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# An evolved approach to the court-subsidiarity model

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Arbitration Act 1996 (c.23) s.44

International Arbitration Act 1994 (Singapore) s.12, s.12A

**Cases:**

Barnwell Enterprises Ltd v ECP Africa FII Investments LLC [2013] EWHC 2517 (Comm); [2014] 1 Lloyd's Rep. 171 (QBD (Comm))

Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd [2017] EWHC 44 (Comm); [2017] 1 All E.R. (Comm) 791 (QBD (Comm))

***Int. A.L.R. 149** **Abstract**

*Almost two decades ago, the English introduced a set of rules to delineate the role of court and arbitral tribunal in issuance of interim measures. This approach was called the "court-subsidiarity" model. In this article, the author explores the inconsistency in application of this model by the courts, identifies issues arising as a consequence of the tests prescribed under the model and highlights the lacunas in English and Singaporean laws.*

## Role of interim measures

Resolving a dispute is not an immediate act. It takes a fair amount of time and resources. If during this process a party gets rid of its assets such that any final judgment or award cannot be satisfied; or destroys the evidence such that its not possible to make a proper determination; or allows for the subject matter concerning the dispute to be lost or destroyed, then the very reason why the process was initiated is defeated. Hence, preventing such acts from occurring is necessary.[1] The role and importance of interim reliefs is clearly highlighted by the following observation of the House of Lords in the landmark case of American Cyanamid Co v Ethicon Ltd (No.1) [2]:

"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction … The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial …"

Equally the European Court of Justice describes the purpose of interim reliefs as:

"the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court." [3]

Thus interim or provisional measures is that quintessential feature of dispute resolution, which protects and preserves the relevance of the whole process.[4]

**Court involvement for interim measures**

Commercial disputes are increasingly involving requests for interim measure.[5] As more and more commercial disputes are being resolved through arbitration, requests for interim measures are becoming fairly common in the arbitration process. In context of arbitration this also forms an area where the function of courts and arbitrator intersect.

Traditionally arbitrators were considered to lack the authority to grant such interim relief and the area was entirely reserved for the courts.[6] This was the case as it was considered that only the courts ought to have coercive powers.[7] However, gradually the position has changed and now most jurisdictions, if not all, recognise the ability of both the arbitrator and the courts to grant interim relief. ***Int. A.L.R. 150*** [8]

Involvement of the courts to grant interim relief is considered to go against the basic objectives of resolving dispute through arbitration.[9] It creates multiple issues such as: (i) it destroys neutrality and may provide party access to forums which allow it to create pressure on the opposite party; (ii) it leads to loss of confidentiality as the court procedures may be public; (iii) it leads to pre-judgment on the merits of the dispute by the courts; (iv) it may cause unnecessary delays; (v) it leads to consideration of issues by judges which may not be as specialised in the particular subject matter of the dispute as the arbitral tribunal; (vi) the tribunal which is more closely connected with the dispute and parties having seen them through the course of proceedings is side-stepped. Indeed, choice of arbitration as a means of dispute resolution would suggest that the same arbitral tribunal would also resolve the issues of interim measures.[10] Therefore involvement of the courts ideally ought to be eliminated.

However, there are equally well-recognised reasons why involvement of the courts for interim measures cannot be dispensed with entirely.[11] In multiple scenarios the arbitral tribunal may not have the ability to grant effective reliefs[12] such as:

**Measures against third parties:**

On occasion interim measures may be required against a third party such as in a scenario where the subject matter in dispute or property required to be inspected is in possession of a third person or where a debt owed by a third party is required to be attached.

**Measures prior to the constitution of the tribunal:**

The process of constitution of the tribunal is not immediate and may take months. The greatest need for interim measures is usually at the outset of a dispute.[13] Thus, there may not always be a functioning tribunal to grant interim relief.

**Enforceability of orders of the tribunal:**

Mareva Injunctions and Anton Pillar orders are common forms of interim measures requested by a party. Such orders are considered effective if accompanied by a threat of contempt for its breach. An interim order of an arbitral tribunal is not always enforceable as an order of a court.

**High degree of urgency:**

While interim reliefs are normally required urgently, in certain situations the degree of urgency may be such that a tribunal cannot arrange for a hearing and issue orders in the short period.

