IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 244

Originating Application No 710 of 2022 (Summonses Nos 4335 and 4336 of 2022)

Between

(1) CXG
(2) CXH

… *Claimants*

And

(1) CXI
(2) CXJ
(3) CXK

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Enforcement] — [Interim measures ordered by the tribunal] [Conflict of Laws] — [Natural forum]

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CXG and another
v
CXI and others

[2023] SGHC 244

General Division of the High Court — Originating Application No 710 of 2022 (Summonses Nos 4335 and 4336 of 2022)
Hri Kumar Nair J
6, 26 July 2023

12 September 2023

Hri Kumar Nair J:

Introduction

1 Should this court, despite possessing the jurisdiction to hear an application to enforce a tribunal-ordered interim measure in a Singapore-seated international arbitration (a "domestic interim measure"), nevertheless decline to exercise that jurisdiction on grounds of *forum non conveniens* ("FNC")? This was the main question raised in these summonses. While the issue initially appeared straightforward, there was a surprising dearth of authority. Upon closer examination, it presented interesting questions on the nature of enforcing a domestic interim measure, the relevance of the FNC doctrine, and what it means for it to be appropriate for the court to hear this action.

2 After hearing parties' submissions, I dismissed the applications, providing brief grounds then. These are my detailed grounds of decision.

Background

3 OA 710 ("the Leave Application") is the claimants' application, pursuant to s 12(6) of the International Arbitration Act 1994 (2020 Rev Ed) ("the IAA"), for permission for judgment to be entered in terms of an interim order ("the Interim Order") granted in SIAC Arbitration No [xxx] of 2021 ("the Arbitration"). The defendants applied in SUMs 4335 and 4336 ("the Stay Applications"), which were before me, to stay the Leave Application on the ground that it was not appropriate for this court to exercise jurisdiction to hear it as Singapore is not the proper forum.

4 The claimants, [CXG] and [CXH], are the founders and minority shareholders of [CXK],[1] a financial technology company incorporated in Singapore which runs an e-wallet open-loop payment method ("the [CXK] App").[2] The claimants are also the claimants in the Arbitration.[3]

5 The defendants, who are the respondents in the Arbitration, are [CXI], [CXJ] and [CXK].[4] The claimants and [CXJ] were the three shareholders of [CXK] at the time of its incorporation.[5]

6 In the Arbitration, the claimants are, in the main, pursuing a claim for minority oppression under s 216 of the Companies Act 1967 and seeking a buyout of their shares in [CXK].[6] The dispute centred on two agreements – a

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1 Claimants' Written Submissions dated 28 June 2023 ("Claimants' Written Subs") at para 13.

2 Affidavit of [VM] dated 15 November 2022 ("VM-1") at para 11.

3 Affidavit of Calvin Liang dated 21 October 2022 ("CL-1") at para 5.

4 CL-1 at para 6.

5 Claimants' Written Subs at para 13.

6 VM-1 at para 10.

Shareholders Agreement dated 17 March 2017 ("the SHA") and an Investment Agreement dated 17 March 2017 ("the IA") – which the claimants, [CXJ] and [CXK] were originally party to.[7] [CXI] later became a party to the SHA and IA after [CXJ] transferred its entire shareholding in [CXK] to [CXI].[8] The SHA and IA are governed by Singapore law.[9]

7 The claimants applied to the arbitral tribunal ("the Tribunal") for interim relief on 19 July 2022 ("the Interim Relief Application").[10] In the Interim Relief Application, the claimants complained about an allegedly competitive product known as "[PXH]" and sought to restrain the defendants from operating and offering [PXH].[11]

8 [PXH] is an e-wallet that is used as a closed-loop payment solution for the [MB] App.[12] The [MB] App is owned and operated by [MBX] (a subsidiary of [CXI]) and connects users to merchants who list their products and services on the [MB] App, including flights, hotels, food, and ride-hailing, among others. The [MB] App is available across the ASEAN region, but [PXH] itself is only available to users of the [MB] App in Malaysia.[13]

9 [PXH] relies on the technology and licence of the payment platform provided by [FXN], under a contract ("the [FXN] Contract") between [FXN]

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7 VM-1 at para 7; CL-1 at para 7; Cl-1 at p 7.

8 VM-1 at para 8.

9 CL-1 at p 36 (Exhibit CL-1 cl 27.1); CL-1 at p 59 (Exhibit CL-2 cl 17.1).

10 VM-1 at para 12; CL-1 at para 11.

11 VM-1 at para 13; CL-1 at para 19 and p 102.

12 VM-1 at para 14.

13 VM-1 at para 14.

and [MBX]'s wholly-owned subsidiary, [GHX].[14] The [FXN] Contract is governed by Malaysian law.

10 Both [FXN] and [GHX] are companies registered in Malaysia.[15] [FXN] is regulated by [LX] bank ("[LX] Bank") as [FXN] is an e-money issuer with an e-money licence granted by [LX] Bank. [PXH] is also regulated by [LX] Bank.[16]

11 The Tribunal issued the Interim Order on 16 August 2022. The Tribunal declined to grant the reliefs sought by the claimants, and instead directed the defendants to complete the following within 90 days from the date of the Interim Order (collectively, "the Commitments"):[17]

(a) to ensure that payments by [PXH] remain closed-loop and accepted only in the [MB] App;

(b) to ensure that the only methods available for top-ups to [PXH] are via a user's [CXK] App account or via refunds from any products and services on the [MB] App, and in this regard, to disable the online banking top-up to [PXH];

(c) to disable the peer-to-peer transfer function;

(d) to cease all discounts and promotions offered to [PXH] users;

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14 VM-1 at para 15.

15 VM-1 at para 15.

16 VM-1 at para 15.

17 VM-1 at para 16.

(e) for management of [PXH] to be transferred to one of [CXK]'s subsidiaries on the contractual and operational arrangements to be mutually agreed between [MBX] and [CXK];

(f) for [PXH] to be renamed to "[UMD]" or another name to be mutually agreed between [MBX] and [CXK] ("the Renaming Commitment"); and

(g) to undertake not to expand the services or geographical reach of [PXH].

Pertinently, the Commitments were offered by [MBX]. The Tribunal issued the Interim Order directing all the defendants to comply with the Commitments.[18]

12 I note that based on their affidavits, the defendants maintained that they had complied with all the Commitments, save for the Renaming Commitment which could only be completed pending approval by [LX] Bank and [FXN].[19]

The parties' cases

The defendants' case

13 By the Stay Applications, the defendants argued that pursuant to O 6 r 12(4)(*b*) of the Rules of Court 2021 ("ROC 2021"), this court should not exercise its jurisdiction to hear the Leave Application because it was not appropriate for it to do so.[20] To be clear, the defendants did *not* contend that this

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18 CL-1 at pp 106–107 (Exhibit CL-4 at paras 11 and 14).

19 VM-1 at paras 17 and 25.

20 1st and 2nd Defendants' Written Submissions dated 28 June 2023 ("1st and 2nd Dfs' Written Subs") at paras 23 and 26.

court lacked jurisdiction to hear the Leave Application; instead, they argued that it should *decline* to exercise such jurisdiction.

14 The defendants argued that in determining whether it was appropriate for this court to exercise jurisdiction, the court should apply FNC principles for two reasons.

15 First, O 28 r 2A(2) of the Rules of Court (2014 Rev Ed) ("ROC 2014") (which concerned a stay of proceedings commenced by originating summons) is the predecessor to O 6 r 12(4) of the ROC 2021 and reflected materially the same operative language as O 12 r 7(2) of the ROC 2014 (which concerned a stay of proceedings commenced by *writ*). Since O 12 r 7(2) of the ROC 2014 had been held in *Grains and Industrial Products Trading Pte Ltd and another v State Bank of India and others* [2019] SGHC 292 (at [66]) to require a FNC analysis, this requirement similarly applied to O 6 r 12(4) of the ROC 2021.[21]

16 Second, under O 48 r 4(2) of the ROC 2021, which governs service out of Singapore for originating applications under the IAA (including applications for permission to enforce domestic interim measures under s 12(6) of the IAA), no permission for service out is to be granted unless it is made sufficiently to appear to the court that the case is a "proper one for service out of Singapore".

