-arbitration injunction.

9 It is beyond doubt that the anti-arbitration injunction is a relief recognised in numerous jurisdictions,[27] from Pakistan[28] to the US,[29] the

18 See generally Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) at para 11.02.

19 *The North London Railway Co v The Great Northern Railway Co* (1883) 11 QBD 30; *Wood v Lillies* (1892) 61 LJ Ch 158; *Steamship Den of Airlie Co Ltd v Mitsui and Co Ltd* (1912) 17 Com Cas 116.

20 *Malmesbury Railway Co v Budd* (1876) 2 Ch D 113; *Beddow v Beddow* (1878) 9 Ch D 89.

21 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 623 and 642.

22 *Compagnie Européenne de Céréales SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 305–306.

23 *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KFT* [2011] 1 Lloyd's Rep 252.

24 *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289.

25 Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation* (Informa, 2009) at p 96.

26 See, for instance, *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 at [84].

27 Canada: see *Lac d'Amiante du Canada Ltee v Lac d'Amiante du Quebec Ltee* JQ (Quicklaw) No 5438 (29 November 1999) (CA, Quebec) (unreported); India: see *Union of India v Dabhol Power Co* (IA No 6663/2003) (Case No 1268/2003) (HC, Delhi) (unreported); Brazil: see *Companhia Paranaense de Energia v UEG*

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UK[30] and Australia,[31] even if there are still some countries where the anti-arbitration injunction is frowned upon.[32] Despite the modern recognition of the permissibility of the anti-arbitration injunction, the position in Singapore remains unsettled. Only one case has considered the issue: *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush*[33] ("*Mitsui*"). The High Court appears to have rejected the anti-arbitration injunction on grounds of incompatibility with the UNCITRAL Model Law on International Commercial Arbitration[34] ("Model Law"). *Mitsui*, however, must be read carefully. As will be demonstrated later,[35] a proper reading suggests that the decision must be confined to its facts.

III. Case for the anti-arbitration injunction

10 At this juncture, it is apposite to first consider and establish the case for the anti-arbitration injunction.

Arauncaria Ltda 21 RDBA 421 (3 June 2003); and Indonesia: see *Persusahaan Pertambangan Minyak Dan Gas Bumi Negara v Karaha Bodas Co* (1 April 2002) (unreported).

28 *Hubco v Water and Power Development Authority of Pakistan (WAPDA)* (2000) 16 Arb Int'l 439.

29 Cases in favour of anti-arbitration injunctions include *Satcom International Group plc v Orbcomm International Partners* (1999) 49 F Supp 2d 331; *Société Generale de Surveillance SA v Raytheon European Management and Systems Co* (1981) 643 F 2d 863; *Masefield AG v Colonial Oil Industries Inc* (2005) WL 911770. However, *cf* cases not in favour of anti-arbitration injunctions: *URS Corp v Lebanese Co for the Development and Reconstruction of Beirut Central District* (2007) 512 F Supp 2d 199; *Ghassabian v Hematian* (2008) WL 3982885.

30 *Elektrim SA v Vivendi Universal SA* [2007] 2 Lloyd's Rep 8; *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289; *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KFT* [2011] 1 Lloyd's Rep 510; *Republic of Kazakhstan v Istil Group Inc* [2008] 1 Lloyd's Rep 382.

31 *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (19 January 1996) (Fed Ct, Aust) (unreported).

32 For instance, France: see *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea* (29 March 2010) (Tribunal de Grande Instance, Paris) (unreported); *SA Elf Aquitaine and Total v Mattei* (6 January 2010) (Tribunal de Grande Instance, Paris) (unreported); and Switzerland: see *Air (PTY) Ltd v International Air Transport Association* (2005) 23 *ASA Bulletin* 739.

33 [2004] 2 SLR(R) 14.

34 UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, annex I (as adopted on 21 June 1985).

35 See para 74 below.

A. Arguments from principle

11 The judicial decisions on the anti-arbitration injunction[36] reveal that there are two main reasons for a party to apply for an anti-arbitration injunction from the courts: (a) the absence of an obligation to arbitrate the dispute; and (b) the nature of the dispute or issue in dispute is non-arbitrable. The applicant may allege the following: the disputed arbitration agreement was never formed between the parties; the disputed arbitration agreement had been discharged by frustration or breach, or is incapable of being performed; the applicant is only bound to arbitrate *some* disputes, but not others; the arbitration is in breach of an exclusive jurisdiction agreement or another arbitration agreement; the arbitration is in breach of an agreement to resolve the dispute to an alternative dispute resolution mechanism such as conciliation or expert determination; or there is an issue that is non-arbitrable. In substance and essence, these are objections to jurisdiction.

(1) Principle of kompetenz-kompetenz[37] *is not supreme*

12 The orthodoxy dictates that when the arbitral tribunal's jurisdiction is challenged, the arbitral tribunal shall have jurisdiction to resolve challenges to its jurisdiction. This principle of *kompetenz-kompetenz* is well enshrined in national and international arbitration laws. Gaillard calls it the "bedrock principle"[38] even though it has given rise to much controversy and misunderstanding, and continues to be the subject of considerable divergence between different legal systems.[39]

13 At its core, the principle of *kompetenz-kompetenz* mandates that it is the arbitral tribunal that has jurisdiction to determine whether it has jurisdiction to decide on the substantive merits of the dispute. Despite it being a widely held view, the arbitral tribunal's jurisdiction to determine the validity of the arbitration agreement is more complicated than just a straightforward application of the *kompetenz-kompetenz* principle. The gravest misconception of the *kompetenz-kompetenz*

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36 See nn 21–31 above.

37 As the learned editors, Emmanuel Gaillard and John Savage, of *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) observed at para 651, the term "*kompetenz-komptenz*" is paradoxical. This is because the traditional German meaning of the term implies that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any court. Yet, this concept is clearly rejected in Germany and indeed elsewhere.

38 Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in *Pervasive Problems in International Arbitration* (Loukas Mistelis & Julian Lew eds) (Kluwer, 2006) at para 10-21.

39 See generally Emmanuel Gaillard & John Savage eds, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) at paras 650–659.

principle is that it precludes judicial review; it does not.[40] Modern authorities have confirmed that judicial review of an arbitral tribunal's decision on jurisdiction is not precluded in setting aside and enforcement of arbitral award proceedings.[41] Judicial determination on the jurisdiction of arbitral tribunals is also not precluded before an arbitral award is rendered. Perhaps the most illuminating observation yet on the reviewability of an arbitral tribunal's jurisdiction even before an award is rendered is contained in the speech of Lord Collins in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*. Lord Collins said:[42]

> So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. *But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it.* Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal. [emphasis added]

14 In Singapore, s 6 of the International Arbitration Act[43] ("IAA") conclusively establishes the power of the courts to review questions pertaining to the arbitral tribunal's jurisdiction *apart* from setting aside and enforcement of arbitral awards proceedings.[44] Section 6 provides that the court shall stay its proceedings in respect of matters that are subject to an arbitration agreement, *unless* the arbitration agreement is "null and void, inoperative or incapable of being performed". Section 6

40 *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp* (2003) 334 F 3d 274 at 228. *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 659. See Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1990) at p 74.

41 *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] 2 All ER (Comm) 476; *Anglia Oils Ltd v The Owners/Demise Charterers of the Vessel Marine Champion* [2002] EWHC 2407 at [16]; *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476. See also William Park, "Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators" (2000) 9 ADRLJ 19 at 29.

42 [2010] 3 WLR 1472 at [84].

43 Cap 143A, 2002 Rev Ed.

44 Section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) is also substantially similar to Art II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (entered into force on 7 June 1959; known as the New York Convention), in that the stay of court proceedings is subject to the arbitration agreement not being "null and void, inoperative or incapable of being performed".

implicitly assumes that a party can commence court proceedings even for matters that are governed by an arbitration agreement. It is up to the party relying on the arbitration agreement to come to court to seek a stay of court proceedings pursuant to s 6.

15 In fact, *even if* s 6 is invoked, in deciding whether to stay the court proceedings in favour of arbitration, the court *must* determine whether the claim that the arbitration agreement is null, void or inoperative has any merits, as required by the language of s 6. This is an issue of validity of the arbitration agreement.[45] Clearly, the party who has commenced court proceedings may successfully resist a stay application if it can satisfy the court that the arbitration agreement is invalid.[46] That this is so has never been questioned by the Singapore courts.[47] Under s 6, the court is not just *in a position* to resolve questions pertaining to the validity of the arbitration agreement, it is *obliged* to do so.[48] This is not just a peculiar feature under the IAA; indeed, it is reflected in Art 8(1) of the Model Law.[49] This is also the position in England.[50]

16 Indeed, there is no rule of jurisdiction that a party who wishes to raise an issue of the effectiveness of an arbitration clause has to go through with the arbitration and the relevant procedures for challenging the jurisdiction of the arbitral tribunal.[51] Conceptually, a party may apply to court for a declaration that a particular arbitration agreement

45 See *Buckeye Check Cashing Inc v Cardegna* (2006) 546 US 440 where the court held that to invoke the "null and void" defence, the party must prove that the arbitration agreement *itself* – and not just the main contract – is subject to one of the typical substantive invalidity defences such as fraud and duress.

46 The position that the courts can examine the merits of a jurisdiction argument in a stay of court proceedings application is the same in the UK: see *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522; *Albon v Naza Motor Trading Sdn Bhd* [2008] 1 Lloyd's Rep 1.

47 See *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732.

48 See Gary Born, *International Commercial Arbitration, Volume 1* (Kluwer, 2009) at p 977 where he made the same point in respect of Art II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

49 Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) states:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

50 *Al-Naimi v Islamic Press agency Inc* [2000] 1 Lloyd's Rep 522; *Albon v Naza Motor Trading Sdn Bhd* [2008] 1 Lloyd's Rep 1.

51 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [99]; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 at [99].

is invalid and the court would have to, *regardless* of whether the other party invokes s 6 of the IAA, resolve whether the arbitration agreement is invalid. To put it simply, the effectiveness of the principle of *kompetenz-kompetenz* enshrined in Art 16(1)[52] of the Model Law is tempered by s 6 of the IAA.

17 An anti-arbitration injunction indubitably encroaches into, and chips away at, this bedrock principle by *potentially* removing the jurisdiction of the arbitral tribunal to decide its own jurisdiction. This may occur when the applicant suspects that the respondent is about to commence arbitration against it. The applicant may seek a declaration from a court that it is not bound by the purported arbitration agreement and that the respondent should be restrained from commencing arbitration. If there are occasions when it would be inappropriate to allow the arbitral tribunal to determine the validity of the arbitration agreement, the corollary must be that it may be appropriate to *restrain* the arbitral tribunal from making a determination of the validity of the arbitration agreement pending the court's decision. One such occasion where the arbitral tribunal should not be left to determine its own jurisdiction when the court is seised of the jurisdictional question is when the applicant seeks an anti-arbitration injunction on the basis that the arbitration agreement was never formed.[53]

(a) Validity of the arbitration agreement

18 If the facts and legal arguments impinge directly on the validity of the arbitration agreement – that is, validity of incorporation of the arbitration agreement,[54] forgery of the main contract that contains the arbitration agreement[55] or simply the case that the offer of the main contract was never accepted – there is no *a priori* reason why the courts

52 Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) states:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

53 See *Dicey, Morris & Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at pp 1599–1604; Kelvin Low, "Choice of Law in Formation of Contracts" (2004) 20 JCL 167; Adeline Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract" in *Re-Examining Contract and Unjust Enrichment* (P Giliker ed) (Martinus Nijhoff, 2007) at p 155.

54 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [16].

55 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [34].

should defer entirely to the principle of *kompetenz-kompetenz*.[56] Using the *kompetenz-kompetenz* principle as the basis for allowing an arbitral tribunal in these cases of contract formation to have free rein to determine jurisdiction is akin to permitting the arbitral tribunal to pull itself up by its own bootstrap.[57] If the arbitral tribunal asserts jurisdiction to determine whether the disputed arbitration agreement was formed, the objection to the arbitral tribunal's jurisdiction on the ground that the arbitration agreement is invalid would effectively be a hollow objection.

19 At its simplest, if the arbitration agreement was never formed, there is considerable logical difficulty with permitting the arbitral tribunal contemplated by the putative arbitration agreement to determine if the same arbitration agreement was even formed. An arbitral tribunal cannot cloak itself with jurisdiction when it has none.[58] As the US Court of Appeals for the Third Circuit held, a "contract cannot give an arbitral body any power, much less a power to determine its own jurisdiction *if the parties never entered into it*" [emphasis added].[59] Viscount Simon summed it up best in *Heyman v Darwins*:[60]

> If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void.

20 Further, if the arbitral tribunal finds that the arbitration agreement was not formed such that the arbitral tribunal has no jurisdiction to hear the merits of the dispute, its decision on jurisdiction is arguably[61] invalid as well, since it could not have had the jurisdiction

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56 See *Fouchard, Gaillard, Goldman on International Commercial Arbitration* ((Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 658.

