

Case Note

INTERIM MEASURES IN AID OF FOREIGN ARBITRATION – A RE-THINK¹

Swift-Fortune Ltd v Magnifica Marine SA
[2007] 1 SLR 629

In *Swift-Fortune Ltd v Magnifica Marine SA*, the Court of Appeal held that courts have no power under s 12(7) of the International Arbitration Act to grant interim measures in aid of foreign arbitration (*ie*, arbitration held outside Singapore). The court's decision contains suggestions that the position may well be different if interim measures of protection were the only relief or order that courts could grant in aid of foreign arbitration. The authors suggest that only interim measures can be granted and, accordingly, the courts should have power to grant interim measures in aid of foreign arbitration.

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1 Ideas expressed in this article have been the subject matter of an internal talk titled "Singapore Courts Unable to Assist Foreign Arbitrations? Court's Powers to Grant Curial Assistance/Injunctions in Aid of Foreign Arbitrations" given by the authors on 1 February 2007, and a talk organised by the Singapore Institute of Arbitrators titled "Enforcement of Arbitration Agreements (Singapore/selected Asian perspectives)" given by Andrew Chan on 26 June 2007. The authors also note that opinions on the *Swift-Fortune* case have also been expressed in an article by Toh Kian Sing SC titled "Judicial Assistance in Maritime Arbitration: A Singapore Perspective" (2006) 18 SAclJ 771.

I. Introduction

1 The Court of Appeal in *Swift-Fortune v Magnifica Marine* (“*Swift-Fortune*”)² decided that the Singapore High Court does not have the power under s 12(7)³ of the International Arbitration Act (“IAA”) to grant a *Mareva* injunction in aid of foreign arbitration. By foreign arbitration, it is meant arbitration where the legal seat or place of arbitration is outside Singapore.⁴ The Court of Appeal, however, left open in *Swift-Fortune* the question as to whether s 4(10) of the Civil Law Act (“CLA”)⁵ provides an alternative basis for a grant of injunctive relief in aid of foreign arbitration.⁶

2 The decision of the Court of the Appeal came against a background of two conflicting decisions of the Singapore High Court. The first was that of Justice Judith Prakash in the High Court case of *Swift-Fortune*⁷ itself, where Prakash J decided that the High Court did not have the ability under s 12(7) to grant a *Mareva* injunction in aid of arbitration taking place in London.

3 Taking a contrary view, Justice Belinda Ang in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* (“*Front Carriers*”)⁸ decided that the

2 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629. See further *Petroval SA v Stainby Overseas Ltd* [2008] SGHC 64, where the need for interim relief to be ancillary to an action in court is discussed with reference to *Swift-Fortune*.

3 Section 12(7) of the IAA (Cap 143A, 2002 Rev Ed) reads: “The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.”

4 See *Swift-Fortune Ltd v Magnifica Marine* [2007] 1 SLR 629 at [3]. The term seat or place of arbitration is to be distinguished from the venue of hearings. See *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393, where the distinction is discussed in some length. For the purpose of this article, the term “foreign arbitration” is used with the additional qualification that the arbitration is one that meets the requirements of an international arbitration set out in s 5(2) and (3) of the IAA. It would seem, however, from an examination of s 5(2) and (3) that all instances of arbitration having its seat outside Singapore will meet the requirements for the arbitration to be an international arbitration. It is worth noting that in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [28], the Singapore Court of Appeal accepted that the power to grant interim relief would not be generously exercised in the case of international arbitration having its place of arbitration in Singapore.

5 (Cap 43, 1999 Rev Ed).

6 Section 4(10) of the CLA reads: “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.”

7 The High Court’s decision is reported at [2006] 2 SLR 323.

8 [2006] 3 SLR 854.

Singapore High Court had the ability under s 12(7) to grant a *Mareva* injunction in aid of a London arbitration. On the facts, however, Ang J decided not to grant the *Mareva* injunction but made it clear that the High Court's decision was based on the merits of the case, and not because of the High Court's lack of jurisdiction.⁹ It is also of note that Ang J identified s 4(10) of the CLA as supportive of the existence of the court's power to grant a *Mareva* injunction.¹⁰

4 Appeals to the Court of Appeal were brought against both decisions. The appeal against the decision of Prakash J came out first (with the appeal against Ang J's decision pending at the time) resulting in the abovementioned decision of the Court of Appeal in *Swift-Fortune*.