17 The defendants argued that the phrase "case is a proper one for service out" imported into O 48 r 4(2) a requirement for the applicant to show that the Singapore court is *forum conveniens*. In support of this, they cited the High Court's decision in *Swift-Fortune v Magnifica Marine SA* [2006] 2 SLR(R) 323 ("*Swift-Fortune*"), where FNC considerations were taken into account in the

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[21] 1st and 2nd Dfs' Written Subs at para 29.

court's assessment of whether to grant permission for service out of an application for the grant of interim relief in support of a foreign-seated arbitration under s 12(7) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (presently s 12A of the current IAA).[22]

18 Turning to the application of the FNC doctrine itself, the defendants relied on the principles as set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") and applied in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*").[23] The FNC analysis under *Spiliada* involves two stages (*Rickshaw Investments* at [14]):

(a) first, whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried, which requires a consideration of factors connecting the dispute to a particular forum; and

(b) second, if the court concludes that there is *prima facie* a more appropriate forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

19 The defendants argued that the connecting factors pointed to Malaysia as the more appropriate forum to enforce the Interim Order:

(a) First, the subject matter of the dispute – *ie*, [PXH] – was in Malaysia. It relied on Malaysian intellectual property which was owned by [FXN], a Malaysian entity, and licensed to [GHX], another

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22 1st and 2nd Dfs' Supplementary Submissions dated 17 July 2023 (1st and 2nd Dfs' Supplementary Subs") at para 6.

23 1st and 2nd Dfs' Written Subs at para 30.

Malaysian entity.[24] Furthermore, in complying with the Interim Order, the relevant stakeholders were all Malaysian entities and had to undertake consultations with [LX] Bank as the Interim Order required changes to e-money services which were regulated by [LX] Bank.

(b) Second, the ease of enforcing the remedy sought. Since the Interim Order likely required a significant degree of supervision which principally affected parties and interests in Malaysia, this added weight to Malaysia being the more appropriate forum for an application to enforce the Interim Order.[25]

(c) Third, the location of the parties and third parties involved. The Interim Order affected the rights of third parties who were neither before the court nor party to the Arbitration, such as [MBX]. Given that the affected parties were Malaysian, it was more appropriate for the Malaysian courts to supervise the third parties' compliance with the Interim Order.[26]

(d) Fourth, the location and compellability of witnesses.[27] The key witnesses to attest to whether the Interim Order had been complied with were in Malaysia, not Singapore.[28]

(e) Fifth, the location and ease of obtaining evidence. Several of the documents that were exchanged between [FXN] and [LX] Bank were in

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24 1st and 2nd Dfs' Written Subs at para 33.

25 1st and 2nd Dfs' Written Subs at paras 35, 37 and 38.

26 1st and 2nd Dfs' Written Subs at paras 40 and 43.

27 1st and 2nd Dfs' Written Subs at para 44.

28 1st and 2nd Dfs' Written Subs at para 45.

Malay, and additional costs would be incurred in having to translate these documents.[29]

20 Further, the defendants argued that they would be prejudiced by the enforcement of the Interim Order in Singapore. Since the relevant entities were mostly Malaysian, evidence of compliance would be in Malaysia and the key witnesses, who were in Malaysia, might not be compellable to testify in Singapore. Hence, enforcement of the Interim Order in Singapore would expose [CXI] and [CXJ]'s directors to the threat of committal proceedings in a jurisdiction where the courts were not best placed to assess evidence relating to a breach of the Interim Order.

21 The defendants also pointed out that the claimant had given no good reason for seeking enforcement of the Interim Order in Singapore instead of Malaysia.[30] On my inquiry, counsel for the defendants confirmed that the defendants would not oppose enforcement of the Interim Order in Malaysia.[31]

22 Thus, the defendants submitted that this court ought not to exercise its jurisdiction to hear the Leave Application because it was not the appropriate court to do so.[32]

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29 1st and 2nd Dfs' Written Subs at para 48.

30 Certified Transcript dated 6 July 2023 at p 47 lines 7–11.

31 Certified Transcript dated 26 July 2023 at p 139 lines 1–9.

32 1st and 2nd Dfs' Written Subs at para 49.

The claimants' case

23 The claimants argued that as a matter of principle, precedent, and policy, FNC considerations were irrelevant to an application under s 12(6) of the IAA.[33]

24 First, as a matter of principle, by choosing Singapore as the seat of the Arbitration, the parties had agreed that the IAA would govern the Arbitration and that they would submit to the jurisdiction of the Singapore court in respect of the exercise of the powers conferred by the IAA. These powers included the power under s 12(6) of the IAA to enforce interim orders made by the Tribunal. Given its supervisory jurisdiction, the Singapore court was necessarily the appropriate court to hear an application under s 12(6) of the IAA for permission to give effect to the Interim Order as a judgment of the court.[34] Furthermore, the giving effect to the Interim Order as a judgment of the court was to be largely an administrative process.[35] Hence, FNC considerations did not apply for enforcement of the Interim Order.[36]

25 Second, as a matter of precedent, case law showed that by choosing a particular seat, the parties to an arbitration agreement agreed to submit themselves to the supervisory jurisdiction of the seat court and its powers over the arbitration.[37] Under Singapore law, this included the power under s 12(6) of the IAA to support the arbitration process by enforcing an injunction granted by an arbitral tribunal. Although the Singapore court could in an appropriate case decline to grant permission under s 12(6) of the IAA to enforce a tribunal's

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33 Claimants' Written Subs at para 6.

34 Claimants' Written Subs at para 6.

35 Claimants' Written Subs at para 6.

36 Claimants' Written Subs at para 43.

37 Claimants' Written Subs at para 50.

interim order, such cases would be limited.[38] The only ground for which there was judicial authority for the court to refuse leave under s 12(6) of the IAA concerned O 69A r 5(2) of the Rules of Court (Cap 322, 2006 Rev Ed) (now O 48 r 5(2) of the ROC 2021), which provided that "[w]here the order sought to be enforced is in the nature of an interim injunction under section 12(1)(*e*) or (*f*), permission may be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages".[39]

26 Third, as a matter of policy, FNC considerations were irrelevant to s 12(6) of the IAA.[40] It would also undermine the attractiveness of Singapore as a preferred arbitral seat,[41] defeating Parliament's intention to empower the Singapore court to enforce tribunals' interim orders and rendering the parties' autonomous choice in choosing Singapore as the arbitral seat nugatory.[42] Furthermore, the nature of international arbitration was that many Singapore-seated arbitrations often had no connection with Singapore apart from it being chosen as the arbitral seat. This meant that in many Singapore-seated international arbitrations, the connecting factors under FNC principles would often point away from Singapore as the proper forum.[43] To allow such connecting factors to oust the supervisory jurisdiction of the Singapore courts to enforce a tribunal's interim orders would be to deprive many Singapore-seated international arbitrations of the curial assistance under s 12(6) of the IAA

38 Claimants' Written Subs at paras 51–53.

39 Claimants' Written Subs at para 52(c).

40 Claimants' Written Subs at para 56.

41 Claimants' Written Subs at para 58.

42 Claimants' Written Subs at para 57.

43 Claimants' Written Subs at para 60.

that Parliament intended them to have, and that parties themselves reasonably expected to be available to them.[44]

27 The claimants further argued that even if FNC principles were to be considered under s 12(6) of the IAA, the defendants had to meet the burden of establishing "exceptional circumstances amounting to strong cause" ("the strong cause test") as to why an application to enforce the Interim Order should not be heard in Singapore.[45] The strong cause test applied where Singapore was named in a non-exclusive jurisdiction clause – *ie*, a party must show "strong cause" why it should not be bound to the contractual agreement to submit to the Singapore court's jurisdiction.[46] The claimants argued that given the analogous nature of the choice of seat in an arbitration agreement to a non-exclusive jurisdiction clause, the defendants likewise had to show "strong cause" why the Leave Application should not be heard in Singapore.[47] However, none of the connecting factors cited by the defendants satisfied the strong cause test as they were all foreseeable at the time the parties entered into the SHA and the IA.[48]

28 Lastly, the claimants argued that even if FNC principles were relevant to s 12(6) of the IAA, and the strong cause test did not apply, there were sufficient connecting factors which made it appropriate to enforce the Interim Order here,[49] such as, *inter alia*, the fact that Singapore was the seat court with

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44 Claimants' Written Subs at para 61.

