Swift-Fortune Ltd v Magnifica Marine SA
[2006] SGCA 42

Case Number : CA 24/2006

Decision Date : 01 December 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tay Yong Kwang J

Counsel Name(s) : Toh Kian Sing and Ian Teo Ke-Wei (Rajah & Tann) for the appellant; Mohan Subbaraman and Adrian Aw Hon Wei (Gurbani & Co) for the respondent

Parties : Swift-Fortune Ltd — Magnifica Marine SA

Arbitration – Interlocutory order or direction – Court's power – Whether Singapore court having power to grant interim relief by way of Mareva injunction in aid of foreign arbitral proceedings with no other connection with Singapore – Section 4(10) Civil Law Act (Cap 43, 1999 Rev Ed), s 12(7) International Arbitration Act (Cap 143A, 2002 Rev Ed)

1 December 2006 *Judgment reserved.*

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Swift-Fortune Ltd ("Swift-Fortune"), a Liberian company, against the decision of Judith Prakash J ("Prakash J") in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 which set aside a Mareva injunction restraining Magnifica Marine SA ("Magnifica"), a Panamanian company, from disposing of or dealing with its assets in Singapore pending arbitration proceedings between the parties in London in accordance with the underlying contract.

2 This appeal raises important issues relating to the power of a Singapore court to grant Mareva interlocutory relief in aid of "international arbitrations". The relevant statutory provisions are: (a) s 12(7) of the International Arbitration Act (incorporating the United Nations Commission on International Trade Law ("UNCITRAL") Model Law ("the Model Law")) (Cap 143A, 2002 Rev Ed) ("IAA"); (b) s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"); and (c) s 18(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA").

3 With respect to the IAA, Prakash J decided that s 12(7) of the IAA conferred powers on the court to grant Mareva interlocutory relief to assist "Singapore international arbitrations", but not "foreign arbitrations", as defined by her. By the expression "foreign arbitration" she meant an arbitration arising out of an international arbitration agreement (as defined in s 5(2) of the IAA) which does not stipulate Singapore as the seat of arbitration. By the expression "Singapore international arbitration", she meant an arbitration where Singapore is stipulated as the seat of arbitration. As these definitions also delineate the scope of Prakash J's decision, we will continue to use them for the purpose of considering its merits.

4 With respect to s 4(10) of the CLA, Prakash J proceeded on the basis that in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 ("*Karaha Bodas")* this court had applied the principle in *Siskina v Distos Compania Naviera SA* [1979] AC 210 ("*The Siskina*") which, in the context of Singapore, is to the effect that a Singapore court has no power to grant Mareva relief in respect of the Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign *court* proceedings. However, in this appeal, counsel for Swift-Fortune has sought to distinguish

Karaha Bodas following the decision of Belinda Ang Saw Ean J ("Ang J") in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 ("*Front Carriers*") which was given before the hearing of this appeal. The distinction is that *Karaha Bodas* was not concerned with giving assistance to foreign arbitrations as distinguished from foreign court proceedings.

5 In *Front Carriers,* Ang J held that under s 12(7) of the IAA the court has the power to grant a free-standing Mareva injunction, *ie*, where the plaintiff has not made a substantive claim against the defendant in the court proceedings, in aid of foreign arbitration. Additionally, she held that under s 4(10) of the CLA the court has such power only where it has personal jurisdiction over the defendant and where "there is a recognisable justiciable right between the parties" under Singapore law (at [52]). In this appeal, counsel for Swift-Fortune has urged this court to accept the decision in *Front Carriers* in preference to that of the High Court in the present case.

6 This appeal raises novel and important issues of statutory interpretation in relation to the court's powers under s 12(7) of the IAA and also under s 4(10) of the CLA. Except for one critical difference in fact, *ie*, the existence of a substantive claim recognisable by a Singapore court, the material facts in the present case and in *Front Carriers* are substantially the same. In both cases, the defendant had assets in Singapore, but no place of business here. In both cases, the parties had agreed to refer the contractual dispute to arbitration outside Singapore and in accordance with English law. One case was concerned with the sale of a ship, and the other with the charter of a ship. That two cases on the same legal issues relating to international arbitrations have come before the courts within such a short span of time may be indicative of the potentially high incidence of similar cases in the future. That two experienced commercial judges have expressed different views on the applicability of the relevant statutory provisions relating to Mareva injunctions also indicates the need for clarity, certainty and predictability in an important area of Singapore commercial law, *viz*, the statutory power of the court to grant interim orders or relief to assist international arbitrations as defined in the IAA.

7 In this appeal, we start our inquiry by examining how the legal issues in the present case arose and how Prakash J dealt with them after considering counsel's arguments. We will then proceed to consider, by way of comparison, the issues in *Front Carriers* and how Ang J dealt with them.

Factual background

8 The underlying dispute in the present case arose in connection with the sale of a vessel, *Capaz Duckling* by Magnifica to Swift-Fortune at the price of US$9.5m for delivery in China but with legal completion in Singapore. The sale agreement, which was subject to English law, provided for arbitration in London of any dispute arising from it. Pursuant to the agreement, Swift-Fortune deposited 20% of the purchase price in an escrow account with DnB NOR Bank ASA ("DnB Bank") in Singapore in the joint names of the parties. Upon delivery of the vessel, the full purchase price was to be paid to Magnifica at DnB Bank in Singapore. Delivery of the ship was delayed, resulting in Swift-Fortune claiming substantial losses estimated to be between US$2m to US$2.5m.

9 On the day before the date fixed for delayed completion, Swift-Fortune filed an action, *ex parte*, seeking a Mareva injunction to restrain Magnifica from disposing or dealing with its assets in Singapore up to the value of US$2.5m. The court granted the injunction, and also gave leave to serve the application and the Mareva injunction on Magnifica outside the jurisdiction. Upon being served with the court papers, Magnifica applied to set aside the proceedings and the Mareva injunction on the ground that the court did not have jurisdiction or power to grant the Mareva injunction.

How the issue of jurisdiction arose

10 Swift-Fortune made its application pursuant to s 12(7), read with s 12(1) of the IAA and O 69A of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). However, with regard to service of the application and the Mareva injunction outside the jurisdiction, it placed reliance on O 11 of the Rules of Court as well. This led to substantial arguments before Prakash J on the applicability of O 11 to the application. Prakash J decided that O 11 did not apply to applications under the IAA, and that the relevant Order was O 69A. She further held that to justify such an order, Swift-Fortune had to show that the case was a proper one for service outside the jurisdiction under O 69A r 4. Swift-Fortune has not appealed against this ruling. In relation to this point, we should also mention that Ang J in *Front Carriers* also held that O 69A is the relevant order for applications made under the IAA.

Showing a proper case of forum conveniens

11 In determining what a proper case is under O 69A r 4, Prakash J applied the decision of this court in *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 ("*Garuda*"), that in order to establish a proper case, the plaintiff has to show, first, that there are merits in the case and, second, that Singapore is the *forum conveniens, ie*, the forum most suitable for the case to be tried in the interests of all parties and for the ends of justice. In this respect, counsel for Swift-Fortune contended that Singapore was the proper forum because: (a) Magnifica had assets in Singapore; (b) legal completion of the sale was to take place in Singapore which would make Singapore the forum with the closest connection with the issues involved in the action; and (c) Magnifica had failed to identify another forum in which the case might be more suitably tried in the interests of the parties and to achieve the ends of justice.

12 Prakash J did not have to deal with this argument as she ruled that a proper case could not be shown unless a Singapore court had the power in a case involving a foreign arbitration to grant Mareva relief against the Singapore assets of a party who has no presence in Singapore. In her view, this court had already decided in *Karaha Bodas* that a Singapore court could not grant Mareva relief in respect of the Singapore assets of a foreign defendant if the only purpose of such relief was to support *foreign court proceedings.* Accordingly, in the absence of express statutory authority giving such power in the case of arbitrations, Singapore would not be the *forum conveniens.* Counsel for Swift-Fortune, in response to this ruling, contended that s 12(7) of the IAA, on a plain reading, has given the court such authority. Counsel for Magnifica contended otherwise, arguing that s 12(7), on a purposive interpretation, does not give such authority. After a careful and detailed consideration of the arguments and the legislative history of the IAA and the Model Law, Prakash J rejected the arguments of counsel for Swift-Fortune and accepted the arguments of counsel for Magnifica as s 12(7) of the IAA does not give such authority. We turn now to consider the background to the enactment of the IAA, and in particular why, when and how s 12(7) was enacted in the IAA. It is our view that understanding this history is the key to ascertaining the legislative intention behind that provision.

The history of the IAA

13 The IAA (incorporating the Model Law) was enacted in 1994 after wide consultation among interest groups. The Bill was drafted by a working committee ("the Committee") of the Law Reform Committee of the Singapore Academy of Law ("the LRC") comprising lawyers who were experienced arbitrators, law academics, foreign lawyers and legal officers from the Attorney-General's Chambers. In drafting the Bill, the Committee carried out a review of the Model Law, relevant foreign legislation relating to commercial arbitration and existing Singapore legislation on the subject. The draft Bill together with a report – Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on Review of Arbitration Laws* (1993) ("the Report") – was submitted to the LRC for consideration. The draft Bill was then revised by the Committee, and, together with the Report, was

submitted to the Minister for Law for consideration. The most important revision made to the draft Bill was the insertion of s 12(6) (now s 12(7)) of the IAA. Prakash J has explained in her grounds of decision that Parliament decided to enact s 12(6) only after it had belatedly realised that it had not given the court power to grant interim orders and measures to assist Singapore international arbitrations. This being the case, we will now examine how and when the inadvertent omission was rectified.

Object of the IAA – to promote international arbitration in Singapore

14 It is common ground that the objective of the IAA is to promote international arbitration in Singapore. What is in dispute between the parties is the kind of international arbitration that Parliament had in mind. This objective is clearly expressed in the following parts of the Report, *viz*, the Summary of Recommendations to the Report, paras 1, 8, 14, 31, 48 and 49 of the Report, 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. The two parliamentary speeches were devoted entirely to addressing the desirability of promoting Singapore as a centre for international arbitrations in order to provide the commercial sector with another venue to resolve their commercial disputes. We can conclude from these materials that the purpose of the IAA is to promote the kind of international arbitration that would augment the legal and other kinds of services already available in Singapore, and which is conducive to promoting Singapore as an international arbitration centre.

