

## INTERIM MEASURES IN AID OF FOREIGN ARBITRATIONS

**Time for the *Deus Ex Machina*?**

Does a Singapore court have the power to issue interim orders in aid of a foreign-seated arbitration? There have been a series of recent decisions by the Singapore courts on this question. Following the Court of Appeal decision in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629, the present position is that, whilst the answer is unclear, it is at least clear that the answer lies in the interpretation of s 4(10) of the Civil Law Act. This article will argue that it is not helpful to look to s 4(10) of the Civil Law Act to discern the policy direction of the Legislature on the question. Whether or not the Singapore court has the power to issue interim orders in aid of a foreign seated arbitration impacts on Singapore's overall reputation and attractiveness as a centre for international arbitration. This article will suggest that resolution of the issue is ultimately a policy decision best made by the Legislature. It will identify the competing policy priorities, including Singapore's aim to be a leading centre for international arbitration. This article will also explain the secondary policy question of whether to adopt the "reciprocity" or "competition" approach to promoting Singapore as an international arbitration centre. This article will conclude that the best way forward is for the Legislature to make its will clear by amending the International Arbitration Act.

**LYE Kah Cheong**

*LLB (Hons) (National University of Singapore),  
LLM (King's College, London); FSI Arb; Advocate & Solicitor (Singapore),  
Solicitor (England & Wales); Of Counsel, Norton Rose (Asia) LLP.*

**YEO Chuan Tat**

*LLB (Hons) (National University of Singapore);  
Advocate & Solicitor (Singapore), Solicitor (England & Wales);  
Associate, Norton Rose (Asia) LLP.*

**CHOO Zheng Xi\***

*LLM (New York University).*

---

\* LLM candidate at New York University for the forthcoming year.

## I. Competing policy priorities – Striking the balance

1 The question of whether or not the Singapore court should have the power to grant interim relief in aid of foreign-seated arbitration proceedings is at heart a question of policy best resolved by the Legislature. Two questions of policy shape the debate on the granting of interim relief in this context.

2 First, in respect of this issue, there is a potential tension between two competing policy goals of Singapore – Singapore aims to be an international arbitration centre, and at the same time seeks to be a leading centre for wealth management.

3 Second, with respect to Singapore’s goal of being a centre for international arbitration, there is a difference of view over whether this is best achieved by adopting a “competition” approach or a “reciprocity” approach. The former would deliberately discriminate against arbitrations seated outside of Singapore. The latter would support international arbitration irrespective of the seat of the arbitration.

### A. *Singapore as a centre for international arbitration*

4 It is no secret that Singapore aims to be a centre for international arbitration. This is acknowledged by practitioners, by the courts and by the Executive. A leading arbitration practitioner notes that “since the early 1990s, Singapore has been keen to position itself as the premier arbitration centre in Asia”.<sup>1</sup>

5 Similarly, the Singapore Court of Appeal observed in *Swift-Fortune Ltd v Magnifica Marine SA* (“*Swift-Fortune (CA)*”)<sup>2</sup> that “this objective is clearly expressed in ... the second reading speech made on 31 October 1994 by the Parliamentary Secretary to the Minister for Law, and the speech of the Government Parliamentary Committee Chairman for Law and Home Affairs who spoke in support of the Bill at the same parliamentary session”.<sup>3</sup>

6 The following excerpts from the Second Reading speech by the Parliamentary Secretary to the Minister for Law, Associate Professor Ho Peng Kee are especially illuminating:<sup>4</sup>

---

1 S Menon & E Chao, “Reforming the Model Law Provisions on Interim Measures of Protection” (2006) 2 AIAJ 1 at 23.

2 [2007] 1 SLR 629.

3 [2007] 1 SLR 629 at [14].

4 *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at cols 625–626 (Associate Professor Ho Peng Kee, Parliamentary Secretary to the Minister for Law).

The 1985 Economic Committee recommended that to develop into a centre for legal services, we should speed up the settlement of commercial disputes and set up an international commercial arbitration centre.

The Singapore International Arbitration Centre (SIAC) commenced operations in 1991. This Bill will facilitate the settlement of commercial disputes in Singapore. As Singapore businessmen expand overseas, there will be greater contacts with foreign parties. Currently, foreign businessmen are uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they select Singapore as the venue for arbitration. They will therefore welcome the application of the Model Law in Singapore.

Sir, international arbitration is a highly competitive business. Businessmen are able to choose from a variety of attractive international centres including Hong Kong, Hawaii, Kuala Lumpur, Melbourne and Vancouver. Currently, a glaring disadvantage of the SIAC is the non-applicability of the Model Law in Singapore.

The Law Reform Commissions and Legislatures of Commonwealth countries which have adopted the Model Law have stated that the Law would assist the development of their respective international arbitration centres.

The Hong Kong experience suggests that the adoption of the Model Law will sharpen the competitive edge of the SIAC.

...

In summary, the reasons why Singapore should adopt the Model Law are as follows ... [I]t will promote Singapore's role as a growing centre for international legal services and international arbitrations.

7 Singapore's ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")<sup>5</sup> is also clear evidence of Singapore's desire to be a centre for international arbitration. The New York Convention provides a modality to enforce foreign arbitral agreements and arbitral awards between signatories to the New York Convention. Singapore's International Arbitration Act ("IAA")<sup>6</sup> consolidates the key statutory provisions on international arbitration, including the New York Convention<sup>7</sup> and the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").<sup>8</sup>

---

5 Singapore ratified the New York Convention on 5 August 1986.

6 International Arbitration Act (Cap 143A, 2002 Rev Ed).

7 See International Arbitration Act (Cap 143A, 2002 Rev Ed) Second Schedule.

8 See International Arbitration Act (Cap 143A, 2002 Rev Ed) First Schedule.

### ***B. Singapore as a wealth management centre***

8 It is well accepted that Singapore aims,<sup>9</sup> and is well positioned, to be a leading wealth management centre.<sup>10</sup>

9 As of 2007, Singapore boasts US\$200bn–\$300bn in assets under management and the financial services sector made up 12% of Gross Domestic Product.<sup>11</sup> This sector is continuously growing, seeing an expansion of 17% in 2007 alone.<sup>12</sup> Even allowing for the impact of the global financial crisis thereafter, wealth management is likely to remain an important part of Singapore's economy.

10 The Government is also actively promoting Singapore as a wealth management centre through initiatives such as the abolition of estate duties and the granting of permanent residency to High Net Worth Individuals ("HNWIs") with assets in Singapore above \$3.1m.<sup>13</sup>

### ***C. A potential conflict of policy goals?***

11 Singapore's twin aims to be a centre for international arbitration as well as a leading wealth management centre are not necessarily inconsistent. The pursuit of one aim does not necessarily prejudice the pursuit of the other.

12 However, there may be a conflict between the two policy aims when considering whether the Singapore court should be empowered to issue interim orders in assistance of foreign-seated arbitrations.