II. Decision of the Court of Appeal in *Swift Fortune*

5 In the appeal decision of *Swift-Fortune*, the Court of Appeal stated that the primary¹¹ reason why the Court of Appeal was reluctant to hold that s 12(7) enabled the court to grant a *Mareva* injunction in aid of foreign arbitration was because if the court had the power to grant such an injunction, it would by extension then have the power to grant all the orders set out in s 12(1) of the IAA.¹² Bearing in mind that s 12(1) enables the court to grant various orders, such as for discovery and security for costs, it would have been too wide for a Singapore court to be able to grant such procedural orders in respect of foreign arbitration. Thus, the Court of Appeal said:

[A] plain reading of s 12(7) of the IAA would also give power to the court to grant any of the orders and reliefs mentioned in s 12(1) to any party to an international arbitration. It is true that *Swift-Fortune* is only seeking a *Mareva* injunction under s 12(1)(i) read with s 12(7). *But if s 12(7) allows this, it must also allow the court to grant the other orders or reliefs in s 12(1). We do not think that Parliament could have intended s 12(7) to have such an exorbitant reach by the use of the inaptly drafted phrase "an arbitration to which this Part applies."*¹³ [emphasis added]

6 This article suggests that a different conclusion would have been reached had the court not proceeded on the basis that s 12(7) would

9 [2006] 3 SLR 854 at [63].

10 [2006] 3 SLR 854 at [32] and [33].

11 The court held that the other arguments presented before it, such as those concerning the legislative history or placement of s 12(7), were inconclusive and insufficient in themselves to convince the court in determining whether courts were or were not intended to have the power to grant *Mareva* injunctions.

12 [2007] 1 SLR 629 at [47] and [54].

13 [2007] 1 SLR 629 at [54].

also give the court the powers to grant all the orders and reliefs in s 12(1). In the view of the authors, in the case of foreign arbitration, s 12(7) only confers the powers to grant interim measures of protection and no more. The conclusion that should then have been reached instead, this article suggests, is that there is power under s 12(7) for the court to grant interim measures of protection in aid of foreign arbitration.

7 The Court of Appeal also examined whether s 4(10) of the CLA could provide an alternative basis for the grant of a *Mareva* injunction in aid of foreign arbitration, and in doing so, made several observations. The Court of Appeal was, however, careful not to express any final views on the point given that at the time when the Court of Appeal reached its decision in *Swift-Fortune*, the appeal in *Front Carriers* was still pending. The Court of Appeal noted that, traditionally, s 4(10) may not have been available in aid of foreign arbitration, but without deciding the point, the Court of Appeal acknowledged that the decision of Ang J had the effect of amplifying or extending the scope of s 4(10) to apply to foreign arbitrations where the court had personal jurisdiction over the defendant and the cause of action was one justiciable in Singapore. In this respect, speaking for the Court of Appeal, Chan Sek Keong CJ noted that, except for one critical difference in fact, *ie*, the existence of a substantive claim recognisable by a Singapore court (which was present in the *Front Carriers* case but not *Swift-Fortune*), the material facts in both cases were substantially the same. Indeed, in both cases, the defendants had assets but no place of business in Singapore, and the parties had agreed to refer the contractual dispute to arbitration outside Singapore in accordance with English law.

8 As it turned out, the appeal against the decision in *Front Carriers* was not pursued. One, therefore, is left with the decision of Ang J in *Front Carriers* and the observations of the Court of Appeal in *Swift-Fortune* when determining the availability of s 4(10) of the CLA as the basis to grant interim measures in aid of foreign arbitration.

III. The acceptability of the court's ability to grant interim measures in aid of foreign arbitration

9 It is implicit from the decision of the Court of Appeal in *Swift-Fortune* that the grant of interim measures of protection in support of foreign arbitration would be acceptable if there is no undue intrusion into the arbitration process or exercise of powers in excess of the purposes for which such interim measures are granted. Thus, the Court of Appeal after referring to what it regarded as the plain meaning of s 12(7) that would have conferred on the court the powers to grant all relief and orders under s 12(1) said:

In our view, this argument in favour of giving effect to the plain meaning of s 12(7) of the IAA would have taken on a different complexion if s 12(7) of the IAA were concerned solely with the power of the court to grant interim measures and nothing more. In that situation, s 12(7) may be said to operate only intra-territorially and would not intrude into the powers of the foreign arbitral tribunal (which would be the legitimate concern of the relevant foreign state). As explained by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (“Channel Tunnel”):¹⁴

The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive at on the substance of the dispute.

