THE NEW INTERNATIONAL ARBITRATION (AMENDMENT) BILL

A Broader Framework for Interim Relief or Just a Tune-up?

Singapore aspires to retain its place as a trusted arbitration hub for commercial parties all around the world. The recently proposed amendments to the International Arbitration Act seek to bring Singapore closer to meeting international standards in relation to the arbitration procedure. While the initiative should be applauded, those amendments relating to interim measures fall somewhat short of expectations of a new, broader framework of curial assistance in aid of arbitration. This article explores the uncertainties that could arise from the proposed amendments, either because of phrasing or of an omission to embrace the Model Law. It is hoped that Parliament will not wait too long to address these uncertainties which go against the grain of promoting Singapore as the ideal centre for arbitration.

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I. Introduction

1 Commonwealth judges are no longer wary of commercial arbitrators nor do they lightly interfere with arbitrators' powers and prerogatives. It is well settled that the courts will endeavour to do their best to facilitate and promote arbitration between commercial parties wherever possible. This shift in judicial tact is not an entirely recent phenomenon. As far back as 1977, Lord Denning MR observed thus in the English Court of Appeal decision of *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*:[1]

> At one time the Courts used to be very jealous of arbitrations. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitrations in commercial disputes. They encourage references to arbitration to commercial men in the City of London. They do not lightly interfere with their awards.

2 Last year, V K Rajah JA in *Tjong Very Sumito v Antig Investments Pte Ltd* expressed a similar sentiment, putting beyond any doubt that Singapore courts will support arbitration as a method of alternative dispute resolution, in the interests of expediency and party autonomy:[2]

> There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. *An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with.* More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law. [emphasis added]

3 Singapore courts, therefore, have a "conspicuously circumscribed role in relation to all arbitration proceedings".[3] They have supportive and limited supervisory functions over arbitrations held in Singapore. These functions are those granted by statute alone – there are no inherent supervisory powers at common law that the courts could

1 [1978] 1 Lloyd's Rep 357 at 360.
2 [2009] 4 SLR(R) 732 at [28].
3 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [20].

otherwise exercise.[4] This position was achieved in respect of international arbitration in 1994 when Singapore implemented the UNCITRAL Model Law on International Commercial Arbitration ("the 1985 Model Law") adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985[5] *via* the International Arbitration Act 1994[6] ("the IAA"). Generally, the law governing the arbitration (the so-called *lex arbitri*) is considered to be the law of the country where the proceedings are held and the award rendered, *ie*, the juridical seat of the arbitration.[7] And, "[t]he law governing the arbitration determines the relationship between the arbitral tribunal and national courts. It will, for instance, determine whether, and to what extent, judicial review of the award or court intervention during arbitral proceedings is authorized".[8] The IAA governs international commercial arbitrations that rely on Singapore law as the *lex arbitri*.[9]

4 The 1985 Model Law, which applies in Singapore through the IAA,[10] excludes curial intervention unless expressly permitted. Article 5 of the 1985 Model Law states that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law". This provision requires all instances of court involvement in arbitration proceedings to be specifically stipulated, thus excluding any general or residual powers of our courts in relation to matters which are prescribed as governed by the 1985 Model Law. The underlying rationale here is to engender certainty for both arbitral parties and arbitrators alike as to the instances in which curial supervision or assistance is to be expected, such certainty being regarded as beneficial to international commercial arbitration.[11]

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4 *Halsbury's Laws of Singapore* (vol 2, "Arbitration") (LexisNexis, 2003 Reissue) at para 20.088.

5 Section 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) 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".

6 Act 23 of 1994 (Cap 143A, 2002 Rev Ed).

7 W M Reisman, W L Craig, W Park & J Paulson, *International Commercial Arbitration Cases, Materials and Notes on the Resolution of the Business Disputes* (The Foundation Press, 1997) at p 172.

8 W M Reisman, W L Craig, W Park & J Paulson, *International Commercial Arbitration Cases, Materials and Notes on the Resolution of the Business Disputes* (The Foundation Press, 1997) at p 691.

9 See Jean François Poudret & Sébestien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at p 83: "The arbitration law (*lex arbitrii*) encompasses all provisions governing the arbitration in a given country, particularly the formal validity of the arbitration agreement, the arbitrability of the dispute, the composition of the arbitral tribunal, fundamental procedural guarantees, assistance from the courts and judicial review of the award."

10 Cap 143A, 2002 Rev Ed.

11 See "Analytical Commentary on draft text of a model law on international commercial arbitration: Report of the Secretary-General" UNCITRAL, 18th Sess,

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5 Parliament's desire to facilitate international commercial arbitration lies at the heart of its decision to enact the IAA.[12] The object and purpose of the IAA was to implement the 1985 Model Law in Singapore because the Model Law, *inter alia*, provided an "internationally accepted framework for international commercial arbitrations" and adopting it would "promote Singapore's role as a growing centre for international legal services and international arbitrations".[13] This "accepted framework" has developed over the years and has led to a revision of the Model Law in 2006 ("the 2006 Model Law").

6 Praising the revised provisions in the 2006 Model Law, the UN General Assembly (of which Singapore is a member) stated that these provisions reflect "*current practices* in international trade and modern means of contracting with regard to the form of the arbitration and *the granting of interim measures* (which) … will *significantly enhance the operation of the Model Law*" [emphasis added].[14] In line with the recognition that the 2006 Model Law reflects worldwide practice, the Singapore Ministry of Law ("the Ministry") recently proposed the International Arbitration (Amendment) Bill 2009 ("the 2009 Bill") to "refine" the IAA.[15] The Bill represents an effort to ensure that Singapore's laws remain consistent with modern international standards. As Law Minister K Shanmugam observed at the second reading of the Bill on 19 October 2009:[16]

> [The 2009 Bill] was the result of a consultation process involving key industry experts, both local and foreign … *We have now taken into consideration amendments made to the Model Law by UNCITRAL in 2006*. … [The amendments] are intended to keep our [IAA] modern, effective and arbitration-friendly. [emphasis added]

7 However, while Singapore's commitment to strengthen its world-renowned arbitration framework through the 2009 Bill is laudable and the Bill's drafting process was remarkably consultative,[17]

UN Doc A/CN.9/264 (1985), reprinted in [1985] 16 YB UNCITRAL 104 ("the 1985 Model Law Commentary") at 112.

12 Cap 143A, 2002 Rev Ed.

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

14 GA Resolution 61/33 (4 December 2006) reproduced in the preface to the 1985 Model Law.

15 Singapore Ministry of Law's Consultation Paper on the Draft International Arbitration (Amendment) Bill 2009 dated 27 July 2009 at para 1.

16 Second Reading Speech by Law Minister K Shanmugam on the International Arbitration (Amendment) Bill available at <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=439> (accessed 1 February 2010).

17 The Ministry of Law's Legal Policy Division led by Ms Valerie Thean, and the Legislation and Law Reform Division of the Attorney-General's Chambers, led by

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the Bill's refinements to the IAA in the context of granting interim measures in aid of arbitration are selective. In some respects, the drafters of the 2009 Bill have eschewed rather than embraced the 2006 Model Law. This article posits that if Singapore intends to promote itself as being arbitration-friendly, Parliament should give the High Court better guidance, which will in turn give arbitral parties and arbitrators a better idea of what to expect from the High Court in terms of curial support or intervention in respect of interim measures.

8 The 2009 Bill's provisions on *court-ordered* interim measures should be refined for the sake of clarity and certainty, and the IAA should be augmented by fresh amendments to the extant law regarding *arbitral-tribunal ordered* interim measures. Specifically, the High Court's discretion under s 12A(3) of the 2009 Bill to refuse to make an interim order in relation to foreign arbitration where it considers it to be "inappropriate" is ambiguous. This provision ought to more clearly define and limit court involvement in support of arbitration. Guidelines should be incorporated into s 12A(3) clarifying the scope of such involvement. Further, although the Bill only purports to provide expressly for *court-ordered interim measures*, the authors believe that Parliament has passed up a good opportunity to guide and provide better curial support to *arbitral tribunal-ordered* interim measures. As it stands, s 12 of the IAA does not provide any conditions as to when these measures may be ordered, nor does it explain the grounds under which the High Court may grant or refuse leave to enforce them.