Counsel's submissions on policy implications

15 Counsel for Swift-Fortune has invited this court to consider the policy implications for Singapore of upholding the decision of Prakash J. He has argued for a broader objective for the IAA that "[i]f Singapore aims to be an international arbitration centre it must adopt a world view of international arbitration" (see the Report at para 8), and to this end should interpret the IAA (and the Model Law) to support all international arbitration (irrespective of the stipulated seat of arbitration), and that this 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. He contended that parties are not any less likely to choose Singapore as the venue of arbitration merely because Singapore courts are given the power to provide curial assistance to foreign arbitrations as the selection of the arbitral venue is determined by many factors. But he also pointed out that a narrow approach would also not bring more international arbitration to Singapore for the same reasons. However, he cautioned that a narrow approach in limiting the scope of the court's power to assist foreign arbitration in the way of interim measures could have adverse consequences for Singapore in that: (a) Singapore's reputation would suffer because it would become a haven for funds placed here to avoid foreign attachment; and (b) Singapore's status as a legal services centre would suffer as Singapore lawyers would be deprived of the services that they would have provided in such matters.

16 We have three general comments on these submissions. First, we are aware that contemporary international arbitration does not need to be anchored to any particular territorial jurisdiction. The choice of venue is dictated by diverse factors and the stipulated seat of arbitration may not ultimately be the chosen venue. *Garuda* ([11] *supra*) is an example of a case where the seat of arbitration was Jakarta, but the arbitration itself was conducted in Singapore. The autonomous character of international arbitration recognised by the legal systems of a large number of trading states has made the arbitrators or the parties and their counsel the final arbiters of where the arbitration is to be conducted. Thus, whilst we can accept counsel's realistic assessment of how international arbitrations are conducted today, the potentially adverse consequences spelt out by counsel are *par excellence* policy considerations within the purview of Parliament. Secondly, it is

reasonable to assume that the framers of the IAA were aware of these considerations and would have factored them into the drafting of the IAA. If they have not been taken into account in the IAA, we doubt very much that we can do so, without arrogating to ourselves the power to decide such policy issues. Thirdly, the duty of the court is to determine what the law is, *ie*, the true meaning of s 12(7), and to apply it to the facts of the case. It should not second-guess Parliament on such matters. In this appeal, we will not traverse beyond the duty to ascertain the scope of s 12(7), applying established principles of statutory interpretation to give effect to the intention of Parliament. If the literal interpretation of s 12(7) promotes the legislative object better than a purposive interpretation, then the court is justified in preferring the former to the latter interpretation. Conversely, if the literal interpretation does not promote the legislative object or does not promote it better than the purposive interpretation, then it is permissible for the court to ignore the literal meaning and give effect to the purposive interpretation.

17 However, this court is entitled to look at the objective of the IAA to see whether a literal, purposive, or some other kind of interpretation will promote the objective of the statute rather than hinder its fulfilment. As we have stated earlier, the objective of the IAA is to promote international arbitration in Singapore. To achieve that status, it must have and be able to sustain a critical volume of such arbitrations being conducted here. This requires the existence of a conducive political, economic and legal environment. It must have a proper legal framework that is generally accepted by the stakeholders in the system. The Model Law, as modified by IAA to suit local circumstances and conditions, would be such a legal framework. But, still, it is just one of many essentials in the making of an international arbitration centre, although it is a most important link. Another, of course, is Singapore being a party to the New York Convention in order to give efficacy to the enforcement of arbitral awards in member countries. We will now examine s 12(7) to determine its legislative intent.

Application of section 12(7) of the IAA – meaning and scope

18 The title to s 12 of the IAA is: "Powers of arbitral tribunal". The significance of the title is self-explanatory. It suggests that s 12 is only concerned with arbitrations before an "arbitral tribunal". This expression is defined in s 2 of the IAA to mean "a sole arbitrator or a panel of arbitrators or a permanent arbitral institution". However, the open-endedness of these terms is qualified by the kinds of international arbitrations that an arbitral tribunal is empowered to conduct under the IAA. In this context, an arbitral tribunal in the Model Law refers to a tribunal appointed under an international arbitration agreement that provides for the seat of arbitration to be in Singapore. Article 1(2) of the Model Law provides that the provisions of this Law, except Arts 8, 9, 35 and 36 apply only if the place of arbitration is in Singapore.

19 The relevant subsections of s 12 read:

> **Powers of arbitral tribunal**
>
> 12(1)— Without prejudice to the powers set out in any other provision of this Act and in the Model law, an arbitral tribunal shall have the powers to make orders or give directions to any party for —
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> (*a*) security for costs;
>
> (*b*) discovery of documents and interrogatories;
>
> (*c*) giving of evidence by affidavit;

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

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

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

(*g*) securing the amount in dispute;

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

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

(2) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.

(3) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.

(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1) (*a*) shall not be exercised by reason only that the claimant is —

(*a*) an individual ordinarily resident outside Singapore; or

(*b*) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.

(5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —

(*a*) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court;

(*b*) may award interest (including interest on a compound basis) on the whole or any part of any sum which —

(i) is awarded to any party, for the whole or any part of the period up to the date of the award; or

(ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

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

(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) as it has for the purpose of and in relation to an action or matter in the court.

[emphasis added]

20 The relevant issues that arise in this appeal are concerned with the meaning of the italicised words in s 12(7). The first issue is the meaning of the phrase "an arbitration to which this Part applies" ("the first qualifier"). The second issue is the meaning of the words "as it has for the purpose of and in relation to an action or matter in the court" ("the second qualifier"). We should mention that the meaning of the first qualifier was thoroughly canvassed by counsel for the parties, but the meaning of the second qualifier was largely ignored. As we shall see (at [60] below), the meaning of the second qualifier is also critical in determining the powers of the court under s 12(7).

Arguments on section 12(7) of the IAA in relation to the first qualifier

21 Swift-Fortune's case is quite simple: it is that the first qualifier makes s 12(1) applicable to all "international arbitrations" because: (a) s 12(7) is in Pt II and (b) s 5(2) which is also in Pt II, defines what an international arbitration is for the purposes of Pt II. It is then argued that as the arbitration in London between Swift-Fortune and Magnifica is undoubtedly an international arbitration as defined in s 5(2) of the IAA, it follows that the court has power under s 12(7) to grant a Mareva injunction under s 12(1)(*i*). Section 5(2) provides as follows:

[A]n arbitration is international if —

(*a*) at least one of the parties to an arbitration agreement, at the conclusion of the agreement, has its place of business in any State other than Singapore; or

(*b*) one of the following places is situated outside the State in which the parties have their place of business:

(i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is mostly connected; or

(*c*) the parties have expressly agreed that the subject matter of the agreement relates to more than one country.

Swift-Fortune's counsel points out that the definition is clear and contains no word of qualification as regards the seat or venue of arbitration or the law applicable to the arbitration. Accordingly, s 12(7) applies to all international arbitrations whether conducted in or outside Singapore. This conclusion, in the words of counsel, follows naturally from a plain reading of the IAA without the need for any strained or unduly narrow interpretation on ss 5(2) and 12(7) of the IAA.

22 Magnifica's case is that s 12(7) 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) should be interpreted purposively to promote the objective of the IAA. It is also contended s 12(7), purposively interpreted, will give effect to its legislative intent and also accords with its legislative history.

Decision of Prakash J on section 12(7) of the IAA

23 Prakash J decided that s 12(7) was intended to apply only to Singapore international arbitrations. She gave the following reasons:

(a) The IAA is intended to encourage such arbitrations.

(b) Section 12(7) uses a form of words taken from s 27(1) of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the AA"), whose equivalent in England, *viz*, s 12(6) of the Arbitration Act 1950 (c 27) (UK) ("the 1950 Act"), has no application to foreign arbitrations.

(c) Section 12(7) is placed in s 12 which deals only with the powers of arbitral tribunals conducting Singapore international arbitrations.

(d) Section 12(7) is not expressed to apply extraterritorially, and therefore does not apply to a foreign arbitral tribunal conducting an arbitration outside Singapore.

(e) In the absence of much clearer words, it is unlikely that Parliament intended s 12(7) to apply to foreign arbitrations, when (at the same time) it has not conferred on the court power to grant Mareva interlocutory relief in aid of foreign court proceedings.

24 Counsel for Swift-Fortune also argued that Pt II of the IAA was intended to apply to international arbitrations generally on the ground that ss 6(3) and 7(1) (which also apply to foreign arbitrations) are found in Pt II. Prakash J rejected this argument. She was of the view that ss 6 and 7 were specially enacted to cater to the specific demands of the two situations and were not indicative of such intention.

25 Another argument put forward by counsel for Swift-Fortune was that s 12(7) of the IAA was intended to give effect to Art 9 of the Model Law so that the court would have the power to grant interim measures to assist foreign arbitrations. Prakash J rejected this argument on the ground that Art 9 is permissive in nature and merely means that parties to international arbitrations may apply to a domestic court for interim measures where the court has power to grant such measures. Article 9 in itself does not make them available. We will consider this issue in greater detail later.

Decision of Ang J in Front Carriers on section 12(7) of the IAA

26 In *Front Carriers* ([4] *supra*), Ang J disagreed with Prakash J on the effect of s 12(7). She held that the section confers power on the court to grant interim orders, including a Mareva injunction, in aid of foreign arbitrations. She gave the following reasons:

(a) Section 12(7) gives effect to Art 9 of the Model Law which preserves the right of the parties to the court's jurisdiction to grant interim measures in support of arbitration proceedings.

(b) The first qualifier is wide enough to include international arbitrations conducted in Singapore and abroad, "*with the qualification that the curial support for arbitral proceedings abroad is confined to court-ordered interim measures*" (at [22]).

(c) Order 69A r 4(1) also supports this interpretation.

Ang J did not explain why she made the qualification (italicised in (b) above) to the first qualifier. It would appear to have been designed to limit the application of s 12(1) itself. As we shall see at [54] below, the added qualification has great significance in determining the legislative intent behind s 12(7). Ang J also stated (at [18]) that s 12(7) enables the court to make for the purpose of and in relation to foreign arbitration, orders regarding those matters (like those under ss 12(1)(*g*), 12(1)(*h*) and 12(1)(*i*)) which it could have made *if the matter referred to arbitration had been tried as a court action*. Again, the italicised words are significant in that, as we shall see, they show a misapprehension on the part of the judge in the way that s 12(7) should be applied: see [60] to [61] below.

27 Ang J found support for her interpretation of s 12(7) in the following decisions: *Econ Corporation International Limited v Ballast-Nedam International BV* [2003] 2 SLR 15 ("*Econ*") at [13], *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670 ("*Coop*") at [135] and *Garuda* ([11] *supra*).

28 Putting aside these decisions for the moment, it is plain that Ang J's decision really rests on a plain reading of s 12(7). Beyond this, we are not able to discover any other justification for her reading of s 12(7). Before we examine this central point of dispute between the two judges, we would like first to dispose of two preliminary issues. The first is the case law and the second is the effect, if any, of Art 9 of the Model Law on s 12(7) of the IAA.