**Ex-parte orders:**

The requirements of consent and providing equal opportunity to parties to present its case are considered to restrict the ability of the arbitrator to order ex-parte interim relief. Usually arbitrators are not empowered to make ex-parte orders.

**Power of the tribunal may be limited by contract:**

Given that arbitration agreement forms the basis of the jurisdiction of the tribunal, parties may restrict the ability of the arbitrator to issue such relief.

Thus, there are reasons to centralise all aspects of the dispute before the arbitral tribunal, however court involvement is necessitated to ensure the effectiveness of the dispute resolution process.

**Free choice and court subsidiarity**

Involvement of the court leads to a subsequent debate.[14] If the courts are required to be involved, how should the power to grant interim relief be distributed between the courts and the tribunal? What should be the extent of the arbitrator's power? What should be the extent of the court's intervention into the arbitral process? Should parties be permitted to select between the courts or a tribunal for interim relief? Does this allow for forum shopping? How is availability of effective interim relief ensured? Two models have emerged in this area of interim measures—(i) the "free-choice" model; and (ii) the "court-subsidiarity" model.[15]

The *free-choice* model provides for a *laissez faire* approach wherein a party is free to approach any forum, i.e. a court or arbitral tribunal for grant of interim relief. ***Int. A.L.R. 151*** This model lays emphasis upon a party's ability to select the forum and has been adopted by certain countries such as Germany.[16]

The "court-subsidiarity" model as adopted in countries such as England and Singapore gives primacy to the tribunal over the courts. The courts can be approached only in situations where the tribunal does not have the power or cannot act effectively. This model lays emphasis upon the parties' choice of arbitration as the means for the dispute resolution and non-interference by the courts.[17] In this article, the author explores the "court-subsidiarity" model while focusing on two common law jurisdictions—England and Singapore.

**England**

Arbitration Act, 1996

**"Court powers exercisable in support of arbitral proceedings.**

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

Those matters are—

the taking of the evidence of witnesses;

the preservation of evidence;

making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

for the inspection, photographing, preservation, custody or detention of the property, or

ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

the sale of any goods the subject of the proceedings;

the granting of an interim injunction or the appointment of a receiver.

If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order."

England introduced the "court-subsidiarity" model through s.44 of the (English) Arbitration Act 1996 (Act) with detailed rules regarding separation of jurisdiction of the courts and tribunal. Sub-sections (3)–(6) capture the essence of the model and prescribe situations in which the court may exercise the powers under s.44.

Sub-sections (3)–(5) impose the following limitations: ***Int. A.L.R. 152***

**Urgency test—**

A party is permitted to approach the court directly only in cases of urgency. Otherwise, a party may approach the court only with the permission of the arbitral tribunal or pursuant to an agreement in writing with the other party to make such application.[18] In practice it is rare to find an agreement between the parties.[19] Thus, this provision effectively ensures that save for cases of urgency, the court would be involved only with the permission of the tribunal.[20] This ensures that the arbitrator remains in charge of the process and that the courts play a supporting role.

**Power and effectiveness test—**

The court may act only to the extent that the tribunal has no power or is unable for the time being to act effectively.[21] This ensures that the courts only step in to cover the gaps in arbitration and not to take over the function of the arbitrator itself.

Sub-section (6) deals with relationship between the orders of the court and arbitral tribunal. It stipulates that if the court itself orders, an order made by the court under s.44 shall stop having any effect upon an order of the tribunal. This section ensures that in situations such as where the court was involved due to the tribunal not having been constituted, the power and function of granting of interim relief would move back to the tribunal once it starts functioning.

The intent behind introducing the "court-subsidiarity" model was to reduce court interference in the arbitral process and to reduce situations where the court exercising its jurisdiction may usurp the role of the arbitral tribunal.[22] It ensures that the arbitral tribunal remains in charge of the dispute, which is in line with the principle provided under s.1(c) of the Act.[23] In Econet Wireless Ltd v VEE Networks Ltd [24] the court observed:

"the powers of the court under section 44 are plainly intended to cover over the crack between the moment of the application and the time when the arbitral tribunal can be formed and take its own decisions about preserving the status quo."