57 Peter M North, *Private International Law Problems in Common Law Jurisdictions* (Martinus Nijhoff, 1993) at p 115.

58 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472 at [24]. See also Nicholas Poon, "Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration: *AJU v AJT*" [2012] Sing JLS 1 at 9.

59 *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp* (2003) 334 F 3d 274 at [55].

60 [1942] AC 356 at 366.

61 This problem may be overcome if one accepts that the parties had submitted to the arbitral tribunal's jurisdiction to determine its own jurisdiction. A decision that the arbitral tribunal does not have jurisdiction would then still be binding. See also *First Options of Chicago Inc v Manuel Kaplan* (1995) 115 S Ct 1920 at 1943 (though this decision has been harshly criticised) where the US Supreme Court stated:

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to make that finding in the first place.[62] While *kompetenz-kompetenz* may be justified on grounds of policy and certainty, there is nothing in the doctrine that strips courts of their power to exercise jurisdiction over a dispute, which they plainly have. One must not lose sight of the core understanding of *kompetenz-kompetenz*: it prorogates jurisdictional power to the arbitral tribunal but it does not negative the jurisdictional power conferred on courts by their own private international law rules.

21 Thus, a sensible suggestion to avoid this *circulus inextricabilis* is to permit the courts, when asked, to resolve the issue of the validity of the arbitration agreement if the alleged invalidity is premised on the argument that the arbitration agreement was never formed. In principle, there should be no strong objection to this approach.[63] Even though most common law[64] and civil law systems[65] generally strive to give effect to arbitration agreements by resorting to techniques such as the principle of "effective interpretation"[66] or the "presumption of arbitration",[67] there is still some recognition that there are limits to upholding arbitration agreements.[68] For instance, although the Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd* recognised

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute [references omitted], so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in narrow circumstances. [references omitted]

62 See Law Reform Committee, *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (Singapore Academy of Law, 2011) at [20]; *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [34].

63 See also Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation* (Informa, 2009) at p 96. In principle, this is arguably not in contravention of Arts II–III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), as the New York Convention protects "valid arbitration agreements, not non-existent or invalid agreements": Gary Born, *International Commercial Arbitration, Volume 1* (Kluwer, 2009) at p 1052.

64 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [31].

65 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 478. *Cf* the position in the People's Republic of China, where the principle of effective interpretation appears not to be recognised: Loukas Mistelis, *Concise International Arbitration* (Kluwer, 2010) at p 676.

66 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 478.

67 *Moses H Cone Memorial Hospital v Mercury Construction Corp* (1983) 460 US 1 at 24–25.

68 See *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm) at [55]–[58].

the principle of effective interpretation as a canon to be applied when dealing with arbitration agreements, it judiciously cautioned against giving effect to arbitrations that are "not within the contemplation of either party".[69] The same emphasis on agreement was made in *Tjong Very Sumito v Antig Investments Pte Ltd* where the Court of Appeal cautioned that courts should be "slow to find reasons to assume jurisdiction over a matter that the parties have *agreed* to refer to arbitration".[70] The potential absence of agreement is a sufficient reason for the court to sidestep the shield of *kompetenz-kompetenz*.[71] If after an examination the court concludes that there is no valid and subsisting arbitration agreement, a final anti-arbitration injunction must be an available remedy to the applicant.

(b) Scope of the arbitration agreement

22 There appears to be a distinction between disputes as to the existence of the arbitration agreement, and disputes as to the scope of the arbitration agreement. It has been said that an anti-arbitration injunction is justified in the former type of dispute, but should not be in the latter.[72] In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* ("*Bremer Vulkan*"), Lord Diplock acknowledged that the anti-arbitration injunction may be granted where "one party claims that the arbitration agreement relied upon was void or voidable *ab initio*".[73] He was quick, however, to distinguish this sort of cases from the other type, where one party claims that no dispute has arisen under the arbitration agreement. In this latter situation, Lord Diplock held that whether there is a dispute or not is a matter to be decided by the arbitrator, and no injunction will be granted.[74] With respect, the dichotomy drawn by Lord Diplock is unnecessary and conceptually inconsistent. Where an arbitration agreement is void *ab initio*, the parties plainly have not agreed to arbitrate. Where there is an arbitration agreement that covers disputes X, Y and Z, but the dispute between the parties is dispute W, it cannot be said that the parties had agreed to arbitrate dispute W. Instead, it is more precise to say that there is an arbitration agreement in respect of disputes X, Y and Z, but no

69 [2009] 3 SLR(R) 936 at [31].

70 [2009] 4 SLR(R) 732 at [29].

71 The position is somewhat different in France, where the Court of Cassation previously held that the "arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment" as long as that question has been brought before it: *Coprodag v Dame Bohin* Cass 2e civ (10 May 1995).

72 *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KFT* [2011] 1 Lloyd's Rep 510 at [42]; Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) at para 11.20.

73 [1981] 1 AC 909 at 981. See *Kitts v Moore* [1895] 1 QB 253.

74 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 AC 909 at 981. See *R v National Joint Council for the Craft of Dental Technicians (Disputes Committee) ex parte Neate* [1953] 1 QB 704.

agreement to arbitrate in respect of dispute W. Therefore, from a contractual basis, the objection to jurisdiction is no different from that in cases of non-formation.

23 Thus, the strength of the principle of *kompetenz-kompetenz* is significantly weakened when there is a real doubt as to whether the applicant had agreed to arbitrate the dispute in question.

(2) Subject matter non-arbitrability[75]

24 The non-arbitrability of the subject matter in a dispute presents another compelling case for requesting for an anti-arbitration injunction.[76] Subject matter non-arbitrability is a form of absence of jurisdiction, but it arises in a different way from the typical absence of jurisdiction cases. In the latter, the basis for the absence of jurisdiction is the absence of a promise to arbitrate; this affects the arbitral tribunal's *in personam* jurisdiction over the applicant. The former, however, admits that the arbitral tribunal may have *in personam* jurisdiction over the applicant, but that jurisdiction does not cover the specific subject matter in question.

25 The Singapore courts came close to the possibility of having to consider an anti-arbitration injunction because of subject matter non-arbitrability. In *Larson Oil and Gas Pte Ltd v Petroprod Ltd*,[77] the appellant sought a stay of court proceedings pursuant to s 6(2) of the Arbitration Act,[78] on the ground that the dispute fell within an arbitration agreement. The Court of Appeal declined to grant a stay, on the basis that the dispute, which arose from the operation of the statutory provisions of the insolvency regime, was non-arbitrable. Ostensibly, if the appellant in that case had continued with the arbitration, the court would have ample reason to grant an anti-arbitration injunction to restrain an arbitration of a non-arbitrable dispute.

26 Another instance where an anti-arbitration injunction may be justified because of subject matter non-arbitrability is where the legality of certain acts of a public body may be integral to one of the parties'

75 The author is grateful to Kelvin Poon (Partner, Rajah & Tann LLP) for sharing his views on some of the arguments canvassed in this subsection.

76 *Cf*, however, Born, who argued that the non-arbitrability of a dispute "ought never to be grounds for enjoining an arbitration". His suggestion, instead, is for the national court to permit litigation of the putatively non-arbitrable dispute and refuse to recognise any arbitral award dealing with the subject: Gary Born, *International Commercial Arbitration, Volume 1* (Kluwer, 2009) at p 1055.

77 [2011] 3 SLR 414.

78 Cap 10, 2002 Rev Ed.

case in the arbitration,[79] such as in *Arqiva Ltd v Everything Everywhere Ltd*[80] ("*Arqiva*"). In that case, there was an issue between private parties as to whether the transfer of spectrum licences was invalid under s 30 of the Wireless Telegraphy Act 2006.[81] Ramsey J held that this concerned the exercise of powers by the relevant regulator, the Office of Communications ("Ofcom"), and that Ofcom should be given the opportunity to make submissions on the relevant issue. He therefore decided the issue subsequently only after Ofcom had served a witness statement and made the relevant submissions.[82]

27 It is conceivable that the situation in *Arqiva* may arise in the course of an arbitration. The parties, and even the arbitral tribunal, may differ on whether the non-arbitrable issue should first be referred to the courts for adjudication, particularly if this non-arbitrable issue only arose at an advanced stage of the proceedings. If the arbitral tribunal refuses to stay the arbitration, whether on its own motion or on the objections of one party, the party seeking to have the non-arbitrable issue adjudicated by the courts may nevertheless commence court proceedings to have that issue determined. However, if it wants to ensure that any court decision on the issue is not redundant in so far as its relevance to the substantive merits of the award is concerned – for instance, if the court is only likely to arrive at a decision way after the arbitral tribunal renders its award – it should simultaneously apply for an anti-arbitration injunction to restrain the other party from proceeding with the arbitration.

28 The need to adjourn proceedings for one party to refer a matter to another adjudicatory body is not unheard of in the context of court proceedings. Indeed, the Rules of Court[83] provides an example where the Singapore court may refer a matter to a foreign court. Order 101 r 2(1) provides that Singapore courts have the power to order parties to seek the New South Wales court's determination of an issue if the issue concerns New South Wales law.[84] Even outside of statutory

79 This has happened in the context of litigation where the legality of a public body's action is a collateral issue, in the sense used in *O'Reilly v Mackman* [1983] 2 AC 237. See also *Cocks v Thanet BC* [1984] 2 AC 286 and *Roy v Kensington* [1992] 1 AC 624.

80 [2011] EWHC 1411 (TCC) at [69]–[70].

81 c 36 (UK).

82 *Arqiva Ltd v Everything Everywhere Ltd* [2011] EWHC 2016 (TCC).

83 Cap 322, R 5, 2006 Rev Ed.

84 Order 101 r 2(1) of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) read with O 101 r 6. Order 101 r 2(1) states:

> Where in any proceedings before the Court there arises any question relating to the law of any specified foreign country or to the application of such law, the Court may, on the application of one or more of the parties, order that proceedings be commenced in a court of competent jurisdiction in that specified foreign country seeking a determination of such question.

(*cont'd on the next page*)

requirements, courts have also been known to refer specific issues to be determined by other foreign courts. In *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR*,[85] the main issue for the Singapore Court of Appeal was whether an English judgment obtained by one party was enforceable by way of registration under the Reciprocal Enforcement of Commonwealth Judgments Act.[86] However, this raised a subsidiary threshold issue of whether the English judgment was first unenforceable in England, as the enforceability of a Commonwealth judgment in the jurisdiction in which it was obtained is a prerequisite for registering that judgment in Singapore.[87] In view of the fact that the parties' experts on English law had diametrically opposing views, the Singapore Court of Appeal adjourned the proceedings and directed the party seeking enforcement to refer the threshold issue to the English courts for determination.[88] This was done and the English High Court held that the English judgment was still enforceable in England.[89] When the matter came back before the Singapore Court of Appeal subsequently, the court accepted the English High Court's decision and proceeded to address the main issue on that basis.[90]

B. Arguments from policy

(1) Anti-arbitration injunction does not undermine arbitration

29 It is important to underscore the point that the anti-arbitration injunction does not necessarily undermine the efficacy of arbitration as an autonomous, self-sufficient dispute resolution mechanism. As a preliminary point, while there is an unmistakable trend and state policy in Singapore to promote international commercial arbitration, with the corollary being minimal curial intervention, minimal curial intervention is not tantamount to *zero* curial intervention. This distinction is fundamental. Although the courts are keenly aware of the importance of minimal curial intervention in the scheme of promoting international commercial arbitrations,[91] they are at the same time alive

Order 101 r 6 designates New South Wales as a "specified foreign country".

85 [2009] 2 SLR(R) 166.

86 Cap 264, 1985 Rev Ed.

87 See the Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 67 r 3(1)(*c*)(i).

88 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [10]–[11].

89 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2008] EWHC 801 at [27].

90 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [17].

91 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29] where the Court of Appeal stated:

(*cont'd on the next page*)

to the need for a balance to be struck. This was exemplified by V K Rajah JA's speech at the Singapore International Arbitration Forum 2010. While he reaffirmed the Singapore courts' commitment to international commercial arbitration, Rajah JA reminded that "there need be no concerns whatsoever about our Courts performing a medieval dance in the discharge of their responsibilities in supervising international arbitrations, if and when they are asked to do so".[92] Most recently at the International Council for Commercial Arbitration Congress 2012, Sundaresh Menon CJ, who was then Attorney-General of Singapore,[93] also confirmed the need for increased regulation of international arbitrations generally.[94]

30 In fact, curial intervention in the form of granting anti-arbitration injunctions is justified because the injunction is not necessarily antithetical to the promotion of international commercial arbitration. Counterintuitive as it may seem, a measured approach to anti-arbitration injunctions may, in fact, operate to promote arbitration. For instance, in cases where the jurisdiction of the arbitral tribunal is disputed and a challenge has already been brought to the courts,[95] it would be far more time- and cost-efficient if the arbitration is restrained while the court rules on the jurisdictional issue.[96] That would be necessary if there is no consent to voluntarily stay the arbitration. If the respondent successfully persuades the arbitral tribunal to continue with the arbitration[97] and the court subsequently determines that the arbitral tribunal has no jurisdiction, the award would in all likelihood be set aside when the applicant commences setting aside proceedings. Both sides would then have wasted unnecessary costs on the substantive

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> Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitrations … In short, the role of the court is now to support, and not to displace the arbitral process.

