INTERIM RELIEF IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION

A Critique on the International Arbitration Act

This essay seeks to explore the underlying issues regarding interim measures in aid of international commercial arbitration by surveying the development of the law on this area in Singapore. The normative theoretical perspectives on the issue shall be considered before a critique on the legal status quo in Singapore would be offered. It will be shown that the recent legislative amendments on the law of interim measures do not go far enough. Instead, Singapore should adopt the 2006 UNCITRAL Model Law on this crucial aspect of international commercial arbitration law.

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I. Introduction

1 International commercial arbitration is a complex legal phenomenon that involves parties and institutions deriving from different jurisdictions and juridical bases. Much attention has been given to international arbitration in Singapore lately. This has been the result of a deliberate effort on the part of the Singapore government to promote Singapore as an international arbitration hub. In January 2010, Maxwell Chambers, the world's first integrated dispute resolution centre, was officially opened in Singapore. The number of cases handled by the Singapore International Arbitration Centre has significantly increased from 58 cases in 2000 to 188 in 2011.[1] In June this year, Singapore hosted the Congress of the International Council for Commercial Arbitration, during which Prime Minister Lee Hsien Loong alluded to the objective of such promotion of Singapore as an international arbitration hub, being that of creating economic opportunities in legal services.[2] Other economic benefits of increased arbitration cases being conducted in Singapore would include the consumption of other services, for example, in the hospitality industry.[3]

1 Tan Qiuyi, "Singapore a Centre for International Investment Arbitration?" *Channel NewsAsia* (10 June 2012).
2 Claire Huang, "Legal Services an Economic Opportunity in its Own Right: PM Lee" *Channel NewsAsia* (10 June 2012).
3 Cavinder Bull, "Standing Tall in Arbitration" *The Straits Times* (2 July 2012).

2 While physical infrastructure and academic conferences are important to place Singapore on the world map for international arbitration, it is important to consider the bottom lines which potential arbitrating parties examine before selecting their seats of arbitration. One of the most crucial considerations would be the legislative framework for international arbitration in the jurisdiction. This essay, therefore, focuses on a particular area of the Singapore legislative framework which is lacking and outdated.

3 One significant issue that often arises in international commercial arbitration is the relationship between national courts and arbitral tribunals with regard to the power to issue and enforce interim measures, which is often necessary to preserve the subject matter of the dispute. In practice, that issue might determine whether one of the parties would ultimately obtain what it had sought.

4 This essay seeks to explore the underlying issues regarding interim measures in aid of international commercial arbitration by surveying the development of the law on this area in Singapore. The normative theoretical perspectives on the issue shall be considered before a critique on the legal status quo in Singapore would be made, together with proposals for reforming the law. It will be shown that the recent legislative amendments to the law of interim measures do not go far enough. Instead, Singapore should adopt the 2006 UNCITRAL Model Law on this crucial aspect of international commercial arbitration law.

II. Issues regarding interim measures in aid of international commercial arbitration

5 International commercial arbitration can be a long-drawn process. Thus, evidence or property may dissipate before (even before an arbitral tribunal has been constituted), during or after arbitral proceedings but before enforcement of the final arbitral award. A party facing immanent and irreparable harm must be able to prevent it. Hence, interim measures are important because they preserve the sanctity of arbitral proceedings.[4] They may go towards facilitating conduct of arbitral proceedings (for example, obtaining or preserving evidence), or towards avoiding loss or damage or to preserve a state of

4 In an American Arbitration Association survey, it was found that 60% of the respondents had experience in arbitral proceedings where interim measures were sought: Richard W Naimark & Stephanie E Keer, "Analysis of UNCITRAL Questionnaires on Interim Relief" in *Towards a Science of International Arbitration: Collected Empirical Research* (Christopher R Drahozal & Richard W Naimark eds) (Kluwer Law International, 2005). This is arguably empirical evidence for the proposition that interim measures are deemed important by parties to an arbitration.

affairs, or towards facilitating later enforcement of the award (for example, preserving the property or value that are the subject of the proceedings).[5] Without them, the arbitral tribunal might be unable to make meaningful decisions, or the final award might ultimately be practically meaningless.

6 This begs the question of which authority should be conferred power to grant interim measures in aid of international commercial arbitration. Three issues surface:[6]

(a) *Should* arbitral tribunals have the authority to grant interim measures; if so, *how* and by what standards should issuance be governed?

(b) *Should* courts enforce arbitral tribunal-ordered interim measures; if so, *how* and by what standards should enforcement be governed?

(c) *Should* courts issue interim measures in aid of international commercial arbitration; if so, *how* should the allocation of authority between the court and the arbitral tribunal be structured?

7 The answers to all three questions are not mutually exclusive. Courts and arbitral tribunals could simultaneously have authority to issue interim measures. At the same time, courts could enforce interim measures issued by arbitral tribunals. The difficult question is *how*. Before turning to the "how", the "should" questions shall be briefly discussed.

A. Should the relevant bodies have authority to order or enforce interim measures?

8 Regarding the above question, it should be noted that we are considering the *normativity* of whether arbitral tribunals and/or national courts should have the authority to *issue* interim measures, and/or whether courts should have authority to *enforce* tribunal-ordered measures. The issue of whether courts should refrain from doing so in a

5 See UN Doc A/CN.9/WG.II/WP.108, para 63. See, for example, s 44(2) of the English Arbitration Act 1996 (1996 c 23); s 9 of Pt I of the Indian Arbitration and Conciliation Act 1996 (No 26 of 1996, 16 August 1996); s 12(1) of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed).

6 Donald Francis Donovan, "The Allocation of Authority between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal" in Albert Jan van den Berg, *New Horizons in International Commercial Arbitration and Beyond: International Council for Commercial Arbitration Congress series No 12* (Kluwer Law International, 2005) p 203 at p 204.

particular context is considered under the issue of *how* the allocation of authority between courts and tribunals should be structured.

(1) Should arbitral tribunals have the authority to grant interim measures?

9 It is submitted that arbitral tribunals should have the authority to grant interim measures.

10 Firstly, it could be argued that because disputing parties have consented to the arbitral proceedings and the arbitral tribunal's authority, it must necessarily be implied that they had also consented to the tribunals' authority to take measures that preserve the integrity of the proceedings.[7] Following from this logic, if the parties had consented to arbitral proceedings and the tribunal's authority but *explicitly* stated that they did not consent to the tribunal's authority to issue interim measures, then that must be respected. Indeed, the juridical basis for international commercial arbitration is fundamentally the parties' agreement.[8]

11 Secondly, since arbitral tribunals are already technically familiar with the case and subject matter and may thus take a shorter time to make a decision than the courts, resources would be more effectively used if parties were able to make their requests for interim measures directly to the tribunal.[9] Applying to the courts may be a lengthy process because they might solicit arguments on the issue or because the court judgment might be appealed.

12 Thirdly, since arbitrations are often conducted in a state that has little or nothing to do with the subject matter in dispute, the courts of the arbitral seat might not have jurisdiction over the parties or the assets

7 Donald Francis Donovan, "The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and a Proposals for Moving Forward" in Albert Jan van den Berg, *International Commercial Arbitration: Important Contemporary Questions: International Council for Commercial Arbitration Congress Series No 11* (Kluwer Law International, 2003) 83.

8 As has been said, "[t]here can be no doubt that arbitrations, whether international or between subjects of private law, derive their mandate and competence from the consent and agreement of the parties to the arbitral agreement; therefore, it is the parties' consent that determines the scope, limits and area of certitude of an arbitrator's authority and jurisdiction": *Watkins-Johnson v Bank Saderat Iran, Award No 429-370-1 (28 July 1989)* (1989) 22 Iran-US CTR 218, 296. "Arbitration is a consensual process and depends upon the existence of a valid agreement to arbitrate": Interim Award in ICC Case No 7929 (2000) XXV YB Comm Arb 312, 316.

9 UN Doc A/CN.9/WG.II/WP.108 at 77.

in question and a court in another state may have to be requested instead.[10]

13 Fourthly, the law in some jurisdictions might take the position that because the parties had agreed to arbitrate, they should be deemed to have excluded the courts from intervening in the dispute.[11] If so, then there would be no means other than tribunal-ordered measures to ensure the integrity of the arbitral proceedings.

14 Fifthly, an arbitral tribunal is entrusted by contracting parties with the power to resolve their dispute. The consensual nature of international commercial arbitration generally results in a high likelihood of the tribunal's orders being voluntarily complied with. For example, a survey done by the American Arbitration Association revealed that parties complied with the arbitral tribunal's decision on interim relief in 90% of the cases.[12]

(2) Should courts enforce arbitral tribunal-ordered interim measures?