---

9 See Economic Review Committee, Sub-Committee on Services Industries Financial Services Working Group, "Positioning Singapore as a Pre-Eminent Financial Centre in Asia" (September 2002) at <[http://app.mti.gov.sg/data/pages/507/doc/ERC\\_SVS\\_LEG\\_MainReport.pdf](http://app.mti.gov.sg/data/pages/507/doc/ERC_SVS_LEG_MainReport.pdf)> (accessed 22 June 2009) at paras 16–35.

10 See, for example, the speech by Mr Ong Chong Tee, Deputy Managing Director (MAS) at the Private Wealth Management Conference (2006) at <[http://www.mas.gov.sg/news\\_room/statements/2006/Private\\_Wealth\\_Management\\_Conference.html](http://www.mas.gov.sg/news_room/statements/2006/Private_Wealth_Management_Conference.html)> (accessed 22 June 2009).

11 Research Republic LLP, "The Future of Asian Financial Centres-Challenges and Opportunities for the City of London" (October 2008) at <[http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC\\_RS\\_asia\\_FC.pdf](http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC_RS_asia_FC.pdf)> (accessed 22 June 2009) at p 17.

12 Research Republic LLP, "The Future of Asian Financial Centres-Challenges and Opportunities for the City of London" (October 2008) at <[http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC\\_RS\\_asia\\_FC.pdf](http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC_RS_asia_FC.pdf)> (accessed 22 June 2009) at p 17.

13 Research Republic LLP, "The Future of Asian Financial Centres-Challenges and Opportunities for the City of London" (October 2008) at <[http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC\\_RS\\_asia\\_FC.pdf](http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC_RS_asia_FC.pdf)> (accessed 22 June 2009) at p 34.

13 As noted above, there are substantial assets being managed by financial institutions in Singapore.<sup>14</sup> If the Singapore court were granted the power to issue interim orders in assistance of foreign-seated arbitrations, this could lead to an increased number of applications to the Singapore court for various interim orders (in particular, Mareva injunctions) against such assets. This raises the concern that investors may move their assets out of Singapore if they feel that the security of their assets located in Singapore is sufficiently threatened.<sup>15</sup>

14 Applications to the Singapore court for various interim orders against assets located in Singapore may also deter potential investors from placing assets in Singapore, thereby adversely affecting Singapore's aim to be a leading wealth management centre. It is relevant to observe that in practice, Mareva injunctions are a common form of interim relief sought from courts to support foreign legal proceedings.<sup>16</sup>

15 On the other hand, if Singapore does not confer its courts with the power to issue interim orders in aid of foreign-seated arbitrations, but instead limits the court's powers to issue interim orders only to Singapore-seated international arbitrations, one could argue that this impacts negatively on Singapore's standing as a pro-arbitration jurisdiction. This could affect Singapore's aim to be a leading international arbitration centre, especially if other centres for international arbitration confer such powers on their courts.<sup>17</sup>

16 Exactly this concern has been articulated by Professor Lawrence Boo, former Deputy Chairman of the Singapore International Arbitration Centre ("SIAC"):<sup>18</sup>

Singapore has hitherto been seen as a 'pro-arbitration' regime. The position as it now lies with the *Swift-Fortune* decision cuts a different

---

14 Research Republic LLP, "The Future of Asian Financial Centres-Challenges and Opportunities for the City of London" (October 2008) at <[http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC\\_RS\\_asia\\_FC.pdf](http://217.154.23.0.218/NR/rdonlyres/11CA0BEC-7946-46DB-9552-FB2A0C4EDA91/0/BC_RS_asia_FC.pdf)> (accessed 22 June 2009) at p 34. See also Ministry of Finance, "Budget Speech 2005" (February 2005) at <[http://www.mof.gov.sg/budget\\_2005/budget\\_speech/index.html](http://www.mof.gov.sg/budget_2005/budget_speech/index.html)> (accessed 22 June 2009) at para 2.17.

15 To advance quite a different point, counsel for *Swift-Fortune* (the plaintiff-appellant) in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 (CA) observed the same link between the availability of injunctive relief and Singapore's attraction as a wealth management centre. This point is examined at para 76 of this article.

16 See, for example, *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 (CA) and *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 in Singapore, the case of *Mercedes v Leiduck* [1996] 1 AC 284 in Hong Kong, and *The Siskina* [1979] 1 AC 210 in England.

17 See the discussion at paras 36–39 of this article setting out the conferral of such powers upon the English and Hong Kong courts.

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

picture, viz, that Singapore is actually only ‘pro-Singapore arbitration’. If the intention is to pitch Singapore as a serious international arbitration hub, a parochial approach of self-help may actually be self-defeating.

## II. Singapore as a centre for international arbitrations: One goal, two roads

17 Concerning the policy goal of making Singapore a centre for international arbitration, a further policy decision needs to be made as to the means by which to achieve that goal.

18 Two competing means to that end can be identified. When stripped to their essence, these schools of thought can be described as “competition” and “reciprocity”. These two competing schools of thought on how to promote Singapore as an international arbitration centre are described below. It will be argued that the “reciprocity” school of thought should be preferred over the “competition” school of thought.

### A. The “competition” school of thought

19 The “competition” school of thought holds that discriminating against parties who seat their arbitrations outside of Singapore will encourage parties to choose to seat their arbitrations in Singapore. This view would favour allowing Singapore courts to issue interim orders in support of an international arbitration only if that arbitration were seated in Singapore. The thinking is that by “punishing” parties who choose to arbitrate outside of Singapore (by not extending Singapore court assistance to these foreign-seated arbitrations), Singapore encourages parties to choose to site their arbitrations in Singapore.

20 Precisely this argument was run by counsel for Magnifica (the defendant-respondent) in *Swift-Fortune (CA)*. The Court of Appeal summarised Magnifica’s argument in the following terms:<sup>19</sup>

Magnifica’s case is that s 12(7) [of the IAA] should not be interpreted literally as it would undermine the purpose of the IAA which is to promote international arbitration in Singapore. A literal interpretation would provide no incentive to foreign parties to select Singapore as the seat of arbitration, if they will have access to a Singapore court for interim measures against assets in Singapore without having to arbitrate in Singapore. Accordingly, s 12(7) [of the IAA] should be interpreted purposively to promote the objective of the IAA.

---

19 See *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [22] (CA).

21 Advocates of the “competition” school of thought may also argue that their approach conflicts less with Singapore’s aim to be a leading wealth management centre, while still serving Singapore’s aim to be a leading international arbitration centre. Both the “competition” approach and a policy preference for promoting Singapore as a wealth management centre lead to the result that Singapore courts should not issue interim orders in aid of a foreign-seated arbitration. As the courts will only issue interim relief in aid of international arbitrations seated in Singapore (but not arbitrations seated elsewhere), there will be fewer applications against assets located in Singapore. Under this system, the Singapore courts will only give interim relief to arbitrations which give immediate benefit to Singapore by virtue of being seated in Singapore.

***B. The “reciprocity” school of thought and why it is to be preferred***

22 In contrast, the “reciprocity” school of thought takes a broader view of the steps which Singapore should take to pursue its goal of being a centre for international arbitration.

23 The “reciprocity” view is that Singapore enhances its reputation and accessibility as a centre for international arbitration by being a responsible member of the international arbitration community. This “good citizen” attitude includes facilitating foreign-seated arbitrations in the hope that a similar respect for Singapore arbitrations will be reciprocated.