45 Claimants' Written Subs at para 63.

46 Claimants' Written Subs at para 65.

47 Claimants' Written Subs at para 66.

48 Claimants' Written Subs at para 71.

49 Claimants' Written Subs at paras 73–76.

supervisory jurisdiction over the Arbitration in which the Interim Order was made.

29 I note that the claimants did not assert that the defendants were in breach of any of the terms of the Interim Order. Rather, the claimants argued that the Interim Order imposed continuing obligations on the defendants, such that the obligations thereunder remained live.[50] This necessitated enforcement of the Interim Order.

My decision

The statutory framework

30 The Leave Application is brought pursuant to s 12(6) of the IAA (read with s 12(1)(*i*) of the IAA) and O 48 r 3(1)(*b*) of the ROC 2021. These provisions are set out below:

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

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[50] Claimants' Written Subs at para 6(c)(ii); Certified Transcript dated 26 July 2023 at p 94 lines 5–13.

> **Matters for Judge or Registrar (O. 48, r. 3)**
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> **3.**—(1) Every application or request to the Court —
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> …
>
> (b) for permission to enforce interim orders or directions of an arbitral tribunal under section 12(6);
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> …
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> must be made to a Judge or the Registrar.

31 There is no doubt that the Singapore courts have jurisdiction to hear an application to enforce the Interim Order. The defendants do not dispute this. Indeed, such jurisdiction is clear from the provisions set out above. Under s 12(1)(*i*) of the IAA, an arbitral tribunal has the power to order a domestic interim measure. The jurisdiction to hear an application to enforce domestic interim measures stems from s 12(6) of the IAA, which applies to orders or directions made in a Singapore-seated arbitration. Such orders and directions 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: see *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry Resorts*") at [113].

32 Further, the choice of seat embodies parties' submission to the curial jurisdiction of the seat's courts. As observed by the English Court of Appeal in *Enka Insaat Ve Sanayi A S v OOO "Insurance Company Chubb" and others* [2020] EWCA Civ 574 ("*Enka EWCA*") at [46]:

> [T]he choice of seat is by its very nature a submission to the curial jurisdiction. The choice of seat is a legal concept which determines the curial law … [t]o hold that the choice of seat is a submission to the curial jurisdiction is therefore no more than to give effect to party autonomy which is fundamental to arbitration agreements and which it is the primary function of the courts to respect and uphold. Parties who agree a particular seat deliberately submit themselves to the law of the seat and

> whatever control it exerts. That not only gives effect to party autonomy but promotes certainty.

33 Thus, where parties have chosen Singapore as the seat of the arbitration, as they have here, they agree to submit to the curial law and jurisdiction of Singapore. It follows that the IAA, as part of our curial law, applies to govern the Arbitration (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("*Sanum Investments*") at [38]). This includes the power of the Singapore courts (specifically, the General Division of the High Court) under s 12(6) of the IAA to enforce interim orders or directions made or given by a Singapore-seated arbitral tribunal.

34 The Stay Applications are brought pursuant to O 6 rr 12(3) and 12(4)(*b*), which provide:

> **Form and service of defendant's affidavit (O. 6, r. 12)**
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> …
>
> (3) If the defendant is challenging the jurisdiction of the Court on the ground that the parties have agreed to refer their dispute to arbitration or on any other ground, the defendant need not file and serve the defendant's affidavit on the merits but must file and serve the defendant's affidavit stating the ground on which the defendant is challenging the jurisdiction of the Court.
>
> (4) The challenge to jurisdiction may be for the reason that —
>
> (a) the Court has no jurisdiction to hear the action; or
>
> (b) the Court *should not exercise* jurisdiction because it is not the appropriate Court to hear the action.
>
> …
>
> [emphasis added]

35 The defendants maintain that *notwithstanding* the jurisdiction of the Singapore courts to hear the Leave Application, this court should nevertheless decline to hear it as it is *not* the appropriate court to do so under O 6 r 12(4)(*b*).

36 In the Stay Applications, the defendants also relied on O 48 r 4(2) of the ROC 2021, which addresses service out of Singapore for originating applications under the IAA. O 48 rr 4(1) and 4(2) read as follows:

> **Service out of Singapore of originating process (O. 48, r. 4)**
>
> 4.—(1) Service out of Singapore of the originating application or of any order made on such originating application under this Order is permissible with the permission of the Court whether or not the arbitration was held or the award was made within Singapore.
>
> (2) An application for the grant of permission under this Rule must be supported by an affidavit stating the ground on which the application is made and showing in what place or country the person to be served is, or probably may be found; and no such permission is to be granted unless it is made sufficiently to appear to the Court that *the case is a proper one* for service out of Singapore under this Rule.
>
> …
>
> [emphasis added]

The defendants argued that since FNC principles are considered under the requirement of an IAA application being a "proper one for service out" under O 48 r 4(2) (pursuant to *Swift-Fortune*), FNC principles should similarly be considered in assessing the appropriate court under O 6 r 12(4)(*b*) to hear applications for the enforcement of domestic interim measures.

37 As a starting point, I observe that by virtue of the parties' choice of Singapore as the arbitral seat, it would ordinarily be appropriate for the Singapore courts to hear an application made pursuant to our curial law. By agreeing to a Singapore-seated arbitration, the parties have accepted that the IAA governs the arbitration, and the claimant would be entitled to apply under s 12(6) of the IAA to this court to enforce domestic interim measures. Hence, the Singapore courts would *prima facie* be an appropriate forum to hear the Leave Application. It was therefore incumbent on the defendants to show why

FNC principles should additionally feature in this assessment of the appropriate forum.

38 In this regard, it is apposite to consider the specific *nature* of the Leave Application and how the statutory framework relating to it sheds light on the way the assessment of the appropriate forum is to be conducted.

39 The Leave Application is an application for permission to enforce the Interim Order, which comprises a set of interim measures ordered by the Tribunal.[51] As stated above at [31], arbitral tribunals in Singapore-seated international arbitrations derive their power to order an interim injunction or any other interim measure from s 12(1)(*i*) of the IAA. However, an arbitral tribunal does not have the same coercive powers of enforcement as the court. To preserve the sanctity of the interim orders and directions issued by the arbitral tribunal, the enforcement of these measures becomes the responsibility of the supervising national courts, at the application of one or more of the parties: *Bloomberry Resorts* at [113]–[114].

40 Section 12(6) of the IAA is the operative provision under which parties apply for permission to enforce interim measures issued in a Singapore-seated arbitration. Section 12(6) was introduced to address a "lacuna" in the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") (which has the force of law in Singapore under s 3(1) of the IAA) in that the Model Law did not expressly provide that an interim measure could be enforced as an award: see the *Report on Review of Arbitration Laws* (August 1993) prepared by the Law Reform Committee's Sub-Committee on Review of Arbitration Laws ("the LRC Report") at para 32. Lee Seiu Kin J observed this

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[51] HC/OA 710/2022 at para 2.1.

point in *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 ("*Pukuafu*") (at [21]):

> … During the drafting stages of the International Arbitration Bill, the Law Reform Committee's sub-committee ("the sub-committee") on the Review of Arbitration Laws proposed that assistance should be available from the courts when interim orders are made by an arbitral tribunal so as to ensure that such orders are not mere paper awards. Article 17 of the Model Law gives an arbitral tribunal powers to make orders on interim measures of protection but is silent on the status and enforceability of such orders. The sub-committee considered that the Model Law had left a lacuna in this aspect and that "such orders may also need to be given the status of awards in order to be enforceable" (at [34] of the sub-committee's report on the Review of Arbitration Laws). Parliament responded by providing in s 12(6) of the IAA that "[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", thus filling in the lacuna with a *sui generis* enforcement mechanism …

41 The need to seek the court's permission under s 12(6) necessarily means that the court has the *discretion* whether to grant permission. Therefore, the court's role cannot be to simply "rubber-stamp" its approval. But the IAA does not prescribe how that discretion is to be exercised. The IAA provisions addressing domestic interim measures and their enforcement sheds some, but insufficient, light on this question.