15 It is argued that courts should enforce arbitral tribunal-ordered interim measures for several reasons.[13]

16 Firstly, although it is suggested above that there is generally a high likelihood for parties to comply with arbitral tribunal orders, there may be instances where that is false. Such orders, that "preserve the integrity of the arbitral process",[14] would become meaningless if it is not given effect by sanction of the state. The interim "relief must be enforceable at the time it is granted".

17 Secondly, arbitrating parties would want increased predictability in regard to their rights and reduced hostility in regard to their relationship. The certainty that the tribunal-ordered interim measures would be given effect by a court of law ensures that.

18 Thirdly, there is today an increased ease of movement of assets from one jurisdiction to another. Interim measures generally go towards preventing such movement that might otherwise result in meaningless

10 UN Doc A/CN.9/WG.II/WP.108 at 76.
11 UN Doc A/CN.9/WG.II/WP.108 at 76.
12 Richard W Naimark & Stephanie E Keer, "Analysis of UNCITRAL Questionnaires on Interim Relief" in *Towards a Science of International Arbitration: Collected Empirical Research* (Christopher R Drahozal & Richard W Naimark eds) (Kluwer Law International, 2005).
13 See Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at pp 238–240.
14 *Pacific Reinsurance Management Corp v Ohio Reinsurance Corp* 935 F 2d 1019 at 1023 (9th Cir, 1991).

awards. Without court enforcement, there remains the uncertainty that meaningless awards might occur.

(3) Should courts issue interim measures in aid of international commercial arbitration?

19 It is further argued that courts should be authorised to issue interim measures as well.

20 Firstly, there might be particular instances where an arbitral tribunal is unable to order interim measures. For instance, interim measures might be required at the outset of a case even before an arbitral tribunal has been constituted. Also, in some states, only courts are authorised to make particular types of interim orders (for various rationales);[15] for example, *Mareva*[16] and *Anton Piller*[17] injunctions.

21 Secondly, the authority of arbitral tribunals is derived from the consent of arbitrating parties. Hence, tribunals have no authority to make orders against third parties. This is particularly important when property involved in the subject matter of the arbitration is within the control of third parties like banks.

22 Thirdly, arbitral tribunals do not have authority to enforce interim measure orders outside the confines of the arbitral process itself. There may be cases where it is more convenient or even necessary for a party to apply to the courts directly. Indeed, it has been argued that procedural economy is enhanced when parties can apply directly to the courts for interim measures; this also circumscribes the possibility that a court might not enforce arbitral tribunal-ordered interim measures.[18]

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15 Admittedly, this argument appears fallacious because it already presupposes that courts do have the power to make certain types of interim orders, which arbitral tribunals cannot.

16 This is named after the English case of *Mareva Campania Naviera v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. It is now more commonly known as a freezing order. A *Mareva* injunction causes the defendant's assets to be "frozen" so that they may not be dissipated from beyond the jurisdiction so as to frustrate a judgment.

17 It is named after the case of *Anton Piller KG v Manufacturing Process Ltd* [1976] 2 WLR 162; [1976] 1 All ER 779. Anton Piller orders grant the applicant a right to enter the defendant's premises to search, inspect and/or take possession of evidence relating to the applicant's claim.

18 Roque J Caivano, "*Medidas cautelares en al arbitraje*" [1998] IV JA 47, cited in Donald Francis Donovan, "The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of jurisdictions, the Work of UNCITRAL and a Model Proposal" in Albert Jan van den Berg, *New Horizons in International Commercial Arbitration and Beyond: International Council for Commercial Arbitration Congress series No 12* (Kluwer Law International, 2005) p 203 at pp 222–223.

B. How should issuance and/or enforcement of interim measures be governed?

23 In the below discussion, it will be seen that there is a lack of harmonisation of laws and practices in many aspects. Although the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[19] is arguably the "most significant contemporary legislative instrument relating to international commercial arbitration",[20] it is unfortunately, though understandably, silent on many of the issues below.

(1) What standards should govern arbitral tribunals and courts in issuing interim measures?

24 There is a wide variety of types of interim measures issued in international commercial arbitration by different arbitral tribunals and national courts of various jurisdictions. The standards employed by these institutions in doing so also differ.

25 A discussion on the types, standards or approaches taken by various jurisdictions shall not be attempted here.[21] However, for the purposes of this essay (particularly, its focus on international arbitration law in Singapore), a brief discussion of the UNCITRAL Model Law shall be considered.

26 Article 17 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Arbitration 1985 provided for arbitral tribunals to have the power to issue interim measures. However, it did not stipulate what types of interim measures could be ordered and the standards that should govern their issuance.

27 In 2006, the UNCITRAL revised the Model Law.[22] The 2006 Model Law included a revised Art 17, which seemed to empower tribunals to issue a wide-ranging scope of interim measures, including a stipulation

19 This has occurred particularly in the US. The US Federal Arbitration Act (9 USC §1 *ff*) is silent on this issue. See, for example, *Sperry International Trade v Israel* 689 F 2d 301 at 304 n 3 (2d Cir, 1982).

20 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 16.

21 This has already been done by more capable writers. See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 16 at pp 1945–2019. Donald Francis Donovan, "The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and a Proposals for Moving Forward" in Albert Jan van den Berg, *International Commercial Arbitration: Important Contemporary Questions: International Council for Commercial Arbitration Congress series No 11* (Kluwer Law International, 2003) 83.

22 United Nations documents A/40/17, annex I and A/61/17, annex I.

on what types of measures could be issued.[23] This is subject to several limitations:

(a) arbitral tribunals have authority only to make orders against arbitrating parties and not third parties;[24]

(b) arbitral tribunals can only make orders that pertain to the "subject matter of the dispute";[25] and

(c) arbitral tribunals' authority is subject to parties' agreement, consistent with the paramount principle of party autonomy.[26]

28 Regarding the standards that could or should be applied by arbitral tribunals when determining whether to issue interim orders, it can be said that there is neither harmonisation of clear standards nor much guidance provided by arbitral institutional rules or national legislation. The 2006 Model Law does provide certain conditions in Art 17A: (a) irreparable harm and "balancing of hardships";[27] and (b) reasonable possibility of success on merits.[28] Nevertheless, it seems

23 The 2006 Model Law Art 17(2) provides:

> An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

24 This is implied in UNCITRAL 2006 Model Law Art 17: "[a]n interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal *orders a party* to …"[emphasis added].

25 UNCITRAL 1985 Model Law Art 17 states that tribunals can issue measures which they "consider necessary *in respect of the subject matter of the dispute*" [emphasis added]. This may be taken to mean property in dispute, contractual rights in question, or simply the equilibrium of the parties: Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 1969. The amendments to Art 17 in the 2006 Model Law should not be taken to mean that there is no longer any such limitation. Instead, it should be merely understood as clarifying that the tribunal does indeed have a wide-ranging power to order interim measures.

26 UNCITRAL 2006 Model Law Art 17(1). Notably, this is also the case for many national arbitration legislations: for example, s 38(1) of the English Arbitration Act 1996 (c 23); Art 183(1) of the Swiss Federal Act on Private International Law, SR 291 (18 December 1987).

27 UNCITRAL 2006 Model Law Art 17A provides: "[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".

28 UNCITRAL 2006 Model Law Art 17A provides: "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination

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certain that the conditions in Art 17A could encapsulate a range of factors which arbitral tribunals might consider. This opens up the possibility of unpredictability and uncertainty for parties seeking interim measures. Nevertheless, it is crucial for arbitral tribunals to be given bandwidth to decide on this issue sensitively to the case. Several considerations might include:[29] (a) urgency;[30] (b) no prejudgment of merits;[31] and (c) jurisdiction.[32]

29 It is submitted that an adoption of the 2006 Model Law is beneficial for clarity on the minimum standards that arbitral tribunals should adopt when determining whether to order interim measures, providing guidance to parties, and harmonising a bottom-line standard that would lend credence when national courts are requested to enforce interim measures, especially those made by tribunals which arbitral seats are in jurisdictions other than the court being requested for enforcement.

30 Article 17J of the 2006 Model Law takes the approach that the same power to issue interim measures as that of the arbitral tribunals is also conferred onto national courts. However, it is unlikely that the standards guiding the courts are also that stipulated in the Model Law for arbitral tribunals.[33] Article 17J states that courts shall exercise that power "in accordance with its own procedures in consideration of the

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on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination".

29 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 1980–1993.

30 Many tribunals have required this standard of "urgency". It has been said that "a situation has an urgent character when it requires that measures be taken in order to avoid that the legitimate rights of a party are not placed in peril": "Partial Award in ICC Case (Unidentified)" in Eric A Schwartz, "The Practices and Experience of the ICC Court" in *Conservatory and Provisional Measures in International Arbitration* (ICC, 1993) 45, 60.