24 The basis of the reciprocity approach was explained by the then Minister for Law, Professor Jayakumar, in August 1986 when passing the Arbitration (Foreign Awards) Bill (since incorporated in Part III of the IAA).

25 In his speech to Parliament introducing the Bill, the Minister noted the principle of reciprocity that underlined Singapore’s desire to assist in the enforcement of foreign arbitration awards in Singapore:<sup>20</sup>

It is desirable for Singapore to accede to the Convention.<sup>21</sup> To do so will be in keeping with our position as an international commercial and financial centre. It will encourage the development of Singapore as an international commercial arbitration centre and provide a boost to the service sector of our economy. The local business community will also benefit in that an award made in Singapore may be enforced in other countries which are parties to the Convention. [footnote added]

---

20 *Singapore Parliamentary Debates, Official Report* (25 August 1986) vol 48 at col 616 (Professor S Jayakumar, Minister for Law).

21 This is a reference to the New York Convention.

26 This principle of reciprocity was also evident in the first reported judgment relating to the enforcement in Singapore of a foreign arbitral award under the New York Convention.

27 In *Re An Arbitration between Hainan Machinery Import and Export Corporation and Donald and McArthur Pte Ltd*,<sup>22</sup> the High Court enforced an award given by the China international Economic and Trade Arbitration Commission (“CIETAC”). In deciding to enforce the award, Justice Judith Prakash in the High Court framed her grounds of decision in the language of reciprocity.<sup>23</sup>

As a nation which aspires to be an international arbitration centre, Singapore must recognize foreign awards if it expects its own awards to be recognized abroad.

28 In the context of granting interim relief in aid of foreign-seated arbitrations, the policy consideration of reciprocity was also enunciated in the English House of Lords case, *Channel Tunnel Group v Balfour Beatty Ltd* (“*Channel Tunnel*”)<sup>24</sup> Lord Browne-Wilkinson noted:<sup>25</sup>

Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.

29 The authors suggest the “reciprocity” school of thought is the preferred approach to take in promoting Singapore as a leading centre for international arbitration. This also appears to be the view favoured by some of Singapore’s arbitration practitioners.<sup>26</sup>

30 The reciprocity view also seems to be the one favoured by the Legislature. As can be seen from Professor Jayakumar’s speech extracted above,<sup>27</sup> a strong argument can be made that the reciprocity view is most in line with the broader purpose of the New York Convention.

31 As an example, the New York Convention requires the Singapore court to stay court proceedings brought in Singapore in breach of an arbitration agreement even if the arbitration agreement

---

22 [1996] 1 SLR 34.

23 [1996] 1 SLR 34 at [45].

24 [1993] 1 AC 334.

25 [1993] 1 AC 334 at 341[C].

26 See, for example, the comments of Professor Lawrence Boo (former Deputy Chairman of the SIAC) cited at para 16 of this article.

27 See para 25 of this article.

provides for arbitration in a jurisdiction outside of Singapore.<sup>28</sup> Similarly, the New York Convention requires the Singapore court to enforce international arbitral awards made in arbitrations which are not seated in Singapore.<sup>29</sup>

32 If one takes the “competition” school of thought to its logical conclusion, Singapore would best promote itself as a centre for international arbitration by staying only court proceedings brought in breach of arbitration agreements which provide for arbitration in Singapore. Similarly, Singapore would only enforce arbitral awards of tribunals seated in Singapore.

33 The authors suggest such an isolationist approach would be counter-productive. That is the weakness of the competition approach.

34 On the question of interim relief, the proper application of the “reciprocity” approach would allow the Singapore court to give interim relief to foreign-seated arbitrations, even if those arbitrations are seated in a State that does not allow its own courts to provide similar relief in aid of foreign-seated arbitrations. The point is that by conducting itself in accordance with the norms and standards of other leading centres for international arbitration,<sup>30</sup> Singapore enhances its reputation as a pro-arbitration State. This will encourage parties to stipulate Singapore as the seat of the arbitration. Adopting an inward-looking “competition” approach will not enhance Singapore’s overall reputation as a pro-arbitration jurisdiction, and may deter parties from having their arbitrations in Singapore.

35 Other leading arbitration centres such as Hong Kong and the UK have taken the “reciprocity” approach. These jurisdictions have amended their legislation to clarify that their courts do have the power to issue interim orders in aid of foreign-seated arbitrations.

36 In the UK, s 2(3) of the UK 1996 Arbitration Act (“UK 1996 Act”)<sup>31</sup> read with ss 43 and 44 of the UK 1996 Act<sup>32</sup> states that the

---

28 See the New York Convention (10 June 1958). This obligation is also provided in s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Art 8 of the UNCITRAL Model Law on International Commercial Arbitration.

29 See s 29 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Arts III–V of the New York Convention.

30 See, for example, the following discussion in respect of England and Hong Kong, and the new Arts 17–17J of the UNCITRAL Model Law on International Commercial Arbitration.

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

32 These enactments were enacted in the (then) new UK 1996 Act, which came into force on 31 January 1997. The pre-amendment position, as enunciated by the House of Lords in *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 AC 334, was that the courts of England have the power to grant interim relief in respect of  
(cont'd on the next page)

English court's powers to issue interim relief in assistance of an arbitration extends to arbitrations which are not seated in England and Wales or Northern Ireland.<sup>33</sup>

(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—

(a) section 43 (securing the attendance of witnesses), and

(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.

37 In the UK, the Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill and Supplementary Report on the Arbitration Act 1996 ("the DAC Report") also stated that an English court ought to be empowered to issue interim orders in assistance of a foreign-seated arbitration seated outside the UK:<sup>34</sup>

Subsection (3) [*ie*, s 2(3) of the UK 1996 Act] concerns the powers of the court to support the arbitration by staying proceedings brought in breach of an agreement to arbitrate, by compelling the attendance of witnesses, by granting those forms of interim relief which are set out in Clause 44, and by enforcing the award at common law by summary procedure. Such powers should obviously be available regardless of whether the seat of the arbitration is in England and Wales or in Northern Ireland, and regardless of what law is applicable to the arbitration agreement or the arbitral proceedings.

38 More recently in Hong Kong, there have been similar legislative initiatives to expressly empower the Hong Kong courts to grant interim orders in aid of arbitrations even where the seat of the arbitration is not Hong Kong. This is subject to the proviso that the arbitration in question has to be one that is capable of leading to an award that is

---

foreign arbitration proceedings if: (a) the court has personal jurisdiction; and (b) there is a cause of action under English law.

33 However, while s 2(3) of the UK 1996 Act empowers the English courts to issue interim relief in assistance of foreign-seated arbitrations, an English court will exercise its discretion and issue interim relief in assistance of foreign arbitrations sparingly. See Robert Merkin, *Arbitration Law* (Informa, 2008) at para 7.62.