*In such a situation, there should be no reason for a foreign state to object to s 12(7) providing assistance to international arbitrations conducted in its territory. However, serious objections would arise if s 12(7) has a greater reach than merely providing non-intrusive assistance to foreign arbitration.*¹⁵ [emphasis added]

10 The Court of Appeal in *Swift-Fortune* was not alone on this point that it is acceptable for interim measures of protection to be granted in aid of foreign arbitration. For one, the House of Lords in the *Channel Tunnel* case, which the Court of Appeal relied upon, reached a similar conclusion. Similarly, support for the ability of the courts to grant interim measures in aid of foreign arbitration has also been found in the courts of India, Canada and Hong Kong.¹⁶

11 In addition, Art 9 read with Art 1(2) of the Model Law¹⁷ supports such a reading by making applicable to foreign arbitration the principle embodied in Art 9 that it is not incompatible with an arbitration agreement for the courts to grant interim measures of protection.

14 [1993] AC 334 at 365.

15 [2007] 1 SLR 629 at [47].

16 See the cases of *Venture Global Engineering v Satyam Computer Services Ltd* (Civil Appeal No 309 of 2008); *Bhatia International v Bulk Trading SA* [2002] INSC 139; *Delphi Petroleum Inc v Derin Shipping and Trading Ltd* (24 Admi LR (2d) 94); *Trade Fortune v Amalgamated Mill Supplies* (1994) 113 DLR (4th) 116; *The Owners of “Lady Muriel” v Transorient Shipping Ltd* (1995) No 87 (Civil), *VibroFlotation AG v Express Builders Co Ltd* [1994] 3 HKC 263; *Interbulk Hong Kong Ltd v Saferich* [1992] 2 HKLR 185; and *Katran Shipping Co Ltd v Kenven Transportation Ltd* Yearbook of Commercial Arbitration (A J van den Berg ed) (1993) Vol XVIII at pp 175–179.

17 Article 1(2) of the Model Law reads: “The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.” Article 9 of the Model Law reads: “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.”

12 The Court of Appeal in *Swift-Fortune* also went so far as to say that if s 12(7) could be limited to only confer on the courts the power to grant interim measures of protection, the case for a grant of a *Mareva* injunction in aid of foreign arbitration would have been much stronger. The Court of Appeal said:

In our view, the proviso cuts the ground under *Swift-Fortune's* case as a plain reading of s 12(7) of the IAA would also give power to the court to grant any of the orders and reliefs mentioned in s 12(1) to any party to an international arbitration.

...

*If s 12(7) were applicable only to or could be read only to apply to the power in s 12(1)(i) the appellant might have a stronger card on its hands.*¹⁸ [emphasis added]

13 A reading of the *Swift-Fortune* and *Front Carriers* cases do not reveal any deliberations on any arguments along the lines that s 12(7) has the effect of only empowering the court in respect of foreign arbitration to grant interim measures and no more. The authors suggest, however, that a correct interpretation to take would be that s 12(7) was intended to enable the court, when it comes to foreign arbitration, to grant only interim measures of protection and no more.

IV. A clue that s 12(7) in the case of foreign arbitration only confers on the court the power to grant interim measures and no more

14 A clue as to the correctness of the approach in allowing a court to grant interim measures in aid of foreign arbitration emerges from the decision of the Court of Appeal. On several occasions in its judgment, the Court of Appeal struggled with why the phrase “an arbitration to which this Part applies” was used in s 12(7). In this regard, the Court of Appeal noted that:

In our view, the strongest argument against relying on the preparatory and legislative materials to restrict the meaning of s 12(7) is that it does not answer the critical question on which the entire case of *Swift-Fortune* rests, ie, if s 12(7) is not intended to apply to foreign arbitrations, *why does it expressly refer to “an arbitration to which this Part applies” [emphasis added], and not, for example, “an arbitration to which this section applies”?* The use of the latter phrase would have put the matter beyond any doubt. Could this be a case of careless or simply bad drafting?¹⁹ [emphasis added]

18 [2007] 1 SLR 629 at [54].

19 [2007] 1 SLR 629 at [40].

15 Indeed, the court rightly noted that if the phrase “this section” had been used in place of “this Part”, there would have been less doubt that s 12(7) was only intended to apply to arbitrations with its place of arbitration in Singapore.