92 Peter Megens, "Singapore Arbitration and the Courts: *Quo Vadis*?" (2012) 78(1) *Arbitration* 26 at 26–27.

93 Former Attorney-General Menon assumed the post of The Honourable the Chief Justice of Singapore on 6 November 2012.

94 Sundaresh Menon CJ, Opening Plenary Session of the International Council for Commercial Arbitration Congress 2012, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (10 June 2012) at paras 51–80 <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 11 September 2012). However, it should be pointed out that Menon CJ opined (at para 44) that the courts are "ill suited" to meet the challenges faced by the arbitration community.

95 For instance, pursuant to Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) read with s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

96 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 678.

97 Arbitral tribunals have been said to be reluctant in staying the arbitration for a variety of reasons, not least because it entails a delay of the arbitral process: Gary Born, *International Commercial Arbitration, Volume 1* (Kluwer, 2009) at p 976.

hearings and the arbitrators' fees. The less parties feel that costs have been wasted in a process, the more commercially appealing that process will become.

31 Most pertinently, if all jurisdictional issues are resolved at an early stage, the award ultimately rendered by the arbitral tribunal would be significantly less susceptible and prone to successful challenges. This is particularly so if the parties have had their attempt at convincing the supervisory court of their arguments on jurisdiction.[98] Such an award is unlikely to be set aside by the supervisory court and any subsequent attempt at raising the same jurisdictional arguments in enforcement courts would likely be disregarded, even though a question of whether a ground for refusing enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a matter that is entirely for the enforcing court to decide.[99] If the enforcing court recognises the concept of issue estoppel,[100] the jurisdictional issue resolved by the court one way or another would form an issue estoppel that would be binding on both parties.[101] The certainty that the award would be enforceable cannot be understated. If the applicant (usually the respondent in the arbitration) loses its application for an anti-arbitration injunction and assesses that its chances of success on the merits are low, it may take a commercial view of matters and offer to negotiate a favourable settlement with the claimant in the arbitration. Instead of protracting the dispute by going through the entire arbitration only to challenge the award at the end on jurisdictional grounds, the anti-arbitration injunction may promote early resolution of disputes by allowing the court to resolve jurisdictional objections before the arbitral tribunal renders its award. In so far as there is recognition that consensual amicable dispute resolution is desirable,[102] this factor is a relevant policy consideration in favour of the anti-arbitration injunction.

32 In more extreme cases where an issue that is part of a broader dispute is non-arbitrable, it would not just be commercially sensible, but even necessary, in the interests of justice, to enable the courts to determine the non-arbitrable issue before the rendering of the award. Naturally, if the respondent assesses that a resolution of the non-arbitrable issue is not in its favour, it would object to a voluntary

98 *Astro Nusantara International BV v PT First Media TBK* [2012] SGHC 212 at [161].

99 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472 at [29].

100 See, however, the recent controversial decision of the English Court of Appeal in *Yukos Capital SARL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855.

101 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472 at [29].

102 See *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] SGCA 48.

stay of the arbitration. The arbitral tribunal, when faced with parties with conflicting interests, may elect to simply render an award and leave the parties to settle the dust that will arise from the court's resolution of the non-arbitrable issue. However, that would be detrimental to the applicant. The award may be enforced in another jurisdiction by the time the court's decision on the non-arbitrable issue is rendered. Even if the decision on arbitrability is favourable to the applicant, it would be for naught because the award would have been enforced. The anti-arbitration injunction is thus immensely useful in ensuring justice. Parties will lose confidence in a system if it perceives that system to deprive it of the justice it deserves.

33 The bottom line is this: if a party has an objection to jurisdiction, it will come before the courts sooner or later.[103] The court will ultimately have to hear the merits of the arguments on jurisdiction to finally dispose of this pivotal threshold issue. As Mann J observed in *Law Debenture Trust Corp plc v Elektrim Finance BV*, it is "cost-effective" for the courts to determine the extent of the arbitrators' jurisdiction even before the arbitral tribunal has been constituted.[104] While the court is deliberating the issue, it is only sensible that the arbitration not be permitted to commence (if it has not been commenced) or continue (if it has been commenced). In the absence of any consensus between the parties or an order of the arbitral tribunal to voluntarily stay the arbitration, an anti-arbitration injunction is the best way to ensure that the court's ruling on jurisdiction would not be rendered nugatory by the time it is issued. This may occur if an award is rendered within the time the court takes to decide the issue. It should be noted that even if the applicant decides to boycott the arbitration,[105] the arbitral tribunal still has the power to render an award in default of the applicant's participation pursuant to Art 25(*c*) of the Model Law.[106] Even if the

103 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [81].

104 [2005] 2 All ER (Comm) 476 at [36].

105 See *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 680.

106 Article 25 of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) states:

> Unless otherwise agreed by the parties, if, without showing sufficient cause —
>
> (*a*) the claimant fails to communicate his statement of claim in accordance with Article 23(1), the arbitral tribunal shall terminate the proceedings;
>
> (*b*) the respondent fails to communicate his statement of defence in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
>
> (*c*) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

award is set aside in that jurisdiction, it may be enforceable in other jurisdictions.[107] That would not be satisfactory. Any victory for the party objecting to jurisdiction would be pyrrhic at best.

34 The anti-arbitration injunction therefore promotes arbitration as it gives both parties the proper sense of security in the arbitration system in the long run. It must be remembered that most commercial parties do not have dispute resolution clauses for just one contract. It is a choice that spans multiple transactions with numerous different business associates. For the long-term viability of arbitration as a functional system, the parties must have confidence that if there is a proper arbitration agreement, it would be upheld. Conversely, if they never entered into one, they must have the security that they would never be subject to an arbitral award. The security blanket that the award *may* be set aside or refused enforcement is not as warm and comforting as one that prevents the arbitration from ever taking off. The courts are best placed to provide this security in the form of the anti-arbitration injunction. Most crucially, it does not come at a cost to the courts. Notwithstanding the strong views of highly respected commentators,[108] it is humbly suggested that arbitration as a process is not undermined by the anti-arbitration injunction. On the contrary, the injunction is the ultimate recognition of the importance of consent and party autonomy, the twin hallmarks of the arbitral process.

(2) Lack of alternatives to anti-arbitration injunction

35 It has been suggested that the *anti-suit injunction* is unnecessary because the same effect could be achieved if the issuing court simply refuses to enforce the foreign judgment in the first place.[109] Using the same logic, this is one possible argument that negates the need for an anti-arbitration injunction. However, it begs the question of whether the arbitration process should be so inflexible as to require the parties to meander through the entire process, spending copious amounts of time and money only to have the final award set aside or to be refused

107 See *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (1997) *XXII Yearbook Comm Arb* 696; *Chromalloy Aeroservices v Arab Republic of Egypt* (1997) *XXII Yearbook Comm Arb* 691.

108 See, for instance, Philippe Fouchard, "Anti-Suit Injunctions in International Arbitration – What Remedies?" in *Anti-Suit Injunctions in International Arbitration*, International Arbitration Institute Series on International Arbitration No 2 (Emmanuel Gaillard ed) (Juris, 2005) at p 154.

109 Frédéric Bachand, "The UNCITRAL Model's Take on Anti-Suit Injunctions" in *Anti-Suit Injunctions in International Arbitration*, International Arbitration Institute Series on International Arbitration No 2 (Emmanuel Gaillard ed) (Juris, 2005) at pp 87–113. *Cf* Adrian Briggs, "The Unrestrained Reach of an Anti-Suit Injunction: A Pause for Thought" [1997] LMCLQ 90.

enforcement.[110] There is little value to the parties or the arbitral process to allow arbitrators the freedom to proceed towards rendering a final award, even though all the actors concerned have reason to believe that the award is likely to be set aside or refused enforcement ultimately. Moreover, the purpose of the anti-arbitration injunction is, in cases where there is an absence of jurisdiction, to halt the arbitration in its entirety. The alternative of refusing enforcement of the award does not have the same bite as the anti-arbitration injunction because even if the award is refused enforcement in one jurisdiction, it is still potentially enforceable in other jurisdictions. France, for instance, has demonstrated its unqualified commitment to arbitration by legislating that awards annulled by the supervisory courts may nevertheless be enforced in France.[111] In *Hilmarton Ltd v Omnium de Traitement et de Valorisation*, a Swiss award that was set aside by the Swiss court was nevertheless enforced by the French Court of Cassation, which expressly held that "the setting aside by the Swiss Courts is not a ground for denying exequatur under [A]rt 1502 [of the New Code of Civil Procedure]".[112] Thus, banking solely on the courts to refuse enforcement of the award is not helpful to a party that has presence and assets in multiple jurisdictions, especially France.[113] A seemingly innocuous nascent trend of enforcing courts disregarding actions taken by supervisory courts[114] to set aside arbitral awards on public policy grounds also does little to assuage the practical fears associated with the very existence of an arbitral award.

36 A second alternative that is less intrusive to the arbitration yet can provide some relief to the party objecting to the arbitration is the mechanism of awarding costs. Arguably, in view of the arbitral tribunal's wide powers on matters of procedures,[115] the arbitral tribunal may order the respondent to bear the costs of the arbitration if it wishes to

110 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [99]; *Christopher Brown Ltd v Genossenschaft Österreichischer* [1954] 1 QB 8 at 12–13.

111 See the New Code of Civil Procedure (1981) (France) Book IV Art 1502.

112 (1997) *XXII Yearbook Comm Arb* 696.

113 Editor Albert van den Berg described the French legal system of enforcing annulled awards as the granting of "asylum" status to annulled awards, and once joked that "if an award is set aside in the country of origin, a party can always try his luck in France": (1994) *XIX Yearbook Comm Arb* 592.

114 *Yukos Capital SARL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855; *Yukos Capital SARL (Luxembourg) v OAO Rosneft (Russian Federation)* (28 April 2009) (No 200,005,269) (Gerechtshof [Court of Appeal], Amsterdam).

115 See the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) Art 19(2). It provides:

> Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

continue with the arbitration, notwithstanding any court proceedings to determine the jurisdiction of the arbitral tribunal and the court ultimately decides that the arbitral tribunal has no jurisdiction. This approach reduces the incentive for the applicant to apply for the anti-arbitration injunction to restrain the arbitration.

37 Practically, there is some value to this approach as it places the burden on both parties to consider the merits of their respective positions. The clear advantage of this alternative is that the arbitration may be kept afoot, pending the resolution of the arbitral tribunal's jurisdiction in the courts. If the court finds that the arbitral tribunal has jurisdiction, there would be no delay and the award could be promptly rendered. Preventing delay is particularly important if a party's interests (usually the claimant) depend heavily on a timely resolution of the dispute, proceeding with the arbitration pending parallel court proceedings may be warranted so as not to unduly prejudice those interests. For instance, in construction disputes where the relief sought is specific performance or sale of goods involving perishables which value decreases exponentially with time, time is of the essence. If a party has to wait one or two years longer than it would otherwise have to, the substratum of the dispute may change radically and irreversibly to the point that an award of damages may not be adequate compensation.

38 However, this approach is only workable if the court agrees with the arbitral tribunal that it has jurisdiction. If the court determines that the arbitral tribunal does not have jurisdiction, the same problem described earlier – namely, that by the time the court has determined the question of jurisdiction, the arbitral tribunal may have already rendered an award that may be enforceable in another jurisdiction even if such an award is vacated by the supervisory court – remains extant.

C. Summary of the case for the anti-arbitration injunction

39 The arguments from principle and policy establish a strong foundation for the issuing of anti-arbitration injunctions. There is mounting acceptance for the idea that early determination of issues concerning the jurisdiction of the arbitral tribunal is in the best interests of the parties and the arbitral process.[116] This must be right. A party that does not have an obligation to arbitrate the particular dispute should have his right not to be subject to arbitration protected by way of an anti-arbitration injunction. A party facing a multifaceted dispute covering both arbitrable and non-arbitrable issues should also be

116 *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2006) *XXXI Yearbook Comm Arb* 747 at 760; Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22 Arb Int'l 463 at 464.

allowed the opportunity of having the non-arbitrable issues resolved prior to the conclusion of the arbitration, by seeking an interim anti-arbitration injunction. Thus, on both principle and policy grounds, the recognition of the anti-arbitration injunction is desirable.

IV. Do the Singapore courts have power to grant anti-arbitration injunctions?

40 However compelling the case for the anti-arbitration injunction may be, it would be for naught if the court does not have the power to grant anti-arbitration injunctions in the first place.