34 See the DAC Report at para 25.

enforceable in Hong Kong. This is set out in s 2GC of the Hong Kong Arbitration Ordinance:<sup>35</sup>

(1) Subject to subsection (1A), the Court or a judge of the Court may, in relation to particular arbitration proceedings which have been or are to be commenced in Hong Kong or in a place outside Hong Kong, do any of the following— (Amended 3 of 2008 s. 11)

- (a) make an order directing an amount in dispute to be secured;
- (b) in relation to relevant property—
  - (i) make an order directing the inspection, photographing, preservation, custody, detention or sale of the property by the tribunal, a party to the proceedings or an expert; or
  - (ii) make an order directing samples to be taken from, observations to be made of, or experiments to be conducted on the property;
- (c) grant an interim injunction or direct any other interim measure to be taken.

(1A) In relation to arbitration proceedings that have been or are to be commenced in a place outside Hong Kong, the Court or a judge of the Court, may make an order under subsection (1), grant an interim injunction or direct any other interim measure to be taken under that subsection, only if the arbitration proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under this Ordinance or any other Ordinance. (Added 3 of 2008 s 11).

39 The new version of the Model Law (2006) also provides the courts with the power to issue interim measures in relation to arbitration proceedings, even if the arbitration is seated outside the territory in which the court is situated. The relevant provision is Art 17J of the Model Law (with amendments adopted in 2006):<sup>36</sup>

---

35 The latest amendments to s 2GC of the Arbitration Ordinance came into force on 2 April 2009.

36 This is the only provision in the new Chapter IVA of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) (2006) which concerns the *court’s* powers to issue interim measures. Most of the provisions in the new Chapter IVA of the Model Law (2006) concern the *arbitral tribunal’s* powers to issue interim measures. A full discussion of all these provisions in the new Chapter IVA of the Model law (2006) is beyond the scope of this article. There are also related provisions on the power of the court to enforce arbitral tribunal ordered interim measures by the court in Arts 17H and I of the Model Law (2006). This topic is discussed briefly at paras 123–125 of this article.

### Article 17J. Court-ordered interim measures

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.

40 This trend amongst other leading arbitration centres was noted by counsel for the plaintiff-appellant in *Swift-Fortune (CA)*, who argued that the Singapore court “should not adopt an insular approach that is at odds with the general trend manifested in other jurisdictions which have adopted the Model Law”.<sup>37</sup>

41 The authors suggest that the Singapore position is presently at odds with other pro-arbitration jurisdictions. If left unrectified, there is real cause for concern that Singapore may be viewed as a less attractive place in which to seat an arbitration.

42 With this background of the competing policy considerations, we move on to discuss the present state of the law and why it is unsatisfactory. The authors suggest that the Legislature should express its will clearly on the matter by amending the IAA. The authors also suggest the IAA be amended to provide the courts with the power to issue interim orders in aid of foreign-seated arbitrations.

## III. The present state of the law

### A. *A trilogy of cases*

43 The present state of the law on whether a Singapore court is able to issue interim orders in aid of foreign-seated arbitrations is established by the Court of Appeal decision in *Swift-Fortune (CA)*.

44 To place the Court of Appeal’s decision in *Swift-Fortune (CA)* in its proper context, it is necessary to describe briefly the two decisions leading up to the Court of Appeal’s decision. These decisions are the *Swift-Fortune* decision by Justice Judith Prakash in the High Court (“*Swift-Fortune (HC)*”),<sup>38</sup> and Justice Belinda Ang’s judgment in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* (“*Front Carriers*”).<sup>39</sup>

---

37 See *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [33] (CA).

38 [2006] 2 SLR 323.

39 [2006] 3 SLR 854.

**B. The High Court decision in *Swift-Fortune* (HC)**

45 In *Swift-Fortune* (HC), the plaintiff (a Liberian company) had entered into a memorandum of agreement (“MOA”) with the defendant (a Panamanian company) for the plaintiff to purchase a vessel. The MOA provided for arbitration in London in the event of any dispute arising out of the MOA.

46 On the day before completion, the plaintiff successfully applied to the Singapore High Court for a Mareva injunction 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. The defendant sought a discharge of the Mareva injunction.

47 The key issue in the case was whether the Singapore High Court could grant a Mareva injunction in support of a foreign-seated arbitration pursuant to s 12(7) of the IAA. Section 12(7) of the IAA reads:

(7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1)<sup>40</sup> as it has for the purpose of and in relation to an action or matter in the court. [footnote added]

48 Prakash J in the High Court granted the defendant’s application to discharge the Mareva injunction, and stated that, based on s 12(7) of the IAA, the High Court had no power to order a Mareva injunction in support of foreign-seated arbitrations.<sup>41</sup>

**C. The High Court decision in *Front Carriers***

49 Subsequent to the High Court decision in *Swift-Fortune* (HC), the same issue arose for consideration by Ang J in *Front Carriers*.

50 In *Front Carriers*, the defendant (a West Indies company) negotiated with the plaintiff (a Liberian company) the time charter of a vessel. The plaintiff subsequently commenced arbitral proceedings in London for a breach of the time charter by the defendant. The plaintiff applied in Singapore for a Mareva injunction against the defendant and this was granted. The defendant applied to set aside the Mareva injunction, arguing that the High Court had no jurisdiction to order the

40 See s 12(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) which sets out the powers which the tribunal has in an arbitration governed by the International Arbitration Act.

41 See, in particular, *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 at [50] (HC).

Mareva injunction, and that the plaintiff had not satisfied the substantive requirements for the grant of a Mareva injunction.

51 In respect of the jurisdictional argument, Ang J held that s 12(7) of the IAA did give the High Court jurisdiction to order a Mareva injunction in support of a foreign-seated arbitration.<sup>42</sup> Her Honour also opined that, as an alternative, s 4(10) of the Civil Law Act<sup>43</sup> also provided the court with the power to support foreign-seated arbitrations subject to the requirements that the defendant must be amenable to the territorial jurisdiction of the court and the court must have residual jurisdiction over the defendant. Section 4(10) of the Civil Law Act reads:

**Injunctions and receivers granted or appointed by interlocutory orders**

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

52 The High Court decision in *Swift-Fortune (HC)* was cited to Ang J in *Front Carriers*, but her Honour expressly refused to follow Prakash J's decision in *Swift-Fortune (HC)*:<sup>44</sup>

With the greatest of respect, I differ from the learned judge on her construction of s 12(7) of the IAA. In my view, the High Court has power under the IAA to assist, by way of interim orders, international arbitration both in Singapore and abroad.

53 However, Ang J then found that the substantive requirements for the grant of a Mareva injunction had not been met, and therefore ordered the discharge of the Mareva injunction.

**D. The Court of Appeal's decision in *Swift-Fortune* (CA)**

54 It will appear, therefore, that, at the time the appeal of the *Swift-Fortune* case was heard before the Court of Appeal, there were two conflicting first instance decisions on the issue of whether the Singapore court could issue a Mareva injunction in aid of foreign-seated arbitrations.

---

42 See *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 at [22]–[23].

43 Civil Law Act (Cap 43, 1999 Rev Ed).

44 See *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 at [14].

55 The Court of Appeal's decision in *Swift-Fortune (CA)* has attracted much discussion and academic comment.<sup>45</sup> It is not the intention of the authors to contribute to the debate on the merits of that decision or to discuss in depth what test the decision establishes in respect of the court's ability to issue an interim order in aid of a foreign-seated arbitration.