The model, to the extent possible, shifts the power to order interim measures into the arbitrator's domain, while maintaining the effectiveness of an interim remedy.

**Singapore**

International Arbitration Act (Singapore)

**"Court-ordered interim measures**

This section shall apply in relation to an arbitration—

to which this Part applies; and

irrespective of whether the place of arbitration is in the territory of Singapore.

Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (i) as it has for the purpose of and in relation to an action or a matter in the court.

The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.

If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.

If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the ***Int. A.L.R. 153*** permission of the arbitral tribunal or the agreement in writing of the other parties.

In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2)."

Singapore through the International Arbitration (Amendment) Act 2009 (2009 Amendment) amended its International Arbitration Act (IAA). A new s.12A was introduced which is almost identical to s.44 of the English Arbitration Act. Thus, through the 2009 Amendment, Singapore expressly incorporated in statute the "court-subsidiarity" model. However, "court-subsidiarity" model can be traced in Singaporean case laws even prior to the 2009 Amendment. In NCC International AB v Alliance Concrete Singapore Pte Ltd [25] the Singapore Court of Appeal observed:

"This shows that, consistent with our interpretation of ss 12(1) and 12(7) of the [International Arbitration Act], parties ought not to be allowed to bypass seeking interim measures from an arbitral tribunal merely because curial assistance is conceivably available. *Rather, help from the court is to be sought only when arbitration is inappropriate, ineffective or incapable of securing the particular form of relief sought*.

In summary, under the [International Arbitration Act] regime, although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings"(emphasis supplied).

The observation shows that Singapore courts only stepped in to provide interim relief when the arbitral tribunal was ineffective or incapable of providing similar relief.

The model was expressly incorporated in statute in line with Singapore's policy of minimal curial intervention. Section 12A of the IAA also limits the parties' ability to approach the courts based on the tests of urgency, power of the arbitrator and effectiveness of the relief granted by the arbitrator.[26] However, there are two key distinctions between s.44 under the English Arbitration Act and s.12A of

the IAA:

The first distinction is that while parties could contract out of s.44 of the English Arbitration Act, s.12A of the IAA is mandatory in nature and applies where the IAA is applicable.

Section 12A(7) of the IAA provides that the order of the court ceases to have effect when the tribunal subsequently makes an order which expressly relates to the whole or part of the order passed by the court. Whereas under the English Arbitration Act the court order shall cease to have effect due to a subsequent order of a tribunal, only if the court so provides. This distinction highlights that under the Singaporean model the arbitrator has higher power given that it could subsequently make orders that may, in effect, modify or vacate earlier orders of the court.[27] However under the English model the arbitrator's order could have such effect only if the court permits.

**"Court-subsidiarity" model—the moving parts:**

The model as implemented in both jurisdictions raises several questions. What should be the degree of urgency to allow direct applications in court? What is meant by the power and effectiveness? What impact should subsequent orders of tribunal have on earlier court orders? Each such question raises several further questions. Given that it is almost two decades since the introduction of the model, the author now looks at how courts have analysed these issues in practice and presents potential solutions and suggestions to further develop the model. ***Int. A.L.R. 154***

***The 'urgency' test***

Pursuant to subss.(3) and (4) of s.44 of the Act, and ss. (4) and (5) of the (Singapore) IAA, a distinction on the basis of urgency has been created. If the case is not urgent, then the permission of the tribunal or consent between the parties is required to apply to the court. However, if the case is urgent, then a party may approach the court directly. This raises an issue regarding how the 'urgency' requirement should be construed.

Under the "court-subsidiarity" model the court's role is to support the arbitration process and restrain from usurping the role of the arbitrator. According to the DAC Report the urgency exception was introduced for situations where the tribunal is not constituted or cannot act quickly enough.[28] It also provides that the requirement of obtaining permission of the tribunal or agreement between the parties has been included as this removes any appearance of unfair court interference or usurpation of the power of the tribunal.[29]

In Jacobs E&C Ltd v Laker Vent Engineering Ltd [30] the court observed that:

"The position is clear. Under section 44(3) that there has to be urgency. That urgency is required because if it is not urgent then the arbitral tribunal and/or the other party have to be involved, leading either to consent or agreement to court proceedings."