The authority of Econ, Coop and Garuda

29 In *Front Carriers*, Ang J regarded *Econ* as having decided that s 12(7) of the IAA confers on the court power to grant interim relief under s 12(1)(*g*) in aid of a foreign arbitration. In that case, Lai Kew Chai J granted an interlocutory injunction restraining the defendants from calling on a performance bond pending arbitration between the parties on the substantive claim in India. However, as Ang J herself noted, this issue was not controverted but assumed in that case. Nevertheless, she believed that the jurisdictional bases must have been clear enough to Lai J for him to have made so affirmative a pronouncement of the court's power. We are aware that Lai J had vast experience in this area of the law (he delivered the first written judgment on the Mareva injunction in Singapore in *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1982-1983] SLR 362). We must assume that he would not have granted the injunction in *Econ* without some degree of appreciation of the scope of s 12(7). Nevertheless, in our view, the absence of any argument on the scope of 12(7) in *Econ* detracts from its persuasiveness as an authority on the effect of s 12(7). Counsel for Magnifica has attempted to distinguish *Econ* on the ground that the relief granted in that case was not a Mareva injunction. We do not consider the distinction valid since the injunction granted in that case was also a form of interim measure covered by s 12(1)(*i*).

30 As for *Coop* and *Garuda,* our view is that both decisions have nothing relevant to say about s 12(7) on Mareva interlocutory relief that requires our consideration. They are therefore not relevant to this appeal.

Article 9 of the Model Law

31 In her grounds of decision, Ang J appears to have placed undue emphasis on the effect of Art 9 of the Model Law on the meaning of s 12(7) of the IAA, although, at the same time, she only went so far as to state that Art 9 "preserves" the interim measures jurisdiction for the domestic courts. She did not rule that Art 9 confers jurisdiction to grant interim measures. Similarly, Prakash J regarded it merely as permissive in nature. We do not think there is any difference in substance

between the views of the two judges. However, it is useful to examine the text of Art 9. It reads:

> *Arbitration agreement and interim measures by court*
>
> 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.

Counsel for Magnifica has helpfully provided us with a vast amount of preparatory references and writings on the genesis of Art 9 of the Model Law, including the working papers of the UNCITRAL Model Law Working Group and related academic commentaries. These materials show 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. In its "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session" at paras 96 and 169, UN Doc A/40/17, reprinted in [1985] YB of UNCITRAL, vol XVI, UNCITRAL reported as follows:

> 96. … It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure *available* under a given legal system and the granting of such measure by a court of "this State" was compatible with the fact that the parties had agreed to settle their dispute by arbitration. [96]
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> …
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> 169. … It was noted … that article 9 … did not regulate *whether and to what extent* court measures were available under a given legal system but only expressed the principle that any request for, and the granting of, such imterim measure, *if available in a legal system*, was not incompatible with the fact that the parties has agreed to settle their dispute outside the courts by arbitration. [emphasis added]

32 These observations on Art 9 are reflected in "Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General", UN Comm on International Trade Law, 18th Sess, UN Doc A/CN.9/264 (25 March 1985), reprinted in [1985] YB of UNCITRAL, vol XVI, as follows:

> 1. Article 9 relates - like article 8 – to recognition and effect of the arbitration agreement but in another respect. It lays down the principle, disputed in some jurisdictions, that resort to a court and subsequent court action with regard to interim measures of protection are compatible with an arbitration agreement. It, thus, makes it clear that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures. The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results.
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> 2. Article 9 expresses the principle of compatibility in two directions with different scope of application. According to the first part of the provision, a request by a party for any such court measures is not incompatible with the arbitration agreement, i.e. neither prohibited nor to be regarded as a waiver of the agreement. This part of the rule applies irrespective of whether the request is made to a court of State X or of any other country. Wherever it may be made, it may not be invoked or treated as an objection against, or disregard of, a valid arbitration agreement

under "this Law", i.e. in arbitration cases falling within its territorial scope of application or in the context of articles 8 and 36.

3. However, the second part of the provision is addressed only to the courts of State X and declares their measures to be compatible with an arbitration agreement irrespective of the place of arbitration. Assuming wide adherence to the model law, these two parts of the provision would supplement each other and go a long way towards global recognition of the principle of compatibility, which, in the context of the 1958 New York Convention, has not been uniformly accepted.

33 The purpose of Art 9 is clear. It is to declare the compatibility between arbitrating the substantive dispute and seeking assistance from the courts for interim protective measures. For this reason, 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. It can neither subtract nor add to the meaning and effect of s 12(7) which has to be determined by reference to its own language and structure, as well as any other relevant extrinsic matters. We will now examine these matters.

34 As we have stated earlier, the two judges disagree on the scope of s 12(7). Prakash J was not persuaded that it was intended to assist foreign arbitration. Ang J was convinced that it was so intended as there is nothing in s 5(2) of the IAA which limits the definition of "international arbitration" to arbitrations with their seat of arbitration in Singapore. We will now examine the respective merits of the two interpretations and set out our own judgment on these matters.

The purpose of the IAA – why, when and how section 12(7) was enacted

35 In our view, the key to unlocking the true meaning of s 12(7) is to examine the history of why, when and how s 12(7) came to be enacted. Prakash J has alluded to this point in her judgment, but she did not elaborate on or pursue it. Counsel for Magnifica has provided us a great deal of preparatory and legislative materials to guide us in this search. The first noteworthy point is that sub-s (7) (then sub-s (6)), when it was enacted, was inserted as the last subsection of s 12. Unlike the preceding sub-ss (1) to (5), sub-s (7) was not part of the original s 12. In our opinion, this is a significant factor in the search of its original intent. We have mentioned earlier that the original Bill was submitted to the LRC for its consideration, and later revised by the inclusion of, *inter alia*, s 12(7) (then s 12(6)). The Committee has provided an explanatory note on the revisions called "Supplementary Note on Bill" ("the Note"). The Note highlighted three main changes to the original Bill, one of which was the inclusion of sub-s (7). Paragraph 4(c) of the Note provides the explanation for the inclusion as follows:

[A] new clause 12(6) [now s 12(7)] is added *to make clear* the High Court's power to grant curial assistance. This was intended *to avoid any doubt* that the High Court has power to issue interlocutory orders in respect of international arbitrations. [emphasis added]

Meaning and implications of paragraph 4(c) of the Note

36 The quoted words from para 4(c) seem rather confusing. The second part of the quotation appears to suggest that the new cl 12(6) was inserted *ex abundanti cautela* to avoid any doubt that the court already possessed the power to issue interlocutory orders with respect to international arbitrations. The Note apparently misled counsel for Magnifica into arguing before the judge that s 12(7) was merely declaratory of the existing power of the court. Prakash J corrected this submission ([1] *supra* at [42]) where she held that s 12(7) is an enabling provision giving powers to the High Court to assist international arbitrations, powers which, hitherto, it never had. To her mind, the more

important question was the extent of the court's power under s 12(7), *ie,* whether it extends to all international arbitrations, including foreign arbitrations or to a limited category of Singapore international arbitrations.

37 In our view, para 4(c) of the Note is inaptly phrased and was probably intended to say the opposite: that hitherto the High Court did not have any power to grant interim measures to assist international arbitrations, and that s 12(7) was being inserted to make clear that it would have such power and to avoid any doubt that the High Court did not have such power. Confirmation of this intended meaning is found in para 5, read with para 4, of the introduction to the Report with the heading "Summary of Recommendations" ("Summary"). Paragraphs 4 and 5 of the Summary read:

> 4. The powers of arbitrators conferred under the Model Law should be expanded.
>
> 5. The assistance of the Courts should be available to enforce interim orders and/or directions made by arbitrators under the Model Law.

38 Further confirmation of the intended meaning is found in the Report at paras 30 and 31 under the title of "Powers of Arbitrators and Curial Support". These two paragraphs explain clearly why s 12(7) was inserted. They read as follows:

> 30 Arbitrators derived their powers and duties from a combination of agreement and status. An arbitration agreement between two parties becomes trilateral once the arbitrator is appointed. In as much as each party submits to his directions and agrees to be bound by his judgment of the matters in dispute, the arbitrator is also bound to each of the parties to undertake the reference as agreed. An arbitrator's duties thus flow from the conjunction of contract and status of a quasi-judicial adjudicator. The Arbitration Act however gives very limited powers to arbitrators. It is generally accepted that an arbitrator has the power to give directions for the general conduct of the arbitration on matters such as exchange of pleadings, determination of preliminary issues, the use of expert witnesses and fixing hearing dates. Such powers are necessarily implied in the agreement to arbitrate and parties generally would not disagree to their exercise by the arbitrator. The limited statutory powers of arbitrators have, however, been a cause of some concern. There is no authority for the assertion that an arbitrator has inherent procedural powers at common law independently of statute, like those of a Court.
>
> 3 1 *To enable the proper functioning of international arbitrations in Singapore the Committee is of the view that arbitral powers given by statute must be substantially increased*. In this respect, the Model Law provisions should be expanded to include the powers set out in the UNCITRAL Rules, SIAC Rules and such other powers ***as a Court should have***, such as:
>
> (a) orders for preservation, interim custody or sale of any property which are the subject matter of the dispute;
>
> (b) orders for securing the amount in dispute;
>
> (c) orders for ensuring that any award which may be made in the arbitration proceedings is not rendered ineffectual by the dissipation of assets by the other party; and
>
> (d) interim injunctions or other interim orders.
>
> Such powers should be made concurrently by the arbitral tribunal and ***(to the extent that curial intervention is allowed in respect of international arbitrations)*** by the Court, the liberty

being given to either party to choose to make such applications to the Court or the arbitral tribunal as that party deems expedient.

[emphasis added in bold italics]

39 The contents of para 31 of the Report which are summarised in paras 4 and 5 of the Summary set out the reasons why more powers should be given to arbitral tribunals and to the courts to grant interim measures. First, the giving of such powers will enable *the proper functioning of international arbitrations in Singapore,* and not elsewhere. Secondly, the powers are to be *concurrently exercisable* by the courts, so that parties to such arbitrations may choose to seek assistance from an arbitral tribunal or from the court, as they deem expedient. The choice is given only to parties who are arbitrating before an arbitral tribunal in Singapore. Thirdly, the power of the court to grant curial assistance is expressed to be limited "*to the extent that curial intervention is allowed in respect of international arbitrations*" [emphasis added]. It is arguable that the italicised words are intended to limit the court's power to arbitrations where they could be legitimately exercised, and not, for instance, extraterritorially or in arbitral proceedings subject to foreign law as it would intrude into the powers of foreign arbitral tribunals or where its exercise would interfere with the rights of the parties under their own arbitration agreements.

40 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? In the sections following, we will examine five arguments that we consider relevant to answer both the issue of draftsmanship and of the scope of s 12(7). They are set out *seriatim* below, but not in the order of persuasiveness.

Argument from legislative history

41 We have examined in [35] to [39] above, the circumstances leading to the enactment of s 12(7) of the IAA. Its intention was, in the Committee's words, to enable the court, "to enforce interim orders and/or directions made by arbitrators under the Model Law" (see para 5 of the Summary). The Committee's intention was not to give more powers to the court to grant interim orders to assist foreign arbitrations, but to assist international arbitrations conducted by arbitral tribunals in Pt II of the IAA. 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).