31 The interim measures must not prejudge the substantive merits of the dispute. It is, however, questionable whether this standard is of any significance in light of the "balancing of hardships" standard. After all, a consideration of the latter must already take into account whether the grant of interim measures would prejudice the other party in the eventuality of the final outcome of the case being for the other party.

32 This has been taken to mean that only after a tribunal determines that there is an absence of its own jurisdiction in the arbitration, then it will lack any authority in regard to interim measures. This is a necessary consequence of the determination on jurisdiction, and therefore may seem rather redundant as an explicit standard.

33 The Working Group considered the possibility of following the standards applicable to arbitral tribunals as stipulated in Art 17A but eventually rejected it: see UNCITRAL Secretariat, *Settlement of commercial disputes: Interim measures of protection: Note by Secretariat* A/CN.9/WG.II/WP.125 (2 October 2003) at 11–12, para 42 and UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Second Session* A/CN.9/573 (10–14 January 2005) at 20, para 91.

specific features of international arbitration". This is most likely interpreted to mean that the courts are free to develop and/or apply its own standards derived from the state's domestic law on interim measures, which is arguably the common practice anyway. Nonetheless, this provision appears to be one of several weaknesses of the 2006 Model Law (at least in reference to the aim of harmonisation) and has been critiqued for being possibly too unqualified (giving courts power to order interim measures without reference to the state law).[34]

(2) How should courts enforce interim measures ordered by arbitral tribunals?

31 There is no harmonisation of law in this regard. Thus, it largely depends on the national arbitration legislation of the individual state.

32 One issue that arises is whether national courts should enforce only those measures that are issued by tribunals in the seat of arbitration, or whether they should also enforce measures issued by tribunals whose seat of arbitration is not in the jurisdiction that the court being requested is in. This issue shall be considered at length in the following section, while surveying the development of the law in this regard in Singapore.

33 There are four possible ways that courts can enforce interim measures:[35]

(a) direct enforcement of a tribunal-ordered interim measure;

(b) executory assistance in enforcing such measures;

(c) recasting tribunal orders to transpose the orders into the national legal system; or

(d) court unilaterally ordering an interim measure of its own.

34 The first approach posits that a national court simply executes an arbitral tribunal-ordered interim measure without reviewing the case. There would therefore be no safeguards at all. The Ecuadorian Mediation and Arbitration Law[36] adopts such an approach. Not surprisingly, most states and parties deem this approach unacceptable.

34 Martin Davies, "Court-ordered Interim Measures in Aid of International Commercial Arbitration" (2006) 17 Am Rev Int'l Arb 299.

35 See Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at p 247.

36 Ecuador's Mediation and Arbitration Law 1997 (Ley No.000.RO/145 of 4 September 1997) Art 9(3).

35 The second approach posits that national courts merely conduct a limited review of the tribunal-issued order before enforcing it. In this regard, it should be noted that the 1985 Model Law did not explicitly address this issue. While the Secretariat had proposed to address it, the Fourth Working Group rejected it on the basis that it was an incomprehensive treatment of a question of national procedural law and court competence and would thus be unlikely to be accepted by many states.[37] Nonetheless, the Working Group noted that this should not preclude states to adopt for themselves procedural law that would render executory assistance to enforcement of such measures.[38] Many states have thus enacted national arbitration legislation that empowers their courts to enforce interim measures issued by arbitral tribunals.[39] Some however have not. This results in problematic situations where national courts have to reinterpret interim measures as "arbitral awards" that can be enforced by virtue of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[40] This forces the courts to stretch the meaning of interim measures to be "final awards" on supposedly "severable" issues. This ambiguity has thus led to differing judicial approaches to the issue, hence unpredictability in this regard.[41] It is to address these problems that the UNCITRAL made amendments in the revised 2006 version of the UNCITARL Model Law. In particular, Art 17H provide that national courts shall enforce tribunal-issued interim measures irrespective of where it was issued from. This is subject to several safeguards stipulated in Art 17I.

36 The third approach posits that the court recasts the tribunal-issued order so as to enforce the order. The court is also empowered to repeal or amend the order. This approach is taken in Germany.[42]

37 UN Doc A/CN.9/WG.II/WP 40.

38 UN Doc A/CN.9/WG.II/245 para 72.

39 See, for example, Art 36 of the Bolivian Arbitration and Conciliation Law (Law 1770, 1997); s 42 of the English Arbitration Act 1996 (c 23); s 2GG of the Hong Kong Arbitration Ordinance (Cap 609); s 12(6) of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed).

40 This has occurred particularly in the US. The US Federal Arbitration Act (9 USC §1 *ff*) is silent on this issue. See, for example, *Sperry International Trade v Israel* 689 F 2d 301, at 304 n 3 (2d Cir, 1982).

41 See, for example, *Publicis Communication v True North Communications Inc* 203 F 3d 725 (7th Cir, 2000), where the court rejected the application to enforce an interim award. See also Cecil O D Branson, "The Enforcement of Interim Measures of Protection 'Awards'" in *International Commercial Arbitration: Important Contemporary Questions* (Albert Jan van den Berg ed) (Kluwer Law International, 2003) at p 163.

42 Section 1041(2) of the German Code of Civil Procedure ("*Zivilprozessordnung*"): "The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1 unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the

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Theoretically, this power to recast orders seems necessary because, in order for the courts to call upon the sanction of the state, they would have to identify a legal basis within that particular state's legal system to do so. The issue was raised before a German court, which had to identify a way to translate a *Mareva* injunction into the German legal system to meet the preconditions of the German certainty principle ("*Bestimmtheitsgrundsatz*"), and ultimately did so on the basis of s 890 of the German Code of Civil Procedure ("*Zivilprozessordnung*").[43] This goes to show that it cannot be taken for granted that all interim measures could be easily translated into a legal system.[44]

37 The fourth approach posits that a court issues its own interim order, taking into consideration the tribunal-issued one. This would require the party seeking to enforce the interim order to endure a new set of proceedings for the order. It should be noted that in most states that adopt this approach, it is provided that the court shall treat the finding of fact made by the tribunal as conclusive.[45]

38 Taking into account the interests of procedural efficiency (for both the courts and the parties), the urgency of upholding interim protection of rights where there is risk of immanent and irreparable

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purpose of enforcing the measure." See Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International, 2005) at p 255.

43 See AAS Zuckerman & J Grunert, "Anmerkung zu OLG Karlsruhe", *Zeitschrift fuer Zivilprozess International* (ZZP*Int*)" (1996) 1, 96–102, cited in Jan Schaefer, "New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared" (1998) 2.2 Electronic J Comp L <http://www.ejcl.org/22/art22-2.html>. Section 890 of the German Code of Civil Procedure, as promulgated on 5 December 2005, reads:

> Paragraph 890
>
> **Enforcement of an obligation not to act and to tolerate an act**
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> 1. If an obligor fails to comply with his obligation not to act or with his obligation to tolerate an act, he shall, on application by the obligee, be sentenced by the court of first instance either to a fine and, if recovery is impossible, to a term of imprisonment or to a term of imprisonment, not exceeding six months. Each fine shall not exceed EUR 250 000, and the term of imprisonment shall not exceed two years in total.
>
> 2. The sentence must be preceded by a coercive warning issued, upon request, by the court of first instance, if such a warning is not already contained in the judgment establishing the obligation.
>
> 3. Upon application by the obligee, the obligor may also be ordered to lodge a security in respect of any subsequent damage which might, within a fixed period, result from any other failure to fulfil an obligation.

44 Thus, it is only in 2004 that the European Union has required of EU states to make provisions for *Mareva* injunctions, pursuant to Art 9(2) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

45 See, for example, Art 9(3) of the New Zealand Arbitration Act (1996 No 99, 2 September 1996); s 1-567(39) of the North Carolina International Commercial Arbitration Act (NCGS Sect 1-567.30 *ff*).

harm, time- and cost- saving for parties, the availability of interim measures to preserve the integrity of arbitral proceedings, it is submitted that the second approach should be adopted by states. In particular, states should adopt the 2006 Model Law and/or national arbitration legislation that achieves the effects intended by the former. Further, Art 17I of the 2006 Model Law stipulates certain standards for courts in determining whether to enforce a tribunal-issued interim measure. This would reduce uncertainty and inefficiency in the arbitration process, make redundant the other approaches and harmonise the law on interim measures to ensure fairness to arbitrating parties.

(3) What should the proper allocation of authority between arbitral tribunals and courts be?

39 This question is a corollary from having considered the above issues. If theoretically, both arbitral tribunals and national courts can and should have authority to issue interim measures, the question must then be how an individual state should structure the relationship of authority between the two institutions.