II. The 2009 Bill and court-ordered interim measures – Need for refinement

A. Significance of the Law Reform Sub-Committee's 1993 report

9 The IAA was passed in 1994 based in large measure on the recommendations of a Singapore Law Reform Sub-Committee on Review of Arbitration Laws ("the Sub-Committee") that had considered the UNCITRAL Model Law, legislation in other jurisdictions and the law then existing in Singapore. The Sub-Committee was tasked to examine existing laws relating to commercial arbitrations in Singapore in the light of international developments in international commercial arbitration and to make recommendations for the reform or revision of such existing laws. In its 1993 report, the Sub-Committee opined that it

Parliamentary Counsel Mr Charles Lim, not only welcomed public consultation on an annotated version of the Draft 2009 Bill from 27 July 2009 to 17 August 2009 ("the Consultation Process"), but sought to explain, in summary, their reasons for adopting or declining recommendations from members or the public regarding the Draft 2009 Bill.

had dealt with the core issues that could be the basis of a new legislative framework for international arbitration in Singapore informed by the 1985 Model Law.[18] As Prakash J has noted: "This in fact came to pass: the [1994] draft [IAA] bill that was proposed to Parliament and which was eventually passed was substantially based on the Committee's recommendations."[19] As a starting point, it would therefore be appropriate to consider the Sub-Committee's comments on the 1985 Model Law as an aid to the proper interpretation of the IAA's provisions relating to interim relief.

B. Article 9 of the 1985 Model Law

10 Where curial intervention in international arbitration is concerned, the pertinent provision of the 1985 Model Law is Art 9, which states:

> Article 9. Arbitration agreement and interim measures by court
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> It is *not incompatible* with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure. [emphasis added]

11 The 1985 Model Law Commentary explains that the rationale for retaining the court's jurisdiction over interim measures is to promote and facilitate arbitration. According to the authors of the Commentary, "the availability of [interim measures of protection from a court] is *not contrary to the intentions of parties* agreeing to submit a dispute to arbitration and that the *measures themselves are conducive to making the arbitration efficient and to securing its expected results*" [emphasis added].[20]

12 Tellingly, apart from stating that it is "not incompatible" with the schema of arbitration envisioned by the rest of the 1985 Model Law, Art 9 does not specify the nature and scope of curial assistance as far as interim measures are concerned. This was a matter that the drafters of the Model Law appear to have left to individual Model Law jurisdictions to determine as they saw fit. Peter Binder notes that few details can be found in Art 9 regarding the different types of interim measures that are

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18 See the Sub-Committee's 1993 Report ("the Sub-Committee Report (1993)") para 4. ("In this Report the Committee sets out its views and recommendations on each of these issues. It is not intended that this report cover all arguments on the issues raised, or all contentious issues relating to international arbitration. The Committee believes, however, that this report covers most of the core issues which, if the principles expounded are accepted, could be the basis of a new legislative framework for international arbitrations in Singapore".)

19 *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR(R) 323 at [39].

20 1985 Model Law Commentary at para 115.

available, due to their multitude and diversity in different countries; and that a number of adopting jurisdictions have made the useful addition to Art 9 of listing the details and types of court-ordered interim measures allowed under their laws.[21]

13 This is precisely what the Sub-Committee contemplated doing – *ie*, formulating a regime for curial support in terms of interim relief that would be suitable for Singapore international arbitrations. At para 31 of its report, the Sub-Committee commented that powers to grant interim relief "should be made *concurrently exercisable* by the arbitral tribunal and (*to the extent that curial intervention is allowed in respect of international arbitrations*) by the Court, the liberty being given to either party to choose to make such applications to the Court or the arbitral tribunal as that party deems expedient" [emphasis added].[22] While acknowledging the importance of court-ordered interim measures, the Sub-Committee was mindful that curial intervention should be confined within strict limits. The meaning of the phrase "to the extent that curial intervention is allowed in respect of international arbitrations" was clarified by the Sub-Committee at para 47 of its report as follows:[23]

> **The [Sub-Committee] recommends that there should be provision to empower the court to grant injunctive relief and other orders *for the interim preservation of property pending the making of an award in an international arbitration*.** Such applications should not be answerable by stay applications and should not be considered as an abuse of judicial process. ***The [Sub-Committee] recognises that while arbitrators should be given some powers to make such orders [see Paragraph 31 above], they should not have the power to make orders affecting third party rights; such powers should remain the preserve of the courts.*** [emphasis added by the Sub-Committee in bold; emphasis added by the court in bold italics]

14 It follows that the Sub-Committee clearly intended the court's role in arbitration proceedings to be a narrow one, operating only in situations of urgency (for instance, to preserve property pending the outcome of arbitration) or where third parties (over which the arbitral tribunal has no jurisdiction) are involved.[24] Limiting curial assistance in this way was meant to guard against an abuse of judicial process arising from an arbitral party delaying arbitration proceedings by taking out interim applications in court.

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21 Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005) at para 2-097.

22 Sub-Committee Report (1993) at para 31.

23 See *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [33].

24 See *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [34].

C. Section 12(7) of the IAA – Imputing a general principle of limited and cautious curial assistance

15 The provisions relating to the powers of the tribunal and the High Court to grant interim relief in aid of arbitration in the 1993 Draft IAA Bill proposed by the Sub-Committee were virtually identical to those eventually approved by Parliament. In particular, under the IAA,[25] the court's power to provide interim relief in international arbitrations is prescribed by s 12(7) read with s 12(1). These subsections provide as follows:

> Powers of arbitral tribunal
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> 12.–(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for –
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> …
>
> (*i*) an interim injunction or any other interim measure.
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> …
>
> (7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part [*ie*, Pt II of the IAA] 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.

16 Section 12(7) of the IAA[26] does not give supervisory jurisdiction to the High Court with respect to interim relief, but instead confers co-extensive powers upon the High Court and the arbitral tribunal to grant such relief. Section 12(7) read with s 12(1) of the IAA "merely provides an alternative for the parties to apply to the High Court if applications for interlocutory relief may not be conveniently made to the tribunal or if it is more expedient to do so in court".[27] Belinda Ang J in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* ("*Front Carriers*") remarked that the interim measures of protection in s 12(1) of the IAA "are essentially remedies aimed at assisting in the just and proper conduct of arbitration, or in the preservation of property which is the subject matter of the arbitration".[28]

17 Section 12(7) of the IAA[29] is substantially similar to s 12(6) of the UK Arbitration Act 1950[30] ("the 1950 UK Act"). Section 12(6) of the

25 Cap 143A, 2002 Rev Ed.
26 Cap 143A, 2002 Rev Ed.
27 Leslie K H Chew, *Singapore Arbitration Handbook* (LexisNexis, 2003) at p 105.
28 [2006] 3 SLR(R) 854 at [15]. Affirmed by the Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [28].
29 Cap 143A, 2002 Rev Ed.
30 Arbitration Act 1950 (c 27) (UK).

1950 UK Act is therefore relevant in interpreting the IAA and the Arbitration Act.[31] According to Sir Michael Mustill and Stewart Boyd, the position under s 12(6) of the 1950 UK Act is as follows:[32]

> Under section 12(6) of the Act, the High Court has power to make certain procedural orders in a reference, by way of *reinforcement of the arbitrator's own powers*. …
>
> In certain respects, namely the ordering of discovery and interrogatories, the powers of the Court duplicate those of the arbitrator. When a party wishes to avail himself of these over-lapping powers, he should *first have recourse to the arbitrator*, and should not invoke the Court's power *unless the arbitrator's order proves ineffectual.*
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> [emphasis added]

18 Section 12(7) of the IAA[33] therefore embodies (albeit tacitly) the schema of the IAA as a whole – *ie*, that curial assistance is a supportive function in relation to arbitration proceedings and the court will intervene only sparingly and in very narrow circumstances. Examples of such circumstances include those where third parties over whom the arbitral tribunal has no jurisdiction are involved, where matters are very urgent or where the court's coercive powers of enforcement are required.[34] As V K Rajah JA held in *NCC International AB v Alliance Concrete Singapore Pte Ltd* ("*NCC International*"):[35]

> 29 We regard the genesis and the context of s 12(7) of the IAA as pointing towards limited curial intervention for two reasons. First, the court's power in respect of interim measures is contained in a single subsection of a provision which bears the heading, "Powers of *arbitral tribunal*" … *Evidently, precedence is given to the arbitral tribunal to provide interim relief, with the court's power being incidental to that of the tribunal.* Second, reading the IAA as a whole, it can be seen that the designated functions of the court are purely supportive in nature … Clearly, ss 12(1) and 12(7) of the IAA must be read in a way which is consistent with the overall scheme of curial assistance contemplated by this Act.
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> 30 In our view, therefore, *a contextual interpretation of ss 12(1) and 12(7) of the IAA unequivocally points towards the court's powers being employed only to the extent that the exercise of such powers would essentially aid arbitration proceedings being or to be diligently pursued.* In short, the court's role is to assist in the arbitration process and not to resolve the dispute at hand either directly or indirectly.

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31 Cap 10, 2002 Rev Ed.

32 Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 296.

33 Cap 143A, 2002 Rev Ed.

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

35 [2008] 2 SLR(R) 565.