56 The authors are content to observe that three points emerge from *Swift Fortune (CA)*.

57 First, s 12(7) of the IAA does not confer any power on the Singapore court to issue interim orders in assistance of foreign-seated arbitrations beyond s 4(10) of the Civil Law Act.<sup>46</sup> It is settled that the approach under Singapore law is to look to s 4(10) of the Civil Law Act to decide if the Singapore court does have this power.

58 Second, the Court of Appeal stated that the proper approach to use in interpreting s 4(10) of the Civil Law Act was to consider the section in the context of the time it was passed (*ie*, 1878).<sup>47</sup> The court was explicit that it was not correct to take into consideration commercial developments since 1878.

59 Third, the Court of Appeal expressed grave reservations about allowing public policy considerations to affect the interpretation of s 4(10) of the Civil Law Act.<sup>48</sup>

60 The implications of these three points will now be examined in greater detail.

---

45 See, for example, Andrew Chan & Renita Crasta, "Interim Measures in Aid of Foreign Arbitration: A Re-Think" (2008) 20 SAclJ 769; Warren B Chik, "Recent Developments in Singapore on International Commercial Arbitration" (2007) 11 SYBIL 337; Joel Lee, "Private International Law in the Singapore Courts" (2007) 11 SYBIL 325; Joel Lee, "Conflict of Laws" (2006) SAL Ann Rev at paras 9.50–9.59; Dr Philip Chan, "Legal Development Affecting Arbitration" SI Arb Newsletter, June 2007; Edward Lam, "Power of a Singapore Court to Grant Mareva Interlocutory Relief in Aid of 'International Arbitration'" (April 2007) at <[http://www.atmdlaw.com.sg/mediacentre/pdfs/0407\\_courtmareva.pdf](http://www.atmdlaw.com.sg/mediacentre/pdfs/0407_courtmareva.pdf)> (accessed 22 June 2009); Rodney Keong, "Case Update: *Swift-Fortune Ltd v Magnifica Marine SA* – Court's Powers under IAA Do Not Extend to Foreign Arbitrations" (March 2007); the case was also touched on in Chan Leng Sun, Teo Cheng Chuah Jack & Toh Kian Sing, "Admiralty, Shipping and Aviation Law" (2006) SAL Ann Rev at para 2.5.

46 See *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [59] (CA), discussed in greater detail below.

47 See the comments of the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [94] (CA), discussed in greater detail below.

48 See, for example, *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [16] (CA), discussed in greater detail below.

(1) *No independent source of power contained in s 12(7) of the IAA*

61 Before the decision on *Swift-Fortune (CA)*, two arguments could be made by a plaintiff seeking to argue that the Singapore court had the power to issue interim orders in aid of foreign-seated arbitrations.

62 The first is founded on a reading of s 12(7) of the IAA as an independent source of statutory power for the courts to issue interim orders in aid of foreign-seated arbitrations. As noted above, this argument was accepted by Ang J in *Front Carriers*, but rejected by the High Court decision in *Swift-Fortune (HC)*.

63 The second argument is that s 4(10) of the Civil Law Act gives the court the power to make interim orders in aid of foreign-seated arbitrations. The argument for the court's jurisdiction on the basis of s 4(10) of the Civil Law Act was also advanced in the case of *Front Carriers* and accepted by Ang J.<sup>49</sup>

64 The decision of the Court of Appeal in *Swift-Fortune (CA)* eliminated the possibility of the first argument by holding that s 12(7) of the IAA did not provide an independent source of statutory power:<sup>50</sup>

Section 12(7) [of the IAA] does not provide an independent source of statutory power for the court to grant the orders and reliefs set out in s 12(1) of the IAA; it draws its power from s 4(10) of the CLA and 18(1) of the SCJA.

65 As *Front Carriers* was pending appeal at the time of the decision in *Swift-Fortune (CA)* by the Court of Appeal, the Court of Appeal decided not to comment on the High Court's interpretation of s 4(10) of the Civil Law Act in *Front Carriers*. The *Front Carriers* appeal was subsequently withdrawn. Consequently, the Court of Appeal has not definitively ruled on the power of the court to issue interim orders in support of foreign-seated arbitration pursuant to s 4(10) of the Civil Law Act.

66 As a result, the last word on the power of the court to issue interim orders in aid of foreign-seated arbitrations under s 4(10) of the Civil Law Act is Ang J's judgment in *Front Carriers*.

67 However, while the Court of Appeal declined to rule on this point of law in *Swift-Fortune (CA)*, it made certain observations relevant

---

49 This argument was not advanced before Prakash J in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 (HC).

50 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [96] (CA).

to the court's power under s 4(10) of the Civil Law Act to issue interim orders in aid of foreign-seated arbitrations.

68 The Court of Appeal noted that the decision in *Front Carriers* “amplified or extended the scope of s 4(10) to apply to foreign arbitrations where the plaintiff has a recognizable cause of action under Singapore law and the court has personal jurisdiction over the defendant”<sup>51</sup> by reason of the defendants having assets within the jurisdiction. It distinguished the case of *Swift-Fortune* by the fact that the case did not involve a cause of action which is justiciable in Singapore.

69 Various other comments by the Court of Appeal cast doubt on whether s 4(10) of the Civil Law Act confers power upon the courts to issue interim orders in aid of foreign-seated arbitrations;<sup>52</sup> some of these comments are discussed in the following section.

(2) *Section 4(10) of the Civil Law Act to be interpreted in the context of circumstances in 1878*

70 The Court of Appeal made it quite clear in *Swift-Fortune (CA)* that the correct way to interpret s 4(10) of the Civil Law Act is to consider the intention of the Legislature in the context of the time the section was passed, *ie*, in 1878. The court was not to take into account the change in circumstances since the section was passed.

71 On the proper approach to statutory interpretation, the Court of Appeal cited *Pettitt v Pettitt*:<sup>53</sup>

Nor can the meaning of a statute have changed merely by reason of a change in social outlook since the date of its enactment; it must continue to bear the meaning which upon its true construction in the light of the relevant surrounding circumstances it bore at that time.

---

51 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [92] (CA). In the case of *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 discussed below, Kwang J was of the view that *Swift-Fortune* supported the position that, for the Singapore court to have power to issue interim relief of a foreign proceeding, a substantive claim must not only be justiciable in the Singapore courts, but should also terminate in a Singapore judgment: see para 95 of this article. Chan J in *Multi-Code Electronics v Toh Chun Toh Gordon* [2009] 1 SLR 1000 disagreed with Tay J's interpretation of *Swift-Fortune Ltd v Magnifica Marine SA*: see paras 97–98 of this article.

52 See, for example, *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [93] (CA), where the Court of Appeal queried whether s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) can have a broader area of application than s 12(7) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

53 *Pettitt v Pettitt* [1970] AC 777 at 813; *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [94] (CA).