16 The Court of Appeal further said:

The critical question is, as we have pointed out, whether in drafting s 12(7), the draftsman had decided to extend its scope beyond the original intention. In our view, even if he did not, then this argument, by itself, may not be sufficient to detract from the plain meaning of s 12(7).

...

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.)

...

We do not think that Parliament could have intended s 12(7) to have such an exorbitant reach by the use of the inaptly drafted phrase “an arbitration to which this Part applies”.²⁰

17 The Court of Appeal, in reaching its decision, described the phrase “an arbitration to which this Part applies” in s 12(7) as an “inaptly drafted phrase”. Such inaptness, however, the authors suggest, provides a clue that there is some other meaning. An interpretation that would limit the court to only being able to grant interim measures of protection in aid of foreign arbitration would remove the inaptness. Such an interpretation would also be consistent with the other provisions as well as with the language of the provision itself. This is shown below.

V. The Model Law and Pt II of the IAA are intended to go hand-in-hand

18 At the outset, it should be highlighted that, in the context of international arbitration law in Singapore, the Model Law and Pt II of the IAA were intended to apply and go hand-in-hand. This is supported by s 3 of the IAA, which makes the Model Law applicable subject to the

20 [2007] 1 SLR 629 at [41], [52] and [54].

modifications in Pt II of the IAA. This position was also made clear in a line of cases beginning with *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* (“*John Holland*”).²¹

19 In that case, Justice Choo Han Teck expressed that it was possible to depart from the general position that the Model Law and Pt II of the IAA go hand-in-hand when Choo J held in *John Holland* that it is possible to exclude the Model Law only but not Pt II of the IAA.²² Parliament, thereafter, intervened with the effect of reinforcing the position that Pt II of the IAA and the Model Law go hand-in-hand when s 15 of the IAA was amended²³ to avoid doubt that Singapore’s domestic arbitration law (*ie*, the Arbitration Act) would apply if parties expressly opt out of the IAA or the Model Law (*ie*, if either Pt II or the Model Law is opted out of, they both go out together and the Arbitration Act would then apply).

20 Similarly, in the subsequent case of *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*,²⁴ Justice Woo Bih Li decided that both the Model Law and Pt II should be read and applied together.²⁵ Woo J, it is suggested, is undoubtedly correct in this.²⁶

21 One of the consequences of the Model Law and Pt II of the IAA going hand-in-hand is that any reference in the IAA to Pt II would include the Model Law. Conversely, any reference to the Model Law or “this law” (in the Model Law) would be a reference to the Model Law as amended by Pt II, if at all.

22 This view is reinforced by Peter Binder in *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (“Peter Binder”),²⁷ who notes that:

True to the Model Law’s drafting principles, the expression “this Law” can be substituted by the individual name given to the national arbitration statute that conforms with the Model Law ... “this Law”

21 [2001] 2 SLR 262.

22 [2001] 2 SLR 262 at [13].

23 See the Parliamentary Debates of the International Arbitration Bill (2001) Vol 73 where Parliament states that s 15 was being amended “to clarify its scope ... that a reference in an arbitration agreement to any institutional arbitration, would not by itself, be regarded as an agreement to opt out of the Model Law”.

24 [2002] 2 SLR 164.

25 [2007] 1 SLR 629 at [84].

26 Although Woo J went further to hold as a matter of *dicta* that the provisions of the UNCITRAL Arbitration Rules may be inconsistent with the IAA and therefore may not be given effect to, this *dicta* has since been reversed by Parliament by the enactment of s 15A of the IAA. The underlying basic position maintained by Woo J that Pt II of the IAA and the Model Law go hand-in-hand is undoubtedly correct.

27 Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2nd Ed, 2005) at pp 97–101.

also has a more fundamental background: many adopting countries regulate more than the Model Law suggests, therefore the ambit of Article 5 is widened, too.²⁸

23 Such an approach that the Model Law and corresponding enacting legislation go hand-in-hand has also been given effect to in other Model Law jurisdictions. In *Noble China v Lei*,²⁹ the Ontario Court of Justice noted that the role of its Arbitration Act was “to vary, substitute or add to the provisions of the Model Law, which had been adopted and set out as a schedule to the Act”. Accordingly, the Ontario court expressed that its Arbitration Act was to be “read as a whole”³⁰ together with the Model Law, and by doing so, it would also be possible to determine the areas in which the Legislature of Ontario had seen fit to amend or derogate from the Model Law.