42 The IAA differentiates interim measures ordered under s 12 from *awards*. Interim measures do not determine the merits of the dispute between parties but seek to preserve parties' rights pending the final determination of the dispute by the tribunal. Thus, s 2(1) of the IAA defines "award" to mean "a decision of the arbitral tribunal on the substance of the dispute [which] includes any interim, interlocutory or partial award *but excludes* any orders or directions made under section 12". By virtue of s 2(2) of the IAA, which provides that "a

word … used both in this Part and in the Model Law … has, in the Model Law, the meaning given by this Part", this definition of "award" applies to the Model Law as well.

43 The significance of this statutory distinction is that procedural and interim measures issued by a tribunal under s 12(1) are exempt from the usual judicial oversight which applies to awards under the IAA and the Model Law. In particular, the grounds for setting aside an award under Art 34(2) of the Model Law *do not* apply to domestic interim measures under s 12(6) of the IAA. Neither does s 24 of the IAA, which provides two additional grounds for the setting aside of a Singapore-seated award – if (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

44 Thus, Lee J in *Pukuafu* noted (at [21]) that by introducing s 12(6) of the IAA, Parliament had instituted "a *sui generis* enforcement mechanism [for orders under s 12] without broadening the definition of "award" to allow the court to set aside these orders". This approach reflected Parliament's decision to insulate these orders from judicial challenge while lending the coercive powers of the court to their enforcement: *Pukuafu* at [22]. Thus, the court has no jurisdiction under the IAA to set aside or review interim measures made by an arbitral tribunal. Limiting challenges only to awards that decide the substantive merits of the case would reduce the risk of delay and prevent tactical attempts to obstruct the arbitration process by bringing challenges on interim orders: *Pukuafu* at [25]. It also reflected the principle that procedural issues fall directly within the province of the arbitral tribunal and should be decided solely by the tribunal: *Pukuafu* at [23].

45 Indeed, at the drafting stage, the regime for enforcement of interim measures was envisioned to be largely free from judicial interference. The LRC Report, which was adopted by Parliament, recommended (at para 35) that "curial assistance should be available such that the interim orders and/or directions may be registered with the courts for enforcement *as an administrative process*" [emphasis added].

46 The only express condition is found in O 48 r 5(2) of the ROC 2021, which reads as follows:

> **Enforcement of interim orders or directions (O. 48, r. 5)**
>
> …
>
> (2) Where the order sought to be enforced is in the nature of an interim injunction under section 12(1)(*e*) or (*f*), permission may be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages.

The Interim Order is one made under s 12(1)(*i*) of the IAA and therefore, this condition does not apply.

47 However, the imposition of this condition for interim injunctions under ss 12(1)(*e*) and 12(1)(*f*) of the IAA does not mean that the court *must* grant enforcement in all other cases – as stated above at [41], enforcement is an exercise of the court's *discretion*. Nor does it inform how the discretion under s 12(6) of the IAA should be exercised.

48 Nevertheless, drawing on the background and context of s 12(6) of the IAA as explored above, the threshold to obtain the court's permission must necessarily be a *low* one:

(a) as stated above, it was envisaged that the obtaining of the court's permission under s 12(6) would be "administrative";

(b) an interim measure, by definition, does not determine the merits of the dispute between the parties but seeks to preserve the parties' rights pending the final determination of the dispute by the tribunal;

(c) the clear policy and intent of the IAA is for minimal curial intervention, and for the court to assist arbitral proceedings, which includes the enforcement of interim measures, directions and, ultimately, awards;

(d) the court is not concerned with the *merits* of the interim measure; indeed, unlike the case of an award, the IAA does not give the court power to even set aside or review interim measures made by the arbitral tribunal; and

(e) as previously observed, the court should eschew any principle or approach which risks delay or allows tactical attempts to obstruct the arbitration process (*Pukuafu* at [25]).

Do FNC principles apply?

49 I now turn to the thrust of the defendant's case, namely that FNC principles are relevant to the question of whether it is appropriate for the court to exercise jurisdiction over an application to enforce a domestic interim measure.

50 As a preliminary point, I note that the claimants went beyond arguing that it was *appropriate* for the court to exercise jurisdiction in respect of the Leave Application. Relying on *Sanum Investments*, they argued that because

this was a Singapore-seated arbitration, the court was in fact *obliged* to hear the Leave Application.

51 The claimants' submission in this respect goes too far. In *Sanum Investments*, the application before the court challenged the *jurisdiction* of the arbitral tribunal. It was in this context that Sundaresh Menon CJ held at [38]:

> There is no doubt … that the interpretation and application of the [agreement] are matters that are entirely within the scope of what the Singapore courts had to deal with in this case. Indeed, we would say that the High Court was not only competent to consider these issues, but in the circumstances, it was *obliged* to do so. This is so because the parties have designated Singapore as the seat of the Arbitration … A necessary consequence of this is that the IAA applies to govern the Arbitration and this in turn *requires* the High Court to consider issues such as the jurisdiction of the Tribunal. …
>
> [emphasis in original]

52 Where the *jurisdiction* of the arbitral tribunal is concerned, the court of the seat is *exclusively* charged with the duty to pronounce on the matter (following an appeal against the tribunal's own decision on jurisdiction): see s 10(3) IAA. This is a crucial component of supervisory jurisdiction, and parties would be left with no recourse against the tribunal's decision on jurisdiction if the court of the seat were to abdicate this duty. Hence, the court of the seat is obliged to consider issues such as the jurisdiction of the tribunal. On the other hand, the enforcement of domestic interim measures is not an issue which the court of the seat has exclusive jurisdiction to hear.

Judicial authority

53 Returning to the issue of the relevance of FNC principles, the claimants relied on the UK Supreme Court's decision in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb and others* [2020] UKSC 38 ("*Enka UKSC*") for the

proposition that FNC principles are *not* relevant to the court's exercise of jurisdiction over an application to enforce a local interim measure. The court in *Enka UKSC* held as follows (at [179]):

> … We agree with the Court of Appeal that forum conveniens, which is a matter that goes to the court's jurisdiction, is *not relevant*. By agreeing to arbitrate in London the parties were agreeing to *submit to the supervisory and supporting jurisdiction* of the English courts, including its jurisdiction to grant anti-suit injunctions.
>
> [emphasis added]

The claimants contended that the enforcement of domestic interim measures was also part of the *supervisory* jurisdiction of the Singapore courts, and hence in line with the holding in *Enka UKSC*, FNC principles were not relevant.

54 In response, the defendants argued that the powers that are exclusive to a supervisory court are listed at Art 6 of the Model Law, which does not include the enforcement of a domestic interim measure; accordingly, the enforcement of a domestic interim measure was not a power exclusive to the seat court and hence Singapore being the seat court did not *ipso facto* mean that the Singapore court is the appropriate enforcement court.[52]

55 The scope of supervisory jurisdiction is *not* founded on Art 6 of the Model Law. The provision reads:

> **Article 6. Court or other authority for certain functions of arbitration assistance and supervision**
>
> The functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ..... [Each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

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52 1st and 2nd Dfs' Supplementary Subs at paras 27–28.