A. General power to issue injunctions

41 The power of the Singapore courts to grant injunctions generally is governed by two statutes: the Supreme Court of Judicature Act[117] ("SCJA") and the Civil Law Act[118] ("CLA"). The court's power to grant interlocutory injunctions is derived from s 4(10) of the CLA,[119] while the power to grant final injunction is instead derived from s 18(2) read with paragraph 14 of the First Sched of the SCJA.[120] Nevertheless, these two statutes, and the powers prescribed thereunder, must be considered in light of the IAA,[121] which governs international commercial arbitrations seated in Singapore.

42 The question is whether the IAA read with the Model Law[122] removes, restricts or circumscribes in any other way the court's general powers to grant injunctions, including the anti-arbitration injunction. The interplay between the IAA, Model Law, CLA and SCJA is effectively an issue of statutory interpretation. A key general principle of statutory interpretation is that the law should be coherent and self-consistent.[123] As far as possible, the provisions in these four legislations should be construed in a manner that does not do violence to, or conflict with, any

117 Cap 322, 2007 Rev Ed.

118 Cap 43, 1999 Rev Ed.

119 The wording of s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) makes it clear that the injunction is granted by an interlocutory order.

120 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [64].

121 Cap 143A, 2002 Rev Ed; as amended by the International Arbitration (Amendment) Act 2009 (Act 29 of 2009).

122 The UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) has the force of law in Singapore by virtue of s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

123 Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) at p 1384.

individual legislation.[124] When read in concert, the most obvious tension across the four statutes is Art 5 of the Model Law.

B. Article 5 of the UNCITRAL Model Law on International Commercial Arbitration

43 Article 5 provides:

> *In matters governed by this Law* [the Model Law], *no court shall intervene* except where so provided in this Law. [emphases added]

44 At first blush, it would seem like Art 5 removes the court's power to intervene on matters governed by the Model Law. This exclusionary effect of Art 5 was accepted by the High Court in *Mitsui*. In that case, the plaintiff was unhappy with the conduct of the arbitrator and applied to remove the arbitrator. At the same time, the plaintiff applied to the court for an injunction to restrain the arbitrator from "continuing or assisting in the prosecution … or taking any further step" in the arbitration.[125] After reviewing the *travaux préparatoires* to the Model Law, in particular, Arts 5 and 13, the court held that it had no jurisdiction or power[126] to grant the injunction under the CLA.[127]

45 *Mitsui* is not an insurmountable difficulty. The idea of a stay of arbitration pending a challenge of an arbitrator was categorically rejected by UNCITRAL, which was the UN Commission that finalised the Model Law.[128] On that basis alone, the anti-arbitration injunction would seem antithetical to the Model Law with respect to challenges to the arbitrator, since it would effectively result in a stay of the arbitration.[129] Given that Art 5 prevents the court from intervening in matters that have been expressly provided by the Model Law, and the drafters of the Model Law deliberately decided against permitting a stay of the arbitration pending the resolution of the challenge to the

124 *Norgen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 at 5.

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

126 Although "power" is frequently used interchangeably with "jurisdiction", it would be more accurate to characterise the availability of the anti-arbitration injunction as an issue of power, rather than an issue of jurisdiction.

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

128 UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (Vienna, 3–21 June 1985) (UN Doc A/40/17) at p 123.

129 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [29]. A stay of arbitration is, in substance, the same as an anti-arbitration injunction. The only difference is that a stay of arbitration is an *in personam* order directed to all the parties to the arbitration, including the arbitral tribunal; an anti-arbitration injunction is an *in personam* order against the respondent, typically the opposing party: see *The Ithaka* [1939] 64 Lloyd's Rep 259.

arbitrator under Art 13, the court's injunctive power was correctly held to be precluded by Art 5.

46 However, *Mitsui* does not lay down a general proposition that applies to anti-arbitration injunctions sought on other bases. First, s 4(10) of the CLA was only mentioned in passing. There was no elaboration of the interplay between Art 5 of the Model Law and s 4(10) of the CLA. The court appeared to have been too ready to assume that Art 5 overrode any power that the court may have to grant anti-arbitration injunctions *generally*. It may well be that to give effect to the intentions behind Art 13, the court is precluded from exercising its powers to grant anti-arbitration injunctions in cases involving a challenge of an arbitrator's appointment. There is a subtle difference between saying that the court has the power to do something but its power may be expressly curtailed by statute, and saying that the court has no power in the first place. Article 13 read with Art 5 does not promote the conclusion that the court has no power to issue anti-arbitration injunctions in respect of proceedings to challenge arbitrators. Instead, it simply states that *even if* the court has a power to grant anti-arbitration injunctions *generally*, such power cannot be *exercised* in cases governed by Art 13. Article 13 read with Art 5 does not pronounce on the *existence* (or the lack thereof) of the general power to grant anti-arbitration injunctions. It simply delimits one situation where the general power, if it exists, cannot be exercised. Indeed, the injunction was not granted in *Mitsui* not for want of power to grant that type of injunction, but for the fact that to do so would be contrary to Art 5. Implicit in this is the recognition that perhaps in situations that are not governed by Art 5, the court has the power to grant the injunction.

47 Second, a more careful reading of Art 5 suggests an alternative construction not considered by *Mitsui*. The key to interpreting Art 5 lies in the phrase "matters governed by this Law". The court's power to grant injunctive relief is only restricted by Art 5 *if* the intervention relates to "matters governed by this Law". This may seem self-explanatory, yet it is not. In fact, this aspect of Art 5 provoked the most discussion during the drafting stages, largely as a result of the UK delegation's comments on the draft text of Art 5:[130]

> Assume that a factual situation 'X' developed in the course of an arbitration, and that the situation causes one of the parties to seek the intervention of the court. Plainly, the court must ask itself whether it has jurisdiction to intervene. The first step is to see whether the

130 UNCITRAL, *Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration* (21 May 1985) (UN Doc A/CN.9/263, Addendum 2) at [21].

> situation is covered by the express words of the Model Law … If the court finds that there are words which cover the situation, it need look no further … But what if the court finds that the situation is not covered by any express words? The court could surmise that there might be any one of three reasons for this omission:
>
> (a) those who framed the Model Law had considered situation X and had decided that the situation should not be dealt with by the Model Law;
>
> (b) those who framed the Model Law had considered situation X and had decided that there should be no power of judicial intervention in that situation;
>
> (c) those who framed the Model Law had not considered situation X at all.

48 The UK delegation's comments can be broken down into two separate aspects. First, what is the definition of "matter"? The comments replaced the word "matter" in Art 5 with "situation", but the uncertainty remains. There are certainly matters or situations that are clearly governed by the Model Law. The challenge of arbitrators as in the case of *Mitsui* is one such example. It is also clear that an application to the courts for a declaration on an issue in the arbitration that is non-arbitrable is not a matter that is governed by the Model Law. At least in so far as anti-arbitration injunctions founded on subject matter non-arbitrability are concerned, the Singapore courts are not precluded by Art 5 of the Model Law to exercise their powers to grant injunctions under the SCJA and CLA.

49 However, there are other less obvious scenarios. For instance, if a party alleges that it is not bound by a purported arbitration agreement on the basis that the purported arbitration agreement was never formed, is this a matter that can be said to be governed by the Model Law? Why should a party seeking a determination from the supervisory court that a purported arbitration agreement was never formed be deemed a jurisdictional challenge falling within the meaning of Art 16, and not a vindication of the applicant's right to have the dispute resolved in the court? Borrowing from the reasoning inherent in the UK's comments to Art 5, can this really be a situation that the drafters of the Model Law had: (a) contemplated; and (b) decided that it would be a matter that (i) falls within the purview of Art 16; and (ii) should not be subject to judicial intervention except as provided for in the Model Law?

50 Before answering this question, a quick look at the English and Hong Kong positions may provide some perspective.

(1) England

51 Any reliance on English law on arbitration must be prefaced with a caution that the entire arbitration regime there is governed by the Arbitration Act 1996[131] ("1996 Act"), not the Model Law. There may be similarities but a careful comparison of the relevant provisions in the 1996 Act with the Model Law is required before regard can be had to the approach taken in England. As far as the anti-arbitration injunction is concerned, a similar tension exists in England between s 37(1) of the Senior Courts Act 1981[132] ("SCA 1981") and s 1(c) of the 1996 Act, and the English courts have resolved this tension in favour of preserving the general powers in s 37(1). Section 37(1) of the SCA 1981 is the closest equivalent of s 4(10) of the CLA and s 18(2) read with paragraph 14 of the First Sched of the SCJA. For ease of reference, the respective provisions provide:

Section 37(1) of the SCA 1981:

> The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

Section 4(10) of the CLA:

> A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

Section 18(2) read with paragraph 14 of the First Sched of the SCJA:

> The High Court shall have the … power to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.

52 Section 4(10) of the CLA is substantively identical to s 37(1) of the SCA 1981. This is not coincidental. Section 4(10) was originally enacted as s 2(8) of the Straits Settlements Ordinance 1878,[133] the latter being a re-enactment of s 25(8) of the English Supreme Court of Judicature Act 1873.[134] As s 37(1) of the SCA 1981 is the present-day

131 c 26 (UK).

132 c 54 (UK). The Senior Courts Act 1981 was originally named the Supreme Court Act 1981.

133 SS Ord No IV of 1878.

134 c 66.

successor of s 25(8) of the English Supreme Court of Judicature Act 1873, it is no surprise that s 37(1) of the SCA 1981 bears striking resemblance to s 4(10) of the CLA. The only difference between s 37(1) of the SCA 1981 and s 4(10) of the CLA is that the former confers on the English court the power to grant final injunctions, while the power of the Singapore courts under the latter is restricted to interlocutory injunctions.[135] The power of the Singapore courts to grant final injunction is instead derived from s 18(2) read with paragraph 14 of the First Sched of the SCJA.[136]

53 As s 4(10) of the CLA is substantially similar to s 37(1) of the SCA 1981 and its predecessors, English authorities are helpful in delineating the applicability and application of s 4(10). The first principle feature of the injunctive relief under s 37(1) of the SCA 1981 is its immense width and flexibility. Lord Goff recognised this in *South Carolina Insurance Co v Assurantie NV*[137] when he cautioned against pigeonholing the situations where an injunction may be granted under s 37(1). The power conferred by s 37(1) of the SCA 1981 is, according to Lord Goff, unfettered by other statutes and "it is impossible to foresee every circumstance in which it may be thought right to make the remedy available".[138] Second, in the context of arbitrations, Lord Diplock in *Bremer Vulkan* observed that the English courts may grant injunctions to control the conduct of an arbitration as part of their *general* jurisdiction to grant injunctions for the enforcement or protection of a legal or equitable right.[139] However, *Bremer Vulkan* and many other English cases that have permitted the anti-arbitration injunction and its equivalent variants[140] predate the 1996 Act, and must now be construed in light of s 1(c) of the 1996 Act.

54 Section 1(c) provides: "[I]n matters governed by this Part the court *should* not intervene except as provided by this Part." Undoubtedly, s 1(c) bears striking resemblance to Art 5 of the Model Law. Yet, s 1(c) does not seem to have prevented the English courts from issuing anti-arbitration injunctions.[141] The use of "should" in s 1(c) of

135 The wording of s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) makes it clear that the injunction is granted by an interlocutory order.

136 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [64].

137 [1987] 1 AC 24.

138 [1987] 1 AC 24 at 44.

139 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 AC 909 at 980.

140 *Kitts v Moore* [1895] 1 QB 253; *The Ithaka* [1939] 64 Lloyd's Rep 259; *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique Du Nord* [1966] 1 Lloyd's Rep 477; *Industrie Chimiche Italia Centrale v Alexander G Tsavliris and Sons Maritime Co* [1987] 1 Lloyd's Rep 508.

141 See *Elektrim SA v Vivendi Universal SA* [2007] 2 Lloyd's Rep 8; *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289; *Claxton Engineering Services Ltd v TXM* (*cont'd on the next page*)

the 1996 Act in contradistinction to the use of "shall" in Art 5 of the Model Law is *the* key distinguishing factor. Naturally, the use of "should" suggests that s 1(c) is not imperative; it has no mandatory effect. Indeed, s 1(c) of the 1996 Act is merely a "guiding" principle[142] and does not act as a bar to the court's exercise of its other statutory powers such as those provided by s 37(1) of the SCA 1981.[143] Thus, courts have consistently held that the power to grant anti-arbitration injunctions under s 37(1) of the SCA 1981 survived the enactment of the 1996 Act,[144] notwithstanding the fact that the principle of *kompetenz-kompetenz* is expressly recognised in s 30(1) of the 1996 Act.[145] Indeed, the English Court of Appeal recently clarified in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* that the issue of whether parties had agreed to arbitrate or not can only ultimately be resolved by the court,[146] and there is no rule that a party who wished to raise an issue of effectiveness of an arbitration clause has to go through with the arbitration and the relevant procedures for challenging the jurisdiction of the arbitral tribunal as provided for in the 1996 Act.[147]

55 Notwithstanding the wealth of support from the English authorities, the fact remains that Art 5 of the Model Law and s 1(c) of the 1996 Act are not *in pari materia*. There is no gainsaying that the exclusionary language in Art 5 of the Model Law is stronger than that in s 1(c) of the 1996 Act. Whether this fact alone justifies a different approach from the English position is debatable. Given that the principle of *kompetenz-kompetenz* is also recognised under the 1996 Act, it is arguable that the tension between s 1(c) of the 1996 Act and s 37(1) of the SCA replicates somewhat the tension in Singapore between Art 5 of the Model Law, s 4(10) of the CLA and s 18(2) of the SCJA.