VI. Provisions relating to the applicability of the provisions in Pt II and the Model Law should be read together

24 Consistent with the approach that the provisions of Pt II of the IAA and the Model Law should be read together, the provisions in Pt II and the Model Law dealing with the application of the provisions contained therein should be read together. In this respect, the central phrase “an arbitration to which this Part *applies*” in s 12(7) raises the very question of the scope of application of Pt II. The primary provision of Pt II of the IAA dealing with the question of application of Pt II is s 5 of the IAA, which is headed “Application of Part II”. A reading of s 5 would, however, reveal that there is no express provision that makes Pt II applicable. Instead, we have s 5(1) that is phrased in the negative,³¹ with the consequence that it does not in a positive manner make the provisions of Pt II applicable. Section 5(2) and (3) deal with when an arbitration is an “international arbitration” and again does not make Pt II applicable. Section 5(4) also does not make Pt II applicable, with the subsection more concerned with the disapplication of the Arbitration Act.³²

28 Peter Binder at p 51.

29 *Noble China Inc v Lei Kat Cheong* (1998) 42 OR (3d) 69.

30 [2007] 1 SLR 629 at [64].

31 Section 5(1) provides, “This Part and the Model Law shall *not apply* to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.” [emphasis added] The phrase “not apply” is negative in nature and does not in itself provide for application of Pt II. See also *Front Carriers* [2006] 3 SLR 854 at [16].

32 Section 5(4) provides: “Notwithstanding any provision to the contrary in the Arbitration Act (Cap. 10), that Act shall not apply to any arbitration to which this Part [*ie*, Pt II] applies.”

25 The absence of any provision in s 5 which is headed “Application of Part II” that directly makes Pt II or any its provisions applicable would be odd. This would suggest that perhaps there is something else outside the section that would serve to supplement and make sense of a provision that deals with the application of Pt II. The external aids, the authors suggest, are provisions of the Model Law dealing with the application of the Model Law. Such a technique would be consistent with the approach explained in Part V of this article that the provisions of Pt II and the Model Law were intended to go hand-in-hand.

26 If one were to look at the Model Law, Art 1(1) positively provides for the application of the Model Law. Article 1(1) provides that:

This Law *applies* to international commercial arbitration, subject to any agreement in force between this State and any other State or States. [emphasis added]

27 As seen in Part V of this article, the phrase “This Law” can be substituted with the national arbitration statutes that conform with the Model Law, *ie*, in the case of Singapore, Pt II of the IAA. Accordingly, Art 1(1) of the Model Law may be read as “[Part II] applies to international commercial arbitration ...”.³³ This would then serve as the positive statement making applicable the provisions of Pt II that s 5 of the IAA is missing. This positive statement in Art 1(1) that makes applicable the provisions of Pt II to international commercial arbitration would also sit well with the negative statement in s 5(1) that makes clear that Pt II does not apply to international arbitration (unless parties otherwise agree). The pieces of the jigsaw, one could say, are beginning to fall into place.

28 As Art 1(1) makes Pt II applicable, and s 12(7) is triggered in instances where Pt II applies, it would then follow that s 12(7) applies to international arbitration, including some cases of foreign arbitration. The definition of when an arbitration is international is set out in s 5(2) and (3) of the IAA and these definitions are wide enough to encompass a situation where arbitration is held outside Singapore, *ie*, foreign arbitration. For instance, if one of the parties is a Singaporean company and the place of arbitration is in London, the arbitration will be an international arbitration given s 5(2)(b)(i) of the IAA.³⁴

29 The plot does not, however, stop there. Article 1(2) of the Model Law applies to make clear that only certain provisions of the Model Law

33 For when an arbitration is international, see s 5(2) and (3) of the IAA.

34 See Part I of this article for the sense in which the term foreign arbitration is used.

(and by parity of reasoning Pt II) would apply in the case of arbitration taking place overseas. Article 1(2) provides that:

The provisions of this Law, except Articles 8, 9, 35 and 36, *apply* only if the place of arbitration is in the territory of this State [*ie*, Singapore, in our case]. [emphasis added]

30 Accordingly, only provisions of the Model Law (and Pt II) that are saved by Art 1(2) of the Model Law would apply to foreign arbitration.³⁵ One of these Articles is Art 9 of the Model Law. Article 9 provides that:

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]

31 In *Swift-Fortune*,³⁶ the Court of Appeal noted that Art 9 was not intended to confer jurisdiction but to declare the compatibility between resolving a dispute through arbitration and at the same time seeking assistance from the court for interim protection orders. The authors agree that it would be difficult to construe Art 9 as conferring on the courts the power to grant interim measures.