72 The Chief Justice then went on to note that future counsel making the argument for such an interpretation of s 4(10) had to show:<sup>54</sup>

[W]hether in the context of the political and commercial conditions existing in Singapore in 1878, the legislature of the Straits Settlements had intended s 4(10) to give power to the court to grant interlocutory injunctions in aid of foreign court proceedings, *or even less likely* in aid of foreign arbitral proceedings. [emphasis added]

73 Taking this to be the approach, it seems difficult to argue that the Legislature in 1878 intended s 4(10) of the Civil Law Act to extend to foreign-seated arbitrations. Indeed, it is difficult to argue the Legislature applied its mind to the question.

74 The position of the Court of Appeal seems to be that the court's powers to grant interim orders in aid of foreign-seated arbitration have to either be limited by existing jurisprudence on s 4(10) of the Civil Law Act, or await legislative consideration of the policy reasons for and against giving the courts such powers.

(3) *The court's reticence to consider public policy*

75 The Court of Appeal had occasion to give its view on public policy considerations when counsel for Swift-Fortune (the plaintiff-appellant) made two policy arguments for using s 12(7) of the IAA to found the Singapore court's jurisdiction to grant protective injunctions in aid of foreign-seated arbitrations.<sup>55</sup>

76 First, not doing so would encourage capital flight into Singapore to avoid foreign attachment as those seeking a safe haven from interim orders against their assets will place funds here. This will affect Singapore's reputation, as it will be seen as a jurisdiction in which parties can place funds beyond the reach of legitimate attachment.

77 Second, that Singapore's legal profession would be deprived of the opportunity to provide services in such cases.

78 These policy arguments were given short shrift by the Court of Appeal, which rejected these arguments on several grounds.

79 First, the Court of Appeal noted that these concerns were "par excellence policy considerations within the purview of Parliament".<sup>56</sup> Second, the Court of Appeal opined that Parliament would have taken

---

54 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [94] (CA).

55 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [15] (CA).

56 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [16] (CA).

these arguments into consideration when passing the IAA.<sup>57</sup> Third, even if Parliament had not considered these issues, the courts should not “second-guess Parliament on such matters”.<sup>58</sup> The Court of Appeal then proceeded to decide the case without reference to policy considerations.

80 Although the Court of Appeal did not express a definitive opinion on the argument that the jurisdiction to grant interim orders in aid of foreign-seated arbitrations could be founded on the court’s broader jurisdiction under s 4(10) of the Civil Law Act, an attitude of judicial restraint is evident. The Chief Justice cited a judgment of the Court of Appeal of the Bahamas<sup>59</sup> interpreting the scope of s 21(1) of the Supreme Court Act (Bahamas), which is materially similar to s 4(10) of the Civil Law Act:<sup>60</sup>

As a matter of first principles, a court may not arrogate to itself legislative functions. For this court to apply a rule of law that is inconsistent with *The Siskina* without the authority of legislation to that end, simply because it considered it desirable to achieve the result produced by s 25 of the English 1982 Act, is an impermissible aberration from the judicial function.<sup>61</sup> [footnote added]

### **E. Summary – Limitations of the present position**

81 There are three problems with the present state of affairs.

(1) *The question is really one of policy which the court is not the appropriate organ to decide; nor is the court minded to do so*

82 As discussed in the first section of this article, the decision whether courts should be empowered to issue interim orders in aid of foreign-seated arbitrations is a question which cannot be determined without having regard to Singapore’s competing policy goals.

83 As the Court of Appeal itself noted in *Swift-Fortune (CA)*, such questions of policy are matters best left to the Legislature, and the courts

---

57 The authors suggest that it is uncertain whether Parliament applied its mind to that specific question. Certainly, neither counsel in *Swift-Fortune Ltd v Magnifica Marine SA* appears to have cited any reference to the parliamentary reports or the Law Reform Committee Report which explicitly addressed this question.

58 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [16] (CA).

59 *Meespierson (Bahamas) Ltd v Grupo Torras SA* (1999) 2 ITEL 29.

60 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [95] (CA).

61 Section 25(1) of the UK Civil Jurisdiction and Judgments Act 1982 (c27) confers statutory jurisdiction to grant interlocutory relief including Mareva relief in aid of proceedings brought or to be brought before a State which is an EU Member State party to Regulation 44/2001. This has been extended to include other States which do not fall within the category above: see the discussion in Robert Merkin, *Arbitration Law* (Informa, 2008) para 14.62(e).

ought not decide such matters.<sup>62</sup> The Legislature should weigh the competing policy considerations and express its intention on the matter clearly. It should not be left to the courts to construe and second-guess its intention from statutory provisions such as s 4(10) of the Civil Law Act.

(2) *Section 4(10) of the Civil Law Act does not express legislative intent on whether the Singapore courts have the power to issue interim orders in aid of foreign-seated arbitrations*

84 The second problem is that, as the law stands presently, the issue of whether the courts are empowered to issue interim orders in aid of foreign-seated arbitrations will be decided by interpreting s 4(10) of the Civil Law Act. In other words, the answer as to whether the Legislature intended for the courts to have the power to issue interim orders in aid of foreign-seated arbitrations is supposed to be discerned from s 4(10) of the Civil Law Act.

85 The Court of Appeal has said the proper way to interpret s 4(10) of the Civil Law Act is in the context of the time it was passed. Section 4(10) of the Civil Law Act was passed in 1878, well before international arbitration became common, and well before Singapore decided to pursue the goal of being a centre for international arbitration. It should not be contentious that when s 4(10) of the Civil Law Act was passed, the Legislature did not apply its mind to the effect this section would have had on international arbitration. As such, s 4(10) of the Civil Law Act does not express the will of the Legislature on the issue of whether the court has the power to issue interim orders in aid of foreign-seated arbitrations.

86 If the question whether the Singapore court may make interim orders in aid of a foreign-seated arbitration is a question of policy (as the authors suggest),<sup>63</sup> it is quite clear that s 4(10) of the Civil Law Act is an inappropriate place to look to in an attempt to discern the will of the Legislature on the issue.

87 Further, as s 4(10) of the Civil Law Act makes no distinction between foreign court proceedings and foreign-seated arbitrations, the policy considerations relating specifically to supporting foreign-seated arbitrations are unlikely to be canvassed in future judgments even if the courts do consider issues of policy in construing s 4(10) of the Civil Law Act. In short, a court considering s 4(10) of the Civil Law Act will be forced to conflate the policy considerations relating to foreign court proceedings with those relating to foreign-seated arbitrations.

62 See the discussion at para 79 of this article.

63 See the competing policy considerations stated in Part I of this article.

88 This is most unhelpful, since there are different policy considerations in each of these two issues. As an example, Singapore will enforce foreign arbitral awards from arbitrations seated in any of the over 140 States that have signed the New York Convention, while there are significantly fewer foreign judgments Singapore will recognise and register pursuant to international conventions.<sup>64</sup>

89 Another example is the policy goal discussed above, *ie*, Singapore aims to be a centre for international arbitration.

(3) *Scope of s 4(10) of the Civil Law Act is unclear*

90 The third problem is that, even if one assumes that s 4(10) of the Civil Law is the proper place to discern legislative intent on the issue, the present state of the law is that it is not clear whether interim relief in aid of foreign-seated arbitrations can be ordered under s 4(10) of the Civil Law Act.