> …
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> 40 … parties ought not to be allowed to bypass seeking interim measures from an arbitral tribunal merely because curial assistance is conceivably available. Rather, help from the court is to be sought only when arbitration is inappropriate, ineffective or incapable of securing the particular form of relief sought.
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> 41 In summary, under the IAA regime, although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, *the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings.*
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> [emphasis added]

D. Section 12A of the 2009 Bill – Codifying the general principle of limited and cautious curial assistance

19 With the advent of the 2009 Bill, one no longer has to parse case law or review the IAA's drafting history to surmise that our courts will, as V K Rajah JA notes, "scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings".[36] Section 12(7) of the IAA will soon be replaced by s 12A of the 2009 Bill, ss 12A(2) and 12A(4) to 12A(7) of which unequivocally codify and clarify this general principle of limited and cautious curial assistance in aid of arbitrations:

> Court-ordered interim measures
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> 12A …
>
> (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection(1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*f*) as it has for the purpose of and in relation to an action or matter in the court.
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> …
>
> (4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as it thinks necessary for the purpose of preserving evidence or assets.
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> (5) If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the

36 [2008] 2 SLR(R) 565 at [41]. See para 18 of this article.

> other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.
>
> (6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
>
> (7) An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2).

20 Section 12A of the 2009 Bill brings the IAA "in line with legislation in other countries such as the UK".[37] In fact, s 12A is *in pari materia* with s 44 of the 1996 UK Arbitration Act.[38] Professor Robert Merkin describes the English position under s 44, and by extension the Singapore position once s 12A of the 2009 Bill comes into effect, as follows:[39]

> The High Court apparently had [under the 1950 UK Act] the discretion to refuse to exercise its powers on the basis that there had not been an initial application to the arbitrators. The position has been maintained, and clarified, by the [1996 UK Act], s 44. The relationship between the arbitrators and the court is now as follows.
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> (a) The overriding rule is that the court shall act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. …
>
> (b) Where an application is made to the court, it may normally act only if permission has been given by the arbitrators or the agreement of the other parties to the arbitration has been obtained. … However, exceptionally, the court may on the application of a party make an order preserving the subject matter of the dispute in the case of urgency without the permission of the tribunal or the consent of the other parties.

21 Clearly, the pre-existing principle of limited curial intervention under the 1950 UK Arbitration Act in respect of interim measures has been preserved by the 1996 UK Arbitration Act. The English Court of Appeal has reinforced this principle in *Cetelem SA v Roust Holdings Ltd*[40]

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37 Singapore Ministry of Law's Consultation Paper on the Draft International Arbitration (Amendment) Bill 2009 dated 27 July 2009 at para 3(a).

38 Arbitration Act 1996 (c 23) (UK).

39 Robert Merkin, *Arbitration Law* (Informa, Looseleaf Ed, 1991, Service Issue No 46, 22 May 2007) at para 14.50.

40 [2005] 1 WLR 3555.

which concerned an application for an interim mandatory injunction pending arbitration pursuant to s 44 of the 1996 UK Act. There, the English Court of Appeal held that:

> The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise, it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power [under s 44 of the 1996 UK Act], it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

22 It can therefore be said with much force that even after the enactment of the 2009 Bill, Singapore's position on curial assistance in the context of interim relief in international arbitration will be largely similar to that under the IAA[41] as it currently stands.

E. Section 12A of the 2009 Bill – An adequate legislative response to the conflict between Swift Fortune *and* Front Carrier*?*

23 The new s 12A of the 2009 Bill is not merely designed to be declaratory in nature. It appears to have been introduced as a response to the Singapore Court of Appeal's decision in *Swift-Fortune Ltd v Magnifica Marine SA*[42] ("*Swift-Fortune*"). In that case, the parties entered into a memorandum of agreement for the sale of a vessel and which provided for disputes to be referred to arbitration in London. A Mareva injunction was obtained by the plaintiffs, restraining the defendant from removing or in any way disposing of or dealing with or diminishing the value of its assets in Singapore up to the value of US$2.5m.

24 In the subsequent application by the defendants to set aside the Mareva injunction, parties canvassed arguments on s 12(7) of the IAA.[43] Prakash J ruled in favour of the defendant, holding that s 12(7) conferred powers on the court to grant Mareva interlocutory relief to assist "Singapore international arbitrations" but not "foreign arbitrations", the latter referring to arbitrations arising out of international arbitration agreements which do not stipulate Singapore as the seat of arbitration. The Court of Appeal agreed with Prakash J that s 12(7) of the IAA did not apply to foreign arbitrations, but only Singapore international arbitrations. The Court of Appeal was reluctant

41 Cap 143A, 2002 Rev Ed.
42 [2007] 1 SLR(R) 629.
43 Cap 143A, 2002 Rev Ed.

to apply s 12(7) to arbitrations outside Singapore for fear of, *inter alia*, offending the principle of comity:[44]

> 48 ***… the exercise of such powers may cut across or intrude into the powers of the foreign arbitral tribunal conducting the arbitration under a foreign law***. Given these implications, the question that naturally arises is whether Parliament intended s 12(7) to have this effect.
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> 49 A similar issue arose in *Channel Tunnel* in connection with s 12(6)(h) of the 1950 Act. The appellants made two arguments that an English court had the power to grant an interim injunction in aid of an arbitration in Belgium under that provision. Lord Mustill dealt with the first argument as follows, at 357–360:
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> > …
> >
> > [T]he court should bear constantly in mind that English law, like French law, is a stranger to this Belgian arbitration, and that the respondents are not before the English court by choice. ***In such a situation the court should be very cautious in its approach both to the existence and to the exercise of supervisory and supportive measures,*** *lest it cut across the grain of the chosen curial law.*
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> > …
> >
> > It seems to be absolutely plain for two reasons that Parliament cannot have intended these provisions to apply to a foreign arbitration. The first reason is that the chosen mechanism was to make these provisions into implied terms of the arbitration agreement, and ***such terms could not sensibly be incorporated into an agreement governed by foreign domestic arbitration law*** *to whose provisions they might well be antithetical …*
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> …
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> 52 ***Having regard to these considerations, it is clear that if a literal interpretation is given to the phrase 'an arbitration to which Part II applies' in s 12(7), that phrase would allow the courts to exercise powers that would be contrary to the spirit of international arbitrations.*** On the other hand, if s 12(7) is read to apply to Singapore international arbitrations only, these difficulties would not arise. This, in our view, is a compelling reason for concluding that Parliament could not have intended s 12(7) to apply s 12(1) to foreign arbitrations.
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> [emphasis added in bold italics; emphasis added by the court in italics]

44 [2007] 1 SLR(R) 629 at [48]–[52].

25 Further, the court found that s 12(7) of the IAA[45] does not independently confer on the court any powers to grant interim measures but draws its powers from s 4(10) of the Civil Law Act[46] ("CLA"). According to the court, s 4(10) of the CLA can serve as a basis for the court to grant a Mareva injunction against the assets of a defendant in Singapore if the plaintiff has an accrued cause of action against the defendant that is justiciable in Singapore. Section 4(10) states:

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

26 In *Front Carriers,*[47] Belinda Ang J held that s 4(10) of the CLA[48] empowered it to grant interim orders to aid foreign arbitration where the applicant had a cause of action justiciable in Singapore against a respondent over whom the High Court had personal jurisdiction. While the Court of Appeal in *Swift Fortune*[49] did not disapprove of the ruling in *Front Carriers* on the scope of s 4(10) of the CLA, it considered whether s 4(10) affords wider statutory powers to the High Court in respect of ordering interim relief than s 12(7) of the IAA[50] does:

> 93 … We have earlier decided that s 12(7) of the IAA applies only to Singapore international arbitrations, and not to foreign arbitrations. *The question that immediately arises is whether in these circumstances, s 4(10) of the CLA can have a broader area of application than s 12(7) of the IAA.*
>
> 94 … Given that Parliament ignored s 4(10) of the CLA entirely when it enacted the IAA to provide a new statutory framework for international arbitrations in Singapore, a court would need to know why it was necessary to enact s 12(7) of the IAA if the court had power under s 4(10) to grant Mareva relief in aid of foreign arbitrations. *Perhaps it was simply a case of Parliament's attention not having been drawn to the need to provide a broader framework to deal with interim measures to assist foreign proceedings, whether court or arbitral proceedings.*
>
> [emphasis added]

45 Cap 143A, 2002 Rev Ed.
46 Cap 43, 1999 Rev Ed.
47 *Front Carriers Ltd v Atlantic and Orient Shipping Corp* [2006] 3 SLR(R) 854.
48 Cap 43, 1999 Rev Ed.
49 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [93]–[94].
50 Cap 143A, 2002 Rev Ed.