32 In *Swift-Fortune*,³⁷ the Singapore Court of Appeal went on further to say that because the purpose of Art 9 was to declare the compatibility between arbitrating a substantive dispute and seeking assistance from the courts for interim measures of protection, “Art 9 can have no bearing on the meaning and effect of a domestic law providing for interim measures, such as s 12(7) of the IAA”. Again, the authors agree with the sentiments of the Court of Appeal if one were to read Art 9 on its own.

33 However, it is suggested that when Art 1(2) is read with Arts 1(1) and 9 and s 12(1)(i) and (7) in Pt II of the IAA, the construction that should be taken is that the court can grant interim measures of protection in aid of foreign arbitration. This line of argument does not appear to have been considered in the judgment of the Court of Appeal.

34 To elaborate, as seen above, the effect of Art 1(1) is to make s 12(7) applicable to foreign arbitration. Article 1(2) then disapplies the provisions of Pt II (which for the reasons given above can be read as a

35 Articles 35 and 36 do not have the effect of law in Singapore, given s 3(1) of the IAA that excludes the operation of Chapter VIII of the Model Law (under which Chapter, Arts 35 and 36 appear).

36 [2007] 1 SLR 629 at [33].

37 [2007] 1 SLR 629 at [33].

substitute for references to the Model Law) to foreign arbitration, save for certain provisions saved by Art 1(2). One of the provisions saved by Art 1(2) is Art 9. As a consequence, when read with Art 1(1) and (2), Art 9 should also have the effect of declaring the compatibility of seeking interim measures from the courts with *foreign arbitration* (and not only international arbitration taking place in Singapore), thereby preserving the court's ability to grant interim measures in aid of foreign arbitration.³⁸

35 If it were compatible to seek interim measures from the court for foreign arbitration, then s 12(7) should apply to foreign arbitration by reason of Art 1(1) of the Model Law read together with s 12(1)(i) such as to enable the court to grant interim measures of protection in aid of foreign arbitration. Section 12(1)(i) (read with s 12(7)) that deals with interim measures would not in this regard be disapplied by Art 1(2). In contrast, all other subsections of s 12(1) (other than s 12(1)(i)), read with s 12(7), would, by reason of Art 1(2), be disapplied.

36 As a consequence, the only powers that the court would have under s 12(7) in relation to foreign arbitration would be the power to grant interim measures and not any of the other directions and orders listed in s 12(1). With this limitation, any concern that s 12(7) would have been of exorbitant reach if the courts had power to grant orders listed in s 12(1) in relation to foreign arbitration does not arise. Also, the phrase "an arbitration to which this Part applies" in s 12(7) would no longer be inapt with the interpretation limiting s 12(7) to only enable the court to grant interim measures in support of foreign arbitration. Such an interpretation would also draw from the provisions in the Model Law (which can for the reasons given above be read as "Part II") dealing with when the Model Law (and hence Pt II) applies, which is what the phrase "an arbitration to which this Part applies" calls for. Had such a line been taken, that would have had the effect of limiting the court to only grant interim measures under s 12(7) in support of foreign arbitration; there may well have been, as the Court of Appeal puts it, a stronger hand in support of the existence of the power.

38 This would not be inconsistent with para [33] of the decision of the Court of Appeal in *Swift-Fortune* that is discussed in the text of the body of this article accompanying nn 34 and 35.

VII. The possible adaptations or modifications that s 12(7) may have over the powers of the court to grant interim measures in aid of foreign arbitration

37 Bearing in mind the above, we may return to examine s 12(7). Section 12(7) of the IAA states that:

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

38 The Court of Appeal in *Swift-Fortune* correctly identified the above two phrases in bold as qualifying the application of s 12(7) in enabling the courts to concurrently exercise the powers under s 12(1).

39 In relation to the first qualifier of “an arbitration to which this Part applies”, the position as suggested in Part VI above is that in relation to foreign arbitration, the court should only have the power to grant interim measures.