This implies that urgency is assessed on the basis of whether the situation allows the party time to obtain permission from the tribunal to make an application in court.[31]

However, in Gerald Metals SAv Timis,[32] the court, relying on the case of Starlight Shipping v Tai Ping Insurance [33] observed that:

"It is common ground that the test of urgency under subsection (3) is to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale."

The court brings a link between the power and effectiveness of the tribunal and the urgency exception. Thus, the urgency is assessed on the basis of whether the reliefs requested could not wait until such time that the tribunal starts functioning and is able to act in a manner, which secures the position of the parties. Assessment of urgency on this basis may prima facie appear to be appropriate. In fact in several cases court assesses urgency on the basis of whether the tribunal having the requisite power, can act effectively within the relevant timescale.[34] However, this assessment of degree of urgency is different from assessing whether the tribunal has time to consider an application for permission to apply to court.

The approach of the courts to assess timescale within which the tribunal may grant effective relief dilutes the rationale of introducing the requirement of tribunal's permission. The urgency exception was introduced to ensure that that the courts do not usurp the arbitrator's role. The assessment by the court regarding the tribunal's ability to effectively protect the parties within the relevant timescale would lead to a more detailed assessment of the case and functioning of the arbitration by the court. This is against the underlying principle of the requirement of the tribunal's permission. Thus, while assessing the urgency requirement the court should limits its assessment to whether the urgency is such that it does not permit a party to apply to the arbitral tribunal for permission to make an application in court.

It is acknowledged that in many cases the answer to the issue of whether the tribunal can act effectively within the relevant timescale would not differ from the answer to whether the tribunal could within the relevant timescale consider the parties' request for permission to apply to the court for interim relief. However, merely because the answer arrived at may be the same, should not allow for an approach which dilutes the intent of the provision and gives a higher role to the courts in making an assessment of the arbitration proceedings. Therefore the nature of urgency should be assessed on the basis of the timescale for the arbitrator to consider granting of permission to apply to the court. A logical corollary to this statement is that if the available time is sufficient then a party is first obligated to apply to the tribunal for permission. This gives rise to the following questions:

On what basis should an arbitrator determine whether it should give permission to the party to make an application to the court?

If the arbitrator declines to give permission, should then the court entertain an application for the same relief?

If the arbitrator does grant permission, should the court again review whether the tribunal has no power or is unable for the time being to act effectively? ***Int. A.L.R. 155***

***On what basis should an arbitrator determine whether it should give permission to the party to make an application to the court?***

The statutes do not provide the factors, which the tribunal may consider while determining whether a party may be permitted to apply to the court for interim measures. There are varying approaches adopted by tribunals, reflecting that the position may be flexible and dependent on facts of each case. However, such flexibility also reduces the certainty and creates multiple issues such as:

How should the degree of urgency be determined by the court if it is unaware regarding the nature of assessment required to be made by the tribunal for granting or refusing permission?

What form of submissions should a party make before the tribunal to oppose or seek such permission?

What should the court approach be after such permission is granted or refused by the tribunal?

Accordingly, the factors that the arbitrator may take into account for granting permission to apply to the court for an interim measure are now identified.

**(1) Power and effectiveness:**

Under the "court-subsidiarity" model, a court can act only if the arbitral tribunal has no power or cannot act effectively. Where the tribunal has the power and can act effectively, the court would not entertain the application. Thus permitting a party to apply to the court would be an exercise in futility, if the tribunal is of the view that it has the power and can act effectively.

In Barnwell Enterprises Ltd (as successor-in-title to Shivaan Enterprises Ltd), Rishi Ltd, Alok Ltd, GNR Reddy v ECP Africa FII Investments LLC,[35] the interpretation of the order of the tribunal declining the request for interim relief was in issue. It was unclear from the tribunal's order if (i) the tribunal had ruled that it does not have power to grant interim relief; or (ii) if the tribunal had denied the request on merits. The party subsequently applying to the court for interim relief argued that the tribunal had ruled that it has no power to grant interim relief. The court while recognising the ambiguity in tribunal's order referred the matter back to the tribunal for clarification. The court

provided that in the event the tribunal clarified that it had power, but refused to grant interim relief, then the matter shall end there. If the tribunal clarifies that it has no power to grant interim relief, then the matter may come back to the court. This shows that if the tribunal had held that it has the power, then the court would not entertain an application. Accordingly, the tribunal while dealing with a request for permission to make an application in court should determine whether the tribunal has the power to grant the interim relief and if such relief would be effective. In fact as noted by the court in Shashoua v Sharma,[36] the tribunal does look into the aspect of whether it has the power and can act effectively.