40 In determining this question, a legal system must address three sub-questions:[46]

(a) Whether courts, tribunals or both should have power to order interim measures. Two more questions arise:

(i) whether the power of courts or tribunals to order interim measures should be subject to the agreement of parties;

(ii) if so, whether parties should be permitted to opt out or opt in to some default arrangement in which courts and/or arbitral tribunals have the power to order such measures.

(b) The legal system must decide what scope of authority each institution should have. Some states give courts and tribunals power to order the same range of measures. Others give one authority a broader range. Two more questions arise:

(i) whether authorities should have power to order measures *sua sponte* (the court takes action on its own motion rather than at request of any party);

46 Donald Francis Donovan, "The Allocation of Authority between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal" in Albert Jan van den Berg, *New Horizons in International Commercial Arbitration and Beyond: International Council for Commercial Arbitration Congress Series No 12* (Kluwer Law International, 2005) 203 at 205.

(ii) whether issuance of measures by courts should be preceded by request from arbitral tribunals for the court's involvement.

(c) How courts and arbitrators exercise authority in relation to one another. State practice falls along a continuum of preference for either courts or tribunals to issue interim measures. Two main approaches along a continuum have emerged:

(i) "free choice" approach where parties have free choice to apply to either courts or tribunals for an order of interim measures;

(ii) "court-subsidiarity" approach where the power of courts to order interim measures is subsidiary to the power of arbitral tribunals.

41 For the most part, the preceding discussion has already covered the first two questions, except for some sub-issues. Based on the preceding discussion, it was argued that the 2006 Model Law should be adopted for the various reasons discussed above. The fact that the 2006 Model Law addresses the first two questions further buttresses that argument.

42 Regarding the first question, the co-existence of Arts 17 and 17J in the 2006 Model Law suggest that both arbitral tribunals and national courts have the power to issue interim measures. Indeed, most developed states legislate for both tribunals and courts to have such authority simultaneously.[47] The authority of arbitral tribunals is subject to parties' agreement,[48] but it is not clear if this is the same for the authority of courts. Most national arbitration legislations do not explicitly address this. However, many national courts have adopted the position that parties may agree to prevent the other party from applying to the courts for interim measures.[49]

43 Regarding the second question, Arts 17 and 17J of the 2006 Model Law suggest that both tribunals and courts share the same scope of power to issue interim measures. Tribunals do not have *sua sponte* powers as Art 17 states that tribunals can grant interim measures only "at the request of a party". It is not clear whether this is the same for courts. Arguably, Art 9 of the Model Law could be interpreted, on the same reasoning as that applied to Art 17, to mean that courts can issue

47 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 1972.

48 2006 Model Law, Art 17(1).

49 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 2051, n 519.

interim measures only when a party requests for it.[50] The Model Law is also silent on whether courts could only issue interim measures when requested by arbitral tribunals for the court's involvement. However, it should be implied from Art 17J that courts have the power without such a circumscription as Art 17J states that the courts are to exercise their power "in accordance with its own procedures".

44 The Model Law appears to be silent on the third question. This question shall thus be discussed in more detail, with the different approaches[51] towards it examined below for the purposes of this essay.

45 The first approach is the "free choice" model. It suggests that parties are free to apply to either courts or tribunals for interim measures, and there is no preference for any institution.

46 As mentioned, the 2006 Model Law does not explicate the relationship between tribunals and courts. Neither does the 1985 Model Law. In this sense, the Model Law could be said to adopt a "free choice" model. It should be noted, nonetheless, that a state could adopt the Model Law and additionally legislate more provisions beyond the Model Law such that the arbitration regime diverges from the "free choice" model.

47 Germany is an example of a state which adopted the 1985 Model Law. Of interest is the fact that the German Code of Civil Procedure stipulates that the court will not enforce an interim order made by a tribunal if a corresponding application has been made to a court.[52] Some commentators have argued that courts should defer to arbitral tribunals with respect to ordering interim measures if (a) an application is already pending with the arbitral tribunal and (b) requirement of effective legal protection does not require the court to step in so as to prevent prejudice in a particular case.[53] If this approach is taken, it suggests a deviation from the "free choice" model towards a "court-subsidiarity" model, which reflects a pro-arbitration attitude.

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50 Article 9 of the 2006 Model Law provides: "[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure".

51 See Donald Francis Donovan, "The Allocation of Authority between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal" in Albert Jan van den Berg, *New Horizons in International Commercial Arbitration and Beyond: International Council for Commercial Arbitration Congress series No 12* (Kluwer Law International, 2005) 203.

52 Section 1041(2) of the German Code of Civil Procedure. as promulgated on 5 December 2005.

53 See Stefan Kröll, "Das neue deutsche Schiedscrecht vor staatlichen Gerichten" [2001] NJW 1173 at 1179.

48 India's Arbitration and Conciliation Act[54] follows the approach taken in Arts 9 and 17 of the 1985 Model Law. There are, however, some divergences. Interestingly, s 9 of the Indian Arbitration and Conciliation Act 1996 allows for a court to order interim measures *after* an arbitral award.[55] Section 9 also stipulates the types of interim measures that may be ordered by the courts. Also, it should be noted that courts are able to order interim measures regardless of whether the arbitration takes place in India – this was based on a presumed reading of Parliament's intention of not frustrating arbitration proceedings.[56] As to the allocation of authority between courts and tribunals, there is no clear choice between either. Thus, parties appear to have free choice. Commentators note, however, that if there were conflict, "the order of the court, being an appellate forum to an arbitral tribunal, would prevail".[57] This approach arguably takes a negative approach towards arbitration.

49 The second approach is the "court-subsidiarity" model. This means that the authority of courts to issue interim measures is subsumed under the authority of arbitral tribunals in certain situations.

50 The English Arbitration Act 1996[58] seems to adopt this position. Several comments are pertinent. Firstly, unlike the Model Law, s 44 of the Act allows parties to expressly exclude the power of courts to issue interim measures with the phrase "unless otherwise agreed by the parties". Secondly, ss 39(1) and 39(4) adopt the position that while tribunals can have powers to order interim measures, the default rule is that tribunals lack such powers, so parties must expressly confer power on the tribunal. Thirdly, s 44(2) provides an *exhaustive* list of interim measures that courts can order. Section 39 enumerates a *non-exhaustive* list of interim measures that a tribunal can order. However, it appears that courts have a wider scope of measures than tribunals; only courts have power to order *ex parte Mareva* injunctions and *Anton Pillar* orders, notwithstanding that parties may attempt to confer such power on tribunals.[59] Fourthly, assuming parties confer power on both courts and tribunal, the power of courts is subsidiary to tribunals. The rationale

54 No 26 of 1996, 16 August 1996.

55 Typically, interim measures would be requested before or during arbitral proceedings. For instance, Art 9 of the Model Law provides that "[i]t is not incompatible with an arbitration agreement for a party to request, *before or during arbitral proceedings*, from a court an interim measure of protection and for a court to grant such measure" [emphasis added].

56 *Bhatia International v Bulk Trading SA* Civil Appeal No 6527 of 2001 (13 March 2002) (SC, India).

57 Lalit Bhasin, "The Grant of Interim Relief under the Indian Arbitration Act of 1996" in ICCA Congress Series No 1, 93 at 96.

58 c 23.

59 Jan K Schaefer, "New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared" (1998) 2.2 Electronic J Comp L.

is to "leave the control of the arbitral process in the hands of the tribunal so far as possible".[60] The relationship of subsidiarity is as follows:

> (a) In "urgent" cases, courts may make such orders to preserve evidence or assets involved in the proceedings.[61]
>
> (b) In "non-urgent" cases, courts may only act upon application of a party if:
>
> > (i) the party has given notice to the other parties and the arbitral tribunal; and
> >
> > (ii) either the arbitral tribunal has given its permission to proceed or the other parties have given written consent.[62]
>
> (c) If a tribunal has no power or is at that time unable to act effectively, then courts have the power to order interim measures only to the necessary extent.[63] If the court orders interim measures in such a situation, such court-issued orders would cease to have effect in whole or in part when the arbitral tribunal decides as such.[64]

51 Fifthly, the power of courts to make interim measures applies even if the seat of arbitration is outside the jurisdiction of the court.[65] However, this is subject to whether courts consider the exercise of powers to be "inappropriate to do so".[66]

52 In some states, the allocation of authority to issue interim relief is not explicitly addressed. One example is Argentina. As legislation there does not explicitly refer to interim measures, it is unclear whether arbitral tribunals have the power to order them. Article 753 of the

60 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) at 215.