91 Following the Court of Appeal's decision in *Swift-Fortune (CA)*, there has been much academic comment on the meaning of the Court of Appeal's dicta concerning the scope (and applicability) of s 4(10) of the Civil Law Act.<sup>65</sup> What seems clear is that it is not clear. There is no better evidence of this than the fact that there have since been two conflicting High Court decisions on the scope and applicability of s 4(10) of the Civil Law Act. These two High Court decisions are in the context of the power of the Singapore court to issue interim relief in assistance of foreign court proceedings.<sup>66</sup>

(a) The question of justiciability

92 In particular, the requirement that the foreign-seated arbitration must involve a cause of action which is "justiciable" in Singapore<sup>67</sup> has led to different interpretations of the term "justiciable".

---

64 Countries gazetted under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) together extend to about ten in total.

65 See para 55 of this article.

66 Although s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) makes no distinction between foreign court proceedings and foreign-seated arbitrations.

67 See the reference to the requirement of a need for the cause of action to be justiciable in Singapore at [87] of the decision in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 (CA), where the Court of Appeal distinguished *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 (HC) and *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 by stating: "In our view, the finding in *Front Carriers* that there was a cause of action justiciable in the Singapore court differentiates it from the present case where *Swift-Fortune* did not have such a justiciable right against *Magnifica* when it obtained the *ex parte* Mareva injunction, and would never have it at any time."

93 In *Petroval SA v Stainby Overseas Ltd* (“*Petroval*”),<sup>68</sup> Justice Tay Yong Kwang sustained a challenge to the court’s jurisdiction to continue a Mareva injunction. In *Petroval*, the plaintiff’s main action was commenced in the British Virgin Islands, and an identical Singapore action was commenced with the sole purpose of obtaining a Mareva injunction against the defendant’s assets here. In fact, the plaintiff acknowledged that it had no intention for the substantive action to be heard in Singapore by voluntarily applying for a stay of the Singapore action.

94 Relying on the decision of the Court of Appeal in *Swift-Fortune (CA)*, the High Court held that a cause of action that was *potentially justiciable* in Singapore was not sufficient to give the court jurisdiction to grant a Mareva injunction if the adjudication of the substantive matter was to take place overseas.<sup>69</sup>

95 Tay J held that:<sup>70</sup>

The Court of Appeal was re-affirming and applying the principles in *Siskina v Distos Compania Naviera SA* [1979] AC 210 (“*The Siskina*”), one of which is that ‘*The Siskina* doctrine contemplated that the substantive claim must not only be justiciable in an English court but should also terminate in an English judgment’ (at [62] of the Court of Appeal’s judgment).

96 In a subsequent first instance case, Justice Chan Seng Onn, in *Multi-Code Electronics v Toh Chun Toh Gordon* (“*Multi-Code*”),<sup>71</sup> disagreed with Tay J’s interpretation of *Swift-Fortune (CA)*’s dicta on the meaning of the *Siskina* requirement of justiciability.

97 Chan J was of the opinion that s 4(10) of the Civil Law Act gave the court jurisdiction to grant a Mareva injunction in cases where the action had been stayed<sup>72</sup> on the basis that the plaintiff possessed a “*potentially justiciable right* against the defendants” [emphasis in original],<sup>73</sup> and the Singapore court’s jurisdiction should not be influenced by whether or not a stay order existed. To Chan J, “it would be sufficient to have a cause of action that was *potentially justiciable* in Singapore never mind if the adjudication was in fact to take place elsewhere” [emphasis in original].<sup>74</sup>

68 [2008] 3 SLR 856.

69 See *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [16].

70 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [13].

71 [2009] 1 SLR 1000.

72 The stay in this context refers to a stay granted in the jurisdiction where the dispute is being litigated in favour of arbitral proceedings overseas (ie, Singapore in *Multi-Code Electronics v Toh Chun Toh Gordon* [2009] 1 SLR 1000).

73 [2009] 1 SLR 1000 at [103].

74 [2009] 1 SLR 1000 at [107].

98 The different schools of thought, “competition” and “reciprocity”, are evident in these two conflicting judgments. The decision in *Petroval*, in setting out the requirement that interim measures would only be granted if the substantive claim was to terminate in Singapore, is consistent with the “competition” school of thought, while the more flexible *Multi-Code* approach would find favour with the “reciprocity” school of thought.

99 Until the issue of the scope of s 4(10) of the Civil Law Act is canvassed before the Court of Appeal, the position of the law on which interpretation of “justiciability” will be taken by the Singapore courts will remain an open question.

100 The authors suggest that the baggage of competing interpretations of s 4(10) of the Civil Law Act can be circumvented by adopting legislative clarity in the IAA. Given the present importance of international arbitration to commerce and trade, the authors suggest the appropriate solution is for the Legislature to clarify its will on the matter by amending the IAA.

#### **IV. Giving effect to policy – Expression of the will of the Legislature**

##### ***A. The way forward – Legislative reform***

101 In the aftermath of *Swift-Fortune (CA)*, the present legal position is that whether a Singapore court has the power to give interim relief in aid of a foreign-seated arbitration lies in interpreting s 4(10) of the Civil Law Act.

102 As explained above, this is not an ideal state of affairs for the following reasons:

(a) The issue of whether the courts ought to be empowered to issue interim orders in aid of foreign-seated arbitrations is essentially one of policy more suitably decided by the Legislature than the courts.

(b) Section 4(10) of the Civil Law Act does not express the will of the Legislature on the issue of whether the courts ought to be empowered to issue interim orders in aid of foreign-seated arbitrations.

(c) Even if s 4(10) of the Civil Law Act is the appropriate place to look to to ascertain the Legislature’s intention on this issue, there are conflicting judicial decisions on the scope of s 4(10) of the Civil Law Act.

103 In the light of this, the authors suggest that the best way forward would be for Parliament to consider the various competing policy considerations, and then amend the IAA to expressly state its position on the matter.

**B. *Amend with care: A note of caution***

104 If Parliament decides to empower the Singapore court to issue interim orders in assistance of foreign-seated arbitrations, there are three issues which impact on the form of amendments to be made to the IAA.

105 These three issues are:

- (a) Should the Singapore court's power to issue interim orders in assistance of foreign-seated arbitrations extend to *all* foreign-seated arbitrations, or should the power be limited to foreign arbitration seated in certain countries?
- (b) Should there be a statutory limit on the types of interim orders the Singapore court is entitled to grant in support of foreign-seated arbitrations?
- (c) Should the legislation set out the test of when it will be appropriate to exercise the power to grant interim relief in assistance of foreign arbitrations?

(1) *Whether all foreign-seated arbitrations*

106 The authors suggest that there ought to be some connection between the foreign-seated arbitration and Singapore before the Singapore court is empowered to grant interim orders in assistance of that foreign-seated arbitration.

107 Such a connection would exist if the seat of the foreign arbitration is a signatory to the New York Convention. Empowering the Singapore court to assist in arbitrations seated in New York Convention countries can be rationalised as an extension of Singapore's New York Convention obligations to recognise and assist in those arbitrations. Furthermore, such a connection will also be in accordance with the "reciprocity" approach discussed above.