Olaj-ÉS Gázkutató KFT [2011] 1 Lloyd's Rep 510; *Republic of Kazakhstan v Istil Group Inc* [2008] 1 Lloyd's Rep 382.

142 *Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All ER (Comm) 70 at [48].

143 *Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All ER (Comm) 70 at [47]; *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] 2 All ER (Comm) 476 at [12]–[13]; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [100].

144 *Elektrim SA v Vivendi Universal SA* [2007] 2 Lloyd's Rep 8; *Intermet FCZO v Ansol Ltd* [2007] EWHC 226 (Comm); *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439.

145 Section 30(1) of the Arbitration Act 1996 (c 23) (UK) states:

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to —
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

146 [2012] 1 WLR 920 at [100].

147 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [99].

(2) Hong Kong

56 Interestingly, there is one Hong Kong decision that has actually considered the interaction between Art 5 and the Hong Kong equivalent of s 37(1) of the SCA. In *Lin Min v Chen Shu Quan*[148] ("*Lin Min*"), the plaintiff was the seller of shares in a company to the 27th and 28th defendants and Gingero, a third party (collectively "the buyers"), under a share purchase agreement. One of the terms of the agreement entitled the buyers to compel the plaintiff to repurchase the shares under certain circumstances. There was also an arbitration clause. Consequently, the buyers exercised their right to compel the plaintiff to repurchase the shares but the plaintiff refused to. The buyers therefore commenced arbitration in Hong Kong under the Hong Kong International Arbitration Centre. The plaintiff responded by commencing court proceedings in Hong Kong against the 27th and 28th defendant and 26 other parties seeking a declaration that the buyers had fundamentally breached the share purchase agreement. Gingero was not a party to the Hong Kong court proceedings. The plaintiff also requested for an anti-arbitration injunction restraining the arbitration pending the determination of the court action. The defendants in turn sought a stay of the court proceedings in favour of arbitration, on the basis that there was a valid arbitration agreement. Reasons provided by the plaintiff in support of his application for the anti-arbitration injunction included inconsistent findings between the arbitral tribunal and the court, hardship to the plaintiff with having to deal with two proceedings simultaneously and the fact that the court proceedings would carry on against the 26 other defendants even if the court proceedings against the 27th and 28th defendants were stayed. The court held that it had the jurisdiction to grant the anti-arbitration injunction, but declined to do so.[149]

57 The relevant aspect of *Lin Min* is the fact that the court considered that it had the power to grant an anti-arbitration injunction, notwithstanding a provision in its arbitration legislation, which is the exact replica of Art 5 of the Model Law. In fact, the buyers' key argument was that as s 12 of the Arbitration Ordinance[150] provides that the court may not intervene except where provided by the Model Law or Ordinance, and nothing in the Ordinance or the Model Law prescribes the granting of anti-arbitration injunctions, the court had no jurisdiction to grant the injunction. This was rejected and the court held that its general jurisdiction to grant injunctions under s 21L[151] of the

148 [2012] HKCFI 328; affirmed by the Court of Appeal in *Lin Min v Chen Shu Quan* [2012] HKCFI 627.

149 *Lin Min v Chen Shu Quan* [2012] HKCFI 328 at [53].

150 Cap 609 (Hong Kong).

151 Section 21L(1) of the High Court Ordinance (Cap 4) (Hong Kong) states:

(*cont'd on the next page*)

High Court Ordinance[152] is not ousted by s 12 of the Arbitration Ordinance. In coming to this conclusion, the court expressly referred to the English cases[153] that held that the power under s 37(1) of the SCA remained intact notwithstanding the 1996 Act.[154] Although the court's decision was expressed in tentative terms, in part because it had not heard full arguments on the tension between s 21L of the High Court Ordinance and s 12 of the Arbitration Ordinance, it was clear that it considered that its powers under s 21L were not ousted by s 12.[155]

58 Coming back to the characterisation question posed earlier,[156] the Hong Kong and English positions seem to favour a narrow reading of Art 5 of the Model Law, which does not preclude the court from exercising its powers to grant injunctions generally in cases where there is a dispute as to the jurisdiction of the arbitral tribunal. However, one must be careful not to follow blindly. *Lin Min* suggests that the power to grant an anti-arbitration injunction survives Art 5 but it does not explain how this is achieved. More is required to circumvent the express language of Art 5 of the Model Law. Notwithstanding, even though the UK and Hong Kong approaches are only of limited value, they do bolster the proposition that the anti-arbitration injunction is within the court's general powers to grant injunctions.

C. International Arbitration Act

59 In the end, an overly narrow construction of Art 5 of the Model Law should be avoided. As the Court of Appeal recently observed in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*, "the *raison d'être* of Article 5 is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to *when court action is permissible*'" [emphasis added].[157] As the law in Singapore presently stands, it is respectfully submitted that an anti-arbitration injunction sought on the grounds that the arbitral tribunal has no jurisdiction is not precluded by Art 5 of the Model Law, except in one limited circumstance. The court has the power to grant anti-arbitration injunctions in two broad instances: (a) before arbitration is commenced; and (b) if arbitration has commenced, after the jurisdictional objection

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> The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.

152 Cap 4 (Hong Kong).

153 *Elektrim SA v Vivendi Universal SA* [2007] 2 Lloyd's Rep 8; *Intermet FCZO v Ansol Ltd* [2007] EWHC 226 (Comm); *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439.

154 *Lin Min v Chen Shu Quan* [2012] HKCFI 328 at [51].

155 *Lin Min v Chen Shu Quan* [2012] HKCFI 328 at [51]–[52].

156 See para 49 above.

157 [2012] SGCA 57 at [36].

is raised before the arbitral tribunal and the arbitral tribunal decides to rule on its jurisdiction as a preliminary issue and that decision is challenged pursuant to Art 16(3) of the Model Law read with s 10 of the IAA. These two situations are not matters governed by the Model Law, including Art 16, which is the provision most closely connected to the issue.

60 Before proceeding further, it is apposite to deal with a relatively new addition to the IAA: s 12A.

(1) Section 12A of the International Arbitration Act

61 The relatively new addition of s 12A, which allows the court to order an interim measure in respect of any of the matters set out in ss 12(1)(*c*) to 12(1)(*i*)[158] irrespective of whether the place of arbitration is in Singapore, should *not* be interpreted as conferring on the court an independent power to grant anti-arbitration injunctions.

62 First, the power of the court under s 12A read with s 12(1)(*i*) of the IAA to grant interim injunctions is inapplicable if the anti-arbitration injunction is sought prior to the commencement of arbitration. This is because s 12A only applies "in relation to an arbitration to which this Part applies".[159] In other words, on a plain reading of the opening words of s 12A(1), for the section to be engaged there must be a subsisting arbitration – not merely an arbitration agreement[160] – that is captured under the IAA.[161] It is necessary to clarify though that an arbitration may be deemed to have commenced even if the arbitral tribunal has not been constituted. Typically, an arbitration will have commenced if the notice of arbitration is received by the respondent or the institution administering the arbitration.[162] Whatever

158 These matters include preserving property that is or forms part of the subject matter of the dispute, preserving evidence for use in proceedings and ensuring that the award is not rendered ineffectual by the dissipation of assets by a party.

159 The wording in s 12A of the International Arbitration Act ("IAA") (Cap 143A, 2002 Rev Ed) is different from s 6 (the stay provision) of the IAA, which states (at s 6(1)) that a stay may be sought in respect of a matter relating to an "*arbitration agreement* to which this Act applies" [emphasis added]. Thus, as long as there is a subsisting arbitration agreement, even if an arbitration has not been commenced, a party may avail itself of s 6.

160 See, for instance, the difference in wording for s 6(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

161 Section 12(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) itself is predicated on the existence of arbitration: *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [57].

162 For instance, under Art 21 of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985), unless otherwise agreed by the parties, arbitration commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Rule 3.3 of the Singapore International Arbitration Centre ("SIAC")

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the test for commencement is, the bottom line is that an arbitration must commence before it can be said to be extant. Under this interpretation, any possibility of obtaining pre-emptive anti-arbitration injunctions under s 12A is negated. It may be argued that s 12A(4) is capable of accommodating anti-arbitration injunctions including pre-emptive ones, as it provides that an application for orders such as an interim injunction may be made to the High Court in urgent cases by a "proposed party to the arbitral proceedings" if it is "necessary for the purpose of preserving evidence or assets". This proposition has some force, following the English Court of Appeal decision in *Cetelem SA v Roust Holdings Ltd*[163] ("*Cetelem*"), which has two important implications. First, the court granted an interim mandatory injunction under s 44(3)[164] of the 1996 Act, which is almost identical to s 12A(4), to preserve a contractual right even though the applicant had not even commenced arbitration. Second, it also held that a contractual right falls within the definition of "assets" in s 44(3).[165]

63 On the first implication, the English Court of Appeal had, with respect, erred in granting the interim injunction pursuant to s 44(3) when there was no proposed, much less subsisting, arbitration to speak of.[166] Unfortunately, this jurisdictional threshold point appeared to have escaped the attention of the court. Literally, a *proposed* party to an arbitration is not the same as a *potential* party to an arbitration because an obligation to arbitrate does not mean that an arbitration will necessarily commence. Thus, the mere existence of an arbitration agreement should not immediately attract the court's powers to grant interim measures under the IAA. Moreover, as a policy, the Court of Appeal rightly noted in *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd*, that in the context of pre-arbitral discovery, "to invoke the assistance of the courts *prior to the commencement of arbitral proceedings* may, in certain instances, appear to run contrary to the spirit and scheme of arbitration" [emphasis added].[167] This policy justification was reiterated in a subsequent case, *Navigator Investment Services Ltd v Acclaim Insurance Brokers Ltd*, where pre-arbitral discovery was briefly discussed.[168] For completeness, it is surmised that the reference to

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Rules (4th Ed, 1 July 2010) is similar, with the difference being that an arbitration commences when the notice of arbitration is received by the registrar of the SIAC.

163 [2005] 1 WLR 3555.

164 Section 44(3) of the Arbitration Act 1996 (c 26) (UK) states:

> If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

165 *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 at [57].

166 *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 at [9].

167 [2005] SGCA 26 at [36].

168 [2010] 1 SLR 25 at [64]. The court also queried in the same paragraph whether it has the *power* to even grant pre-arbitral discovery. See also the article cited

(*cont'd on the next page*)

"proposed party" in s 12A(4) may refer to a party that has not received the notice of arbitration even though the arbitration has commenced under the rules governing the arbitration, or a third party that is sought to be brought into a subsisting arbitration.

64 As for the second implication in *Cetelem*, even if the merits of the court's holding is debatable, it is hard to argue as a matter of statutory interpretation that contractual rights do not fall within the meaning of "assets" in s 12A(4). The Explanatory Statement to the International Arbitration (Amendment) Bill 2009,[169] which introduced s 12A, confirmed an earlier statement by the Ministry of Law that the term "assets" in s 12A(4) was intended to be given a wide meaning to "include *choses* in action and rights under a contract" [emphasis added].[170] Indeed, the Ministry's statement – which came on the back of public feedback that the proposed wording in s 12A may cause confusion, in particular, on the meaning of the word "assets" – explicitly clarified that the term "assets" should be given a wide meaning as decided in *Cetelem*.[171] Nevertheless, it is humbly suggested that there is more than just residual trifling doubt as to what "assets" really encompass,[172] not least because in the Second Reading of the International Arbitration (Amendment) Bill 2009 containing the proposed s 12A amendment, the Minister for Law stated:[173]

> The term 'assets', *in line with current case law*, should be read widely in this context, to include intangible assets or choses in action, *which include bank accounts, shares and financial instruments*. [emphases added]

65 The above excerpt therefore suggests that the court's power to order interim injunctions to preserve assets under s 12A(4) was intended to cover assets such as *choses* in action in the form of bank accounts, shares, financial instruments, and not necessarily to contractual rights such as rights under exclusive jurisdiction agreements or mediation agreements, notwithstanding *Cetelem*. At any rate, even if

favourably by the court, Jeffrey Pinsler, "Is Discovery Available Prior to the Commencement of Arbitration Proceedings?" [2005] Sing JLS 64.