Argument from adaptation of section 12(7) of the IAA from section 21(7) of the AA

42 Part II of the IAA applies to "international arbitrations" as defined in s 5(2). This clause was included in the original Bill. The function of s 5(2) was then to define the types of international arbitrations that would fall to be regulated by the other provisions in Pt II of the Bill, *viz*, ss 6, 7, 8, 9, 10, 11 and 12. However, when the Committee implemented para 31 of the Report to give powers to the court concurrent with those given to arbitral tribunals under s 12(1), it had to draft a suitable clause to do it. Not unexpectedly, the Committee adapted s 27(1) of the AA ([23] *supra*) for this purpose. This provision was modified and enacted as s 12(7) of the IAA. Let us see how the Committee modified this provision from the AA (which, it should be mentioned, is applicable only to

domestic arbitrations).

43 Section 27(1) of the AA reads:

> The court shall have, for the purpose of and *in relation to a reference*, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of and in relation to an action or matter in the court: … [emphasis added]

The phrase "a reference" in s 27(1) of the AA means a reference to the arbitrator under the AA. No ambiguity arises from the use of that phrase in s 27(1) of the AA. However, in the context of the IAA, the only reference that is relevant for the purpose of the IAA would be a reference to the arbitral tribunal under Pt II of the IAA. Pursuing this line of reasoning, it would therefore be natural for the Committee to use the phrase "an arbitration to which Part II applies" ("the replacement phrase") in s 12(7) as a substitute for and to equate it with the original phrase "a reference" in s 27(1) of the AA, for the purpose of giving concurrent powers to the court. In our view, this is a reasonable and acceptable explanation for the meaning of the replacement phrase. That this was the intention of the Committee in using the replacement phrase is also consistent with the new clause (6) (sub-s (7)) being placed in a provision, *viz*, s 12, that deals exclusively with the powers of arbitral tribunals conducting international arbitrations in Singapore. In our view, the placement of sub-s (7) in s 12 of the IAA raises a legitimate question why, if sub-s (7) was not intended to apply only to arbitral tribunals, it was not enacted as an independent provision to avoid any ambiguity that might arise as to its intent. Again, in our view, this argument, by itself, may not be a sufficient answer to the plain meaning of s 12(7).

Argument from placement

44 Prakash J gave considerable weight to the placement of s 12(7) as an indication of Parliament's intention for it not to apply to foreign arbitrations. As ss 12(1) to 12(6) deal only with the powers of arbitral tribunals under Pt II of the Act, it would be incongruous for s 12(7) to travel outside the limits of the preceding subsections. In her view, construing s 12(7) to give the court concurrent powers would go far beyond its stated purpose of reinforcing the procedural orders given by arbitral tribunals under s 12(1). In our view, this is a reasonable conclusion in the light of one other consideration that Prakash J had already stated, *viz*, in her own words ([1] *supra* at [49]):

> If 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 to imply it from the use of the words "[an arbitration] to which this Part applies" or from the fact that Art 9 of the Model Law envisages that courts may make such orders. [emphasis added]

In other words, she considered it most unlikely, in the absence of clear words, that Parliament would have given the courts power to assist foreign arbitrations when Parliament had yet to give the court power to assist foreign *court* proceedings. We should mention, at this juncture, that Ang J disagreed with the premise of this argument. In *Front Carriers* ([4] *supra*), she ruled that under s 4(10) of the CLA the court does have power to grant interlocutory orders to assist foreign court proceedings provided the court has personal jurisdiction over the defendant in respect of a justiciable cause of action in a Singapore court. Hence, the force of the argument in this section depends on whether Prakash J or Ang J is correct in law. This point will be examined later.

The argument from extraterritoriality

45 When analysing the content of ss 12(1)(*a*) to 12(1)(*j*), Prakash J also questioned whether Parliament had intended Singapore courts to be able to do such things as order security for costs (s 12(1)(*a*)) or make orders either for discovery of documents (s 12(1)(*b*)) or for the preservation and interim custody of evidence (s 12(1)((*d*)) to assist foreign arbitrations. She considered that applying the powers in ss 12(1)(*a*) to 12(1)(*i*) to foreign arbitrations would amount to legislating extraterritorially, which, in her view, "the Singapore legislature has no power" to do. For this reason, she ruled that an arbitration agreement that is "international" as defined in s 5(2) of the IAA carries with it the implication that it refers to an international arbitration with its seat in Singapore. In other words, the definition must be read down to ensure that it does not have extraterritorial application. She also observed that Parliament did not appear to have considered the possible extraterritorial ramifications of s 12(7), read with s 5(2): the debate in Parliament was focused entirely on promoting international arbitration in Singapore and no mention was made on the subject of assisting foreign arbitrations.

46 In our view, Prakash J's refusal to attribute to Parliament an intention to effect such a radical change in the law is understandable. However, we should note that her statement that Parliament has no power to make rules relating to foreign arbitrations is incorrect as a matter of constitutional law. What she probably meant to say was that a court has no power to make orders against persons outside its territorial jurisdiction unless authorised by statute, *ie*, that there is no inherent extraterritorial jurisdiction: see Lord Mustill in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 297. But that does not detract from her central point that, unless provided otherwise, Singapore law has no extraterritorial application. In *Holmes v Bangladesh Biman Corporation* [1989] 1 AC 1112, Lord Griffiths said, at 1137–1138:

> The basis of the rule that statutes do not have extraterritorial effect is the presumption that our own Parliament will not seek to intervene in matters that are legitimately the concern of another country. Countries respect one another's sovereignty and the right of each country to legislate for matters within their own boundaries.

However, we are of the view that this argument in the way it has been expressed may not by itself, be sufficient to prevail over the plain meaning of s 12(7).

47 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 Betty Construction Ltd* [1993] AC 334 ("*Channel Tunnel*") at 365:

> 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 provide non-intrusive assistance to foreign arbitration. We consider this argument next.

Argument against interfering with rights of parties and intruding into powers of foreign arbitral tribunals

48 Prakash J alluded to this issue in her grounds of decision where she questioned whether Parliament had intended for Singapore courts to intervene in foreign arbitrations with respect to its powers in ss 12(1)(*a*) to 12(1)(*i*). However, she did not pursue this question further. The nature of this objection can be appreciated if we posit a scenario in which Swift-Fortune had applied under s 12(7) for an order that the parties give evidence by affidavits or that Magnifica give full discovery of documents or answer interrogatories pursuant to s 12(1) of the IAA. On Swift-Fortune's interpretation of s 12(7), the court would have power to make such orders. This result has two implications. First, it will mean that these statutory powers have been impliedly incorporated into the arbitration agreement between the parties, whether or not they had agreed to them. Secondly, the exercise of such powers may cut across or intrude into the powers of the foreign arbitral tribunal conducting the arbitration under a foreign law. Given these implications, the question that naturally arises is whether Parliament intended s 12(7) to have this effect.

49 A similar issue arose in *Channel Tunnel* in connection with s 12(6)(h) of the 1950 Act ([23] *supra*). The appellants made two arguments that an English court had the power to grant an interim injunction in aid of an arbitration in Belgium under that provision. Lord Mustill dealt with the first argument as follows, at 357–360:

> The main problem with the claim based on s 12(6)(*h*) is to decide whether this provision has any application at all to an arbitration agreement of the type contained in clause 67 of the construction contract. The respondents say that it has none, because the clause contemplates a foreign arbitration, which is outside the scope of this particular part of the Act of 1950.
>
> …
>
> … In my opinion, when deciding whether a statutory or other power is capable of being exercised by the English court in relation to clause 67, and if it is so capable whether it should in fact be exercised, the court should bear constantly in mind that English law, like French law, is a stranger to this Belgian arbitration, and that the respondents are not before the English court by choice. In such a situation the court should be very caution in its approach both to the existence and to the exercise of supervisory and supportive measures, *lest it cut across the grain of the chosen curial law.*
>
> Thus, in the present instance I believe that we should approach section 12 of the Act of 1950 by asking: can Parliament have intended that the power to grant an interim injunction should be exercised in respect of an arbitration conducted abroad under a law which is not the law of England? For an answer to this question one must look to the origins of s 12, which lie in section 2 of the Arbitration Act 1889. This provided:
>
> > 2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act …
>
> The Schedule comprised a list of nine statutory implied terms. Two of these (paragraphs (*a*) and (*b*)) related to the constitution of the arbitral tribunal. Those imposed by paragraphs (*c*), (*d*) and (*e*) were concerned with the time for making the award. Paragraph (*f*) dealt compendiously with the examination of the parties on oath, with production of documents, and with the general duty to 'do all other things which during the proceedings on the reference the arbitrators or umpire may require.' Paragraph (*g*) empowered the arbitrators to examine on oath witnesses other than the parties. Paragraph (*h*) stipulated that the award was to be final and binding, and paragraph (*i*) empowered the arbitrators to make orders for costs, and to tax or settle the amount of costs.

It seems to be absolutely plain for two reasons that Parliament cannot have intended these provisions to apply to a foreign arbitration. The first reason is that the chosen mechanism was to make these provisions into implied terms of the arbitration agreement, and such terms could not sensibly be incorporated into an agreement governed by foreign domestic arbitration law *to whose provisions they might well be antithetical*: see, for example, the provisions concerning the administration of oaths, discovery and orders for costs.