108 A similar approach has been adopted by Hong Kong in the amended Hong Kong Arbitration Ordinance, in particular s 2GC(1A).<sup>75</sup> This provides:

---

75 As noted above, this came into force on 2 April 2009.

(1A) In relation to arbitration proceedings that have been or are to be commenced in a place outside Hong Kong, the Court or a judge of the Court, may make an order under subsection (1), grant an interim injunction or direct any other interim measure to be taken under that subsection, *only if the arbitration proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under this Ordinance or any other Ordinance.* [emphasis added]

109 A further advantage of this approach is that by defining the jurisdiction of the court over foreign-seated arbitrations by reference to the New York Convention, Singapore will decouple the test of when the court has power to assist foreign *arbitrations*, from the test of when the court may assist foreign *court proceedings*. In other words, the power of the Singapore court to issue an interim order in assistance of a foreign arbitration will no longer depend on whether the Singapore court could have issued an interim order *if the foreign arbitration had been a foreign proceeding*.

110 This prevents conflation of the two different issues which, under the present legal position, are bundled together in s 4(10) of the Civil Law Act.<sup>76</sup>

111 It should also be noted that the suggested approach differs from the position adopted by Art 17J of the Model Law (2006) (set out at para 39 above). Under Art 17J of the Model Law (2006), the court's power to issue interim relief is not limited to arbitrations in certain countries. It is also not entirely clear from Art 17J of the Model Law (2006) whether there is a decoupling of the test of when the court has power to assist foreign arbitrations, from the test of when the court may assist foreign court proceedings. In the light of the discussion above, the authors are of the view that the suggested approach is to be preferred over the approach taken in Art 17J of the Model Law (2006).

(2) *What types of interim relief should the Singapore court be empowered to grant in assistance of foreign-seated arbitrations?*

112 The authors suggest that the Singapore court should be empowered to order such *interim relief* in assistance of foreign-seated arbitrations, as if the foreign-seated arbitration were *international arbitrations* seated in Singapore.

113 Such power will be in accordance with the "reciprocity" approach discussed above, and will prevent conflation of the court's

---

<sup>76</sup> See the discussion of why there should not be such a conflation at paras 88–90 of this article.

power to assist foreign arbitrations with the court's power to assist foreign court proceedings.

114 It is important to note the italicised parts of the suggestion in para 112 above. The power of the Singapore court should be restricted to issuing *interim relief*, and not extend to other remedies which are more appropriately sought from the court of the seat of the foreign arbitration.<sup>77</sup>

115 In addition, if the power of the Singapore court is referenced to the power of the Singapore court over an *international arbitration* in Singapore,<sup>78</sup> this will be more limited than the power the court has in respect of a purely domestic arbitration under the Arbitration Act.<sup>79</sup>

(3) *Statutory test of when it will be appropriate to exercise the power to grant interim relief in assistance of foreign arbitrations?*

116 The third issue which arises is whether Parliament ought to statutorily stipulate the test for when the Singapore court should issue interim orders in assistance of foreign-seated arbitrations.

117 A nod to this approach has been taken in Hong Kong. The Hong Kong Arbitration Ordinance has statutorily enacted factors which the Hong Kong court should take into account when determining whether to issue interim relief in aid of foreign-seated arbitrations:<sup>80</sup>

(1C) In exercising the power under subsection (1) in relation to arbitration proceedings in a place outside Hong Kong, the Court or a judge of the Court, shall have regard to the fact that the power is—

- (a) ancillary to arbitration proceedings outside Hong Kong; and
- (b) for the purpose of facilitating the process of a court or arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitration proceedings. (Added 3 of 2008 s. 11)

118 The recent version of the Model Law also has a general guideline that the court should take into account the “specific features of international arbitration” in deciding whether to exercise the court's powers in issuing interim relief in aid of foreign-seated arbitrations.<sup>81</sup>

---

77 For example, the removal of the arbitrator.

78 As defined in s 5(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

79 Arbitration Act (Cap 10, 2002 Rev Ed).

80 See Hong Kong Arbitration Ordinance s 2GC(1C).

81 See the UNCITRAL Model Law on International Commercial Arbitration s 17J, excerpted at para 39 of this article.

119 However, the authors suggest there is no need for Parliament to enact statutory considerations and/or guidelines which the Singapore court ought to take into account when deciding whether to grant interim relief in assistance of foreign-seated arbitrations.

120 The main rationale for such guidelines is to prevent the courts from crossing the line from judicial *assistance* of a foreign-seated arbitration to judicial *interference* with a foreign-seated arbitration. The Singapore court has demonstrated a clear understanding of how international arbitration works and has shown itself not to be eager to substitute the courts' own decision for that of the arbitrators.<sup>82</sup>

121 Another rationale for having such guidelines could be to ensure that there is a certain degree of certainty as to when the courts can issue interim orders in assistance of foreign arbitrations. However, even in the absence of such guidelines, it is likely that a body of jurisprudence will be built up by the Singapore court quite quickly – this will provide a body of judicially-created guidelines which the Singapore court could look to.

122 Furthermore, the Singapore court is open to looking to foreign jurisprudence (where applicable) to discern principles which could be applicable to issues which arise in international arbitration.<sup>83</sup> There is no reason why the Singapore court would not do the same in respect of this issue.

## V. A related issue

123 An issue related to whether the Singapore court ought to be granted the power to issue interim relief in assistance of foreign-seated arbitrations is whether the Singapore court should also be given the power to *enforce* interim measures ordered by a foreign-seated tribunal.

124 In accordance with the “reciprocity” school of thought, the authors are of the view that the Singapore court should also be empowered to enforce interim measures ordered by a foreign-seated tribunal. For the reasons discussed above,<sup>84</sup> the Singapore court should be empowered to only enforce interim measures of tribunals seated in New York Convention countries.

---

82 See, for example, *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565.

83 See, for example, *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86; *VW v VW* [2008] 2 SLR 929.

84 See paras 106–111 of this article.

125 It should also be noted that empowering the Singapore court to enforce interim measures made by the foreign-seated tribunal is less of a potential interference with a foreign-seated arbitration than empowering the Singapore court to issue interim measures in assistance of foreign-seated arbitration. When enforcing interim measures made by the foreign-seated tribunal, the Singapore court is in fact respecting and giving effect to the decision of the foreign-seated tribunal, and thus in no way interferes with the foreign-seated arbitration.

## VI. Conclusion

126 There is a movement amongst centers of international arbitration to empower their courts to issue interim relief in assistance of foreign-seated arbitrations. Recent developments in the UK,<sup>85</sup> Hong Kong<sup>86</sup> and the amendments to the Model Law in 2006<sup>87</sup> evidence this.

127 It would enhance Singapore's status as a centre for international arbitration to follow this movement. It seems unlikely the courts will be able to align Singapore's position with that of other centres of international arbitration. There is a need for the *Deus Ex Machina* of Parliament to effect this.

---

---

85 See para 36 of this article.

86 See the discussion at para 38 of this article.

87 See para 39 of this article.