61 Arbitration Act 1996 (c 23) (UK) s 44(3).

62 Arbitration Act 1996 (c 23) (UK) s 44(4).

63 Arbitration Act 1996 (c 23) (UK) 44(5).

64 Arbitration Act 1996 (c 23) (UK) s 44(6).

65 Section 2(3) of the English Arbitration Act 1996 (c 23) provides that the powers in s 44 apply even if the seat of arbitration is outside England and Wales or Northern Ireland.

66 Arbitration Act 1996 (c 23) (UK) s 2(3). Robert Merkin comments that the inappropriateness depends on two factors: (a) whether English law has been chosen as the procedural law; and whether the only hope of assistance is provided by English courts; or (b) where although the arbitration has no connection with England, there is evidence in England which needs to be preserved, or one of the parties has assets within the jurisdiction which can be frozen by means of a *Mareva* injunction: Robert Merkin, *Arbitration Act 1996* (Lloyds Commercial Law Library, 2000) at 102.

National Code of Procedure in Civil and Commercial Matters[67] provides that arbitrators may not decree "compulsory and execution measures". Most commentators argue on the basis of that provision that arbitrators may not order interim measures. Some commentators argue otherwise. It is also not clear whether parties can agree to confer power on arbitral tribunals. However, it is clear that the courts have power to make interim measures on the basis of Art 753.

53 The problem with having courts and tribunals having concurrent authority to issue interim measures is that it may result in conflicting decisions, duplicative parallel proceedings which may be costly, and perhaps encourage forum-shopping. In principle, two considerations may be weighed: party autonomy and judicial non-interference in arbitral proceedings (which corollary is an avoidance of time-consuming and costly duplicative proceedings, forum-shopping and conflicting decisions).

54 The "free choice" model upholds party autonomy as paramount but it is at the expense of judicial non-interference, resulting in the risks stated above. On the other hand, the "court subsidiarity" model upholds the judicial non-interference principle, but not at the expense of party autonomy[68] since it also allows parties to choose which institution should have authority. Even where parties choose both, it favours authority to tribunals while still allowing parties to proceed to the courts under certain conditions which further respect the autonomy of not just the applicant party but also the other parties to the dispute. Hence, it is submitted that the court-subsidiarity model should be adopted.

55 Having considered the theoretical discussion, the development of the law on interim measures and international commercial arbitration in Singapore shall now be surveyed.

III. Interim measures in Singapore: A brief history

A. 1994: Singapore adopted the 1985 UNCITRAL Model Law

56 In 1994, Singapore adopted the 1985 Model Law via the International Arbitration Act 1994 ("IAA").[69] The Singapore government

67 The Argentinian National Code of Civil and Commercial Procedure (Law 17.454 of 19 September 1967).

68 In this sense, it could be said to be a Pareto efficient approach.

69 Cap 143A, 2002 Rev Ed. Section 3(1) of the IAA states that "[s]ubject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore".

extolled the Model Law as an internationally accepted framework for international commercial arbitration, which if adopted, would promote Singapore's role as a hub for international commercial arbitration and international legal services.[70]

57 Section 5 of the IAA provides that the IAA and the Model Law applies, *inter alia*, to all international commercial arbitrations in which Singapore is chosen as the arbitral seat. Article 5 of the 1985 Model Law further precludes any inherent or residual powers of the courts to be exercised in intervention into international commercial arbitrations in Singapore, except as otherwise explicitly provided in the IAA.

58 The IAA was adopted largely based on the recommendations made by the Singapore Law Reform Sub-Committee on Review of Arbitration Laws 1993 ("1993 Sub-Committee").[71] In its analysis of the Model Law, it considered that there was a lacuna in regard to interim measures.[72] It pointed out that while Art 17 of the 1985 Model Law provided for arbitral tribunals to order any party to take interim measures, it does not provide any method of enforcing such interim orders; neither does the Model Law state that interim orders are deemed "awards" that could be recognised and enforced. Instead, Art 9 of the Model Law merely provided that "it is not incompatible" for a party to request a court for interim measures. The lacuna was definitely a valid concern, because the drafters of the 1985 Model Law must have intended to leave the issue of interim orders largely to the prerogative of the individual state to address by legislation.[73] This is probably because of the wide variety of types of and standards for governing interim measures across different states. If the Model Law was to stipulate them, it might make the Model Law less attractive to these states.

59 Several comments about the 1993 Sub-Committee report are pertinent. Firstly, the 1993 Sub-Committee recognised the importance of interim measures in protecting the integrity of arbitral proceedings. It thus recommended that arbitral powers be substantially increased, and drawing on the arbitral powers stipulated in the UNCITRAL Arbitral Rules 1976 and the Singapore International Arbitration Centre ("SIAC") rules, it recommended a list of such powers that the Singapore arbitration

70 See *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at col 627 (Ho Peng Kee, Parliamentary Secretary to the Minister for Law).

71 This was noted by the Singapore High Court in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR(R) 323 at [39].

72 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at paras 32–35.

73 The drafters suggested in the 1985 Model Law Commentary, at para. 115, that court-issued interim measures were in fact conducive to making the arbitration efficient and to securing the expected results.

legislation should confer on arbitral tribunals.[74] It also recommended the creation of a mechanism to enforce them through the courts.[75]

60 Secondly, the 1993 Sub-Committee also recognised that the courts should also have powers to grant interim measures. It noted that only the courts had authority to issue orders against third parties.[76] It also took the view that the concurrent authority should be given to both courts and tribunals so as to give parties more options to obtain interim protective relief more expediently.[77]

61 Thirdly, the 1993 Sub-Committee recognised that judicial interference with arbitral proceedings should be minimised.[78] It saw that widening the powers of tribunals would go towards achieving that aim. The principle of judicial non-interference has been upheld by the Singapore Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* ("*NCC International*").[79] In that case, the applicant applied for interim mandatory injunction from the court to compel the respondent to deliver concrete under the terms of the contract. There was an arbitration agreement in the contract providing that any disputes between the parties would be referred to arbitration in accordance with the SIAC rules. The Court of Appeal upheld the High Court's refusal of the application, stating that the court's assistance in arbitration proceedings should only be sought when arbitration was inappropriate, ineffective or incapable of securing the relief sought, that the court would not usurp the functions of the arbitral tribunal and would only order interim measures when it would support arbitration proceedings; this might be where interim measures sought are to be issued against third parties, where matters are urgent, or where the court's coercive powers of enforcement are needed.[80]

62 The Singapore Parliament adopted the 1993 Sub-Committee recommendations and enacted the IAA in 1994. Section 12(1)(*i*) of the IAA stipulated that arbitral tribunals would have the power to order interim measures against any party. Section 12(7) of the IAA further provided that the courts shall have the same power of making orders as

74 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at para 31.

75 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at paras 34–35.

76 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at para 47.

77 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at para 31.

78 Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) at paras 34–35.

79 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5.

80 See David St John Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 7-138.

that of arbitral tribunals as well as the power of making orders that courts have in judicial proceedings. It bears repeating that the principle of judicial non-interference has been interpreted into the relationship between ss 12(1) and 12(7) by the Court of Appeal in *NCC International*.

B. 2001, 2002: Legislative amendments (on matters other than interim measures)

63 For comprehensiveness' sake, it should be mentioned that the IAA was amended in 2001 in order to streamline it with the domestic Arbitration Act that was enacted in the same year.[81] The amendments concerned the definition of "arbitration agreement", stay of proceedings, application of the Limitation Act, summoning of witnesses and the immunity of arbitral institutions in the appointment of arbitrators.[82]

64 In 2002, the IAA was further amended to introduce a new provision to clarify the application and effect of arbitral institution rules which parties agreed to in their arbitration agreements and the relationship between those rules and that of the IAA (as well as the Model Law incorporated by virtue of the IAA).[83]

C. 2003: Just another injunction?

65 In the case of *Econ Corp International Ltd v Ballast-Nedam International BV*,[84] the Singapore High Court issued an interim injunction against a party to prevent it from calling on a performance bond even though the arbitration was in India. No arguments were made against this on basis of s 12 of the (then 1994) IAA. The court there considered that it had the power to grant interim injunctions on the basis of ss 12(1)(*g*) and 12(6) of the 1994 IAA, read with Art 9 of the Model Law. The issue of whether the Singapore courts had the power to issue such interim injunctions to aid arbitrations that had their arbitral seats outside of Singapore was never raised. This issue would only surface eventually, as discussed below.

81 Arbitration Act 2001 (Act 37 of 2001).

82 See Review of Arbitration Laws Committee, *Review of Arbitration Laws Report* (LRRD No 3/2001) para 3.1.

83 See *Report on Proposed Amendment to the International Arbitration Act on Rules of Arbitration* (LRRD No 11/2002).

84 *Econ Corp International Ltd v Ballast-Nedam International BV* [2003] 2 SLR(R) 15 (HC).