27 The apparent conflict between *Swift Fortune*[51] and *Front Carriers*[52] stems from the reluctance of the Court of Appeal in the former to expressly overrule the High Court in the latter, on the point that s 4(10) of the CLA[53] empowered the courts to provide curial assistance to foreign arbitration. The two decisions created the possibility of side-stepping s 12(7) by seeking curial assistance in foreign arbitration under s 4(10) of the CLA. The new s 12A therefore seeks to bring clarity to the common law confusion by laying down the rule that the courts may lend curial assistance to foreign arbitration where necessary. Section 12A(1) enables the High Court or a judge thereof to grant interim orders in aid of arbitrations held outside Singapore in certain circumstances, in line with the new Art 17J of the revised Model Law,[54] which was inserted by the UNCITRAL in 2006.[55] In addition, the proposed s 12A(3) gives the courts the discretion to refuse to grant interim orders to assist a foreign arbitration if the court considers, in its opinion, it "inappropriate" to do so. The Ministry's Consultation Paper on the 2009 Bill states that s 12A(3) is an added safeguard to give the court sufficient flexibility to deal with complicated international disputes.[56]

28 Section 12A(1) and (3) of the 2009 Bill provide as follows:

> Court-ordered interim measures
>
> 12A.–(1) This section shall apply in relation to an arbitration –
>
> (*a*) to which this Part applies; and
>
> (*b*) irrespective of whether the place of arbitration is in the territory of Singapore.

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

52 *Front Carriers Ltd v Atlantic and Orient Shipping Corp* [2006] 3 SLR(R) 854.

53 Cap 43, 1999 Rev Ed.

54 The recent amendments to the Model Law saw the substitution of the old Art 17 with a new Chapter IVA. Among other things, Art 17J of the 2006 Model Law gives the court power to grant interim measures to aid international arbitration both held within the court's territorial jurisdiction and also in other States. Article 17J of the 2006 Model Law reads:

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

The Explanatory Note by the UNCITRAL Secretariat to the 2006 amendment states that Art 17J was inserted: "[T]o put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures."

55 Explanatory Statement to the 2009 Bill at p 8.

56 See Singapore Ministry of Law's Consultation Paper on the Draft International Arbitration (Amendment) Bill 2009 dated 27 July 2009 at p 4.

> …
>
> (3) 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]

29 In addition to Art 17J of the 2006 Model Law, ss 12A(1) and 12A(3) are inspired by s 2(3) of the 1996 UK Arbitration Act,[57] which states:

> (3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined –
>
> …
>
> (b) section 44 (court powers exercisable in support of arbitral proceedings);
>
> but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

30 Although it is commendable that the Ministry has sought to introduce a new framework for "court-ordered interim measures" in place of s 12(7) of the IAA,[58] it is unclear whether this framework adequately deals with the court's concerns in *Swift-Fortune*[59] or constitutes the broad "framework to deal with interim measures to assist foreign proceedings, whether court or arbitral proceedings", that the Court of Appeal in that case had in mind. In particular, there are several issues which should be resolved by Parliament or the courts.

31 First, the new s 12A(3) of the 2009 Bill does not provide any guidelines as to when it would be "inappropriate" to grant an interim order because the arbitration is designated or determined to be held outside Singapore. This could render s 12A(3) vague and unhelpful to parties. Without further elucidation, the net effect of s 12A(1) read with s 12A(3) appears, rather tautologically, to be that the High Court can order interim relief in aid of foreign arbitration although the very fact that the arbitration is overseas could make it inappropriate to provide such curial assistance. It can only be surmised that the "inappropriate"

57 Arbitration Act 1996 (c 23) (UK).
58 Cap 143A, 2002 Rev Ed.
59 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629.

test in s 12A(3) is inspired by the principle of comity, which the Ministry acknowledges is a "fundamental principle".[60] Although the Ministry opines, and the authors agree, that this principle need not be expressly stated in the 2009 Bill, at minimum, the Explanatory Statement to the 2009 Bill should emphasise the important role the principle of comity plays in determining an "inappropriate" interim relief for the purposes of s 12A(3) of the Bill. The Statement should make it clear that s 12A(3), like its English counterpart, s 2(3) of the 1996 UK Arbitration Act, "is there to counter any suggestion that by conferring jurisdiction in this way Parliament is indicating that the absence of a seat link is an irrelevant factor when deciding whether to exercise the jurisdiction".[61]

32 Second, reading s 12A(3) together with s 12A(5), it appears that the High Court may refrain from granting interim relief on the ground that it would be "inappropriate" to do so, despite having the tribunal's permission and/or the parties' written consent to do so. This cuts against the grain of the IAA and the spirit of the 1985 and 2006 Model Law, which, as we have seen, defer to party autonomy. Further, s 12A(3) permits the High Court to refrain from exercising its power under s 12A, but does not specify if there are exceptional circumstances, such as fraud, that render curial assistance in aid of foreign arbitration "appropriate", even if there is no seat link between Singapore and the arbitration and/or substantial assets in Singapore to justify curial assistance.

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60 Ministry of Law's Responses to Public Feedback Received at p 4.

61 *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 2 All ER (Comm) 1034 at [160], *per* Walker J. That case involved an application for a freezing order under s 44(3) of the Arbitration Act 1996 (c 23) (UK) where the court was asked to consider whether such an order would be inappropriate under s 2(3) of the same Act. Declining to grant a freezing order in relation to a foreign arbitration where there was no sufficient seat link to the UK, Walker J held that the principle of comity with foreign courts or tribunals in other jurisdictions was paramount in granting interim relief:

> *There will always need to be a careful examination of the justification for any part of the proposed order which would tend to run counter to principles of comity with courts in other jurisdictions.*
>
> …
>
> It may be that in particular cases the fact that an arbitral tribunal is involved will lead to fewer practical problems [than where a foreign court is involved]. *Where, however, a proposed order would tend to run counter to principles of comity, in particular because it involves assuming jurisdiction over assets not located here, it seems to me that the court must exercise at least the same degree of caution as it would in relation to an order in aid of foreign litigation.*
>
> …
>
> [I]n the absence of any exceptional feature such as fraud, and in the absence of substantial assets … located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under s 2(3) of the 1996 Act.
>
> [emphasis added]

33 Third, given that the Court of Appeal in *Swift-Fortune*[62] emphasised that Parliament should be made aware of the need for a legislative framework for interim relief in foreign proceedings, "whether court or arbitral",[63] it follows that the provisions relating to curial assistance in the CLA[64] and the IAA[65] should be harmonised. In other words, the determination of whether interim relief is "inappropriate" under s 12A(3) of the 2009 Bill should include considerations of whether the High Court has personal jurisdiction over the respondent to an application *and* whether a recognisable cause of action has arisen under Singapore law. Although the Court of Appeal in *Swift Fortune* held that "[t]he existence of the court's personal jurisdiction over the defendant in itself does not give power to the court to grant a Mareva injunction in aid of a foreign arbitration",[66] these twin considerations could be elements or guidelines for courts to take into account when determining if s 12A(3) is triggered. This would in turn lead to the development of a *autochthonous corpus* of Singapore case law concerning the scope of the elements or guidelines of s 12A(3) of the 2009 Bill, instead of leaving arbitral parties and judges to have to fathom the meaning of phrases such as "inappropriate", which, as Andrew Hutcheon astutely notes, "add very little to understanding the particular issues involved".[67]

34 In response to the authors' call for greater clarity to be inserted into the "inappropriate" test in s 12A(3), the Ministry replied that introducing the phrase "justiciable", which was relied upon by the Court of Appeal in *Swift-Fortune*,[68] is likely to "open the door to further litigation as what is meant by 'justiciable' is not entirely clear".[69] This is not entirely accurate. Unlike the amorphous phrase "inappropriate", it is well settled that a cause of action is justiciable in Singapore if it satisfies two requirements: (a) the court asked to grant interim relief must have jurisdiction over the defendant whether by service of process within the country or permitted service of process outside of the country;[70] and (b) the claim must relate to a legal or equitable right or interest which is enforceable in Singapore (regardless of whether it is ultimately enforced

62 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629.
63 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [94]. See para 26 of this article.
64 Cap 43, 1999 Rev Ed.
65 Cap 143A, 2002 Rev Ed.
66 [2007] 1 SLR(R) 629 at [96].
67 Andrew Hutcheon, "Worldwide Freezing Orders in Disputes between States and Commercial Parties" European & Middle Eastern Arbitration Review 2009, Section 2.
68 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629.
69 Ministry of Law's Responses to Public Feedback Received at p 4.
70 *Siskina v Distos Compania Naviera SA ("The Siskina")* [1979] AC 210 at 254F–G, *per* Lord Diplock; *Channel Group v Balfour Beatty* [1993] AC 334 at 342E–343D; *Mercedez Benz v Leiduck* [1996] 1 AC 284 at 309A–G.

here) by a final judgment of the High Court.[71] It is far more likely that the flood of litigation, which the Ministry fears, may ensue in relation to the lay phrase "inappropriate" than "justiciable", which is a legal term of art as far as conflict of laws is concerned.

F. Recommendation

35 Based on the arguments above, s 12A(3) of the 2009 Bill should be redrafted (proposed amendments in italics) as follows:

> (3) 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, *taking into account whether the applicant has a justiciable cause of action under the laws of Singapore.*

III. Arbitral tribunal-ordered interim measures – A missed opportunity

36 The 2009 Bill provides expressly for the powers of the High Court to make certain orders in support of international arbitration in response to *Swift-Fortune*,[72] but makes no effort to revise or update the IAA[73] in view of the 2006 amendments to Art 17 of the Model Law regarding the court's role in recognising or enforcing arbitral tribunal-ordered measures.