Secondly, section 2 of the Act of 1889, unlike section 12 of the Act of 1950, was concerned exclusively with the internal conduct of the arbitration, and not at all with any external powers of the court. I can see no reason why Parliament should have had the least concern to regulate the conduct of an arbitration carried on abroad pursuant to a foreign arbitral law. …

When we turn to the Act of 1934, which introduced a miscellaneous series of amendments, we find that the list of statutory implied terms relating to the powers of arbitrators, contained in the Schedule to the Act of 1889, was enlarged by the addition of the powers to order specific performance and to make an interim award. In addition, section 8(1) provided that in relation to the matters set out in this Schedule to the Act of 1934:

> (1) The Court shall have, for the purpose of and in relation to a reference, the same power of making orders … as it has for the purpose of and in relation to an action or matter in the court …

The powers listed in the Schedule were the same as those now set out in section 12(6) of the Act of 1950. Quite plainly the reference to 'the court' was to an English court, and when one looks at the items on the list (such as the ordering of discovery and interrogatories) it is easy to see that they were concerned with powers which the English court would never at that time even have thought of exercising in relation to actions in a foreign court. *This being so, I can see no reason why the legislature should have wished to make the powers available to the court in respect of a [sic] foreign arbitrations. Indeed it appears from paragraphs 30 and 31 of the MacKinnon committee's report that notwithstanding the width of its terms of reference the committee chose not to deal with foreign arbitrations.*

… The Act of 1950 was a consolidating statute which merely rearranged and in some instances reworded the existing legislation, and it cannot have had the effect of enlarging the categories of arbitration to which the former legislation applied. *In these circumstances I consider that none of the terms of the Act of 1950, of which the provisions cited from the Acts of 1889 and 1934 were the precursors, apply to foreign arbitrations and that since these include section 12(6), the power conferred by section 12(6)(*h*) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present.*

[emphasis added]

50 The second argument was in relation to the long-established principle endorsed by Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 that an English court had no supervisory power over the conduct of arbitration proceedings more extensive than the powers conferred by the powers of the Arbitration Acts. The appellants had argued that this principle applied in that case. Lord Mustill rejected this argument for two reasons, one of which was as follows ([47] *supra* at 364):

> Secondly, the injunction claimed in *Bremer Vulkan* would have involved a direct interference by the court in the arbitral process, and thus an infringement of the parties' agreement that the

conduct of the dispute should be entrusted to the arbitrators alone, subject only to the limited degree of judicial control implicit in the choice of English law, and hence of English statute law, as part of the curial law of contract. The purpose of interim measures of protection, by contrast, 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 on the substance of the dispute. *Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration*. [emphasis added]

51 We have cited Lord Mustill's speech *in extenso* because his reasoning on the inapplicability of s 12(6) of the 1950 Act to foreign arbitrations applies equally to s 12(7) of the IAA. It may be recalled that s 12(7) was adapted from s 12(6) of the AA (which itself was adapted from s 12(6) of the 1950 Act). We highlight the following similarities between the effect of s 12(6) of the 1950 Act and s 12(7) of the IAA, and some additional points pertinent to the object of the IAA:

(a) If s 12(7) is given a plain meaning, ss 12(1)(*a*) to 12(1)(*i*) would become statutorily implied terms in all foreign arbitration agreements.

(b) Some such terms (*eg*, the ordering of discovery or interrogatories or security for costs) may be antithetical to the curial law chosen by the parties.

(c) Any such orders granted by a Singapore court on these matters may cut across the grain of the chosen curial law and interfere with the powers of the foreign arbitral tribunal.

52 Having regard to these considerations, it is clear that if a literal interpretation is given to the phrase "an arbitration to which Part II applies" in s 12(7), that phrase would allow the courts to exercise powers that would be contrary to the spirit of international arbitrations. On the other hand, if s 12(7) is read to apply to Singapore international arbitrations only, these difficulties would not arise. This, in our view, is a compelling reason for concluding that Parliament could not have intended s 12(7) to apply s 12(1) to foreign arbitrations.

53 Counsel for Swift-Fortune, in support of his plain meaning argument, has also relied strongly on Lord Mustill's statement in the passage we have cited earlier from *Channel Tunnel* (at [47] above) that there can be no objection in principle to the English courts granting interim protective orders, such as a Mareva injunction, to assist foreign arbitrations which do not intrude upon the powers of foreign arbitrators or the foreign arbitration itself. A Mareva injunction merely enhances the efficacy of foreign arbitrations and does not regulate, restrict, stifle or otherwise control the conduct of the foreign arbitration. Ang J also referred to Lord Mustill's reasoning in reaching the same conclusion: see *Front Carriers* ([4] *supra*) at [27]. However, this argument ignores the critical proviso to Lord Mustill's statement at 365, *ie*:

Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

54 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. 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". 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. Ang J appears to

recognise this weakness in her reasoning as is evident from the limitation she placed on the kind of measures the court may grant under s 12(7): see *Front Carriers* at [26]. But this is not possible. As matters stand, Swift-Fortune's interpretation of s 12(7) leaves it holding too many bad cards. The argument is ultimately self-defeating in over-reaching itself.

55 Finally, apart from the intrusive effect that s 12(7) would have were it given a plain meaning, we would still have great difficulty in accepting an argument that implies that Parliament had enacted s 12(7) with the intention of permitting the courts to become universal providers of procedural orders and reliefs to assist all anticipated or ongoing international arbitrations (as defined in s 5(2) of the IAA) in any country in of the world, whether or not they are Model Law states or signatories to the New York Convention.

Sections 6 and 7 of the IAA

56 Counsel for Swift-Fortune has also contended that since ss 6 and 7 of the IAA (which are in Pt II) apply to all international arbitrations as defined in s 5(2) of the IAA, Pt II would be internally inconsistent unless s 12(7) is read to apply to all international arbitrations. Such a result should be avoided, and this can be done if the provisions were read harmoniously. Magnifica's response, *a contrario,* is that ss 6 and 7 are exceptional provisions designed to cater to two specific situations as recommended by the Committee. It is further argued that ss 6 and 7 are consistent with s 12(7) applying only to Singapore international arbitrations as the claimant to whom s 6 or s 7 applies would have submitted to the jurisdiction of the court by invoking its jurisdiction, and thereby enabling the court to exercise the powers specifically prescribed in those provisions. With respect to this issue, Prakash J said ([1] *supra* at [45]):

> First, both sections contemplate a situation in which the parties initiating the proceedings concerned have validly invoked the court's jurisdiction in respect of a substantive dispute that is amenable to the jurisdiction, and therefore, had the application for a stay not been requested, the court could have gone on to deal with the merits of the dispute and enter a final judgment in respect of the same. Such final judgment would have an impact on the property referred to in s 6(3) or the arrested vessel mentioned in s 7(1). Thus, it is not unreasonable to give the court power to make its stay conditional on terms relating to such property or vessel. Secondly, in relation to s 7(1) itself, it bears mentioning that this was the result of a specific recommendation of the Committee. It considered that provision should be made to allow ships arrested under the High Court's admiralty jurisdiction to be used as security pending foreign arbitrations. …There is nothing in the Committee's report to indicate that in making this recommendation, it was considering giving the court power to issue a Mareva injunction against assets in Singapore to support a foreign arbitration.

57 Ang J's view on ss 6 and 7 is that both are reconcilable with s 12(7) applying to foreign arbitration and that the purpose of s 7 is to do away with the *Rena K* test (*The Rena K* [1979] QB 377: see *Front Carriers* [4] *supra* at [28]). With respect, we are not persuaded that the existence of ss 6 and 7 supports Swift-Fortune's argument. In our view, s 12(7) is consistent with ss 6 and 7 only because, whatever its purpose may be, it does not deal with the situations that ss 6 and 7 deal with. Section 12(1) does not deal with a stay of proceedings to enable the dispute to be referred to arbitration as s 12(1) itself is predicated on the existence of arbitral proceedings. Furthermore, s 12(1) is not concerned with admiralty jurisdiction, which belongs exclusively to the High Court. The Committee addressed this issue specifically and recommended that ships arrested under the High Court's admiralty jurisdiction should be made available in aid of international arbitration. We may add that if Swift-Fortune's interpretation of s 12(7) is correct, there would have been less concern on the part of the Committee on the arrest of ships in Singapore waters as the court would

have been able to grant interim protective orders against the movement or disposal of the ship. In other words, it is only because s 12(7) does not apply to foreign arbitrations that it was necessary to enact s 7.

58 For the above reasons, we agree with Prakash J's views on ss 6 and 7 of the IAA. We should also point out that ss 6 and 7 were part of the original Bill that was later amended with the inclusion of s 12(7). This shows that ss 6 and 7 were necessary provisions in the first instance and therefore the later addition of s 12(7) cannot affect the reasons for including them in the original Bill. It should also be noted that ss 6 and 7, by themselves, provide all the interim relief that is necessary to protect the claims of the claimants until the disposal of the substantive claims. It is not necessary to resort to s 12(7) for any additional relief or measures to protect his claims pending the disposal of the arbitral dispute. Hence, for this reason also, the existence of ss 6 and 7 cannot affect the interpretation of s 12(7) of the IAA.

The decision of this court on the scope of section 12(7) of the IAA

59 In our view, the collective weight of the reasons given in [40] to [58] above, but in particular the implications of the over-reaching argument of counsel for Swift-Fortune, we agree with the decision of Prakash J and hold that s 12(7) was not intended to apply to foreign arbitrations but only Singapore international arbitrations. For this reason, s 12(7) does not give power to the court to grant interim measures, including Mareva interlocutory relief, to assist foreign arbitrations. But for another reason which is discussed in [60] to [61] below, s 12(7) does not independently confer on the court any power which it does not have in relation to a cause of action or proceeding before it.

What is the scope of section 12(7) of the IAA in relation to the court's power to grant interim measures?

60 At this juncture, we would like to consider one other issue on interpretation in connection with the second qualifier in the text of s 12(7) of the IAA. Prakash J held that s 12(7) is an enabling and not a declaratory provision, without determining what is being enabled. Ang J however ([4] *supra* at [18]) paraphrased s 12(7) to mean that the court has the power to make for the purpose of and in relation to foreign arbitration orders those matters (like those under ss 12(1)(*g*), 12(1)(*h*) and 12(1)(*i*)) which it could have made *if the matter referred to arbitration had been tried as a court action.* This meaning carries with it two implications: first, s 12(7) is an independent source of statutory power for the court to grant the orders or reliefs set out in s 12(1), and secondly, the arbitral dispute is to be treated as if it were a cause of action being heard in a court of law. Is this a correct paraphrase of the second qualifier in s 12(7)? This is not an academic question. It is an important question because if Prakash J was wrong on this point, it would have meant that even if Swift-Fortune were to succeed on the interpretation issue regarding s 12(7), it would still have to cross another hurdle.

61 It is necessary to take another look at s 12(7). It provides:

> 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]

On the face of s 12(7), the meaning of the second qualifier (the italicised words) does not seem to be that as paraphrased by Ang J. Section 12(7) does not say that the arbitral dispute is to be treated as if it were a cause of action before the court for the purpose of determining whether the court has

power to make orders in respect of the matters set out in s 12(1). What it says is that the court's power to make orders in respect of any of the matters set out in sub-s (1) is the same as the court's power to make orders in relation to an action or matter in the court. In other words, what s 12(7) says and means is 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 Pt II applies. This means that s 12(7) does not independently confer any power on the court in the same way that ss 12(1) to 12(6) independently confer new powers on arbitral tribunals.

62 It follows that the court's power under s 12(7) has to be found in another statutory source. In the context of this case, that source can only be s 4(10) of the CLA, read with s 18(1) of the SCJA. This means that for the purposes of s 12(7) of the IAA, we must look to s 4(10) as the source of statutory power for the court to grant interlocutory relief, including Mareva injunctions, in aid of foreign proceedings. If the court has such power with respect to foreign court proceedings, then it has similar power with respect to arbitral proceedings governed by the IAA. We should add that this conclusion is also consistent with the general understanding in 1994, *ie*, the decision of the House of Lords in *Channel Tunnel* ([47] *supra*) that the *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: see *Karaha Bodas* ([4] *supra*) at [38].