D. 2006-2007: Judicial disagreement on enforcement of interim orders in aid of foreign arbitration

66 Between 2006 and 2007, two significant cases involving international commercial arbitration and interim measures arose, resulting in three important judgments. The first judgment was *Swift-Fortune Ltd v Magnifica Marine SA* ("*Swift-Fortune*").[85] In that case, the plaintiff had entered into a memorandum of agreement ("MOA") with the defendant to purchase a vessel. The MOA contained an arbitration agreement that provided that any dispute arising out of the MOA would be settled by arbitration in London. The plaintiff successfully obtained a *Mareva* injunction that prevented the defendant from removing, disposing of, dealing with or diminishing the value of its assets in Singapore up to the value of US$2.5m. The defendant then applied to the High Court for a discharge of the *Mareva* injunction. Judith Prakash J in the High Court considered s 12(7) of the 2002 IAA[86] and held that the court had no power to make a *Mareva* injunction in support of foreign-seated arbitration. Prakash J considered that the IAA only had territorial effect unless explicitly stated otherwise. Hence, the IAA only empowered the Singapore courts to assist international commercial arbitrations that had their arbitral seat in Singapore. Prakash J considered Arts 1(2) and 9 of the Model Law and held that Art 9 was merely permissive and only allowed parties to apply interim measures where the domestic law already had provisions stipulating for such interim relief. Prakash J further considered that the Singapore Parliament could not have intended for the application of s 12 of the IAA to extend beyond Singapore.[87]

67 The second judgment that arose was *Front Carriers Ltd v Atlantic & Orient Shipping Corp* ("*Front Carriers*").[88] The same issue arose in this case. The plaintiff commenced arbitration proceedings in London against the defendant and sought a *Mareva* injunction in the Singapore High Court. Although the court ultimately refused to grant the *Mareva* injunction, it was on a basis other than the interpretation of

85 *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR(R) 323 (HC).

86 Section 12(7) of the 2002 IAA read:

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

87 See Lawrence Boo, "Arbitration Law" (2006) 7 SAL Ann Rev 51; Joel Lee, "Private International Law in the Singapore Courts" [2007] SYBIL 15; Mahdev Mohan & Tay Eu-Yen, "The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-up?" (2010) 22 SAcLJ 299; Lye Kah Cheong, Yeo Chuan Tat & Choo Zheng Xi, "Interim Measures in Aid of Foreign Arbitrations – Time for the *Deus Ex Machina*" (2009) 21 SAcLJ 429; Andrew Chan & Renita Sophia Crasta, "Interim Measures in Aid of Foreign Arbitration – A Re-Think" (2008) 20 SAcLJ 769.

88 *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR(R) 854 (HC).

s 12(7) of the IAA. Belinda Ang J in *Front Carriers* differed in her interpretation from Prakash J and held that the High Court could grant a *Mareva* injunction under s 12(7) of the IAA. Ang J held that Art 12(7) of the IAA gave effect to Art 9 of the 1985 Model Law (incorporated via the IAA). Article 9 provided for parties to seek interim relief from the courts regardless of whether the arbitral seat was in Singapore or not. However, this is on the condition that the court has *in personam* jurisdiction over the party against whom the interim measure was being sought, and the measure sought had legal basis in Singapore law.

68 Additionally, Ang J examined s 4(10) of the Civil Law Act,[89] which provided the Singapore courts with a general power to interim injunctions. Reading this with Art 9 of the Model Law, incorporated via the IAA, Ang J thought that s 4(10) of the Civil Law Act provided further basis for the High Court's jurisdiction to grant interim injunctive relief.

69 The third and most important judgment was by the Singapore Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* ("*Swift-Fortune (CA)*").[90] The court considered the legislative history of s 12(7) of the IAA as well as Art 9 of the Model Law and upheld Prakash J's ruling that s 12(7) of the IAA did not empower the Singapore courts to issue interim measures in aid of foreign arbitrations. The court rejected a literal reading of s 12(7) because it thought that, taken that reading to its logical end, it would provide the Singapore courts with a wide-ranging scope of power (when read with s 12(1)) to issue interim measures in all foreign arbitrations whether seated in Singapore or otherwise. It considered that such a wide-ranging power, if established, would "cut across or intrude into the powers of the foreign arbitral tribunal conducting the arbitration under a foreign law".[91] The court thus considered that the Singapore Parliament could not have intended such an effect, and that such an approach would be "contrary to the spirit of international arbitration".[92]

70 The Court of Appeal further considered Ang J's decision regarding s 4(10) of the Civil Law Act in *Front Carriers*. It thought that s 12(7) of the IAA derived its power from s 4(10) of the Civil Law Act, and thus could not have conferred on the Singapore courts any new powers. Section 4(10) of the Civil Law Act allowed the courts to issue injunctions against parties in Singapore if the applying party had an

89 Cap 43, 1999 Rev Ed. Section 4(10) read:

> 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.

90 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 (CA).

91 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [48].

92 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [52].

accrued cause of action that is justiciable in Singapore and if the court has *in personam* jurisdiction over the defendant (that is, the defendant has assets within the jurisdiction[93]). However, the court left open the issue of whether this s 4(10) power enabled the courts to grant interim relief in aid of foreign arbitral (or court) proceedings. This meant that the decision on s 4(10) by Ang J in *Front Carriers* remains good law in Singapore.

71 The Court of Appeal's decision subsequently received much criticism, on policy grounds. The outcome has been critiqued for representing Singapore as being merely *pro-Singapore* arbitration, and thus antithetical to the goal of making Singapore an *international* arbitration hub.[94] It has also been said that the approach following from the *Swift-Fortune (CA)* decision was a "competition" model which posits the notion that Singapore would promote itself as an international arbitration hub by providing curial assistance only to Singapore-based international arbitrations, as a punitive means to make business people select Singapore as the arbitral seat; that this model is "isolationist" and counter-productive.[95]

72 The policy critique is a little ironic since the Court of Appeal rejected outright the consideration of policy arguments.[96] Its response to this was that such considerations were for the Singapore Parliament to deliberate over, and presumably thereby respond with legislative amendment.[97] Eventually, the Singapore Parliament did respond with a legislative amendment, which shall now be considered.

E. 2009: Legislative amendment after Swift-Fortune

73 Following the three judgments, the Singapore Parliament enacted legislative amendments to the IAA in 2009 that directly dealt with the effect of *Swift-Fortune (CA)*.[98] The significant change was the

93 Order 11 r 1(1)(*a*) of the Singapore Rules of Court.

94 See Lawrence Boo, "Arbitration Law" (2006) 7 SAL Ann Rev 51 at para 3.24.

95 See Lye Kah Cheong, Yeo Chuan Tat & Choo Zheng Xi, "Interim Measures in Aid of Foreign Arbitrations – Time for the *Deus ex Machina*" (2009) 21 SAcLJ 429 at 434–437.

96 It was argued that: (a) the refusal to allow *Mareva* injunctions to aid foreign arbitrations would encourage flight of assets into Singapore as a "safe haven" from legitimate attachment, thereby affecting Singapore's reputation; (b) Singapore's legal profession would be deprived of the opportunity to provide international arbitration services: *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [15].

97 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [16].

98 This was explicitly mentioned by the Law Minister: see Second Reading of the International Arbitration (Amendment) Bill by Law Minister K Shanmugam (19 October 2009) at para 5. *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628.

introduction of s 12A, which would replace the contested s 12(7). Notably, s 12A is *in pari materia* with s 44 of the English Arbitration Act 1996, discussed above.[99]

74 The Singapore government stated that the 2009 amendment was meant to bring the IAA up to date with latest developments in international commercial arbitration law, particularly the 2006 Model Law revision, and to ensure that the Singapore legal regime for international commercial arbitration remains modern, effective and arbitration-friendly.[100]

75 Section 12A(1)(*b*) clarifies that the Singapore courts can provide curial assistance to arbitrations that are seated outside of Singapore.[101] This is subject to a certain "inappropriateness" standard stipulated in s 12A(3).[102] It should be noted that the "inappropriateness" standard has been (rightly) critiqued:

(a) for being vague and uncertain in application;[103]

(b) for non-clarity in its relationship with s 12A(5) (which requires in non-urgent cases, tribunal's permission and/or other parties' consent);[104]

(c) for the failure to provide legitimate exceptions;[105]

99 See para 50 above.

100 See Second Reading of the International Arbitration (Amendment) Bill by Law Minister K Shanmugam (19 October 2009) at para 28. *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628.

101 Section 12A(1)(*b*) of the 2009 IAA reads: "This section shall apply in relation to an arbitration irrespective of whether the place of arbitration is in the territory of Singapore."