56 This provision was meant to allow the legislature of a State to designate the relevant court which would perform the functions referred to in the specified articles. The title of Art 6 itself, which reads "*certain* functions of arbitration assistance and supervision" [emphasis added] indicates that the provision was not meant to exhaustively list the supervisory powers of the national courts. Thus, it has been observed that (Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Wolters Kluwer, 2015) at p 240):

> Article 6 enables the legislature of a State enacting the Model Law to designate which court or authority in the State is to perform certain functions under the Law … its primary purpose is to aid foreign parties in locating the competent court or authority and obtaining information on its procedures and practices … Not all court functions under the Law are included in the designation under Article 6 …

Clearly, Art 6 does not delineate the scope of supervisory jurisdiction.

57 At the same time, the claimants' contention that the enforcement of domestic interim measures forms part of the Singapore courts' *supervisory* jurisdiction is not accurate. The supervisory jurisdiction of the courts of the seat concerns powers unique to the courts of the seat, which they possess for the purpose of *supervising* the arbitral proceedings: see *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 ("*Westbridge*") at [73]. Such powers include the power to set aside awards, as well as the oversight which the courts of the seat have over, for example, challenges against the jurisdiction of the arbitral tribunal under s 10 of the IAA. The enforcement of interim measures ordered by the arbitral tribunal does *not* form part of the court's supervisory jurisdiction. It is not a power unique to the courts of the seat and it does not concern the court's supervision of the arbitral proceedings. Thus,

the holding in *Enka UKSC* that FNC principles do not apply to the court's exercise of supervisory jurisdiction is not strictly on point in this case.

58 Overall, the authorities do not appear to address specifically the issue of whether FNC principles apply to the enforcement of domestic interim measures. Hence, I turn to consider the nature and purpose of the FNC doctrine and if or how it maps onto the enforcement of domestic interim measures under s 12(6) of the IAA. For reasons discussed below, I find that FNC principles do not apply to the enforcement of domestic interim measures.

FNC considerations are irrelevant to the enforcement paradigm

59 The defendants' argument fundamentally misunderstands and misapplies FNC principles. In essence, they wrongly conflate a "proper" and an "appropriate" forum.

60 The court will only grant a stay on FNC grounds where it is satisfied that there is *some other* available and appropriate forum for the trial of the action: *Rickshaw Investments* at [14], citing *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [19]. Thus, the purpose of the FNC analysis is to identify the *most appropriate forum* (*ie*, the proper forum) to hear the substantive dispute: *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens AG*") at [19]. The court therefore considers which forum the material elements of the dispute (*eg*, the parties, governing law, evidence, and witnesses) are most closely connected to, such that the case may be tried more suitably in that forum for the interest of all the parties and the ends of justice: *Rickshaw Investments* at [13], citing *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [35].

61 However, the nature and purpose of a FNC inquiry is simply ill-suited to applications for the enforcement of domestic interim measures. First, FNC principles are concerned with the *substantive* dispute at hand – hence the focus on the factors connecting the substantive dispute to a particular jurisdiction, such as the availability of witnesses and evidence. This focus on the substantive dispute is necessary to ascertain the single, most appropriate forum for determining the dispute: *Siemens AG* at [4].

62 Where the enforcement of domestic interim measures is concerned, the court is *not* concerned with adjudicating the *substantive merits* of the dispute or the interim measure itself. The court is therefore *not* concerned with the typical connecting factors which a particular forum has to the dispute. Further, the aim of the FNC doctrine – *ie*, to identify the single, most appropriate forum for determining the substantive dispute – makes little sense in the enforcement paradigm, since an enforcement application can be brought in multiple jurisdictions.

63 Put another way, just because it may be appropriate, or even more effective, to enforce the Interim Order in Malaysia or some other jurisdiction, it does not mean that Singapore is not an appropriate forum to hear the Leave Application. This same reasoning applied in *U & M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm) ("*U & M*"), albeit in the context of a court-ordered worldwide freezing injunction granted in support of sums awarded by a London-seated arbitral tribunal. Although the enforcement of the injunction was almost entirely linked to Zambia rather than England (since the bulk of the relevant assets were in Zambia and there were no relevant assets in England), Teare J held that (at [63] and [65] of *U & M*):

> 63. … the mere fact that enforcement of an award will take place in Zambia is, by itself, *insufficient to make it inappropriate* for

> this court, being the court of the place where the arbitration has its seat, to grant [the injunction] …
>
> …
>
> 65. This is a case where it is appropriate for two courts to grant a freezing order against KCM … I *do not accept* that the fact that it may be appropriate for another court to grant a freezing order means that it is inappropriate for this court to do so …
>
> [emphasis added]

Thus, where it comes to enforcement of an interim order, the fact that the courts of one forum may also enforce such an order does not impact the appropriateness of the courts of another forum. FNC principles are therefore irrelevant to the assessment of the appropriate court to hear applications for the enforcement of domestic interim measures.

Application of FNC principles contradicts party autonomy and certainty

64 The application of FNC principles is also antithetical, in a practical sense, to the question of whether it is appropriate for this court to exercise jurisdiction over the enforcement of domestic interim measures under s 12(6) of the IAA.

65 The common practice, and reality, in international arbitrations is that the chosen seat may have little or even no connection with the parties or the dispute; its choice may turn on, or reflect the parties' confidence in, the legal infrastructure of the seat, the national curial law and willingness of the courts to support and facilitate the arbitration. Indeed, the lack of connecting factors to, and the neutrality of, the seat may be the precise reason why the parties chose that very seat: see *Westbridge* at [92]. Applying FNC principles to enforcement would be contrary to party autonomy and the expectations of the parties.

66 Applying FNC principles would also introduce uncertainty. The application of FNC, which involves multi-factorial considerations, is often a complicated and unpredictable exercise. If the defendants are correct, the "appropriate" jurisdiction to enforce an interim measure would not only be unclear from the outset, it may also engage different jurisdictions depending on the nature and terms of the interim measure to be enforced. It therefore presents ample opportunity for a respondent to engage in delay and tactical attempts to obstruct the arbitration process, which is the very mischief s 12(6) seeks to avoid: see *Pukuafu* at [25]. Such an outcome would potentially make Singapore a less attractive seat for international arbitrations: see Gary B Born, *International Commercial Arbitration* (3rd Ed, Wolters Kluwer, 2012) at para 14.02[A][6].

Legitimate reasons and practical benefits for seeking enforcement at the seat

67 Further, there may be legitimate reasons and practical benefits for seeking enforcement at the court of the seat. First, parties may have chosen the arbitral seat for the very reason of the seat jurisdiction's approach toward enforcing awards (used in the loose sense of the term and including interim measures). The court in *Enka EWCA* stated at [48] that "preferences for seats are predominantly based on users' appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its *track record for enforcing agreements to arbitrate and arbitral awards*" [emphasis added].

68 Second, the seat court's grant of enforcement dispels any potential for a future challenge to the award on procedural grounds. As observed by the court in *Shell Energy Europe Ltd v Meta Energia SpA* [2020] EWHC 1799 (Comm) at [17]:

> … [I]n the context of the international enforcement of an arbitration award, there is an *inherent value* in there being confirmation from the court of the seat … that the award in question is fully valid, effective and enforceable according to the law governing the arbitral process, and that there was and is no basis for a challenge to the award on 'due process' grounds under that law. …
>
> [emphasis added]

This inherent value in seeking and obtaining enforcement at the court of the seat makes it practical and reasonable for parties to do so, irrespective of considerations such as the ease of enforcement at the seat jurisdiction.

Foreign interim measures

69 The above analysis, *ie*, that FNC principles are not relevant to the assessment of the appropriate court to hear applications for the enforcement of domestic interim measures, is supported by the provisions in the IAA relating to the enforcement of tribunal-ordered interim measures in foreign-seated international arbitrations ("foreign interim measures").

70 Under Part 3 of the IAA, which addresses foreign awards, an "arbitral award" includes an order or a direction made or given by an arbitral tribunal in the course of an arbitration in respect of any of the matters set out in ss 12(1)(*c*)–12(1)(*j*) of the IAA. Hence, the distinction between an "interim measure" and an "award" which applies for Singapore-seated arbitrations (as noted above at [42]) does not apply for foreign-seated arbitrations. In other words, a foreign "award" includes a foreign interim measure, and therefore IAA provisions addressing foreign awards deal with foreign interim measures as well.