63 For the sake of completeness, we would mention that apart from s 4(10) of the CLA, the only other source of statutory authority of the court's power to grant interlocutory relief in aid of arbitration proceedings is s 31 of the Arbitration Act (Cap 10, 2002 Rev Ed) read with s 4(10) of the CLA. Prior to amendments made to the AA in 2002, s 31 was numbered s 27(1), which was the source of s 12(7) of the IAA. As the AA applies only to domestic arbitrations, it is irrelevant to this appeal. It is now necessary to examine the scope of s 4(10) of the CLA.

Power under s 4(10) of CLA

64 In respect of court proceedings, the source of the court's power to grant interlocutory injunctions is s 4(10) of the CLA ([2] *supra*). This provision was originally enacted as s 2(8) of the Straits Settlements Ordinance No IV of 1878 (which itself was a re-enactment of s 25(8) of the Judicature Act of 1873 (36 & 37 Vic c 66) ("the English 1873 Act"). Subsequently, it was re-enacted (and renumbered) as s 5(7) of the Civil Law Ordinance of 1909 (SS Ord No VIII of 1909), and as s 4(8) of the Civil Law Ordinance of 1926 (SS Ord No 111, vol 3, 1926 Ed). It then read:

> A mandamus 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.

This section remained unchanged until 2005 when the expression "mandamus" was replaced by the expression "mandatory order", and the section renumbered as s 4(10). This provision gives power to the court to grant only interlocutory injunctions. The power to grant final injunctions is found in para 14 of the First Schedule to the SCJA.

65 There were no legal developments affecting the court's power under s 4(10) until the early 1980s when, in line with the decisions of English courts under the equivalent English provision, our courts invoked s 4(10) as the statutory source of power to grant Mareva injunctions in court proceedings: see *Art Trend Ltd v Blue Dolphin (Pte) Ltd* ([29] *supra*) at 366, [27], where Lai Kew Chai J said:

> Mareva injunctions have been issued by the High Court of Singapore for some years now. They

> have been issued under s 4(8) of the Civil Law Act (Cap 30). The subsection in terms is equivalent to the former s 45 of the English Supreme Court of Judicature (Consolidation) Act 1925, since replaced and expanded. The latter provision was the basis of an injunction, later known by the sobriquet Mareva injunction, was for the first time granted in England in May 1975: see Colin Ying, *The Mareva Injunction and Pre-trial Attachment* [1981] 2 MLJ cvii.

In that passage, Lai J noted the correspondence between the Singapore and the English provisions (the latter having been authoritatively interpreted in *The Siskina* ([4] *supra*)). In his article referred to in the quotation above, Colin Ying has argued that s 4(10) allowed a Singapore court to grant Mareva injunctions but subject to the prerequisites laid down by Lord Diplock in *The Siskina.* One such requisite is that the court must have jurisdiction over the substantive claim.

Karaha Bodas Co LLC v Pertamina Engergy Trading Ltd

66 In *Karaha Bodas* ([4] *supra*), this court applied the principle in *The Siskina* that a court had no power to grant Mareva interlocutory relief unless the defendant was "amenable to the jurisdiction of the court" in respect of a substantive cause of action. In that case, the appellants had obtained an arbitral award in Hong Kong against the respondents' holding company ("Pertamina"), an Indonesian company. The appellants obtained a garnishee order against the respondents ("Petral"), a Hong Kong company, attaching the debts owing by Petral to Pertamina. The appellants then discovered that Petral's wholly-owned Singapore subsidiary ("PES") also owed money to Petral. The appellants then obtained an *ex parte* Mareva injunction against Petral and PES and also leave of the court to serve the proceedings on them. They applied to set aside the proceedings, including the Mareva injunctions. Prakash J, accurately summarised the ratio of the case at [32] of her grounds of decision ([1] *supra*):

> In *Siskina v Distos Cia Naviera SA* [1979] AC 210, the English House of Lords decided that a court could not (in the absence of express statutory authority) grant Mareva interlocutory relief unless the defendant was "amenable to the jurisdiction of the court" in respect of a substantive cause of action. This principle was followed in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112, a Court of Appeal decision which held that a Singapore court could not assume jurisdiction over a foreign defendant simply because he had assets within the territorial jurisdiction that could be the subject of an injunction order, and that in order to apply for Mareva relief against such a defendant, the plaintiff has to possess an accrued right of action in Singapore based on an existing legal or equitable right against the foreign defendant. Thus, this court cannot grant Mareva relief in respect of the Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign court proceedings.

Accordingly, this court set aside the proceedings and the Mareva injunctions: (a) as against Petral, on the ground that there was no substantive claim against Petral at all, whether in Singapore or Hong Kong; and (b) as against PES, on the ground although the court had personal jurisdiction over PES, there was no accrued cause of action in Singapore, or even in Hong Kong against PES.

67 In *Karaha Bodas,* the court did not have to consider the question whether a Singapore court had the power to issue a Mareva injunction in aid of a foreign arbitration. However, the court adverted to the issue with this observation (at [45]):

> There has been considerable debate on the extent to which this principle [that the court had no jurisdiction to preserve assets within England in order to support the plaintiff in a claim he was making in a foreign arbitration] *is still in force.* [emphasis added]

The implication of this statement is that this court understood that there was such a principle under English law.

68 In the present case, Prakash J was very much troubled by this point in relation to Swift-Fortune's argument that s 12(7) of the IAA has given such jurisdiction to the court. She was sceptical of this argument as, in her view, under existing law the court does not even have the power to grant such an injunction in aid of foreign *court proceedings.* She found it difficult to accept that Parliament could have intended s 12(7) of the IAA to have such a wide application when at the same time the court was powerless to grant the same relief to assist foreign court proceedings. However, it is not clear from the grounds of decision in *Karaha Bodas* that this court had also endorsed this view, as on the facts before the court, this point also did not arise.

69 In *Front Carriers* ([4] *supra*), Ang J took the view that she was not bound by *Karaha Bodas,* distinguishing it on the ground that there the court was not asked to grant a Mareva injunction to support a foreign arbitration (which had already been completed in Hong Kong), but the enforcement of the arbitration award (which was in the nature of court proceedings). On first impression, it would seem that the distinction cannot be supported in logic or in law. If the court has no power to grant a Mareva injunction to support foreign proceedings under s 4(10) of the CLA, *a fortiori* it could not do so in aid of foreign arbitration proceedings. However, a closer examination of the facts in *Front Carriers* shows that Ang J's refusal to be bound by *Karaha Bodas* is justified by a critical difference of fact between the two cases (which we have earlier pointed out in [6] above). In *Karaha Bodas,* the plaintiff did not have an accrued cause of action against the defendant that was recognisable by a Singapore court. This is also the factual situation in the present case where Swift-Fortune also did not have an accrued action recognisable by a Singapore court. This factual difference would also explain Prakash J's observation about the powerlessness of the court to grant a Mareva injunction under s 4(10) in the present case.

70 In contrast, in *Front Carriers,* Ang J found as a fact that the plaintiff had an accrued cause of action against the defendant that was subject to the jurisdiction of the Singapore court. For this reason, Ang J was not wrong to distinguish *Karaha Bodas* on the ground that it was not concerned with a foreign arbitration. It was therefore open to her to interpret s 4(10) of the CLA in the light of the decision of the House of Lords in *Channel Tunnel* ([47] *supra*). In that case, the accrued cause of action was justiciable in an English court but had been referred to arbitration in Brussels pursuant to the underlying contract. In other words, the material facts in both cases are similar. In *Channel Tunnel*, the House of Lords held that the English court had power under s 37(1) of the Supreme Court Act 1981 (c 54) (UK) ("the English 1981 Act") (which corresponded to s 4(10) of the CLA) to grant Mareva interlocutory relief to assist a foreign arbitration so long as it retained some form of jurisdiction over the substantive claim. In a case where the parties have agreed to refer the substantive dispute to foreign arbitration, the retention of a *residual* jurisdiction would be sufficient to enable the court to exercise such power. It is on this basis that Ang J held that s 4(10) of the CLA, read with Art 9 of the Model Law, conferred a general power on the court to grant Mareva relief in support of foreign arbitration. We will come back to this issue later (at [86]).

The House of Lords decision in Channel Tunnel

71 Since this appeal is not an appeal against the decision of Ang J, it is not really necessary for this court to consider further whether she was correct in interpreting s 4(10) in the way she has done. But since we have heard arguments from counsel for Swift-Fortune in support of her decision, we think it is desirable to examine the decision in *Channel Tunnel* for its effect on *The Siskina* doctrine.

Overview of Mareva injunctions in England

72 It is well known that it was the English Court of Appeal, and in particular Lord Denning MR, who fashioned the Mareva injunction against foreign parties out of the words of s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49) (UK) ("the English 1925 Act"). In the case that gave the name to the injunction, *viz*, *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, Lord Denning asserted that s 45 of the English 1925 Act gave the court a wide general power to grant protective injunctions. However, later decisions held that the predecessor of s 45, *viz*, s 25(8) of the English 1873 Act did not confer any additional jurisdiction on the court, and that that section dealt only with procedure and had nothing to do with jurisdiction: see *Gouriet v Union of Post Office Workers* [1978] AC 435 at 516. Doubts were also expressed as to the power of the English court to grant Mareva injunctions against non-residents, and this led to the enactment of s 37(3) of the English 1981 Act (which has no equivalent in Singapore) to give the court express authority in this regard.

The Siskina doctrine and subsequent developments in England

73 In *The Siskina* ([4] *supra*), the plaintiffs, who had no cause of action against the defendants which was justiciable in England, but only an arbitral claim outside England, issued a writ against the defendants and applied for a Mareva injunction to restrain the defendants from remitting abroad the proceeds of insurance held in England. The House of Lords refused leave, holding that there was no jurisdiction to commence proceedings in England, and that no leave could be granted under O 11 r 1(1)(*i*) to serve the writ out of the jurisdiction unless the plaintiff had a substantive cause of action against the defendant enforceable by an English court. With reference to the power of the English court to grant injunctions, Lord Diplock, after referring to s 45(1) of the English 1925 Act which provided as follows:

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

said (at 254):

> That subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, *claiming substantive relief which the High Court has jurisdiction to grant* and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which *Mareva* injunctions have been granted. [emphasis added]

74 The doctrine in *The Siskina* was subsequently followed and applied in many English decisions and also widely followed in Commonwealth jurisdictions that had imported s 45(1) of the English 1925 Act. It was generally accepted that a court has no power to grant free-standing interlocutory relief brought in proceedings claiming only that type of relief. The plaintiff must have a pre-existing claim or right that is justiciable in an English court and the defendant must be amenable to the jurisdiction of the court. However, according to Steven Gee, *Gee on Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at p 21, the position in England in relation to free-standing interlocutory relief has been eroded by a succession of developments. The first is s 25 of the Civil Jurisdiction and Judgments Act 1982 (c 27) (UK) ("the English 1982 Act"). This provision confers a statutory jurisdiction to interlocutory relief including Mareva relief in aid of proceedings brought or to be brought before a contracting state. The second is the decision in *Channel Tunnel* ([47] *supra*) in recognising that the court has jurisdiction to grant interlocutory relief in substantive proceedings brought in England, even though the proceedings were stayed to allow the claim to be resolved by arbitration abroad. The third development is the enactment of the Arbitration Act 1996 (c 23) (UK), in which s 44 permitted the

court to grant free-standing Mareva relief in relation to arbitral proceedings wherever the seat of arbitration is or even if no seat has been designated or determined. Finally, in 1997 the Interim Relief Order (SI 1997/392) made under the English 1982 Act empowers the court to grant interim relief under s 25(1) of the English 1982 Act in relation to "proceedings" regardless of where they are commenced. The earlier difficulties relating to service outside the jurisdiction under O 11 were also resolved by a new rule permitting such service. Today there is no longer any issue in England as regards the power of the court to grant free-standing interlocutory relief, including Mareva injunctions to assist court proceedings as well as foreign arbitrations.