Further, the tribunal is better positioned to determine if it can act effectively. For example, the tribunal is better suited to determine factors such as: (i) the time period for the issuance of final award; (ii) the time when the tribunal can assemble and hold a hearing; (iii) the likelihood of a party to comply with the order of the tribunal; and (iv) whether the power of negative inference and other powers (e.g. powers available under s.41 of the Act) can sufficiently remedy the issue of non-compliance with tribunal orders.

**(3) Abusive action**

In certain cases an application for interim relief may be intended for an abusive action such as to delay the proceedings and create an additional cost burden on the opposite party etc.[37] A tribunal which has witnessed the parties conduct during the dispute resolution process is better suited than the courts to ascertain the true nature of the interim relief application.[38] Thus, while granting permission to the party a tribunal may also look into such factors.

Accordingly, a tribunal may look into the following three factors:

the power and effectiveness of the tribunal to grant the required relief;

the merits of the request for interim relief;

the request not being an offensive or dilatory tactic.

Consideration of merits by the arbitrator at this stage does reduce the subsequent role of the court. However, as discussed above, it also raises additional issues. Given that such approach leads to inefficiencies and has the potential for creating conflicting views, it is advisable that the tribunal abstains from consideration of the merits keeping in mind the degree of urgency.

***If the arbitrator declines to give permission, should the court entertain a direct application for the same relief?***

Upon consideration of the aforesaid factors, if the arbitrator declines permission to apply to the court for interim relief, the principle of least interference would dictate that the court should not entertain a subsequent application directly made to the court. The urgency requirement is an exception to the normal principle that ***Int. A.L.R. 156** a party shall require permission of the tribunal or agreement to approach the court. The requirement of prior permission has been included to ensure that the court does not interfere or usurp the arbitral process.[39] Thus, in cases where the arbitral tribunal has refused permission, acceptance of subsequent application directly made to the court would defeat the intent of the "urgency" test. It would also be tantamount to the court's review of the arbitrator's exercise of discretion to grant or refuse permission.

If the permission has been denied on the basis of such request being a dilatory or offensive tactic, then subsequent consideration of a direct application in court on the same grounds would in effect allow for execution of that tactic. In circumstances where the arbitrator determines it has the power and can act effectively, then entertaining a subsequent application in court would lead to the court reviewing the arbitrator's decision on its power and effectiveness.

In Starlight Shipping Co v Tai Ping Insurance Co Ltd, Hubei Branch,[40] the court was faced with a similar issue. The arbitrators declined permission for making an application to the court. This refusal was then raised as a defence to an application subsequently made to the court. The court rejected the defence on the basis that the arbitrators did not have similar evidence or information as is available to the court when they declined to give permission.[41] The court identified that the factors, which gave rise to the urgency and ineffectiveness of the tribunal, were not put before the tribunal

itself and that the tribunal was misled.[42]

This case indicates that the parties can make applications directly to the court even after the arbitrators refused permission. However, the courts should be hesitant of adopting such an approach. Not only does it go against the principle of the Act as provided under s.1(c), this makes the "urgency" distinction inane.

***If the arbitrator does grant permission, should the court again review whether the tribunal has no power or is unable, for the time being, to act effectively?***

A corollary to the above discussion is that, once the arbitrator does grant the permission, it implies that the arbitrator in the given circumstances has no power and/or cannot act effectively. Once the arbitrator arrives at this conclusion, it is best suited for the court to accept that, rather then undertaking a fresh analysis of whether the arbitrator has the power and can act effectively. Indeed, non-acceptance of the determination by the arbitrator would create an unwanted scenario where the arbitrator may be constrained to issue interim orders even though it is satisfied that it could not sufficiently secure the parties in arbitration. Further, once the arbitrator determines that court assistance is appropriate, denial of such assistance by the court would imply denial of the court support to arbitration and would amount to a review of the arbitrator's determination. Thus, if the arbitrator grants permission, the courts should view such permission as a fact that leads to the satisfaction of the requirement under s.44(5) of the Act or s.12(6) of the IAA, i.e. the "power and effectiveness" test. The burden would then be upon the respondent to show that the arbitrator does have the power and can act effectively on account of factors like change in circumstances after grant of permission, which shows that the tribunal now does have the power to grant reliefs or the ability to act effectively.