169 No 20/2009.

170 Explanatory Statement to the International Arbitration (Amendment) Bill 2009 (No 20/2009) at p 8.

171 Ministry of Law, Responses to Public Feedback Received (International Arbitration (Amendment) Bill 2009 (No 20/2009) at p 5 <http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick1e3a.pdf> (accessed 1 November 2012).

172 *Cf Telenor East Holding II AS v Altimo Holdings & Investments Ltd* [2011] EWHC 735 (Comm) at [30]; and *Starlight Shipping Co v Tai Ping Insurance Co Ltd, Hubei Branch* [2008] 1 Lloyd's Rep 230 at [21]. These two High Court cases followed the definition of "assets" in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555.

173 *Singapore Parliamentary Debates, Official Report* (19 October 2009), vol 86 at col 1628 (K Shanmugam, Minister for Law).

the term "assets" in s 12A(4) includes *choses* in actions such as ordinary contractual rights, reading s 12A(4) as conferring a power to grant anti-arbitration injunctions for breach of a contractual right would lead to the unsatisfactory result that anti-arbitration injunctions may be sought to protect jurisdiction or mediation agreements,[174] but not on other grounds such as the absence of an arbitration agreement (not a breach of a contractual right) or where the arbitration commenced is said to be vexatious or oppressive (breach of an equitable right).[175] Only a strained reading of s 12A(4) would encompass the latter two scenarios. Even if somehow s 12A(4) can justify an anti-arbitration injunction, it can only be ordered as an interim measure as the court's power under s 12A must be read with s 12(1)(*i*). Section 12A(4) therefore does not address situations where a final anti-arbitration injunction is sought on the ground of, for instance, the lack of an arbitration agreement. Reading s 12A(4) as permitting the granting of an interim anti-arbitration injunction only is unsatisfactory if the court either has no other power at all to grant a final one, or if it has the power, that it lies elsewhere.

66 Second, the power in s 12A is qualified by ss 12A(3) to 12A(6) of the IAA. If the case is not one of urgency, that is, outside of s 12A(4), then s 12A(5) provides that the court shall make the order requested "*only* on the application of application … made with the permission of the arbitral tribunal *or* the agreement in writing of the other parties" [emphases added]. This provision militates against the granting of an anti-arbitration injunction for two reasons. One, the arbitral tribunal is likely to be unimpressed by an application that effectively seeks to halt arbitration and hence is unlikely to give its permission. Two, it is inconceivable that the party who will be enjoined by the injunction will agree to the application for an anti-arbitration injunction.

67 Equally problematic is s 12A(6) of the IAA, which states that "[i]n *every case*, [the court] shall make an order under subsection (2) *only if or to the extent* that the arbitral tribunal … has no power or is unable for the time being to act effectively" [emphases added]. This covers both urgent (s 12A(4)) and non-urgent cases (s 12A(5)). If s 12A is read to cover anti-arbitration injunctions, it would require the party applying for the anti-arbitration injunction to first make the same request to the arbitral tribunal (assuming it has been constituted). Only if the arbitral tribunal has no power or is unable to act effectively (for

174 See *Starlight Shipping Co v Tai Ping Insurance Co Ltd, Hubei Branch* [2008] 1 Lloyd's Rep 230 is an interesting case where the court held that it had the power to grant an interim anti-suit injunction to restrain Chinese proceedings brought allegedly in breach of a London arbitration clause.

175 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 AC 909 at 980.

whatever reason) can the Singapore court then intervene to consider and make the order. Quite apart from the extremely unlikely event that any party would seek an anti-arbitration injunction from the very arbitral tribunal whose jurisdiction it is seeking to avoid, it is equally difficult to imagine an arbitral tribunal refusing to address an application for an anti-arbitration injunction whose objective is to undermine the very same tribunal on the basis that it has no power or cannot "act effectively". If the arbitral tribunal considers the application for an anti-arbitration injunction but refuses to grant it, s 12A(6) is unlikely to afford the applicant much solace.

68 There is one unlikely but possible scenario where an anti-arbitration injunction may be granted by the court in support of an arbitration pursuant to s 12A(5) of the IAA. A party in an existing arbitration may seek to restrain another party from commencing a second arbitration with a different tribunal.[176] Indeed, in this peculiar situation, the first arbitral tribunal may be motivated to have the court order an anti-arbitration injunction to prevent the commencement of a rival, second arbitration. It may view a court-ordered injunction as superior to any order that it could make. The first arbitral tribunal may thus give the party permission to apply to the court for an anti-arbitration injunction as required under s 12A(5). The prerequisite in s 12A(6), that an order will only be made if the arbitral tribunal cannot act effectively, may also be overcome because in this tussle between two arbitral tribunals, it is plausible that any order by the first arbitral tribunal is practically ineffective. The party that is sought to be enjoined is unlikely to respect the first arbitral tribunal's injunction, even if one is issued. A court-ordered anti-arbitration injunction carries significantly more bite, though, of course, the same outcome can be achieved with the arbitral tribunal ordering the anti-arbitration injunction and the applicant may enforce the injunction if necessary pursuant to s 12(6) of the IAA.

69 Given all these difficulties, s 12A should not be construed as providing the courts with any independent power to grant anti-arbitration injunctions. More significantly, s 12A should *not* be interpreted as precluding the courts from exercising their powers under the CLA or the SCJA just because the powers available to the court pursuant to that section does not extend to anti-arbitration injunctions. The better interpretation is that s 12A was not intended to deal with applications that seek to *halt* the arbitration. From the language in s 12A read with s 12(1), it is evident that the orders that the court may grant under ss 12(1)(*a*) to 12(1)(*h*)[177] are intended to *support* arbitrations.

176 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (2002) ICSID Rev 305.

177 Section 12(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) states:

(*cont'd on the next page*)

Section 12(7), which is the predecessor of s 12A, was construed by the Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* as a provision that was intended to enable the courts to "aid arbitration being or to be diligently pursued".[178] Parliament, in amending s 12(7) into its present form, which is s 12A, also confirmed that the powers under s 12A are intended to give the court powers to assist in foreign arbitration by, for instance, granting interim orders.[179] For these reasons, the preferable view is that s 12A does not contemplate and provide for anti-arbitration injunctions. Section 12A is therefore irrelevant to this inquiry.

(2) Anti-arbitration injunctions sought before arbitration is commenced

70 Article 16(1) of the Model Law is a critical provision as it encapsulates the general doctrine of *kompetenz-kompetenz*. The general problems with relying on the doctrine have been discussed above.[180] Yet, although Art 16(1) permits the arbitral tribunal to rule on its own jurisdiction as a preliminary question or in an award on the merits, it is crucial to point out that Art 16(1) envisages the possibility that the validity of the arbitration agreement may be resolved by the courts.

71 Article 16(1) of the Model Law states that "[t]he arbitral tribunal *may* rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". If the arbitral tribunal is the only body that has jurisdiction to resolve all

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Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —

(*a*) security for costs;

(*b*) discovery of documents and interrogatories;

(*c*) giving of evidence by affidavit;

(*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;

(*g*) securing the amount in dispute;

(*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(*i*) an interim injunction or any other interim measure.

178 [2008] 2 SLR(R) 565 at [30].

179 Second Reading of the International Arbitration (Amendment) Bill 2009 (No 20/2009): *Singapore Parliamentary Debates, Official Report* (19 Oct 2009), vol 86 at col 1628 (K Shanmugam, Minister for Law).

180 See paras 12–23 above.

issues pertaining to the validity of the arbitration agreement, Art 16(1) would have used the word "shall" as opposed to "may". The reference to "may" indicates that it is permissive in as much as the arbitral tribunal is permitted to rule on its own jurisdiction, notwithstanding allegations that it does not have jurisdiction.[181] Hence, Art 16(1) is inclusionary, not exclusionary. To recapitulate a point made above on the doctrine of *kompetenz-kompetenz* generally, Art 16(1) serves a prorogation function by conferring on arbitral tribunals the power to decide on their own jurisdiction. It does not, however, purport to derogate any jurisdiction that the courts otherwise have. For this reason, Art 16(1) cannot be read as restricting the court's jurisdiction to determine the validity of the arbitration agreement. All it provides is that the arbitral tribunal is competent to resolve its own jurisdiction; it does not mandate that the arbitral tribunal is the *only* authority that may address that issue. Little more can be added to Waller LJ's astute observation of the principle of *kompetenz-kompetenz* captured in s 30 of the 1996 Act in *Al-Naimi v Islamic Press Agency Inc*:[182]

> The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear the court should enforce them. Unless the parties otherwise agree section 30 of the Arbitration Act 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. *It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.* [emphasis added]

72 Similarly, when one considers s 6 of the IAA and the court's prerogative to decide on the validity of the arbitration agreement pursuant to that section, it is manifestly clear that Art 16 of the Model Law cannot restrict the court's power to rule on the arbitral tribunal's jurisdiction. It would be incoherent if the party is only permitted to determine the validity of the arbitration agreement when resisting a stay application, and not by way of a pre-emptive application for a

181 Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) has been said to be the Working Group's answer to the question of whether the arbitral tribunal should be empowered to "decide on any pleas as to its jurisdiction including those based on non-existence or invalidity of an arbitration agreement". The principle of *kompetenz-kompetenz* is thus a consequence of the recognition of the separability of the arbitration agreement: see Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1990) at p 76.

182 [2000] 1 Lloyd's Rep 522 at 524–525.

declaratory order.[183] That being the case, Art 5 of the Model Law cannot be invoked to limit the court's powers to grant the appropriate relief in connection with a declaration on the arbitral tribunal's jurisdiction sought before the arbitration is commenced.

(3) Anti-arbitration injunctions sought after arbitration has commenced

(a) If the jurisdictional objection was raised and decided as a preliminary ruling

73 The position is the same if arbitration has commenced *and* the jurisdictional objection was raised before the arbitral tribunal. Article 16(3)[184] permits a party to challenge an arbitral tribunal's decision in the supervisory court if the arbitral tribunal decides rules on a jurisdictional objection as a preliminary question. The supervisory court in such a challenge has the power to "decide the matter". Not only does the supervisory court have the power to decide the jurisdictional matter, it is evident that it has the power to effect a stay of the arbitration. This is plainly manifested in s 10(9)(*a*) of the IAA, which states:

> Where an application is made pursuant to Article 16(3) of the Model Law or this section —
>
> > (*a*) such application *shall not operate as a stay* of the arbitral proceedings or of execution of any award or order made in the arbitral proceedings *unless the High Court orders otherwise*.
>
> [emphases added]

74 *Prima facie*, when there is a challenge of the arbitral tribunal's decision as to jurisdiction pursuant to Art 16(3) of the Model Law read with s 10 of the IAA, the court proceedings do not operate as a stay of the arbitration. However, the High Court has the power to order the *equivalent* of a stay of the arbitration. Section 10(9)(*a*) of the IAA read

183 See *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [108] where a similar point was made by the English Court of Appeal by reference to s 9(4) of the Arbitration Act 1996 (c 23) (UK), which governs stay of court proceedings in favour of arbitration.

184 Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) states:

> The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

with Art 16(3) of the Model Law thus contemplates the scenario where the arbitration will be suspended, pending a resolution of the challenge against the arbitral tribunal's decision on jurisdiction. This position is contrary to that provided by Art 13 of the Model Law, which as explained above, was intended by UNCITRAL to preclude any stay of arbitration even when an arbitrator's appointment was challenged.[185] *Mitsui* must therefore be confined to its facts. There, the challenge was not to the jurisdiction of the tribunal *per se*, but to the continued appointment of the arbitrator.[186] Because Art 13 of the Model Law has made it abundantly clear that the courts are not permitted to stay the arbitration pending the challenge of the arbitrator's appointment, Art 5 of the Model Law applies to restrict the exercise of the High Court's ancillary powers derived from sources external to the IAA and Model Law.

75 Section 10(9)(*a*) of the IAA is paramount as it clarifies that the court has the power to suspend the arbitration in challenges to jurisdiction falling under Art 16(3) of the Model Law. An order to stay proceedings is essentially an injunctive order, and *vice versa*, an anti-arbitration injunction (on the assumption that the restrained party does not act in contempt) in effect operates as a stay.[187] Thus, where an anti-arbitration injunction is sought concurrently with an application appealing against an arbitral tribunal's preliminary ruling on jurisdiction pursuant to Art 16(3) of the Model Law read with s 10 of the IAA, this is a situation that is expressly regulated by the IAA. If the IAA contemplates that the arbitration may be suspended pending resolution of the challenge, Art 5 of the Model Law cannot be invoked to preclude the court from ordering an anti-arbitration injunction to effect that suspension.