Effect of Channel Tunnel on The Siskina

75 With this backdrop, it is now convenient to backtrack to consider what the House of Lords decided in *Channel Tunnel* ([47] *supra*). In that case, litigation arose out of a contract to build the Channel Tunnel. Disputes were to be resolved by an arbitral tribunal sitting in Brussels. A dispute arose and the builders (the defendants) threatened to stop work. The claimant employers sought an interlocutory injunction under s 37(1) of the English 1981 Act (which replaced, with modifications, s 45 of the English 1925 Act) to restrain the defendants from stopping work while the underlying dispute was being referred to Brussels for arbitration. The House of Lords held that the court had jurisdiction to grant the interlocutory injunction although the injunction was not ancillary to a claim for substantive relief to be granted in England by an order of the English court (the dispute having been referred to arbitration in Brussels). The basis of this ruling was that the English court retained a *residual* jurisdiction over the underlying cause of action.

76 Lord Browne-Wilkinson accepted that the *The Siskina* doctrine required the plaintiff to have a substantive claim before the court and that the defendant must be amenable to its jurisdiction before the court could grant a Mareva injunction. However, his Lordship did not agree that *The Siskina* had decided that the substantive claim must be decided by an English court. In his view, it was not necessary that the substantive claim must result in an English judgment. The relevant question was whether the English court had power to grant the substantive relief, not whether it would in fact grant it. He was of the view that the court's power under s 37(1) of the English 1981 Act to grant Mareva interlocutory relief ancillary was not so confined. It did not matter if the final order is made by the English court or some other court or arbitral tribunal, so long as there is a pre-existing cause of action subject to English jurisdiction.

77 Lord Mustill also rejected the argument that *The Siskina,* and its line of authorities meant that the English court could never grant an injunction in support of a cause of action which the parties had agreed to refer to arbitration abroad, and *a fortiori* where the court itself had halted the proceedings in England. His Lordship continued ([47] *supra* at 362):

> For present purposes it is sufficient to say that the doctrine of the *Siskina,* put at its highest, is that *the right to an interlocutory injunction cannot exist in isolation*, but is always incidental to and dependant on the enforcement of a substantive right which usually although not invariably takes on the shape of a cause of action. *If the underlying right is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) by way of interim relief.* [emphasis added]

Lord Mustill held that the doctrine in *The Siskina*, so restated, had no application to the instant case as the court continued to retain *residual* jurisdiction over the substantive right. His Lordship proceeded to explain his decision by three incremental illustrations as follows:

(a) where a contract entirely English in all respects is subject to an agreement for

arbitration in London: in this case, the court continues to have jurisdiction over the dispute, whether or not there is application for a stay;

(b) a similar contract but where one party is a national of a foreign state: the arbitration agreement ceases to be domestic, but the cause of action is still "potentially justiciable" by the English court, and will be adjudicated upon if there is no stay; and

(c) a contract with an arbitration agreement calling for arbitration abroad.

78 With respect to the first two illustrations, Lord Mustill said that the *The Siskina* restrictions on the grant of an interlocutory injunction did not apply. In the case of the third illustration, his Lordship (after stating that an arbitration agreement providing for arbitration in London justified the inference of English law as the substantive proper law of the contract, and hence giving the court jurisdiction over the cause of action), said (at 363):

> If the seat of arbitration is abroad *this source of jurisdiction is cut off, and the inhibitions created by the* Siskina *authorities will preclude the grant of an injunction*. Nevertheless, *if the facts are such that the court has jurisdiction in some way other than the one just described* I can see no reason why the additional foreign element should make any difference to the *residual jurisdiction of the court over the dispute*, and hence to the existence of the power to grant an injunction in support. So also in the present case. [emphasis added]

79 After *Channel Tunnel* and until the enactment of the UK Arbitration Act 1996, the position in England was that the court had power to grant Mareva injunctions in aid of foreign court or arbitral proceedings if the substantive claim was justiciable in an English court. *Channel Tunnel* clarified and circumscribed the doctrine in *The Siskina* to the extent stated, but the prerequisite that the court must have jurisdiction over the cause of action, even if on a *residual* basis, remained intact.

80 It seems clear to us that the House of Lords in *Channel Tunnel* was strongly influenced not only by their own worldview of the role of the English courts in international dispute resolution, but also by the judicial philosophy that curial assistance should be given to foreign court or arbitral proceedings to ensure that justice was done. In *Channel Tunnel,* Lord Goff of Chieveley said (at 341):

> I add a few words of my own on the submission that the decision of this House in [*The Siskina*] would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such injunction were otherwise appropriate. If correct, this submission would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. 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.

The debate in Mercedes Benz

81 It may be recalled that in *Karaha Bodas* ([4] *supra*), this court referred to an ongoing debate on the limits of the *The Siskina* doctrine. That was a reference to the dissenting judgment of Lord Nicholls of Birkenhead in *Mercedes Benz* ([46] *supra*) which this court had referred to in *Karaha Bodas. Mercedes Benz* is a decision on the application of O 11 of the Hong Kong Rules of the Supreme Court (corresponding to the English O 11 and also our O 11). In that case, the appellant had sued the first respondent in Monaco on a dishonoured promissory note (given against money advanced) and

had obtained an order attaching its assets, but the order did not extend to the assets of the second defendant, a Hong Kong company, that the appellant had received part of the money. The appellant then applied *ex parte* to the High Court of Hong Kong for and obtained a worldwide Mareva injunction restraining both respondents from dealing with any of their assets, including the first respondent's shares in the second respondent. There was no claim for any substantive relief. The first respondent applied to have the *ex parte* order discharged on the ground that the court had no jurisdiction over him. The High Court set aside the ex parte order, and this was affirmed by the Court of Appeal. The Privy Council (by a majority) dismissed the further appeal. Lord Mustill analysed the competency of the court to grant a Mareva injunction in circumstances where the defendant has assets within the jurisdiction but where the plaintiff has no cause of action within the jurisdiction as an issue that is concerned, first, with territorial jurisdiction over the defendant, and second, power to grant a Mareva injunction against the defendant.

82 On the first question, Lord Mustill (delivering the majority judgment) confirmed the correctness of *The Siskina* and held that O 11 r 1 did not permit the service outside the jurisdiction of a writ claiming Mareva relief alone because a claim for such relief was not a claim of that character, and that the claim for such relief did not fall within O 11 r 1(m) because it was not brought to enforce anything but to prepare the ground for a possible execution by different means in the future, and there was, in any event, no judgment in existence to enforce.

83 As the second question of power did not arise, Lord Mustill preferred to express no conclusion on it, but thought it proper to make the following observation at 304:

> It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court, be it in Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain *Mareva* relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend on the susceptibility of the defendant to personal service. Their Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of R.S.C., Ord. 11, r. 1(1), a result could be achieved which for the reasons already stated is not open on the present form of the rule.

84 Lord Nicholls delivered a strong dissenting judgment and said (at 314) that, "The law took a wrong turn in *The Siskina,* and the sooner it returns to its proper path the better." In his view, the turn taken wrongly was in tying Mareva relief to the underlying cause of action rather than the enforcement of the prospective judgment which was the rationale of a Mareva injunction. The court when hearing an application for Mareva relief is concerned to consider the plaintiff's prospects of obtaining the judgment whose efficacy he is seeking to protect, and therefore it is not essential that the cause of action must have accrued. Lord Nicholls further held that where, as in that case, the judgment obtained abroad (in Monaco) could be enforced in Hong Kong, the plaintiff should be entitled to bring an action claiming Mareva relief as a substantive relief. According to Lord Nicholls (at 313):

> A claim for a *Mareva* injunction can stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in *other* proceedings. In such an action *Mareva* relief is not interim relief in the sense relevant for Ord. 11, r.1(1)(*b*) purposes. In that action the *Mareva* relief is not granted pending the trial of that action. It is granted pending judgment in the other proceedings. At the trial of the *Mareva* action, if it ever took place, the only relief sought would be the *Mareva* injunction. That is the substantive relief sought. Obtaining that relief is the purpose of the action.

85 However, the majority of the law lords could not accept Lord Nicholl's exposition of the "true" law as the law of Hong Kong, and by implication, the law of England. In this connection, it is worthwhile mentioning that Lord Nicholls' speech created a minor judicial schism in the common law world in Commonwealth countries whose legislation is derived from s 25(8) of the English 1873 Act or s 37(1) of the English 1981 Act. The Court of Appeal of the Bahamas was not persuaded by Lord Nicholl's speech, although the Jersey Court of Appeal followed it in *Solvalub Limited v Match Investments Limited* [1996] JLR 361 and so did the High Court of the Isle of Man in *Securities and Investment Board v Michael Ivor Braff* (1997/1998) 1 OFL 553. In *Karaha Bodas,* this court preferred the views of Lord Mustill. In England today, as we have mentioned earlier (at [74]), this is no longer a live issue as a result of the UK Arbitration Act 1996.

Ang J's ruling on section 4(10) of the CLA in Front Carriers

86 With this backdrop, we can now return to *Front Carriers* ([4] *supra*). In that case, the plaintiffs ("FCL"), negotiated the charter of a Panamax newbuilding to be called *Double Happiness* with the Singapore representative of the defendants ("A&O"). The terms of the contract required any dispute to be referred to arbitration in London in accordance with English law. Ang J was of view that the contract was arguably made through an agent in Singapore on behalf of A&O: see *Front Carriers* at [41]. As such, FCL's claim for breach of charter was one that was recognisable by the Singapore courts. In [52], she confirmed her finding that there was a recognisable right between the parties, even though the right was to be determined not by the court but by arbitration in London. On the basis of this finding, Ang J was able to rely on *Channel Tunnel* ([47] *supra*) to hold that s 4(10) of the CLA, read with Art 9 of the Model Law, conferred a general power on the court to grant Mareva relief in support of foreign arbitrations. The material facts in *Front Carrier* were similar to those in *Channel Tunnel,* save for the immaterial fact that in the latter case the action in the English court was stayed.