102 Section 12A(3) of the 2009 IAA reads: "The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined *makes it inappropriate to make such order*." [emphasis added]

103 Mahdev Mohan & Tay Eu-Yen, "The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-up?" (2010) 22 SAcLJ 299 at para 31.

104 Mahdev Mohan & Tay Eu-Yen, "The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-up?" (2010) 22 SAcLJ 299 at para 32.

105 Mahdev Mohan & Tay Eu-Yen, "The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-up?" (2010) 22 SAcLJ 299 at para 33.

> (d) for the failure to harmonise with the Civil Law Act (as discussed in *Front Carriers* and *Swift-Fortune (CA)*), in particular, by including a "justiciable cause of action" requirement.[106]

76 In this regard, it is apposite to mention Merkin's comments on the "inappropriateness" standard in s 2(3) of the English Arbitration Act 1996, which is *in pari materia* with s 12A(3). Merkin suggested that the inappropriateness depends on two factors: (a) whether English law has been chosen as the procedural law; and whether the only hope of assistance is provided by English courts; or (b) where although the arbitration has no connection with England, there is evidence in England which needs to be preserved, or one of the parties has assets within the jurisdiction which can be frozen by means of a *Mareva* injunction.[107] This is supported by the Singapore Law Minister's comments on the "inappropriateness" test:[108]

> [F]or example, the English High Court has held that if an applicant to a foreign arbitration was unable to show that the other party has substantial assets in England or was unable to show any link between the foreign arbitration and England, the Court could refuse to make an order.

The Minister might have been referring to the case of *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*,[109] where the English High Court rejected an application for a *Mareva* injunction (referred to as a freezing order) because (cumulatively) the arbitral seat was New York and not England, there were no exceptional features in the case such as fraud, and there was no proof of defendant's assets in the jurisdiction; essentially, it was necessary for the applicant to show a real link with the jurisdiction that justifies the court's intervention. It is thus submitted that there is no need for further legislative clarification on the "inappropriateness" standard; instead, the Singapore courts are well equipped to interpret the standard based on the purposive interpretation of the provision and drawing on English jurisprudence on s 44 of the English Arbitration Act 1996.

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106 Mahdev Mohan & Tay Eu-Yen, "The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-up?" (2010) 22 SAcLJ 299 at paras 33–34.

107 See n 66 above, Robert Merkin, *Arbitration Act 1996* (Lloyds Commercial Law Library, 2000) at 102.

108 Second Reading of the International Arbitration (Amendment) Bill by Law Minister K Shanmugam (19 October 2009) at para 14. This is an important comment because the courts interpreting s 12A(3) in future would likely interpret the provision purposively (by virtue of s 9A(1) of the Singapore Interpretation Act (Cap 1, 2002 Rev Ed)), taking into account the Minister's comments. *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628.

109 *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA (PDVSA)* [2008] EWHC 532.

77 Finally, as a matter of comprehensiveness, the Singapore government most recently passed a bill introducing further amendments to the IAA.[110] The amendments do not pertain to interim measures but concern the definition of arbitration agreements (to include arbitration agreements of any form and not merely in writing), empowering courts with power to hear appeals on jurisdictional challenges notwithstanding arbitral tribunals' negative rulings, as well as power of arbitral tribunals to order interest payments on the awarded sum and on legal costs.

78 Having considered the historical development of the law in Singapore on interim measures in the IAA, the law at status quo shall now be critiqued in light of the theoretical discussion in the previous section.

IV. Interim relief in Singapore: Does it measure up?

79 Recalling the above-mentioned three questions that a legal system must consider in determining the allocation of authority between courts and tribunals in issuing interim measures in aid of international commercial arbitration, it shall now be considered whether the present law in Singapore adequately deals with those questions. It should be stated at the onset that it is important for Singapore's legal regime on international arbitration to deal with these questions because it would then provide certainty and predictability to parties, which is exalted as a paramount interest in international commercial arbitration for parties.[111] Achieving that would facilitate Singapore's growth as an international arbitration hub, which is evidently the Singapore government's overarching goal.

A. Whether courts, tribunals or both have power to order interim measures

80 The 2009 IAA clearly provides for both courts and tribunals to have power to order interim measures. Sections 12(1) and 12A(2) of the 2009 IAA establishes that. Notably, s 12A(1)(*b*) clearly stipulates that this power applies to foreign-seated arbitrations as well.

81 It then begs the issue of whether the power of courts or tribunals to order interim measures is subject to the agreement of parties.

82 Article 17 of the Model Law, applicable through the IAA, states that "[u]nless otherwise agreed by the parties, the arbitral tribunal may,

110 See International Arbitration (Amendment) Bill (Bill 10 of 2012).
111 See UN Doc A/CN.9/264.

at the request of a party, order any party to take such interim measure of protection". Thus, parties can agree to preclude the power of arbitral tribunals to order interim measures.

83 This is not the case for the power of the Singapore courts to order such measures. In contrast with ss 12(2) and 12(3) of the 2009 IAA, s 12A does not have the words "unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary". It might therefore be argued that parties are unable to agree to preclude the power of courts to order interim measures; at least not without explicitly opting out of the Model Law and the IAA altogether, which parties could do by virtue of s 15 of the 2009 IAA (which was legislatively enacted only in 2002).[112] This is nevertheless uncertain.

84 What then would be the effect of an agreement between parties that either party are precluded from applying to the courts for interim measures? Typically, such contractual clauses are in the form of *Scott v Avery*[113] arbitration clauses, with wording that specifically precludes "any … legal proceedings".[114] The English courts have considered this question in several cases.[115] The judgment of Mr Justice Flaux in *B v S* is pertinent.[116] He examined the line of cases following from *Mantovani v Caparelli SpA*[117] and ultimately concluded that the pivotal factor is the change in approach from the English Arbitration Act 1950 to the English Arbitration Act 1996.[118] Under s 12(6) of the 1950 Act, the jurisdiction of the English courts could not be ousted by parties' consent

112 Section 15 of the 2009 IAA reads:

> If the parties to an arbitration agreement (whether made before or after 1st November 2001) have expressly agreed either
>
> (*a*) that the Model Law or this Part shall not apply to the arbitration; or
>
> (*b*) that the Arbitration Act (Cap 10) or the repealed Arbitration Act (Cap 10, 1985 Ed.) shall apply to the arbitration,
>
> then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

113 *Scott v Avery* (1856) 5 HL Cas 811 (HL).

114 See, for example, cl 29 of Form 54 from the Federation of Oilseeds and Fats Association, contended over in the case of *B v S* [2011] EWHC 691: "[n]either party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators". See also cl 26 of the Grain and Feed Trade Association, discussed in *Mantovani v Caparelli SpA* [1980] 1 Lloyd's Rep 375.

115 See, for example, the English Court of Appeal case of *Mantovani v Caparelli SpA* [1980] 1 Lloyd's Rep 375; *Re Q's Estate* [1991] 1 All ER 499 and *B v S* [2011] EWHC 691.

116 *B v S* [2011] EWHC 691.

117 [1980] 1 Lloyd's Rep 375.

118 *B v S* [2011] EWHC 691 at [72].

as it was deemed that the wording of the subsection was couched in mandatory terms.[119] However, s 44 of the 1996 Act opened with the phrase, "[u]nless otherwise agreed by the parties". The 1996 Act was deemed to be clearly oriented towards party autonomy. Mr Justice Flaux thus held, following the line of cases from *Mantovani v Caparelli*, that such a clause could successfully preclude any party from applying to the courts for ancillary or interim orders.

85 If the above reasoning is applied to the Singapore context, it is highly probable that the Singapore courts would interpret s 12A of the IAA to be that the jurisdiction of the Singapore courts cannot be ousted by parties' agreement. This is because of the manifest absence of the words "unless otherwise agreed by the parties" found elsewhere in the IAA. Further, s 12A adopts similar wording as s 12(6) of the English Arbitration Act 1950: "the High Court … shall have the … power".[120] It should, however, be qualified that this power is subsidiary to the arbitral tribunals' power to do the same, that is the court-subsidiarity approach.[121]

B. Scope of authority that the courts and tribunals have

86 Section 12(1) of the 2009 IAA sets out the scope of orders that arbitral tribunals could make against arbitrating parties. These are:

(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.