76 Taking a step back, if one examines s 10(9)(*a*) of the IAA more carefully, the most striking feature of the provision is the absence of a mechanism that confers on the court the power to order a stay. It only contemplates that a stay is a possible outcome without identifying which powers of the High Court would, when exercised, effectuate the stay. Section 10(9)(*a*) presupposes that the court has the power – whether contained in other provisions of the IAA or elsewhere – to order a stay of the arbitration. As nothing in s 10(9)(*a*) or the IAA confers on the court the power to grant injunctions to stay arbitrations, s 10(9)(*a*) of the IAA must be construed as making an external reference to the CLA and the SCJA. In a circular manner, s 10(9)(*a*) implicitly reaffirms that

185 See n 128 above and accompanying text.

186 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [6].

187 *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [29].

the court's general power to grant interlocutory and final injunctions pursuant to the CLA, and the SCJA is not ousted by the IAA and the Model Law.

77 One may query what the position is, if the jurisdictional objection is not raised before the arbitral tribunal, or if the jurisdictional objection was raised before the arbitral tribunal but was not decided as a preliminary ruling. Does Art 5 of the Model Law govern these two scenarios to the exclusion of the anti-arbitration injunction?

(b) If the jurisdictional objection was not raised before the arbitral tribunal

78 If the jurisdictional objection was not raised before the arbitral tribunal but the party simply comes to court to seek an anti-arbitration injunction on the basis of absence of jurisdiction, this would not be a matter that is governed by the Model Law. Again, Art 16 of the Model Law does not compel a party to raise a jurisdictional objection before the arbitral tribunal. The fact that Art 34 of the Model Law contemplates jurisdictional objections as a basis for setting aside of an arbitral award does not mean that an anti-arbitration injunction founded on *in personam* and subject-matter jurisdictional objections is a matter that is already governed by the Model Law pursuant to Art 5.

79 However, this is somewhat complicated by Art 4 of the Model Law. Article 4 states:

> A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

80 On the plain language of Art 4, if the jurisdictional objection is founded, for example, on a breach of a condition precedent to the commencement of arbitration under a typical multi-tiered dispute resolution clause, but the party objecting to jurisdiction before the court continued participation in the arbitration without raising the non-compliance of the multi-tiered dispute resolution clause, the objecting party will be deemed to be a waiver of the right to object to jurisdiction.[188] While Art 4 may seem to govern a jurisdictional objection, which should have been but was not raised, it does not

188 Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 2009) at pp 80–81.

preclude the party from going to court to seek an anti-arbitration injunction. This is because Art 4 does not govern what the parties may or may not *do*; it merely clarifies the consequences of not objecting to jurisdiction at an opportune moment. Articles 4 and 16 of the Model Law cannot be read as contemplating what steps a party may or may not take if it has a jurisdictional objection. The consequence of Art 4, which is that the objecting party cannot later rely on the jurisdictional objection, may very well be considered by the court in ascertaining whether an anti-arbitration injunction *should* be issued.[189] That is a separate determination from whether the court *can* grant the anti-arbitration injunction. Thus, a party who participates in an arbitration and elects not to raise the jurisdictional objection *may* seek an anti-arbitration injunction from the court as a matter of procedure, albeit the possibility of obtaining one in light of Art 4 is extremely remote.

(c) If the jurisdictional objection was raised but decided together with the merits of the dispute

81 The one instance where Art 5 of the Model would operate to preclude the granting of an anti-arbitration injunction is where the jurisdictional objection was raised before the arbitral tribunal, and the latter decides to address it together with the merits of the dispute. If the court were to entertain any application for a declaration on the jurisdiction of the arbitral tribunal even when the arbitral tribunal has ruled that it will decide on jurisdictional objections together with the merits of the dispute, this would mean that the choice provided in Art 16(3) of the Model Law to arbitral tribunals to determine a jurisdictional objection either as a preliminary rule or together with the merits is effectively nugatory. The arbitral tribunal would be forced to rule on jurisdiction as a preliminary issue or run the risk that the party challenging jurisdiction would go to the courts seeking a resolution of that issue by way of declaration coupled with an anti-arbitration injunction.

82 It must be noted though that the basis for allowing the arbitral tribunal to postpone the decision on jurisdiction is because, in certain cases, the jurisdictional issue is so "intertwined with the substantive issue".[190] The Working Group expressly stated that the purpose of Art 16(3) of the Model Law was to prevent dilatory tactics by limiting the parties' right to court, which was permitted under the previous

189 Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1989) at p 200.

190 UNCITRAL, *Analytical Commentary on a Draft Text of a Model Law on International Commercial Arbitration* (25 March 1985) (UN Doc A/CN.9/264) at [11]–[14].

Art 17 where concurrent court control was legislated for. However, the disadvantage of waste of considerable time and money was also recognised. Due to these two divergent concerns, the notion of giving discretion to the arbitral tribunal to decide was born.[191] Given this specific history, it is clear that Art 16(3) contemplates and governs the situation where the jurisdictional objection was raised but deliberately left to the merits stage to be determined. On this basis, Art 5 of the Model Law would apply to prevent the court from exercising its powers under the CLA or SCJA to grant an anti-arbitration injunction.

83 There is an undeniable peculiarity with this approach. Only jurisdictional objections that are raised before the arbitral tribunal, but which determination is postponed to the end of the arbitration, will not found a basis for seeking an anti-arbitration injunction from the court. If the jurisdictional objection is brought to the court's attention in any other circumstance, the court may determine the issue and grant the anti-arbitration injunction if need be. This peculiarity may not be satisfactory, but it is necessitated by the structure of the Model Law and the IAA. The Model Law has placed the power in the hands of the arbitral tribunal to determine when it should decide on jurisdictional objections. The discretion afforded to the arbitral tribunal, however contentious, must be respected in the absence of legislative amendment in the IAA to limit the arbitral tribunal's exercise of their discretion.[192] To ensure that this discretionary power does not become superfluous, the harmonious interpretation of the IAA, Model Law, CLA and SCJA dictates the conclusion that Art 5 of the Model Law restricts the court from exercising its power to grant the anti-arbitration injunction when there is a jurisdictional objection that has been expressly reserved by the arbitral tribunal for determination with the substantive merits. The courts should not overreach and cause inconsistency across the respective legislations.

V. Preventing an abuse of the anti-arbitration injunction

84 The most obvious ramification of the proposed interpretation of the present state of the law is the watering down of the *kompetenz-kompetenz* principle and, arguably by extension, the principle of minimal curial intervention. If the courts entertain applications for declarations that the arbitral tribunal has no jurisdiction even before the alleged jurisdictional objections are raised before the arbitral tribunal, and grants anti-arbitration injunctions where it finds that the arbitral

191 See *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2012] SGHC 212 at [142]–[144].

192 Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1990) at pp 85–86.

tribunal has no jurisdiction, the force of Art 16(1) of the Model Law will be curtailed. Once there is a court ruling, an arbitral tribunal that is formed after the court ruling will effectively be discouraged from exercising its right to determine its own jurisdiction under Art 16(1). Thus, Born robustly argued that the anti-arbitration injunction should "virtually never be issued", and if need be, only with the "utmost circumspection and only in rare circumstances".[193] For the reasons already canvassed, Born's view is, with respect, too strict. Notwithstanding, it is important to recognise the potential of conflict between the courts and arbitral tribunals, and to take steps to mitigate this conflict.

A. Potential tension between the courts and arbitral tribunals

85 A jurisdictional battle between the courts and arbitral tribunals may ensue with judicial recognition of the anti-arbitration injunction.[194] The party who is sought to be enjoined from proceeding with the arbitration may pre-empt the anti-arbitration injunction application by going to the arbitral tribunal and requesting for an anti-suit injunction. Arbitral tribunals have regularly found that it is within their jurisdiction to grant anti-suit injunctions.[195] For instance, in *E-Systems Inc v Islamic Republic of Iran*,[196] the majority opinion held that the tribunal has an inherent power to issue anti-suit injunctions to ensure that its jurisdiction and authority are made fully effective. This view that arbitral tribunals possess the inherent power to issue anti-suit injunctions is also shared by the eminent commentator, Gaillard. He argued that the arbitral tribunal's jurisdiction to decide their own jurisdiction has to include a power to sanction any breaches of the agreement to submit to the arbitral tribunal's jurisdiction.[197] The anti-suit injunction is a manifestation of the power to protect the arbitral tribunal's jurisdiction.

86 A tension between the courts and arbitral tribunals is not healthy and should be avoided as far as practicable. There is no "silver

193 Gary Born, *International Commercial Arbitration, Volume 1* (Kluwer, 2009) at p 1054.

194 See *Himpurna California Energy Ltd v Republic of Indonesia* (Interim *Ad Hoc* Award, 26 September 1999) (Final Award, 16 October 1999) (2000) *XXV Yearbook of Comm Arb* 109 where the arbitral tribunal refused to comply with an anti-arbitration injunction issued by the supervisory court); ICC Case No 10623 (Partial Award) (2003) 21 *ASA Bulletin* 59 where the International Chamber of Commerce tribunal proceeded with the arbitration notwithstanding a Ghanaian court order enjoining the arbitration on the basis that the disputes were non-arbitrable.

195 ICC Case No 8887 of 1997; ICC Case No 9593 of 1998; ICC Case No 8307 of 2001.

196 Interim Award No ITM 13-388-FT (4 February 1983).

197 Emmanuel Gaillard, "Anti-Suit Injunctions Issued by Arbitrators" in *International Arbitration 2006: Back to Basics?* International Council for Commercial Arbitration Congress Series No 13 (Albert Jan van den Berg ed) (Kluwer, 2007) at p 238.

bullet" to resolve this tension,[198] as the Court of Appeal has astutely recognised. The solution is not to deny that the power to grant the anti-arbitration injunction exists. That is a useful power for the reasons aforementioned. Instead, the better solution, it is suggested, is to *restrict* the court's exercise of the power to the truly appropriate cases. The fact that there are strong conceptual reasons for the court to determine the validity of the arbitration agreement does not mean that it should always assume jurisdiction and do so. If that were the case, the principle of *kompetenz-kompetenz* enshrined in the Model Law and voluntarily adopted[199] by Parliament via the IAA would be rendered otiose, since every party contesting the validity of the arbitration agreement can and will have first recourse to the courts. The availability of the anti-arbitration injunction should not be abused to enable a party to usurp the arbitral process.[200] Courts must be vigilant in guarding against spurious allegations of invalidity of the arbitration agreement, lest its processes are abused. The subversion of an arbitration agreement is a grave matter,[201] and courts should not be seen as readily accessible and available to parties desirous of getting out of an arbitration agreement. It must be remembered that the anti-arbitration injunction is a powerful remedy with serious consequences, and as one judge put it, is "one of the gravest problems of international commercial arbitration".[202] This is further exacerbated if the anti-arbitration injunction is deemed to be a freestanding injunction, in which case a party need not commence a substantive cause of action before the court to request for the injunction.[203] Thus, the temptation to use the anti-arbitration injunction as a device to undermine, destabilise, delay or avoid an arbitration may be heightened.[204]

198 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [24].

199 The UN Commission for the Model Law opined that "it was ultimately for each state, when adopting the model law, to decide whether it wished to accept the principle [of *kompetenz-kompetenz*] and if so, possibly express in the text that the parties could exclude or limit that power": UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (Vienna, 3–21 June 1985) (UN Doc A/40/17) at para 151.

200 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618 at [71].

201 Jan Paulsson, "Interference by National Courts" in *The Leading Arbitrators' Guide to International Arbitration* (Lawrence Newman & Richard Hill eds) (Juris, 2004) at p 124.

202 Stephen Schwebel, "Anti-Suit Injunctions in International Arbitration – An Overview" in *Anti-Suit Injunctions in International Arbitration*, International Arbitration Institute Series on International Arbitration No 2 (Emmanuel Gaillard ed) (Juris, 2005) at p 5.

203 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Fourie v Le Roux* [2007] 1 WLR 320; *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [79] and [96(c)]. *Cf Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [16].

204 Julian Lew, "Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration" in *Anti-Suit Injunctions in International Arbitration*, International Arbitration Institute Series on International Arbitration No 2 (Emmanuel Gaillard ed)

(*cont'd on the next page*)

B. Minimising potential abuse

(1) The anti-arbitration injunction can only be issued by courts with sufficient jurisdictional nexus

87 The first prerequisite is that the court should only grant an anti-arbitration injunction if it has some form of jurisdictional standing over the arbitration. There may be several courts with sufficient jurisdictional nexus. At minimum, the court must have *in personam* jurisdiction over the parties. Second, the court must have sufficient interest in the proceedings. Courts that have no interest in the dispute should not grant anti-arbitration injunctions even if they have such a power under their relevant laws. While a full consideration of the definition and scope of "sufficiency of interest" is not within the ambit of this article, some non-exhaustive examples of courts with the requisite jurisdictional nexus and interest include the court of the seat of the arbitration[205] or the court in a jurisdiction agreement to which the dispute is allegedly subject. There will be some controversy if the applicant is seeking the anti-arbitration injunction on the basis of the absence of an arbitration agreement as there would be no "seat" to speak of. The "chosen" seat in the disputed arbitration agreement would, strictly speaking, be the putative seat. In such a situation, the proper court from which to seek the anti-arbitration injunction should still be the putative supervisory court. Indeed, it has been said that the primary responsibility of supervising a "purported" arbitration falls to the courts of the country where the putative arbitral seat is located.[206] While this may give rise to a question of whether the supervisory court should then grant a freestanding anti-arbitration injunction (since the putative seat would no longer be the seat if the arbitration agreement is invalid), it is relatively settled under Singapore law that the courts may grant freestanding injunctions as long as the cause of action is justiciable in Singapore.[207]

(Juris, 2005) at p 27. See also Julian Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* International Council for Commercial Arbitration Congress Series No 13 (Albert Jan van den Berg ed) (Kluwer, 2007) at pp 206–214.