***The "power & effectiveness" test***

Section 44(5) of the Act and s.12(6) of the IAA provide that in any case the court can act only to the extent the tribunal does not have the power or cannot act effectively. This exception forms the backbone of the "court-subsidiarity" model.

The DAC Report[43] provides that this exception is to enable the court to grant reliefs where the tribunal may lack the necessary powers such as for issuing a Mareva Injunction or an Anton Pillar order or for passing an order affecting a third party. Further, in Singapore the Law Minister while addressing the Parliament over the 2009 Amendment[44] stated that:

"Consistent with the policy of limited court intervention, the Court can exercise these new powers only when the arbitral tribunal or arbitral institution has no power to act, or is unable to act for the time being effectively. It is envisaged that one such scenario could be where the foreign arbitral tribunal has power to make an interim order, but that order cannot otherwise be enforced in Singapore apart from an application under this new section.

Other examples include:

a party applying to Court for relief before the arbitral tribunal has been fully or properly constituted;

a party applying to Court for relief against a non-party to the arbitration, which an arbitral tribunal has no power over; and

where the arbitral tribunal is unable to hear an urgent application for interim relief sufficiently quickly."

Thus the exception allows the court to act in those situations where the parties cannot be protected through the arbitral process. The reasons that necessitate the ***Int. A.L.R. 157*** involvement of courts for issuance of interim relief[45] also constitute the circumstances in which the tribunal lacks the power or cannot act effectively. There is no fixed test to ascertain the power and effectiveness of the tribunal, and the issue is considered in light of the fact and circumstances of each individual case. However, there are a few standard scenarios in which this condition is considered satisfied.

***Tribunal not constituted***

The most common circumstance for invoking the court's jurisdiction is the non-constitution of the tribunal, as mostly the provisional measures are required at the outset of the dispute.[46] Indeed, in many cases the non-constitution of the tribunal is seen as sufficient justification for satisfaction of the "power and effectiveness" condition.[47] However, the introduction of new mechanisms such as emergency arbitration and expedited procedures impact this aspect. This has been discussed in greater detail below.[48] Also, as discussed below, a party relying on this ground to invoke the jurisdiction of the court should ensure that it has taken steps for expeditious constitution of the tribunal.[49]

***Tribunal lacks the power***

There are various circumstances in which the tribunal may be considered to lack the power. As is the case in England, the provisions regarding the power of the arbitrator to grant interim relief are derogable.[50] Therefore the parties by agreement could take away the power to order interim measures from the arbitrator. Additionally, in England, the arbitrator may be considered to lack the requisite power to order a Mareva Injunction.[51] However, in Singapore, s.12 of the IAA that deals with power of the arbitrator is mandatory in nature and gives arbitrator wide powers. Thus, for arbitrations seated in Singapore to which the IAA is applicable, it is unlikely that the arbitrator may not have the requisite power. Accordingly, in Singapore, arbitrator may lack the requisite power in fairly limited situations like requirement of *ex-parte* relief or relief against a third party.

***Tribunal's order not enforceable***

The use of the twin expression of power and effectiveness in the statutes suggests that the framers covered situations where the tribunal may be authorised to make interim orders, i.e. have the power, but such interim order would lack the necessary teeth. In Singapore, following the public feedback[52] it was specifically clarified in the Explanatory Statement to the 2009 Amendment, that the "power and effectiveness" test would authorise the court to act in a situation where the tribunal is seated outside Singapore, but the interim measure is required in Singapore. This is due to the lack of enforceability of orders passed by the foreign-seated tribunal in Singapore. Thus an interim relief from the foreign-seated tribunal would be ineffective in Singapore. English courts also consider lack of enforceability of the tribunal's order as sufficient to justify their involvement.[53]

In Singapore, the process for enforcement of tribunal orders is administrative and quick.[54] Thus for arbitration seated in Singapore, non-enforceability or time lag in enforcement of interim orders may not be relied upon in many cases as justification for invocation of courts jurisdiction.