119 The opening words of s 12(6) of the English Arbitration Act 1950 (c 27) were "The High Court shall have …".

120 Section 12A(2) of the IAA.

121 See paras 49–50 and 90.

87 The scope of power granted to courts is slightly smaller as (a) security for costs and (b) discovery of documents and interrogatories are excluded.[122] This is in line with the long-standing policy of judicial non-interference in arbitral proceedings. The types of orders excluded are seen as pertaining to procedural and evidential matters that deal with the conduct of the arbitration itself, and thus should be decided by the arbitral tribunal alone.[123]

88 One ancillary issue is whether courts or tribunals have power to order measures *sua sponte*. Regarding the power of courts, it is clear that based on Art 9 of the Model Law (as incorporated *via* the IAA), a court may grant such measures at the party's request. Likewise, Art 17 of the Model Law provides that the arbitral tribunal may grant such measures "at the request of a party". Both articles use wording that suggest an "optional" effect. Therefore, it appears that the Singapore courts and arbitral tribunals do not have *sua sponte* powers. This merely reflects the essential nature of international arbitration, being grounded on parties' consent and initiative.

89 Another issue is whether issuance of measures by courts should be preceded by requests from arbitral tribunals for the court's involvement. This is now settled by s 12A of the 2009 IAA, which follows the UK approach. Only in "urgent" cases may courts make such orders to preserve evidence or assets involved in the proceedings.[124] In "non-urgent" cases, courts may only act upon application of a party if:

> (a) the party has given notice to the other parties and the arbitral tribunal; and
>
> (b) either the arbitral tribunal has given its permission to proceed or the other parties have given written consent.[125]

Again, this reflects both the court-subsidiarity approach and the principle of parties' autonomy.

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122 Section 12A(2) of the IAA.

123 See Second Reading of the International Arbitration (Amendment) Bill by Law Minister K Shanmugam (19 October 2009) at para 8: "They do not extend to procedural or evidential matters dealing with the actual conduct of the arbitration itself – like discovery, interrogatories, or security for costs. These procedural matters fall within the province of the arbitral tribunal and must be decided by the tribunal itself": *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628.

124 Section 12A(4) of the 2009 IAA.

125 Section 12A(5) of the 2009 IAA.

C. How courts and arbitrators exercise authority in relation to one another

90 Since s 12A of the 2009 IAA follows the English Arbitration Act 1996, Singapore has also taken on the English court-subsidiarity approach, that is, the power of courts to order interim measures is subsidiary to the power of arbitral tribunals to do the same. As argued above, this is the preferred approach as it upholds the judicial non-interference principle, while preserving party autonomy. Indeed, it is the more "pro-arbitration" approach.

D. How courts enforce tribunal-issued interim orders

91 The issue of enforcing tribunal-issued interim orders was considered above. It was noted that the 1985 Model Law, which the present IAA adopts, did not explicitly address the issue. The IAA thus contained s 12(6):

> All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.

92 The problem with s 12(6) is that it fails to provide the grounds, standards and limits for enforcement. It is precisely because of this problem that the 2006 Model Law introduced Arts 17H and 17I, which respectively stipulate the basis of recognition and enforcement, and the grounds for refusing recognition or enforcement.

93 Article 17H(1) of the 2006 Model Law expressly stipulates that the national court shall enforce an interim measure issued by an arbitral tribunal regardless of the country in which it was issued. It should be noted that this is different from s 12A of the IAA, which is concerned with the Singapore court's issuing (not enforcing) of interim measures. Nevertheless, it is theoretically possible for the Singapore court to "enforce" an interim measure according to the fourth approach mentioned above,[126] issuing its own interim order while giving significant weight to the arbitral tribunal's interim order. The clarification in s 12A(1)(*b*) of the IAA makes this particularly legitimate.

94 Of greater utility is Art 17I, which states exclusively what the grounds for refusing enforcement are. Article 17I refers to some of the substantive grounds stipulated in Art 36 of the 2006 Model Law.

126 See para 37 above.

The party on which the interim order is invoked against would have to prove:

(a) incapacity of the party or invalidity of the arbitration agreement;[127]

(b) failure of the other party to provide proper notice of appointment of arbitrator, or of arbitral proceedings, or was unable to present his case;[128]

(c) tribunal's lack of jurisdiction;[129]

(d) illegal composition of arbitral tribunals;[130]

(e) the other party had failed to comply with a tribunal's order to provide security in connection with the interim measure;[131] or

(f) the interim measure has been terminated or suspended by the tribunal or the national court in the arbitral seat or the national court which issued the interim measure.[132]

95 Further, the national court may refuse enforcement on its own volition if it is found that:

(a) the interim measure is incompatible with that court's powers;[133]

(b) the subject-matter of the dispute is not "arbitrable";[134] or

(c) the interim measure is against the public policy of the state.[135]

96 The omission of such clear guidelines in s 12(6) of the IAA is problematic because it fails to provide guidance for arbitral tribunals when issuing interim orders, resulting in much uncertainty and risk that some tribunal-issued orders might go unenforced.

97 It is important to note that the approach in the 2006 Model Law as to grounds for non-enforcement of interim measures is that the conditions in Art 17I are meant to limit the grounds for

127 2006 Model Law, Art 36(1)(a)(i).
128 2006 Model Law, Art 36(1)(a)(ii).
129 2006 Model Law, Art 36(1)(a)(iii).
130 2006 Model Law, Art 36(1)(a)(iv).
131 2006 Model Law, Art 17I(1)(a)(ii).
132 2006 Model Law, Art 17I(1)(a)(iii).
133 2006 Model Law, Art 17I(1)(b)(i).
134 2006 Model Law, Art 36(1)(b)(i).
135 2006 Model Law, Art 36(1)(b)(ii).

non-enforcement.[136] This means that a state looking to adopt Art 17I is free to stipulate less grounds. This approach is evidently pro-arbitration as it strives to curtail the otherwise theoretically unlimited power that national courts have in nullifying the effects of tribunal-issued interim orders. A pro-arbitration regime approach would therefore favour adopting Art 17I modified with few grounds for non-enforcement.

98 It appears that Art 17I is also pro-party autonomy as it limits the court's *sua sponte* powers of non-enforcement to a few severe grounds. It is of course up to the national courts to determine the standards of these grounds, of non-arbitrability and public policy. Further, Art 17I is also meant to be exclusive, thereby providing clarity to parties as to its various options and possible outcomes.

99 It is therefore submitted that Singapore should adopt the 2006 Model Law. In particular, it should consider adopting Art 17H and a modified Art 17I.

E. Standards applicable when courts and arbitral tribunals issue interim measures

100 Another important aspect regarding the authorities' power to issue interim measures missing in the IAA is that regarding the applicable standards to be considered when arbitral tribunals determine whether to issue interim measures.

101 The same problems and rationales mentioned in the preceding discussion on s 12(6) apply here. Section 12 of the IAA does not stipulate the standards that arbitral tribunals should consider when determining interim measures. Section 12A arguably confers the same power of issuing interim measures given to arbitral tribunals pursuant to s 12 upon the Singapore courts. There is therefore no stipulation of applicable standards for both arbitral tribunals and the Singapore courts. The only guideline given to the Singapore courts is that of "inappropriateness" discussed above;[137] even so, that is only a limiting factor in regard to Singapore courts making interim orders in support of foreign arbitration.

136 See the footnote to Art 17I of the UNCITRAL Model Law 2006:

> The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

137 See n 108 above.

102 Again, it is submitted that Singapore should adopt the 2006 Model Law. Article 17A provides the conditions of:

(a) irreparable harm and "balancing of hardships";[138] and

(b) reasonable possibility of success on merits.[139]

While these conditions may not necessarily provide very much certainty as to the outcome of parties' applications since the conditions would require tribunals to factor in various considerations in the "balancing of hardships", it would minimally circumscribe the playing field and facilitate harmonisation in this regard.

V. Conclusion

103 Singapore has been growing as an international arbitration centre ever since the adoption of the Model Law and the enactment of the IAA in 1994. The opening of Maxwell Chambers in 2010 is to be lauded. While physical institutions are important to attract international commercial arbitration to Singapore, it must be emphasised that the more important key to making Singapore a centre of gravity for international arbitration is the credibility of the legal system and the predictability that its laws provide. Singapore would do well to adopt the 2006 Model Law, which has been said to reflect the "current" and "modern" practices in international trade and arbitration.[140] It is unfortunate that the Singapore government did not do so during the most recent 2012 International Arbitration (Amendment) Bill. It is thus hoped that the Government will consider the 2006 Model Law in the next review of the international arbitration regime in Singapore. Such reforms would enable a more robust legislative framework crucial to enable Singapore to "stand tall in the international arbitration world".[141]

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138 Art 17A of the UNCITRAL 2006 Model Law provides:

> Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

139 Art 17A of the UNCITRAL 2006 Model Law provides:

> There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

140 See GA Resolution 61/33 (4 December 2006).

141 Cavinder Bull, "Standing Tall in Arbitration" *The Straits Times* (2 July 2012).