205 It is trite that the courts of the seat of the arbitration have supervisory oversight of the arbitration: *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [7]; *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 646 at 661. While parties choose arbitration in order to be outside of court procedures, arbitration is not self-sustaining and needs the support of the courts: *West Tankers Inc v RAS Riunione Adriatica de Sicurta SpA* [2007] UKHL 4 at [19]–[20].

206 See *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1981] 2 Lloyd's Rep 446.

207 See n 203 above.

88 Courts in jurisdictions where the award may be enforced should not grant anti-arbitration injunctions. In the first place, it is difficult to pinpoint the potential places where an award may be enforced, particularly if the parties have presence worldwide. The issue of jurisdictional nexus will only arise when the award is actually enforced. Prior to that, any interest will be speculative. More critically, courts should be alive to the danger of becoming "international busybodies".[208] Forum-shopping for anti-arbitration injunctions is a dangerous phenomenon that must be guarded against. The courts should be careful to avoid inadvertently promoting a race to secure the jurisdiction of the courts for the purpose of defeating an arbitration. Restricting access to the anti-arbitration injunction to only courts with sufficient jurisdictional nexus maintains the delicate balance between the interests of the applicant and the importance of respecting arbitral tribunals and arbitration as an autonomous dispute resolution process. Even though this is not the forum for an extensive discussion on the jurisdictional nexus, the importance of this exclusionary requirement must be emphasised.

(2) Threshold for assuming jurisdiction to determine the arbitral tribunal's jurisdiction

89 Another mechanism to restrict the potential abuse of the anti-arbitration injunction is the calibrating of the threshold required for the courts to assume jurisdiction to determine the jurisdictional objection. The applicant may allege that it is not bound by an obligation to arbitrate, but the court may choose not to assume jurisdiction on the basis that the argument does not have sufficient merit. Although the potential for abuse of the anti-arbitration injunction is not to be taken lightly, the need to guard against unmeritorious allegations aimed at undermining arbitrations should not be overstated. Courts deal with these all the time,[209] and the allegation that an arbitration agreement is invalid is not *sui generis*.[210] The rules of civil procedure can assist in determining the merits of the allegation.[211] For instance, the court may

208 *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12].

209 For instance, courts have had to deal with validity of choice of law and jurisdiction agreements: see *Mackender v Feldia AG* [1967] 2 QB 590; *Compania Naviera Micro SA v Shipley International Inc* [1982] 2 Lloyd's Rep 351; and *Partenreederei M/S v Grosvenor Grain and Feed Co Ltd* [1994] 2 Lloyd's Rep 287.

210 The US Supreme Court in *Scherk v Alberto-Culver Co* (1974) 417 US 506 treated arbitration clauses and jurisdiction clauses as the same species. The majority opinion (at 519) pointed out that an arbitration agreement in favour of a specified tribunal "is in effect, a specialised kind of forum-selection clause that posits not only the *situs* of suit but also the procedure to be used in resolving the dispute".

211 For example, see O 18 r 19(1)(*a*) of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) and the attending judicial decisions on the threshold required for striking out pleadings and endorsements for disclosing no reasonable cause of action or defence, as the case may be. See also O 14 r 3 of the Rules of Court and the

(*cont'd on the next page*)

decline to assume jurisdiction (and therefore dismiss the application for the anti-arbitration injunction) if there is a "*prima facie*"[212] arbitration agreement or, on the flipside, if it is "plain and obvious"[213] that the applicant has an obligation to arbitrate.

90 Traditionally, courts have undertaken full review of the merits of the jurisdiction objections notwithstanding the *kompetenz-kompetenz* principle,[214] though the modern approach suggests a somewhat more restricted standard of review.[215] In France, the court must decline jurisdiction unless the arbitration agreement is "patently void".[216] In the English case of *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KFT*,[217] one party claimed that the dispute was subject to an exclusive choice of English court clause, while the other party claimed that the dispute was subject to an arbitration agreement. Gloster J held that it was appropriate for the English court to resolve the issue since both parties agreed that the matter was capable of being resolved on the basis of the written evidence without cross-examination.[218] Although Gloster J did not refer to any standard of proof required, presumably because there was ostensibly a *genuine* battle of the forms, the fact is that the courts are in a position to make the determination as to whether an allegation has any merit, bearing in mind the court's role in the context of arbitrations. One other English case held that curial intervention is

attending judicial decisions on the test for when an applicant is entitled to summary judgment.

212 In Switzerland, Ontario and Hong Kong, the standard of review appears to be one of "*prima facie*" existence and effectiveness: *Foundation M v Banque X* (1996) 3 *ASA Bulletin* 527; *Rio Algom Ltd v Sammi Steel Co* (1993) *XVIII Yearbook of Comm Arb* 166; and *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co* (1993) *XVIII Yearbook of Comm Arb* 180, respectively. The learned editors, Emmanuel Gaillard and John Savage, of *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) at para 658 also appear to favour "*prima facie*".

213 This is the threshold used for striking out pleadings and endorsements in civil procedure pursuant to O 18 r 19 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed): *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [18].

214 Doak Bishop, Wade Coriell & Marcelo Campos, "The 'Null and Void' Provision of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Petrio eds) (Cameron May, 2008) at pp 281–283.

215 Doak Bishop, Wade Coriell & Marcelo Campos, "The 'Null and Void' Provision of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Petrio eds) (Cameron May, 2008) at pp 283–286.

216 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 672 also appear to favour "*prima facie*".

217 [2011] 1 Lloyd's Rep 252.

218 *Claxton Engineering Services Ltd v TXM Olaj-ÉS Gázkutató KFT* [2011] 1 Lloyd's Rep 252 at [17].

justified if there are "good grounds" that the applicant never agreed to arbitrate the dispute.[219]

91 The Singapore courts have shown restraint on several occasions, with particular emphasis on a measured approach and judicial common sense.[220] In the context of determining if a stay of proceedings should be granted pursuant to s 6 of the IAA, the Court of Appeal has intimated that it is only in the "clearest of cases" that the court ought to make a ruling on the "inapplicability" of an arbitration agreement.[221] It held previously, on the question of whether there is a "dispute" that is subject to an arbitration agreement, that there would be no dispute that is referable to arbitration if there has been a "clear and unequivocal admission" to both liability and quantum.[222]

92 Although there is merit to suggest that the threshold should be higher when the existence of the arbitration agreement is the very quarrel, it is outside the scope of this article to assess the possible spectrum of standards that the court may apply in determining whether to assume jurisdiction to resolve the myriad of jurisdictional objection. Certain matters such as the arbitrability of a particular issue will likely be "open and shut". Others such as whether the arbitration agreement was formed may be trickier. The baseline remains that the entire process is an exercise of judgment with regard to all the circumstances of the case, including cognisance of frivolous and *mala fides* allegations that seek to undermine the *kompetenz-kompetenz* principle.

(3) Relevant factors to consider in granting the anti-arbitration injunction

93 Even if the court decides to assume jurisdiction to determine the jurisdiction of the arbitral tribunal, it may still refuse to grant an anti-arbitration injunction pending the conclusion of the court's determination on jurisdiction, if the granting of the injunction will cause injustice to the respondent.[223] Calibrating the degree of injustice, which merits the withholding of an anti-arbitration injunction, is a mechanism that the courts can use to prevent an abuse of the anti-arbitration injunction. If the threshold is set too low, it is arguable

219 *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] 2 All ER (Comm) 476 at [35].

220 *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 at [25]; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [24].

221 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [24].

222 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [59].

223 *The Ithaka* [1939] 64 Lloyd's Rep 259 at 262–263; *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 at [38]; *Elecktrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm) at [55].

that mere delay in the resolution of the dispute, for instance, will satisfy the requirement of prejudice. That being so, the anti-arbitration injunction will rarely be granted, if at all, since the granting of the anti-arbitration injunction invariably delays the conduct of the arbitration one way or another. On the other hand, if the bar is set too high, the anti-arbitration injunction may appear more frequently as it will be relatively harder for the respondent to demonstrate that it has suffered serious prejudice.

94 The key is injustice *to the respondent*, and not to the arbitral tribunal. For example, the fact that the arbitrators' appointments (and payment of fees) may be in abeyance is an inconvenience to the *arbitrators*, but does not qualify as injustice to the respondent *per se*. The absence of injustice to the respondent, however, is not a positive reason to grant the anti-arbitration injunction. The requirement that the courts consider the injustice to the respondent should be viewed as a "safety-valve" mechanism. The fact that arbitration proceedings have only just commenced and pleadings have not been submitted and no prejudice will accrue should not be a positive factor for the granting of an anti-arbitration injunction. It is, at most, a neutral factor.

95 The most common unjust factor is delay. An anti-arbitration injunction may cause substantial prejudice to the respondent if it is requested for and granted at a very late stage of the arbitration proceedings.[224] An anti-arbitration injunction should therefore not be granted if it were sought at a late stage of the arbitration proceedings.[225] *Toepfer International GmbH v Molino Boschi*[226] is an example of extreme delay that militated against the granting of an anti-suit injunction. In that case, the applicant had waited seven years before applying for the anti-suit injunction to restrain the prosecution of Italian proceedings brought in breach of an arbitration clause. By that time, the parties had exchanged extensive submissions on the jurisdictional and substantive merits of the dispute. Mance J held that if the applicant's case was that the Italian proceedings were a breach of the arbitration agreement, they should have taken steps much earlier to rectify that position.[227]

96 In *Verity Shipping SA v NV Norexa*,[228] proceedings in the Antwerp court commenced in breach of an arbitration agreement had already been going on for three years. The Antwerp proceedings had progressed to the point where the surveyor's final and substantial report

224 See *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 871.
225 *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 at [21]; *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord* [1966] 1 Lloyd's Rep 477 at 484–485.
226 [1996] 1 Lloyd's Rep 510.
227 *Toepfer International GmbH v Molino Boschi* [1996] 1 Lloyd's Rep 510 at 516.
228 [2008] 1 Lloyd's Rep 652.

had been published, and the Antwerp court had given directions for the parties to plead their cases and to prepare for an oral hearing. It was only then that the applicant requested for an anti-suit injunction from the English court. The court held that whether proceedings are "too far advanced" depends on an analysis of what has happened, and what has still to happen.[229] It appears that in that type of proceedings, the surveyor's findings are typically adopted by the Antwerp court and the surveyor's report was therefore a substantial aspect of the proceedings. For that reason, the English High Court held that the anti-suit injunction was not sought promptly.

97 In short, while the anti-arbitration injunction may be abused, there are sufficient checks and balance available to the courts to disabuse improper use of the anti-arbitration injunction. The process of calibrating the various mechanisms to the appropriate levels may take some time, but that is the inescapable feature of the common law system. The fear of floodgates may be genuine but as Rajah JA powerfully reminded, albeit in the context of the criticisms against the use of extrinsic evidence for the purpose of contractual interpretation, "the administration of justice should not meekly bow down to considerations of convenience".[230]

VI. Conclusion

98 Arbitration is here to stay. It is, in the words of Sundaresh Menon CJ, in a "golden age".[231] Notwithstanding, the challenges that arbitration faces are mounting. The question posed in the beginning remains the most controversial: to what extent should courts intervene in arbitration process? There is increasing recognition that the ideal point lies somewhere in the middle. A balance[232] or an "equilibrium"[233] is necessary. The law on the anti-arbitration injunction is another fertile area for the courts to explore in their quest to achieve that equilibrium. The court clearly has the power to grant anti-arbitration injunctions in appropriate circumstances. More importantly, legalities aside, there are

229 *Verity Shipping SA v NV Norexa* [2008] 1 Lloyd's Rep 652 at [44].

230 V K Rajah, "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 SAcLJ 513 at [39].

231 Sundaresh Menon CJ, Opening Plenary Session of the ICCA Congress 2012, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (10 June 2012) at [1] <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 11 September 2012).

232 Nicholas Poon, "Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration: *AJU v AJT*" [2012] Sing JLS 1 at 11.

233 Sundaresh Menon CJ, Opening Plenary Session of the ICCA Congress 2012, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (10 June 2012) at [82] <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 11 September 2012).

practical advantages of the anti-arbitration injunction to the parties and arbitration as an autonomous, self-sufficient process. The anti-arbitration injunction is a useful tool in the judicial arsenal of remedies.