87 In our view, the finding in *Front Carriers* that there was a cause of action justiciable in a 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. For this reason, the decisions in the present case and in *Front Carriers* and Prakash J's judgment below are not in conflict with each other in their interpretations of s 4(10) of the CLA.

88 In *Front Carriers,* Ang J rejected the argument of counsel for A&O that *Channel Tunnel* should not be followed as it was a decision on the construction of s 37(1) of the English 1981 Act which is differently worded from that of s 4(10) of the CLA. In her view, the two provisions were materially similar, although worded slightly differently.

89 Before us, counsel for Magnifica raised a different argument based on the wording of s 4(10). It was that s 4(10) refers to the court's power to grant an interlocutory injunction, and that the Mareva injunction that Swift-Fortune obtained was in substance a final injunction as it would be the only relief that it would be seeking from the court. Hence, it is argued, the court has no power to grant such an injunction. We do not accept this argument. A Mareva injunction is, by nature, an interlocutory injunction. Its nature does not change because the plaintiff does not seek a final order. In practice, a Mareva injunction does not need to become a final order for the simple reason that it is intended to protect a prospective right of enforcement. The legal objection is not the nature of the injunction but the absence of a cause of action within the jurisdiction of the court which is a pre-condition for the exercise of the power under s 4(10) of the CLA. To use the words of Lord Mustill in *Mercedes Benz* ([46] *supra*) at 297 in connection with the issue of service outside the jurisdiction, "the order cannot simply be made in the air".

90 There is one other ruling in *Front Carriers* that needs our consideration since counsel for Swift-Fortune has relied on it in this appeal. Ang J, after referring to Lord Mustill's third illustration, went on to say (at [47]) that Lord Mustill recognised that:

> … *the claim itself need not be brought before the English court especially where the parties have agreed to arbitration to resolve their disputes*. In other words, all that the claimant must establish is that the factual situation on which he relies to support his claim must be capable of sustaining his proceedings against the defendant and, in this respect, there is a close connection with the substantive law relating to what is recognised as a legally valid cause of action. [emphasis in original]

Proceeding from this statement, she referred to the decision of the Hong Kong Court of Appeal in *The Lady Muriel* [1995] 2 HKC 320 as an illustration of the principle that once personal jurisdiction is established, the court has jurisdiction to grant interim relief based on its domestic law. In that case, the question was whether the Hong Kong court had jurisdiction to order a survey to be conducted on a vessel in its territorial waters in aid of arbitral proceedings in London. The Hong Kong Court of Appeal held that it had inherent jurisdiction to make the order, and following the reasoning in *Channel Tunnel* held that it was not a necessary condition that for the grant of an interim measure of protection that the measure must be ancillary to a final order to be granted by the Hong Kong court. Although the Hong Kong Court of Appeal relied on *Channel Tunnel* in support of its decision, the judgment itself did not make explicit the necessity for the existence of a substantive claim justiciable by the Hong Kong court.

91 Prakash J, without the benefit of reading Ang J's judgment, had considered and distinguished the decision in *The Lady Muriel* in her judgment on the following grounds: (a) the order to inspect the vessel while it was in Hong Kong waters was analogous to an Anton Piller order; (b) the order was given under the inherent jurisdiction of the court; (c) the present case is concerned only with the extent of the court's power under s 4(10) of the CLA, and not under its inherent jurisdiction; and (d) that decision was not concerned with a Mareva injunction but an order analogous to an Anton Piller order, which is not within the terms of s 4(10). For the reasons given by Prakash J, we agree with her that *The Lady Muriel* has no application in Singapore.

92 We may summarise our view of the state of the law on Mareva injunctions in aid of foreign proceedings in the context of s 4(10) of the CLA. First, given the facts of the present case, our decision in this appeal will not take the law beyond *The Siskina* doctrine as applied in *Karaha Bodas,* and confirmed in *Mercedes Benz.* Secondly, the decision in *Front Carriers,* following *Channel Tunnel,* has amplified or extended the scope of s 4(10) to apply to foreign arbitrations where the plaintiff has a recognisable cause of action under Singapore law and the court has personal jurisdiction over the defendant (in Singapore by reason of the defendant having assets within the jurisdiction: see O 11 r 1(1)(*a*) of the Rules of Court).

93 As this appeal is not against the decision of Ang J in *Front Carriers* (against which a separate appeal has been filed) it would not be prudent for this court to say anything that may be interpreted as either approving or disapproving it as a s 4(10) decision. However, we think that we are entitled to observe that given the differences in the legal framework in Singapore and in England relating to the power of the court to grant interim measures to assist foreign court and foreign arbitral proceedings, there are arguments for and against construing s 4(10) of the CLA to restrict or broaden the types of cases in which the court could or could not grant Mareva interlocutory relief to assist foreign court proceedings or foreign arbitral proceedings. In *Karaha Bodas,* it was not necessary for this court to decide whether the court has the power under s 4(10) of the CLA to grant an injunction in aid of foreign court proceedings where the plaintiff has a pre-existing cause of action against the defendant

who has property in Singapore. In that case, the plaintiff did not even have a pre-existing cause of action. Likewise in the present case, *Front Carriers* is the first time a Singapore court has decided that given the two preconditions, *viz*, personal jurisdiction over the defendant and a pre-existing cause of action subject to Singapore law, a court has the power to grant a Mareva injunction under s 4(10) of the CLA in aid of foreign arbitral proceedings. We have already pointed out that the way the law has developed in England is very different from the way the law has been developed in Singapore. Until the enactment of the IAA, the only statutory authority for the grant of Mareva injunctions to support arbitrations was the Arbitration Act, which is applicable only to domestic arbitrations. The IAA was enacted to fill the gap in the law with respect to international arbitrations and with a view to promoting Singapore as a centre for international arbitrations. We have earlier decided that s 12(7) of the IAA applies only to Singapore international arbitrations, and not to foreign arbitrations. The question that immediately arises is whether in these circumstances, s 4(10) of the CLA can have a broader area of application than s 12(7) of the IAA.

94 We have pointed out earlier that s 4(10) of the CLA has remained unchanged since it was enacted in 1878, and that therefore the legislative intent of s 4(10) has also not changed. The meaning of s 4(10) does not change because social or political conditions have changed. In *Pettitt v Pettitt* [1970] AC 777 at 813*,* Lord Upjohn said:

> 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.

It is therefore open to argument in a future case whether 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. Unlike in England where legislative and policy developments since the 1980s appeared to have influenced the courts in their interpretation of s 37(3) of the English 1981 Act (which has no equivalent in Singapore), there has been no such development in Singapore in relation to s 4(10) of the CLA as a source of statutory authority in relation to Mareva injunctions in aid of foreign proceedings until the enactment of the IAA. Given that Parliament ignored s 4(10) of the CLA entirely when it enacted the IAA to provide a new statutory framework for international arbitrations in Singapore, a court would need to know why it was necessary to enact s 12(7) of the IAA if the court had power under s 4(10) to grant Mareva relief in aid of foreign arbitrations. Perhaps it was simply a case of Parliament's attention not having been drawn to the need to provide a broader framework to deal with interim measures to assist foreign proceedings, whether court or arbitral proceedings.

95 Finally, it may be useful to refer to the approach of the Court of Appeal of the Bahamas in a similar situation concerning the power of a Bahamas court to grant a Mareva injunction in aid of foreign court proceedings where the plaintiff did not have a pre-existing cause of action. In *Meespierson (Bahamas) Limited v Grupo Torras SA*(1999–2000) 2 ITELR 29, the court had to consider scope of s 21(1) of the Supreme Court Act (Bahamas) which was modelled verbatim on s 37(1) of the English 1981 Act (and which Ang J had held to be materially similar, although differently worded from s 4(10) of the CLA). However, when the Bahamas Parliament enacted s 21(1), it omitted to enact s 37(3) of the English 1981 Act (which as we have stated earlier conferred statutory power on the court to grant Mareva injunctions against foreign residents). In the High Court, the Chief Justice held that s 21(1) empowered her to grant a free-standing injunction. The Court of Appeal unanimously overruled her and decided that it was bound by the decision of the Privy Council which applied *The Siskina* on the power of the court under s 37(1) of the English 1981 Act. The President of the Court of Appeal, in his judgment, said (at 34, 35 and 38):

It is trite that the *The Siskina* approach to the Mareva injunction has held sway in subsequent cases in English and Commonwealth courts without departure from the underlying pre-supposition of there being an existing cause of action for which relief is claimed in substantive proceedings brought in the jurisdiction. There have been significant English statutory developments which impinge on Mareva relief, namely s 37 of the Supreme Court Act 1981 Act and, of greater importance to the present issue, s 25 of the Civil Jurisdiction and Judgments Act 1982 (the English 1982 Act).

…

Certainly s 25 of the English 1982 Act made a significant inroad in the *The Siskina* principle by allowing a free-standing Mareva in aid of foreign (Contracting State) proceedings brought or to be brought. Nowhere in the Bahamian statute law is there a comparable enactment to s 25 of the English 1982 Act and therefore the conclusion seems irresistible that the Bahamian Parliament has not yet considered that public policy calls for law reform in the shape of the English legislation. The following question arises: could it be said that where the Bahamian Parliament, unlike its English counterpart, has omitted to reform the law by thus widening the power of the courts to grant Mareva relief, the courts may themselves, as a matter of inherent jurisdiction, effect the desired reform? To pose the question is to answer it. 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 is considered desirable to achieve the result produced by s 25 of the English 1982 Act, is an impermissible aberration from the judicial function. …

…

… I do not perceive a public policy in the Bahamas, standing as an sovereign state, which drives the Bahamian judge to be creative to the extent of making a serendipitous discovery of a common law principle equivalent to the provision of s 25 of the Civil Jurisdiction and Judgments Act 1982 which the English Parliament saw fit to enact to empower free-standing interim relief to be given in aid of proceedings brought or to be brought in a Contracting State to the Brussels or Lugano Convention.

Summary of findings of this court

96 In summary, our findings are as follows:

(a) Section 12(7) of the IAA does not apply to foreign arbitrations but applies to Singapore international arbitrations.

(b) Section 12(7) 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.

(c) Section 4(10) of the CLA does not confer any power on the court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court.

(d) Where the plaintiff has such a cause of action against the defendant who is subject to the personal jurisdiction of the Singapore court (as, *eg*, where he has assets in Singapore), *Front Carriers* ([4] *supra*) has decided that the court has power under s 4(10) of the CLA to grant a

Mareva injunction in aid of the foreign arbitration to which the substantive claim has been referred in accordance with the agreement of the parties, and by implication, where the substantive claim is tried in a foreign court.

(e) The existence of the court's personal jurisdiction over the defendant in itself does not give power to the court to grant a Mareva injunction in aid of a foreign arbitration.

Conclusion

97 For the reasons given above, the appeal of Swift-Fortune against the decision of Prakash J is dismissed with costs, with the usual consequential orders to follow.

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