40 In relation to the second qualifier, under s 12(7), the court’s powers to make orders in respect of any of the matters set out in sub-s (1) is expressed to be the same as the court’s powers to make orders in relation to an action or matter in the court. Hence, the court explained that this meant that “if a court has no power to grant interim measures in an action or matter in court, it has no power in relation to an arbitration to which Part II applies. This means that section 12(7) does not independently confer any power on the court in the same way that sections 12(1) to 12(6) independently confer new powers on arbitral tribunals”.³⁹

41 The Court of Appeal in *Swift-Fortune* also went on to say that in construing whether the court has such powers, it should look to determine whether the court has such powers in relation to foreign court proceedings, which would be presumably analogous to foreign arbitration proceedings.

42 In this regard, Prakash J articulated that:

[I]f Parliament had intended to effect such a far-reaching change in the law as would allow our courts to make orders to assist foreign arbitrations notwithstanding that they would still be powerless to aid foreign court proceedings, the legislation would have been clearly worded to effect such a drastic change and it would not be necessary

39 [2007] 1 SLR 629 at [61].

to imply it from the use of the words “an arbitration to which this Part applies” or from the fact that Article 9 of the Model Law envisages that courts may make such orders.⁴⁰

43 Similarly, in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*,⁴¹ Prakash J applied the principle in *Siskina*, and held that “a Singapore court has no power to grant *Mareva* relief in respect of Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign court proceedings”.⁴² More recently, the Singapore Court of Appeal in *Wu Yang Construction Group Ltd v Mao Yong Hui*⁴³ reaffirmed that “[i]f no substantive relief is claimed against a party, a freezing order cannot be issued against that party”.

44 The authors agree that it would be drastic to expect a court to be able to grant all the orders mentioned under s 12(1) of the IAA for the sole purpose of supporting foreign proceedings simply by virtue of Art 9 or the use of the words “to which this Part applies”. However, as suggested above, the court in the case of foreign arbitration is only able to grant interim relief sought under s 12(1)(i), and not any other relief or order.

45 In addition, the authors note with interest the decision of *Re Unisoft (No 1)*,⁴⁴ where the court held that the necessity for the second qualifier in s 12(7) was so as to extend the court’s power found in a provision outside the arbitral legislation to apply to foreign arbitrations, as it would not have otherwise applied by itself. Likewise, in the present context, such an argument would mean that s 12(7), as an enabling provision, would allow for the power under s 4(10) of the CLA to apply to arbitrations to which the IAA and Model Law applies. Although *Re Unisoft (No 1)* related to the power of courts to grant an order for security of costs, it is suggested, therefore, that the same reasoning could similarly apply to extend the power of the court in relation to a matter in the court for the grant of interim measures in aid of foreign arbitration.⁴⁵ This is perhaps a point that can be considered in future cases; noting here the meaning of the second qualifier was never fully canvassed before the Court of Appeal.⁴⁶ In this connection, if it is correct that the first qualifier is intended to confer on the court the power of

40 [2007] 1 SLR 629 at [44].

41 [2006] 1 SLR 112.

42 [2007] 1 SLR 629 at [4].

43 [2007] SGCA 55 at [29].

44 *Re Unisoft Group Ltd (No 1); Saunderson Holdings v Unisoft Group Ltd* [1993] BCLC 1292.

45 Similar positions were adopted in *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [1994] 4 All ER 507 at 514; *BNP Paribas v Deloitte & Touche LLP* [2003] EWHC 2874.

46 [2007] 1 SLR 629 at [20].

granting interim measures in support of foreign arbitration, the second qualifier should, it is suggested, be construed in a manner that is consistent (*ie*, apply also to foreign arbitration).

VIII. Conclusion

46 From the above, the authors therefore suggest that the courts should have the power to grant an injunction in aid of foreign arbitration. That having been said, it is suggested that the best approach moving forward is for Parliament to expressly clarify the scope and effect of s 12(7) and its applicability to foreign arbitrations. In this regard, such an approach would follow the direction of several other jurisdictions, such as England,⁴⁷ which have expressly enacted legislation that allows for courts to grant interim measures in aid of foreign arbitration. It would also accord with the recent amendment made to Art 17J of the UNCITRAL Model Law, which now 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.

47 Legislation similar to the effect of the above would, therefore, enable the courts to assist and render more effective the decisions of arbitrators without necessarily encroaching on them and this would well accord the spirit of international arbitration (as exemplified by Arts 9 and 1(2) of the Model Law).

47 Section 44 of the English Arbitration Act 1996.