A. Article 17 of the 1985 Model Law – Identifying the "lacuna"

37 Article 17 of the 1985 Model Law empowered arbitral tribunals to grant interim relief as follows:

> Article 17. Power of arbitral tribunal to order interim measures
>
> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party *to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute*. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. [emphasis added]

71 See *Karaha Bodas Co LLC v Pertamina Energy Trading Pte Ltd* [2006] 1 SLR(R) 112 at [35] and [38].

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

73 Cap 143A, 2002 Rev Ed.

38 Although Art 17 of the 1985 Model Law confers considerable discretion on the arbitral tribunal, it gives no guidance on what sort of interim measures may be granted and under what conditions they may be considered "necessary" to aid international arbitrations. Further, Art 17 does not expressly specify the status and effect of such measures – *ie*, are interim measures granted pursuant to Art 17 enforceable arbitral awards, and if not, what are the grounds for recognising or refusing their enforcement?

39 It appears that the drafters of the 1985 Model Law preferred to leave these issues pertaining to the scope, status and enforceability of interim relief to be determined by the domestic law and procedure of the Model Law jurisdictions. Indeed, this approach is in line with the overall character of the 1985 Model Law and the recognition by the UN General Assembly that "the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations".[74]

40 Summarising the relevant sections of the 1985 Model Law Commentary and other UNCITRAL preparatory materials,[75] the editors of *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*[76] had this to say in respect of Art 17 of the 1985 Model Law:[77]

> There was some sentiment for specifically limiting the measures that could be taken to 'measures for conserving, or maintaining the value of, the goods forming the subject matter in dispute', but ultimately the broader power was approved that provided for any measures of protection in respect of the subject matter of the dispute. … A third question of policy that was addressed was the question of the arbitral tribunal's power to enforce the interim measure it orders. *The Secretariat drafted a sentence to provide that the arbitral tribunal could*

74 UNCITRAL General Assembly Resolution 40/72, 112th Plenary Meeting, 11 December 1985.

75 In the event a plain reading of the 1985 Model Law is unhelpful or vague, s 4 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) permits recourse to extrinsic materials and preparatory materials to aid interpretation of the Article(s) in question. Section 4 states: "(1) For the purposes of interpreting the Model Law, reference may be made to the documents of – (*a*) the UNCITRAL; and (*b*) its working group for the preparation of the Model Law, relating to the Model Law. (2) Subsection (1) shall not affect the application of section 9A of the Interpretation Act (Cap 1) for the purposes of interpreting this Act."

76 Singapore courts regard this as an authoritative resource on the interpretation of the Model Law, often referring to it in judgments regarding international arbitration (see, for example, *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14).

77 Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989) at p 531.

> *request a court to render executory assistance. The Working Group ultimately decided not to address this question because it touched on matters dealt with in laws of national procedure and court competence and would probably be unacceptable to many States. The question of execution of interim measures is thus not dealt within the (Model) Law and is governed by other provisions of domestic law.* [emphasis added]

41 In formulating the 1993 Draft IAA Bill to adopt and augment the 1985 Model Law, the Sub-Committee recommended, *inter alia*, that in order to enable "the proper functioning of international arbitrations in Singapore … arbitral powers given by statute must be substantially increased". The Sub-Committee added that "the Model Law provisions should be expanded to include the powers set out in the UNCITRAL Rules, SIAC Rules and such other powers as a Court should have, such as … interim injunctions or other interim orders", lest there be a "lacuna" in the Model Law with respect to the scope and enforceability of arbitral tribunal-ordered interim measures of protection. Paragraphs 32 to 35 of the Sub-Committee's 1993 Report deserve to be quoted *in extenso*:

> Article 17 of the Model Law provides that the arbitral tribunal may order any party to take such interim measures as the tribunal deems necessary. *The Article does not expressly state that any such interim order is to constitute an interim award, nor does it provide any method of enforcing any such interim orders …*
>
> The Hong Kong Law Reform Commission did not make any suggestion on the point but *the Australian Working Group recommended that an 'award' should be defined to include interim awards and that interim awards should be made capable of being made on many matters including costs. The New Zealand approach was most comprehensive, since it amended Article 17 so as to award status to orders for interim protection. The amended Article 17 also makes it clear that the powers of enforcement in Articles 35 and 36 apply to interim orders*.
>
> *There is a lacuna in the Model Law which the Committee feels should be filled.* Quite apart from the desirability of the arbitrators having power in appropriate circumstances to make partial awards during the course of the proceedings and also awards for costs, *there is a need for the arbitrator to be able to make interim procedural orders. Such orders will help expedite the proceedings and also ensure that the award finally made is not a mere 'paper award'.* Arbitrators should be able to make orders for discovery and inspection of documents and other relevant evidence, the issue of interrogatories, the submission of evidence (eg damaged goods) to expert appraisal, and orders relating to interim preservation of property. *Such orders may also need to be given the status of awards in order to be enforceable. If the arbitral tribunal has the power to make interim awards on a wide range of matters then, first judicial interference with arbitral proceedings will be minimised and, secondly, the parties will be able to get efficient and expeditious interim relief.*

> The Committee therefore recommends that when the arbitral tribunal makes interim orders and/or directions pursuant to powers of the kind contemplated in Paragraph 31 above, curial assistance should be available such that the interim orders and/or directions may be registered with the courts for enforcement as an administrative process.
>
> [emphasis added]

B. Section 12(6) of the IAA – Empowering the arbitral tribunal

42 As mentioned, the provisions relating to the powers of the tribunal and the High Court to grant interim relief in aid of arbitration in the 1993 Draft IAA Bill proposed by the Sub-Committee were virtually identical to those eventually approved by Parliament. In particular, under the IAA,[78] the arbitral tribunal's power to provide interim relief in international arbitrations is prescribed by s 12(6) read with s 12(1). These subsections provide as follows:

> Powers of arbitral tribunal
>
> 12.–(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for –
>
> …
>
> (*i*) an interim injunction or any other interim measure.
>
> …
>
> (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.

43 At first glance, it appears that s 12 of the IAA[79] addresses the Sub-Committee's concerns with respect to tribunal-ordered interim measures and assists the High Court to strike the right balance between intervening in arbitration to grant interim relief and holding the parties to their arbitration agreement. After all, s 12(1) of the IAA commendably enumerates a range of interim measures that an arbitral tribunal or the High Court is empowered to make to assist international arbitration. These measures mirror interim and interlocutory orders that are often granted by Singapore courts in local litigation, including discovery of documents, preservation of evidence and the provision of security for costs.

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78 Cap 143A, 2002 Rev Ed.

79 Cap 143A, 2002 Rev Ed.

44 Moreover, s 12(6) of the IAA[80] confers, with leave from the High Court, arbitral tribunal-ordered interim measures the same status and enforceability of judicial orders, thereby ensuring that such orders "help expedite the proceedings and also ensure that the award finally made is not a mere 'paper award'".[81] A plain reading of s 12 of the IAA reveals that an order or direction in an international arbitration, unlike an award, cannot be set aside by Singapore courts. There is no mechanism in s 12 or, for that matter, in any other section of the IAA, for an application to be made to the courts to set aside an order or direction made by an arbitral tribunal; nor are the courts empowered to do so.

45 In fact, in November 2001, Parliament specifically amended the definition of an award in s 2 of the IAA[82] to clarify that an "award means a decision of the arbitral tribunal on the substance of the dispute and *includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12*" [emphasis added]. There is no judicial recourse against interim measures made under s 12(6) of the IAA:[83] not being awards, they cannot be set aside under s 24 of the IAA or Art 35 of the Model Law.[84] Even if interim relief is framed in the form of an award, as opposed to an order or direction, the definition of an award in s 2 bars it from being judicially interfered with.[85] Differentiating between the status and effect of an interim award from an interim order is consistent with that of other Model Law jurisdictions, where courts have held that it is the substance of an arbitral ruling, and not its form, that is determinative of whether it will be treated as having the effect of an arbitral award.[86]

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80 Cap 143A, 2002 Rev Ed.

81 See para 41 of this article.

82 Cap 143A, 1995 Rev Ed.

83 Cap 143A, 2002 Rev Ed.

84 *Halsbury's Laws of Singapore* (vol 2, "Arbitration") (LexisNexis, 2003 Reissue) at p 93. ("Decisions on interlocutory matters pertaining to procedure such as security for costs or for the claim, preservation of property, discovery of documents or inspection, are not termed awards but orders or directions. *Such orders or directions, not being awards, are not subject to any judicial review or appeal process.*" [emphasis added])

85 Lawrence Boo, *The Law and Practice of Arbitration in Singapore* (ICCA Supplement No 38, April 2003) (Kluwer) at p 183. See also Lawrence Boo, "Interim measures and the arbitral Institution: A Singapore Perspective", paper presented at ICC International Court of Arbitration and SIAC Symposium on Institutional Arbitration in Asia on 18–19 February 2005 at p 210 (an "order for interim protection measures, (is) not (a) decision on the substance in dispute and would not be considered as such even if the document is titled in the form of an award").