71 Under O 48 r 6 of the ROC 2021, a party may apply for permission to enforce a foreign award (which includes an interim measure) without notice and is not required to state in its affidavit why Singapore is an appropriate forum for

enforcement. Nor is it even required, under O 48 r 6(4), to seek leave to serve the order giving permission out of jurisdiction. This underscores the irrelevance of a FNC assessment in respect of the enforcement of a foreign interim measure in Singapore.

72 Further, under O 48 r 6(5) of the ROC 2021, the respondent may apply to set aside the order giving permission. Section 31(1) of the IAA provides that enforcement of a foreign award may only be refused in cases mentioned in ss 31(2) and 31(4) of the IAA, *but not otherwise*. Sections 31(2) and 31(4) of the IAA basically enshrine the same grounds for refusing enforcement of an award as Art 36 of the Model Law (although it should be noted that Art 36 of the Model Law, being part of Chapter VIII of the Model Law, is not given force of law in Singapore pursuant to s 3(1) of the IAA). These grounds mostly relate to procedural and jurisdictional objections to the arbitral proceedings, such as the invalidity of the arbitration agreement or the inability of a party to present its case in the proceedings. There is no reference to FNC considerations as a ground for refusal of enforcement.

73 In contrast, Parliament did not see fit to prescribe *any* grounds to refuse the enforcement of domestic interim measures.

74 Logically, Parliament could not have intended that the court's discretion to refuse enforcement of a domestic interim measure would be wider than that for a foreign interim measure. Singapore-seated international arbitrations are subject to the curial jurisdiction of the Singapore courts and the accompanying supervision which the Singapore courts are empowered to impose on such arbitrations pursuant to the IAA. In contrast, foreign-seated international arbitrations are not subject to the supervision of the Singapore courts at all. Given this, it is reasonable to expect that the statutory position toward the

enforcement of foreign interim measures would be *more restrictive* than that toward the enforcement of domestic interim measures. This expectation is indeed borne out by the actual structure of the IAA, which, as noted above, provides various grounds for refusing the enforcement of a foreign interim measure but none for the enforcement of a domestic interim measure. The imposition of more judicial scrutiny on the enforcement of domestic interim measures would also be inconsistent with the general policy of making such enforcement an expeditious, "administrative" process, as evidenced by the carving out of domestic interim measures from the setting-aside regime for domestic awards under the IAA as well as the LRC Report's comments (noted above at [44]–[45]).

75 In the circumstances, in so far as FNC considerations are irrelevant in the context of the enforcement of foreign interim measures, which they plainly are, there is no good reason for applying such considerations to the court's exercise of jurisdiction in respect of domestic interim measures.

76 The only limb that could possibly assist the defendants is s 31(4)(*b*) of the IAA – *ie*, where the enforcement of the foreign award would be contrary to the public policy of Singapore. The ambit of "public policy" will be discussed later at [112]–[116]. It suffices to say for now that this doctrine is a strict and narrow one, including, for example, the situation where enforcement "shocks the conscience" or "violates Singapore's most basic notion of justice": *BAZ v BBA and others and other matters* [2020] 5 SLR 266 ("*BAZ*") at [180]. No authority was cited to support the proposition that FNC considerations engage the public policy of Singapore. They plainly do not.

Other arguments by the defendants

The 2006 Model Law

77 The defendants also urged me to consider Art 17I of the Model Law with amendments as adopted in 2006 (the "2006 Model Law"), which provides instances where the recognition or enforcement of an interim measure may be refused.[53] Art 17I reads as follows:

> **Article 17 I. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an interim measure may be refused only:
>
> (a) At the request of the party against whom it is invoked if the court is satisfied that:
>
> (i) Such refusal is warranted on the grounds set forth in article 36(1)(*a*)(i), (ii), (iii) or (iv); or
>
> (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
>
> (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
>
> (b) If the court finds that:
>
> (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
>
> (ii) Any of the grounds set forth in article 36(1)(*b*)(i) or (ii), apply to the recognition and enforcement of the interim measure.
>
> …

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[53] Certified Transcript dated 6 July 2023 at p 53 line 20–p 54 line 31.

78 The defendants accept that Art 17I is not part of Singapore law, but say it represents "international consensus" which is persuasive.[54] I decline to adopt Art 17I as authoritative. It is for Parliament to amend the IAA to adopt the 2006 Model Law or Art 17I if it sees fit.

79 In any event, Art 17I of the 2006 Model Law does not assist the defendants. It does not provide for the refusal of enforcement, much less to decline the exercise of jurisdiction over an application to enforce, on FNC principles. The only possibly relevant provision is Art 17I(1)(*b*)(i), under which the court may decline enforcement if "the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance". However, the *travaux* for the 2006 Model Law make clear that this provision is only concerned with orders that might be *beyond* the power of the national court: see UNCITRAL Working Group on Arbitration, *Report on the work of its Thirty-Third Session* (A/CN.9/485, 20 December 2000) at paras 79 and 100; UNCITRAL Working Group on Arbitration, *Report on the work of its Thirty-fourth Session* (A/CN.9/487, 15 June 2001) at para 76; UNCITRAL Working Group on Arbitration, *Report on the work of its Thirty-eighth Session* (A/CN.9/524, 2 June 2003) at para 48. This is entirely different from the defendants' arguments on FNC principles, which relate to orders that might *more appropriately* be enforced in the courts of another jurisdiction.

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[54] 1st and 2nd Dfs' Supplementary Subs at para 59.

Case law

(1) Swift-Fortune

80 The defendants relied on the decision in *Swift-Fortune* for the proposition that under O 69A r 4 of the Rules of Court (Cap 322, 2004 Rev Ed) (what is now O 48 r 4(2) of the ROC 2021), the phrase "case is a proper one for service out" required the applicant to show that the Singapore court is *forum conveniens*.[55] However, *Swift-Fortune* does not apply here.

81 *Swift-Fortune* did not deal with an application to enforce an interim measure, but an application to serve out an originating process. The court in *Swift-Fortune* was asked to grant a Mareva injunction in support of a foreign-seated arbitration. It did not involve a Singapore-seated arbitration, nor was jurisdiction based on submission via an exclusive or non-exclusive jurisdiction clause. In dealing with an order to serve out this application, the court correctly applied the test in *Spiliada*, namely that the applicant must show merits in the case and that Singapore was the *forum conveniens*.

82 Further, it is not the case that the *Spiliada* test applies in all applications for service out. For example, where there is an exclusive jurisdiction clause in the contract, the "strong cause" test applies instead – *ie*, a party seeking to bring proceedings in breach of that clause must show "exceptional circumstances amounting to strong cause": *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 at [83]–[85].

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[55] 1st and 2nd Dfs' Supplementary Subs at para 6.

83 An altogether different assessment applies in the context of applications for the enforcement of domestic interim measures. As noted above at [62], for such applications, there is no need to ascertain the single, most appropriate forum for enforcement. For the reasons set out above, FNC principles are irrelevant. In fact, the question of whether a case involving such an application "is a proper one for service out of Singapore" is presumptively answered in the affirmative by the fact that Singapore is the seat jurisdiction.

84 *Swift-Fortune* therefore does not aid the defendants' case. Further, I note that the discussion on the *Spiliada* connecting factors under the FNC analysis was ultimately irrelevant as the court in *Swift-Fortune* concluded that it did not have the power, under the IAA, to grant a Mareva injunction in aid of a foreign-seated arbitration: *Swift-Fortune* at [49]–[50] and [60].

85 For completeness, and in any case, the issue of service out of jurisdiction under O 48 r 4(2) of the ROC is *not* engaged in this case. The defendants have, through their Singapore solicitors, accepted service of the Leave Application.[56]

(2) *Margulies* and *Tridon*

86 The defendants cited the cases of *Margulies Brothers, Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 Lloyd's Rep 205 ("*Margulies*") and *Tridon Australia Pty Ltd v ACD Tridon Inc* [2004] NSWCA 146 ("*Tridon*"), for the general proposition that the court will refuse enforcement of arbitral awards where the enforcement will not serve a legitimate purpose.[57] These authorities do not assist them. The cases involved declaratory awards, which the courts declined to enforce either because it was outside the statutory jurisdiction of the

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56 Certified Transcript dated 26 July 2023 at p 115 lines 20–21.