86 See Michael Pryles, "Interlocutory Orders and Convention Awards: the Case of *Resort Condominiums v Bolwell*" (1994) 10 Arbitration International 385 at pp 388–390. In *Resort Condominiums International Inc v Bolwell* 118 ALR 655, the Supreme Court of Queensland held that a partial award could not be treated as an award for the purpose of the New York Convention as it purported to grant some interlocutory remedy otherwise than on the merits of the substantive issues in dispute. Lee J held

(*cont'd on the next page*)

46 Given that no statutory power is conferred upon the Singapore courts to review, restrain or reverse an order or direction under s 12 of the IAA,[87] Singapore courts are likely to take the view that they cannot and/or will not exercise any inherent or residual jurisdiction to so intervene. Put differently, as a general rule, Singapore courts will only intervene in international arbitrations to the extent that curial intervention is expressly permitted in respect of international arbitrations.[88] That principle is contained in Art 5 of the 1985 Model Law which provides that "*[i]n matters governed by [the Model] Law, no court shall intervene except where so provided in this Law*".

47 The Singapore High Court's decision in *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush*[89] ("*Mitsui*") illustrates that, in view of Art 5 of the Model Law, Singapore courts will refrain from taking an interventionist approach in international arbitrations. The issue before the court in *Mitsui* was whether there was any jurisdiction or judicial power to grant an injunction against an arbitrator to prevent him from proceeding with the arbitration pending a decision on his removal or recourse against an interim award. Mitsui suggested that there was a residual power lying with the court to make such an order, arguing that as the law allows the court to set aside an award on grounds no less serious than the power to remove an arbitrator, it must follow that the court would have a residual power to grant an interlocutory injunction under Art 34 of the 1985 Model Law and s 24 of the IAA,[90] if not under Art 13 of the 1985 Model Law, in order not to render the court's eventual decision on the application to set aside an award nugatory.

48 After a thorough review of the drafting history of Art 5 of the Model Law, the High Court rejected this argument. Woo Bih Li J held, *inter alia*, as follows:[91]

> It seemed to me that Mitsui's argument went against the terms of Art 5 which states that in matters governed by the Model Law, no court shall intervene 'except where so provided' in the Model Law.

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as follows: "These orders, as well as the orders made by the District Court Judge on 14 July 1993, are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes referred by [the applicant] for decision or to finally resolve the legal rights of the parties. They are provisional only and liable to be rescinded, suspended, varied or re-opened by the tribunal which pronounced them."

87 Cap 143A, 2002 Rev Ed.

88 See Michael Hwang, "The State of International Commercial Arbitration in Singapore" in ICC Court of Arbitration Bulletin entitled "International Commercial Arbitration in Asia – Special Supplement" (November 1998) at p 47.

89 [2004] 2 SLR(R) 14.

90 Cap 143A, 2002 Rev Ed.

91 [2004] 2 SLR(R) 14 at [23].

Since the Model Law does not provide for the Interlocutory Injunction in respect of an application under Arts 13 and 24, the court does not have the power to do so.

C. Leaving the "lacuna" exposed

49 Yet, the "*lacuna*" identified by the Sub-Committee in its 1993 report has not been entirely filled. Section 12(6) of the IAA[92] omits any reference to the conditions, requirements or relevant principles for the granting of such interim measures. Consequently, international arbitral tribunals applying Singapore law as the *lex arbitri* have had to bridge this omission by relying on conditions espoused by scholars,[93] regardless of whether these conditions comport with Singapore law or general principles of international law concerning interim or interlocutory injunctions, orders and directions.[94]

50 Moreover, s 12(6) of the IAA[95] does not adequately provide for the recognition and enforcement of arbitral tribunal-ordered interim measures. It bears repeating that in considering how to strengthen the enforceability of such measures so that they do not become mere "paper" awards, the Sub-Committee considered the Australian position,

92 Cap 143A, 2002 Rev Ed.

93 See *Order Concerning Application for Interim Measures to Maintain Status Quo Ante* (23 August 2006) at p 8 (para 37), International Chamber of Commerce ("ICC") International Court of Arbitration Database, ICC Case No 126/TE/MW, quoting Julian Lew, "Commentary on Interim and Conservatory Measures in ICC Arbitration Cases" (200) ICC Bulletin 11 at 23, also cited by Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 4th Ed, 2004).

94 Absent guidance from domestic legislation as to when interim measures should be granted, arbitral tribunals often resort to applying criteria laid down by scholars such as Dr Julian Lew on the basis of foreign national legislation and conclude that these criteria "are helpful and appropriate" as a matter of Singapore law. Arbitral tribunals applying Singapore law have concluded that interim measures may be granted if (a) there is no prejudgment of the merits of the case, (b) the measure is urgent; and (c) irreparable or substantial harm may result if the interim measure is denied. See *Order Concerning Application for Interim Measures to Maintain Status Quo Ante* (23 August 2006) at p 8 (para 37). However, different tests or standards apply in Singapore. In an application for an interim injunction, a Singapore court has to consider the following guidelines: (a) the plaintiff must establish that he has a good arguable claim to the right he seeks to protect; (b) the court must not attempt to decide the plaintiff's claim or claims on the affidavits, it being sufficient if the plaintiff shows that there is a serious question to be tried; and (c) if the plaintiff satisfies the above-mentioned tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience: see *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396; *Bengawan Solo Pte Ltd v Season Confectionery Co (Pte) Ltd* [1994] 1 SLR(R) 448.

95 Cap 143A, 2002 Rev Ed.

where interim orders are called or given the status of interim awards[96] as well as, in the Sub-Committee's words, the "comprehensive" New Zealand position, which had amended its application of Art 17 of the 1985 Model Law to make it clear that the powers of recognition and enforcement of arbitral awards under Arts 35 and 36 apply to interim orders.[97]

51 A shortcoming of the IAA[98] is that despite clarifying through s 2 that interim measures are procedural orders that should not be elevated to the status of interim awards, as they are in Australia, it left the *lacuna* unaltered: it does not apply the New Zealand approach of providing a separate regime for the recognition and enforcement of interim measures under s 12(6). When this shortcoming was brought to the attention of the Ministry by the authors during the 2009 Bill's consultation process, the Ministry remarked as follows:

> Although section 2 of the IAA provides that interim orders are excluded from being awards, section 12(6) and (7) of the IAA *provides expressly for the enforcement of interim measures ordered by a tribunal seated in Singapore*. It was not then intended to refer to interim orders made by a foreign arbitral tribunal. This was affirmed by the Singapore Court of Appeal in *Swift Fortune* [2006] SGCA 42 when the Court of Appeal held at paragraph 59 that section 12(7) was not intended to apply to foreign arbitrations. [emphasis added]

52 The Ministry's response presumes that the proposed review of the IAA[99] should only seek to amend s 12(7) of the IAA in the aftermath of *Swift-Fortune*[100] on the basis that there is nothing about s 12(6) that deserves to be remedied since it "provides expressly for the enforcement of interim measures ordered by a tribunal seated in Singapore". This presumption does not rest on firm ground and should be revisited. Although s 12(6) contemplates enforcement, with leave of the High Court, it provides no guidance as to the circumstances under which such leave shall be granted or denied by the High Court. Order 69A r 5 of the Singapore Rules of Court under the Supreme Court of Judicature Act,[101] which purports to govern the enforcement of interim orders made under s 12 of the IAA, is equally unhelpful – formalistically requiring that the applicant abide by an undertaking as to damages, but providing no further assistance to the High Court:

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96 Report of Working Group to the Standing Committee of Attorneys-General at p 18.

97 Draft Arbitration Act (New Zealand) s 17. See para 41 of this article.

98 Cap 143A, 2002 Rev Ed.

99 Cap 143A, 2002 Rev Ed.

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

101 Cap 322, R 5, 2004 Rev Ed.

> Enforcement of interlocutory orders or directions (O.69A, r.5)
>
> 5.—(1) An application for leave to enforce an order or direction given by an arbitral tribunal must be supported by an affidavit:
>
> (*a*) exhibiting a copy of the arbitration agreement and the original order or direction made by the arbitral tribunal sought to be enforced; and
>
> (*b*) stating the provisions in the Act or the applicable rules adopted in the arbitration on which the applicant relies.
>
> (2) Where the order sought to be enforced is in the nature of an interim injunction under section 12(1)(*e*) or (*f*) of the (International Arbitration)Act, *leave shall be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages*.
>
> [emphasis added]

D. 2006 Model Law amendments – A broad framework for recognition and enforcement

53 In December 2006, the UN General Assembly adopted changes to the 1985 Model Law, which comport with the New Zealand position of providing a separate regime for the recognition and enforcement of interim measures. The new provisions found in Chapter IVA of the 2006 Model Law on Interim Measures and Preliminary Orders include a more comprehensive regime for dealing with interim measures during the course of arbitral proceedings. These provisions provide far more detail and guidance than what is currently found in the IAA[102] on the use of interim measures. In particular, Art 17A provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in Arts 17H and 17I) of a regime for the recognition and enforcement of interim measures, which was modelled on the regime for the recognition and enforcement of arbitral awards under Arts 35 and 36 of the 1985 Model Law.[103]

54 Unlike s 12(6) of the IAA,[104] Arts 17H and 17I of the 2006 Model Law include the following specific characteristics:

> (a) the party seeking recognition or enforcement of the interim measure must inform the court if there is any termination, suspension or modification of that measure (see Art 17H(2));

102 Cap 143A, 2002 Rev Ed.
103 Explanatory Note to the 2006 Model Law by the UNCITRAL Secretariat at p 31.
104 Cap 143A, 2002 Rev Ed.

(b) the court may order the requesting party to provide appropriate security if this has not already been determined by the tribunal or where it is necessary to protect the rights of third parties (see Art 17H(3));

(c) in addition to the grounds for refusing to recognise or enforce an interim measure under Art 36(1)(a)(i), Art 36(1)(a)(ii), Art 36(1)(a)(iii) or Art 36(1)(a)(iv) (though note that Art 36(1)(v) which only applies in relation to an award that is subject to challenge proceedings is excluded) and Art 36(1)(b) (arbitrability and public policy), a court may refuse to recognise or enforce an interim measure if it finds that the interim measure is incompatible with its own powers (unless it decides to reformulate the measure to adapt it to its powers and procedures) (see Art 17H(1)(b)(i)); and

(d) in determining whether to recognise and/or enforce the interim measure, the court shall not review the substance of the interim measure (see Art 17H(2)).

55 As mentioned, the UN General Assembly (including Singapore) acknowledged in its resolution of 4 December 2006 that the amendments relating to interim measures reflected "current practices in international trade and modern means of contracting" and would "significantly enhance the operation of the Model Law".[105] Similarly, the New Zealand Justice and Electoral Committee recommended to Parliament that these amendments be included to increase certainty and encourage consistency with international best practice:[106]

> Recent changes to the Model Law set out detailed provisions for the making of interim measures, including the appropriate test for the arbitral tribunal to use regarding the need for interim measures, and provision for the making of preliminary orders. *We consider that including amendments to reflect the recent update to the Model Law would increase certainty for arbitral parties by providing more detail as to how and when interim measures will be applied.* This amendment would also ensure that the Act remains *consistent with the Model Law*, and with arbitral legislation in other jurisdictions. [emphasis added]

105 GA Resolution 61/33 (4 December 2006) reproduced in Model Law and Explanatory Notes at p viii.

106 Justice and Electoral Committee Report, Arbitration Amendment Bill (2007) at <www.parliament.nz/en-NZ/PB/Legislation/Bills/b/7/e/00DBHOH_BILL7633_1-Arbitration-Amendment-Bill.htm> (accessed 1 February 2010). See also Amokura Kawharu, "New Zealand's Arbitration Law Receives a Tune-Up" (2008) 24(3) Arbitration International 405 at 412.

E. Importance of adopting the Model Law amendments

56 Some may insist there is no need to amend s 12(6) of the IAA[107] to bring it in line with recent amendments to the Model Law for the sake of certainty and consistency since the possibility of the courts enforcing interim measures is recognised by that provision. Yet, arbitral jurisprudence indicates that s 12(6) of the IAA has proven controversial and would benefit from being updated and augmented by the 2006 Model Law.

57 Not all arbitral tribunal-ordered interim measures are unremarkable forms of relief that should be enforced by the High Court as a matter of course. Suppose an arbitral tribunal imposes an interim measure that relates to a matter outside the scope of the tribunal's reference, adversely affects third party rights and/or is contrary to Singapore's public policy. Would the High Court grant leave to enforce this measure? The answer should, as a matter of Singapore law, be in the negative,[108] yet an International Chamber of Commerce ("ICC") arbitral tribunal applying Singapore law as the *lex arbitri* recently opined that it could impose interim relief that purports to inquire into the sovereign authority of another State to expropriate or exercise police powers in relation to its own property, without regard for the High Court's likely approach to matters of Singapore law and public policy:[109]

> At the hearing [counsel] eloquently argued that the *lex arbitri* was the law of Singapore, a Singapore judge possess co-extensive jurisdiction with the Tribunal to grant interim measures of protection, and that therefore this Tribunal should be guided by the principles which would be applied by a Singapore court. *He also contended that a Singapore court would not enforce an order for an interim injunction given by this Tribunal if it was against public policy. He said that under the Act of State doctrine a Singapore court would not enquire into the power or authority of the [defendant] to expropriate or exercise police powers in relation to the entry onto or continued possession of [the property].*
>
> This Tribunal is not persuaded that an arbitral tribunal must approach an application for interim measures in the same way as would a court of the place of arbitration. *In any event a broad measure of discretion is*

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107 Cap 143A, 2002 Rev Ed.

108 The authors agree with the editors of *Halsbury's Laws of Singapore* (vol 2, "Arbitration") (LexisNexis, 2003 Reissue) at paras 20.005–20.010 who recognise that "leave to enforce (an interim order) would be given unless it is shown that the tribunal has no power to make the direction, or the direction relates to a matter outside the scope of his reference or that third party rights are adversely affected".

109 See *Order Concerning Application for Interim Measures to Maintain Status Quo Ante* (23 August 2006) at p 8 (paras 40–41), International Chamber of Commerce ("ICC") International Court of Arbitration Database, ICC Case No 126/TE/MW.

> *conferred on the adjudicating tribunal, be it a court or an arbitral tribunal and there is room for latitude.*
>
> [emphasis added]

58 Absent a codification of the curial support that the arbitral tribunal can expect to receive under s 12(6) of the IAA,[110] arbitral tribunals can only speculate as to what this ICC panel considered the *High Court's* "broad measure of discretion" and "latitude" to grant leave for enforcement of interim measures permits or prohibits. The ICC panel's decision indicates that it believes the court's discretion to be, at best, amenable or, at worst, immaterial to its own "latitude" regarding the grant of interim measures. However, it is well settled that Singapore courts do not have "latitude" when it comes to certain matters, including those raised in this ICC arbitration. They will not sit in judgment of the acts of a foreign sovereign State to expropriate, take possession or exercise the right of eminent domain or police powers in relation to property in its territory.

59 As a rule, courts will not adjudicate upon the legality, validity or acceptability of sovereign acts of foreign States. The House of Lords in *Kuwait Airways Corp v Iraqi Airways Co* described this "act of state" rule of public international law, and the principle of comity of nations or international comity upon which it is premised, as follows:[111]

> *There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognized foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts.* They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny. The rule gives effect to a policy of 'judicial restraint or abstention': see *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 931f–934c per Lord Wilberforce. …
>
> …
>
> *It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognized in* Oppenheimer v Cattermole *[1976] AC 249, 277–278, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations.*

110 Cap 143A, 2002 Rev Ed.

111 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1108, *per* Lord Hope; see also *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2)* [2004] VSC 341.

> *This principle normally requires our courts to recognize the jurisdiction of the foreign state over all assets situated within its own territories: see Lord Salmon, at p 282. A judge should be slow to depart from these principles.* He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognize it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.
>
> [emphasis added]

60 International comity is an integral component of Singapore's public policy. Indeed, the rationale for public policy is based on "*conceptions of international comity*".[112] Adopting the "act of state" doctrine, the High Court in *Korea Jonmyong Trading Co v Sea-shore Transportation Pte Ltd*[113] held, quoting the seminal English decision *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* ("*James Sagor*"):[114]

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

61 *James Sagor* stands, *inter alia*, for the proposition that a court will recognise:[115]

> (a) the compulsory land acquisition law (pursuant to the right of eminent domain) of a foreign State;
>
> (b) the change of title of property which has come under the control of the foreign State; and
>
> (c) the consequences of that change of title.

62 Section 12(6) of the IAA[116] should be amended to clearly define the grounds for and limits on enforcing arbitral interim orders. In addition to interim measures that purport to impinge on Singapore public policy, there should be other limits on the High Court's "broad discretion" to grant leave for enforcing interim measures. While there is no local decision where s 12(6) of the IAA has been invoked to refuse enforcement of an arbitral order for interim relief, the Court of Appeal has refused to recognise or enforce interim injunctive relief arising out

112 *Regazzoni v KC Sethia* [1958] AC 301 at 327, *per* Lord Keith. Affirmed by the Singapore Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842.

113 [2003] 1 SLR(R) 702 at [24].

114 [1921] 3 KB 532 (CA), [1921] All ER 138.