57 1st and 2nd Dfs' Supplementary Subs at para 46.

court to enforce such an order (see *Margulies* at 207), or on the basis that enforcement served no useful purpose (see *Tridon* at [12]).

87 It suffices to note several points on *Margulies* and *Tridon* which undercut the defendants' reliance on them. First, the Interim Order is not a declaratory award and there is therefore no question of it being incapable of enforcement.

88 Second, they involved the application of English and Australian arbitration statutes (the Arbitration Act 1950 in *Margulies* and the Commercial Arbitration Act 1984 in *Tridon*) which did not incorporate the Model Law. In contrast, the enforcement provisions in the IAA and the Model Law do not differentiate between declaratory and other awards, with the result that the same limited grounds for refusal of enforcement apply to all awards. Thus, the court in *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 005 ("*Meydan*") (at [25] and [33]–[34]) observed that the Model Law does not afford the court discretion to refuse a declaratory award on grounds that it would serve no useful purpose – that coram included Roger Giles J, who decided *Tridon*.

89 Further, the apparent prohibition in *Margulies* against the enforcement of declaratory awards was subsequently rejected in *The Front Comor* [2011] 2 All ER (Comm) 1, where the court held (at [28]) that a declaratory award will be enforced if to do so would make a positive contribution to the securing of the material benefit of the award.

90 Third, neither *Margulies* nor *Tridon* cited FNC principles as a ground for refusing to enforce an award. Overall, these cases do not advance the

defendants' argument that this court should refuse to hear the Leave Application.

Sufficient safeguards on the enforcement of interim measures in Singapore

91 The defendants argued that unless FNC considerations are imposed, the Singapore courts will become "the policemen of the world" as far as the enforcement of interim measures are concerned.[58] I disagree:

(a) s 12(6) of the IAA only applies to *Singapore-seated* international arbitrations; and

(b) there are safeguards with respect to applications to enforce foreign interim measures, since they are subject to the same grounds for refusal of enforcement under the IAA as all other foreign arbitral awards (see [72] above).

92 In any event, the defendants' concerns are overstated. It is highly unlikely that commercial parties will want to incur time and financial resources enforcing interim awards in Singapore unless there are practical benefits.

Appropriate for the court to hear the Leave Application

93 Overall, I find that under O 6 r 12(4)(*b*) of the ROC 2021, this court is the appropriate court to hear the Leave Application and it should not decline to exercise its jurisdiction to do so.

94 Order 6 r 12(4)(*b*) is a provision of general application, and there may well be other types of applications for which FNC principles or other

[58] Certified Transcript dated 6 July 2023 at p 144 lines 1–7.

considerations may dictate that it would be inappropriate for the Singapore court to hear that application. However, in the context of applications to enforce domestic interim measures under s 12(6) of the IAA, it would almost always be the case that the parties' choice of Singapore as the seat makes the Singapore court the appropriate court to hear the application.

95 Further, it is not the case that the Interim Order has nothing to do with Singapore. Singapore law governs the tribunal's powers to issue the Interim Order, which in turn imposes continuing obligations against all the defendants, including [CXK] which is a Singapore company. Thus, the Interim Order raises the possibility of breach by a Singapore party in Singapore. [CXK]'s officers also owe fiduciary and statutory duties under Singapore law which are relevant to the performance of the Interim Order.

96 To be clear, this is *not* an endorsement of the *Spiliada* test of connecting factors as the correct method for assessing whether under O 6 r 12(4)(*b*) the Singapore court is an appropriate court to hear the Leave Application. As articulated, that is sufficiently dealt with by the fact that Singapore is the seat. Nevertheless, these features of the Interim Order serve to bolster the conclusion that it is appropriate for this court to hear the Leave Application.

Committal proceedings

97 The defendants argued that they would be prejudiced by the hearing of the Leave Application by this court as the mechanism for enforcement of the Interim Order would likely be committal proceedings brought against its officers for breach.[59] This was in fact one of the main planks of their submission

[59] 1st and 2nd Dfs' Supplementary Subs at para 14(a).

that Singapore was not the appropriate forum under O 6 r 12(4)(*b*) of the ROC 2021. Since compliance with the terms of the Interim Order requires steps to be taken in Malaysia, they argued that they may have difficulty producing evidence, particularly from third parties in Malaysia, to demonstrate what steps have been taken to comply with the same.[60]

98 The defendants have conflated enforcement of the Interim Order with the execution of a committal order. If the court grants permission to enforce the Interim Order, and assuming there is a breach of the Interim Order, the aggrieved party must first apply to the court for permission to make an application for a committal order: see O 23 r 3(1) of the ROC 2021. The court may at that stage consider the nature of the application and decide whether to grant such permission. The considerations which the defendants have pointed to are more relevant to that stage of proceedings – *ie*, whether a committal order should be granted, rather than the present stage of proceedings – *ie*, whether enforcement of the Interim Order should be granted. Further, at the present stage, the prospect and nature of any potential committal proceedings are uncertain. Indeed, what evidence will be relevant in a future committal proceeding (if any), and whether there will be any difficulty adducing that evidence, will depend on the breach alleged. That has not arisen. Thus, it would be speculative at this point to decide on the propriety of a committal order, which was essentially what the defendants were asking this court to do.

99 Further, whether committal proceedings will even be brought is also speculative. The defendants say they have complied with the Interim Order, save for the Renaming Commitment, which is subject to the approval or acts of

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60 1st and 2nd Dfs' Subs at paras 45 and 48.

third parties in Malaysia. The claimants have also not alleged that the defendants are in breach.

100 In fact, the difficulties with pursuing committal proceedings, if any, will be on *the claimants*. They will have to prove, beyond reasonable doubt, that the defendants are in deliberate breach of the terms of the Interim Order: *Monex Group (Singapore) Pte Ltd v E-Clearing (Singapore) Pte Ltd* [2012] 4 SLR 1169 at [30]. The defendants will be able to give evidence of what steps they have taken, what difficulties they have encountered and why they have done all that is reasonable for them to do. If the evidence of non-compliance is in Malaysia and cannot be adduced, it will be more difficult for the claimants to satisfy their burden of proof. Further, and again to the claimant's disadvantage, if the defendants' officers responsible for the breach are outside this court's jurisdiction, then any committal proceedings brought will likely be ineffective.

101 In any event, the difficulties cited by the defendants would similarly exist in respect of committal proceedings arising from foreign awards or interim measures, but, as discussed above at [72], that is not a ground to oppose their enforcement. Thus, the defendants' concerns relating to committal proceedings are not relevant in determining the appropriate court under O 6 r 12(4)(*b*), whether as part of their FNC arguments or as a standalone factor.

102 The defendants relied on *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives Airports*") for the proposition that the court will generally not make an order that it cannot properly supervise.[61] In *Maldives Airports*, the Court of Appeal was addressing

[61] 1st and 2nd Dfs' Subs at para 35(a).

an appeal against the decision of the High Court judge below to grant an interim injunction ("the Injunction") in aid of a Singapore-seated international arbitration. The Court of Appeal (at [2]) allowed the appeal, holding that the balance of convenience did not lie in favour of the Injunction being granted or upheld. A significant factor leading to this conclusion was the presence of practical problems associated with the enforcement of the Injunction, including an unacceptable degree of supervision in a foreign land: *Maldives Airports* at [71].

103 *Maldives Airports* dealt with the *merits* of granting an injunction. It was in that context that the court considered whether the balance of convenience lay in favour of granting the Injunction. However, the issue before me was a *jurisdictional* one – *ie*, whether the court should decline to exercise jurisdiction to hear the Leave Application. The balance of convenience considerations do not apply since the court is simply concerned with whether the application should even be heard at all. In fact, the court in *Maldives Airports* did consider at length, prior to its assessment of the balance of convenience, whether it had jurisdiction to hear the appeal: see *Maldives Airports* at [14]–[31]. It found that it did, and no balance of convenience considerations featured in that analysis.

104 In any case, the enforcement of the Interim Injunction does bear some connecting factors to Singapore: see [95] above. Hence, an order granting enforcement of the Interim Injunction will not be an exercise in futility, unlike the case in *Maldives Airports*. Further, a balance of convenience test is a multifactorial and fact-centric exercise. Besides the factor of an unacceptable degree of supervision in a foreign land, the Court of Appeal in *Maldives Airports* cited many other factors in reaching its decision that the balance of convenience lay in favour of not granting the Injunction. These included the fact that there was an adequate remedy in damages should the Injunction not be

granted (at [65]); the sheer width of the Injunction sought, which led to uncertainty in compliance (at [68]); and the impact which the Injunction would have on third parties (at [69]). It would be incorrect to reduce that analysis to a single factor.

105 Finally, and in any case, the fact that the court order *may* not be enforced effectively is not a sufficient reason for the court to decline to hear enforcement proceedings for, or to grant the enforcement of, an interim measure. An example would be an anti-suit injunction issued by the court against a foreign party commencing, or proceeding with, foreign proceedings in breach of an arbitration agreement. The court of the seat will ordinarily grant such remedy: see *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [68]. Whether the respondent will comply, and whether compliance with the injunction can be effectively enforced, is a separate matter.

106 If the defendants have genuine, practical difficulties in complying with the terms of the Interim Order, which terms I note were volunteered by [MBX], it is open to them to apply to the Tribunal for a variation.

107 For completeness, and for the same reasons above, I reject the defendants' alternative arguments that the Leave Application be stayed under s 18(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (read with para 9 of the First Schedule) and the inherent jurisdiction of the court.

Possible limitations to the court's discretion under s 12(6) of the IAA

108 The court's exercise of its discretion to grant permission to enforce under s 12(6) of the IAA was not before me. It is to be addressed at the merits hearing for the Leave Application. However, given the dearth of both statutory and judicial guidance on this issue, I make some brief observations on the issue.

For clarity, the possible limitations on the court's exercise of discretion under s 12(6) of the IAA discussed below are *not* jurisdictional factors to be considered under O 6 r 12(4)(*b*) of the ROC 2021. Rather, they are arguments for resisting enforcement of domestic interim measures under s 12(6) of the IAA and O 48 of the ROC 2021.

109 Given Parliament's exclusion of the s 12(6) regime from the setting aside and refusal of enforcement mechanisms under the IAA (see [44] and [73] above), the bar for the court to refuse to grant permission to enforce a domestic interim measure must necessarily be a high one. In my view, if there are any limits to the court's discretion to grant permission to enforce a domestic interim measure, they are where:

(a) the granting of the interim measure would have been in excess of the court's powers;

(b) the enforcement of the interim measure would be against public policy; and

(c) the enforcement application is brought in abuse of process, which the court always has the inherent power to control.

Excess of the court's powers

110 Logically, the court cannot grant permission to enforce an interim measure which it could not itself have granted. Hence, where the granting of the interim measure would have been in excess of the court's powers, the court must refuse permission to enforce it. An example is where the interim measure calls for the exercise of police powers.

Public policy

111 Public policy is included as a ground for setting aside under Art 34(2)(*b*)(ii) of the Model Law and refusal of enforcement of awards under s 31(4)(*b*) of the IAA and Art 36(1)(*b*)(ii) of the Model Law. I note the court's observation in *AJU v AJT* [2011] 4 SLR 739 at [37] that there is no difference between the setting aside and the enforcement regime where the ground of public policy is concerned. Thus, the case law on public policy in the enforcement regime is likewise relevant to the setting aside regime: *AJU* at [38].

112 In my view, the public policy ground and that same body of case law are also applicable to the enforcement of domestic interim measures. The *travaux* for the Model Law makes clear that the public policy ground is concerned with "fundamental notions and principles of justice", rather than state politics or policies. As the court in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") observed at [59]:

> As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):
>
> In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised *the fundamental notions and principles of justice*... It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.
>
> [emphasis added]

113 I see no reason why such contravention of "fundamental notions and principles of justice", and the body of case law outlining its ambit, should not

also feature in the court's exercise of its discretion to permit the enforcement of domestic interim measures.

114 In this regard, the prevailing approach is that the public policy objection must involve either "exceptional circumstances … which would justify the court in refusing to enforce the award", or be a violation of "the most basic notions of morality and justice: *Bloomberry Resorts* at [162], citing *AJU* at [38]. Similarly, the court in *PT Asuransi* noted at [59] that:

> … the general consensus of judicial and expert opinion is that public policy under the [IAA] *encompasses a narrow scope* … it should only operate in instances where the upholding of an arbitral award would '*shock the conscience*' … or is '*clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public*' … or where it *violates the forum's most basic notion of morality and justice* …
>
> [emphasis added]

115 In *CEB v CEC and another matter* [2020] 4 SLR 183 at [50], the Court of Appeal commented on this holding in *PT Asuransi*, noting that "[t]hese are strong words which give effect to the underlying objective that it is only in circumstances where the effect of an award comes into conflict with accepted norms of public decency, behaviour, morality and/or justice that the court should intervene". The court in *CEB* noted further that "[t]his will seldom be the case in commercial disputes".

116 An example of when the enforcement of an award would be contrary to public policy would be where the enforcement of the award would mean ignoring the underlying contract's "palpable and indisputable illegality": *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 at 767 (cited in *CBX and another v CBZ and others* [2020] 5 SLR 184 at [56]). Another (more specific) example may be found in *BAZ*. There, the court held

(at [180]) that "it violates Singapore's most basic notion of justice" to find minors liable under a contract that was entered into when they were only between three to eight years old. Thus, the court set aside the arbitral award as it related to the minors.

Abuse of process

117 The court's inherent power to regulate its own process in order to prevent it from being misused is well-established: see *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [31]–[32]. This power should apply where the enforcement of domestic interim measures is sought.

118 I note that it is difficult to map the conventional understanding of an abuse of process onto the enforcement of domestic interim measures. The court in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") explained (at [22]) that the term "abuse of process" signifies that the process of the court must be used *bona fide* and properly and must not be abused – in this regard, the court would prevent the improper use of its machinery and prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. A type of conduct which constituted an abuse of process was the bringing of an action for a collateral purpose: *Gabriel Peter* at [22].

119 However, in the context of applications to enforce a domestic interim measure, it is difficult to see how such an application could be used "as a means of vexation and oppression" or "for a collateral purpose". A tribunal has necessarily determined that it is appropriate on the merits to order the domestic interim measure in favour of the applicant. The statutory regime under s 12(6)

of the IAA is specifically intended to aid and facilitate the enforcement of that domestic interim measure. Indeed, given the legitimate reasons to seek enforcement in the court of the seat (see [67]–[68] above), it will be extremely difficult to establish that such an application is an abuse of process.

120 In any case, there is no need in the present case to explore if enforcement of the Interim Order would be an abuse of process. The affidavits filed by the defendants did not allege that the Leave Application was an abuse of process. As stated above at [13], it was not even the defendant's case that this court had no jurisdiction over the Leave Application – the defendants accepted that it did. The defendant's affidavits focused entirely on why Malaysia was the more appropriate forum – there was no allegation of a collateral purpose or vexatious motive underlying the Leave Application.

Conclusion

121 In the context of the enforcement of domestic interim measures, FNC considerations do not apply in determining whether this court is the appropriate court to hear the Leave Applications under O 6 r 12(4)(*b*) of the ROC 2021. In any event, I have determined that it is appropriate for this court to hear the Leave Application. I therefore dismissed the Stay Applications with costs.

122 I thank counsel for their detailed and helpful submissions.

Hri Kumar Nair
Judge of the High Court

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