115 See also *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 965.

116 Cap 143A, 2002 Rev Ed.

of ongoing domestic arbitrations under the Arbitration Act[117] ("AA") where such relief went beyond the subject-matter of the dispute.

63 The following cases, and the principles they advance, are useful by way of analogy, especially since "the AA and the IAA ought, as far as the statutory language allows, to be read consistently because both statutes, taken together, comprise the entire arbitration regime available in Singapore".[118] In *Bocotra Construction Pte Ltd v AG*[119] ("*Bocotra Construction*"), Bocotra was engaged as main contractors for the building of an expressway in Singapore. A performance guarantee was furnished by Bocotra to secure their performance of the contract. Works were delayed. Bocotra claimed damages for delay and additional work caused by errors in tender documents and alleged maladministration by the Singapore Public Works Department ("PWD"). PWD counterclaimed for costs of rectification works due allegedly to defective works and damages for Bocotra's delay in completion. Bocotra took the view that the counterclaim was a nullity and not within the reference before the arbitrator. The claims were referred to arbitration. When PWD gave notice that they intended to call on the performance guarantee, the arbitrator, on Bocotra's request, issued an interim declaration restraining the PWD from calling on the guarantee. Refusing to enforce the interim measure, the Court of Appeal held, *inter alia*, that the disputes relating to the guarantee, being purely peripheral to the primary reference to arbitration, did not fall within the arbitrator's jurisdiction.

64 According to the editors of *Halsbury's Laws of Singapore* on "Arbitration", *Bocotra* "would perhaps be a good example to justify a refusal of leave if the matter was an arbitration under the International Arbitration Act".[120] *Bocotra* is not the only case supporting this proposition. In *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Shiekh Sultan bin Khalifa bin Zayed Al Nahyan*,[121] the plaintiffs agreed to build a luxury yacht for the defendant. The defendant claimed that the shipyard had breached the construction contract in material aspects while the shipyard alleged that the defendant had failed to make payments due there under. Again, the Court of Appeal refused to restrain a call on a performance bond issued in favour of a defendant pending arbitration on the basis that the interim relief sought by the plaintiff was premised on issues that were collateral to the primary dispute referred to arbitration.

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117 Cap 10, 2002 Rev Ed.

118 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [43], *per* V K Rajah JA.

119 [1995] 2 SLR(R) 282.

120 *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at paras 20.005–20.010.

121 [2000] 1 SLR(R) 117.

65 These Singapore decisions have led one scholar to conclude: "Singapore courts take a *narrow view* of what constitutes the subject matter in dispute and have been slow to issue or support grants of interim measures where the same falls outside the scope of that subject-matter" [emphasis added].[122] The IAA[123] should be amended to codify this fact – that in exceptional circumstances, the High Court will take a "narrow view" rather than give too much "room for latitude" when it comes to enforcing interim measures of protection as the ICC panel's decision above in relation to the "act of state rule" seemed to suggest.

66 Without clearly defined guidelines as to when the High Court should grant or deny leave for enforcement, arbitral parties may fear uncertainty with respect to the recognition and enforcement of interim measures, which does not augur well for the growth and development of international commercial arbitration in Singapore. Arbitral parties' real or perceived concerns in this regard may have a chilling effect on the choice of Singapore as the place of arbitration and/or Singapore law as the *lex arbitri* because an interim measure cannot be enforced overseas under the New York Convention, which strictly pertains to the enforcement of foreign *awards* alone. Arbitral awards, including interim awards, are enforceable with the leave of the High Court in the same manner as orders or judgments of court. Interlocutory orders and directions made pursuant to s 12(6) of the IAA[124] in Singapore arbitrations are also enforceable in the same manner as if they were orders made by the court. Not being in the nature of an arbitral award, arbitral orders and directions are limited to enforcement within the jurisdiction and are not enforceable under the New York Convention. This article would undoubtedly have been enriched by empirical research into arbitral parties' sentiments towards the application of s 12(6) of the IAA, but this is in itself not a reason to delay the opening of a debate concerning the limitations of this section as it currently stands. The time is ripe to adopt the 2006 Model Law amendments and improve certainty for arbitral parties by providing more detail as to how and when interim measures will be applied. Such adoption would also ensure that the IAA remains consistent with the Model Law and with arbitral legislation in other jurisdictions.

F. Recommendation

67 The 2009 Bill only purports to provide for *court-ordered* interim measures. As such, Parliament has passed up a good opportunity to

122 Lawrence Boo, "Interim measures and the arbitral Institution: A Singapore Perspective", paper presented at ICC International Court of Arbitration and SIAC Symposium on Institutional Arbitration in Asia on 18–19 February 2005 at p 210.

123 Cap 143A, 2002 Rev Ed.

124 Cap 143A, 2002 Rev Ed.

guide and provide better curial support for *arbitral tribunal-ordered* interim measures, which are the mainstay of s 12 of the IAA.[125] Section 12 of the IAA does not provide any conditions as to when these measures may be ordered, nor does it explain the grounds under which the High Court may grant or refuse leave to enforce these measures. The recently introduced Arts 17A, 17H and 17I of the 2006 Model Law seek to address these gaps by setting out detailed provisions for the making of interim measures, including the appropriate test for the arbitral tribunal to use regarding the need for interim measures and the grounds for recognition and enforcement of these measures. This recent update to the Model Law should be incorporated (with minor modifications) into Singapore law as it would increase certainty for arbitral parties by providing more detail as to how and when interim measures will be granted, recognised and enforced.

68 Consistent with Chapter 4A of the New Zealand Act, which in turn modifies and applies Arts 17 A, 17H and 17I of the 2006 Model Law, the following amendments should be introduced to the IAA:

> *Amendment of s 12*
>
> Section 12 of the principal act is amended by deleting subsection (6).
>
> *New s 12B*
>
> Conditions for granting interim measure
>
> (1) If an interim measure of a kind described in subparagraph (a), (b), (c), (e), (g), (h), and (i) of the definition of that term in section 12(1) is requested, the applicant must satisfy the arbitral tribunal that –
>
> > (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
> >
> > (b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
> >
> > (c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.
>
> (2) If an interim measure of a kind described in subparagraph (d) and (f) of the definition of that term in Article 12(1) is requested, the applicant must satisfy the arbitral tribunal of the matters specified in paragraph (1)(a) to (c), but only to the extent that the arbitral tribunal considers appropriate.

125 Cap 143A, 2002 Rev Ed.

(3) If an interim measure of a kind described in subparagraph (a) of the definition of that term in Article 12(1) is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim.

(4) A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination.

New s 12C

Recognition and enforcement

(1) An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the High Court, irrespective of the country in which it was granted.

(2) Paragraph (1) is subject to section 12D.

(3) The applicant for recognition or enforcement of an interim measure under Model Law Article 35 must promptly inform the Court of any modification, suspension, or cancellation of that interim measure.

(4) The Court may, if it considers it proper, order the applicant to provide appropriate security if –

(*a*) the arbitral tribunal has not already made a decision with respect to the provision of security; or

(*b*) the decision with respect to the provision of security is necessary to protect the rights of third parties.

New s 12D

Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only –

(*a*) at the request of the respondent if the High Court is satisfied that –

(i) the refusal is warranted on the grounds set out in Article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure granted by it has not been complied with; or

(iii) the interim measure has been suspended or cancelled by the arbitral tribunal or, if so empowered, by the Court of the country in which the arbitration took place or under the law of which that interim measure was granted; or

(*b*) if the Court finds that –

(i) the interim measure is incompatible with the powers conferred on the Court, unless the Court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set out in Article 36(1)(b) apply to the recognition and enforcement of the interim measure.

(2) A determination made by the Court on any ground in paragraph (1) is effective only for the purposes of the application to recognise and enforce the interim measure.

(3) The Court must not, in making that determination, undertake a review of the substance of the interim measure.

IV. Conclusion

69 The 2009 Bill sends a clarion message to the global arbitration community that Singapore courts will continue to lend curial assistance to arbitration in Singapore and, in more limited circumstances, abroad as well. The Bill will undoubtedly fortify Singapore's reputation as an internationally renowned arbitration hub. Nonetheless, the 2009 Bill appears to be more of a tune-up than a revision of the IAA designed to introduce a broad framework for curial assistance consistent with the 2006 Model Law. The "inappropriateness" test in s 12A(3) of the 2009 Bill deserves further legislative clarification. The 2009 Bill also stops short of improving the IAA's existing s 12(6)[126] which relates to arbitral tribunal-ordered interim measures, thereby passing up a good opportunity to introduce the new provisions of the Model Law which seek to address contemporary problems associated with the judicial recognition and enforcement of such measures. It is hoped that these matters will, as the Ministry promises, be "reconsider[ed] at a later juncture and will [be kept] under review".[127]

126 Cap 143A, 2002 Rev Ed.

127 Ministry's Response to Feedback on the 2009 Bill at p 2.