***Other situations—anti-suit injunctions***

In cases where a party requests an anti-suit injunction from the court as an interim measure, the courts have generally taken into account whether a tribunal can within the relevant time issue a final award on the issue.[55] However, in Sheffield United Football Club Ltd v West Ham United Football Club plc,[56] the court observed that the "power and effectiveness" test is satisfied for the court to act even though the tribunal could issue the final award in time. The court found even if there were sufficient time for the tribunal to issue a final award, it would not be effective in the given circumstances. While there are certain reservations against the approach of the court in the matter, the case reflects that there may be peculiar circumstances leading to ineffectiveness of the tribunal.

***Impact of new developments***

There have been many changes in the rules and procedures in international arbitration. The introduction of new mechanisms like emergency arbitration[57] and ***Int. A.L.R. 158** expedited formation of tribunal[58] is for increasing the effectiveness of arbitration and filling the gaps, which currently exist in the arbitral process. These procedures have been introduced to reduce the role of the court and to provide parties with a complete protection within the dispute resolution mechanism chosen by them.[59] The emergency arbitration mechanism allows parties to obtain interim measures prior to the constitution of the tribunal.[60] It therefore affects the requirement for involving courts prior to the constitution of the tribunal. The expedited formation of the tribunal affects the tests as the time lag in constitution of the tribunal is reduced. Therefore, there is a consequent impact of such procedures

on tests prescribed under the "court-subsidiarity" model.

In Gerald Metals SAv Timis,[61] the court while determining the nature of urgency observed:

"*The obvious purpose of Articles 9A and 9B [of the LCIA Rules] is to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It seems to me that to make commercial sense of the provisions a similar functional interpretation of Articles 9A [Expedited Formation of Arbitral Tribunal] and 9B [Emergency Arbitrator] needs to be adopted as has been given to section 44(3) of the Arbitration Act. In other words, the test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale—the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal*. That, in my view, is the rational interpretation of these rules.

Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44"(emphasis supplied).

In Seele Middle East FZE v Drake & Scull International SA Co,[62] the court again acknowledged the potential impact of such mechanisms on assessment of applications directly made to the court. The court noted that:

"In these cases, the court under section 44(5) shall only act if and to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard has no power or is unable for the time being to act effectively. *Although this is a matter where there is an arbitration under the ICC Rules, it is not subject to the recent change in those rules in the form of the introduction of an emergency arbitrator to deal with applications*. An ICC arbitration has been commenced but it is not said that the arbitral tribunal is yet in a position to act. Therefore, there is no power for the time being for an ICC arbitral tribunal to act effectively"(emphasis supplied).

The observations of the court clearly show that institutional rules have a consequent impact on the ability of a party to apply to the court. Thus, while determining the nature of the urgency and power and effectiveness of relief available through arbitral process, the courts are required to inquire into the nature of the arbitration agreement between the parties and the consequent impact of such agreement and institutional rules on the ability of the parties to be secured within the realm of such rules.

***Interaction between court and tribunal orders***

Interim orders by their very nature are transient or temporary in nature. Such orders can be subsequently modified, altered, revoked or set aside.[63] Frequently a party approaches the court due to tribunal not having been constituted.[64] In such circumstance an issue arises regarding how should the court orders be treated once the tribunal is constituted and functioning.

England and Singapore have adopted different approaches regarding the impact of subsequent order of the tribunal over an earlier order of the court. Under the Singapore approach, the court orders are been deemed subsidiary to the tribunal's order and automatically cease to have effect upon the order of the tribunal.[65] Under the English approach the court itself determines if the subsequent order of the tribunal will have an impact on its order under s.44.[66] However, a review of the judgments of the English courts reflects that in practice the position in England is not different from Singapore.

The English courts view their role as covering the gap in protection until such time that the tribunal starts functioning. This provision has been inserted to ensure that the arbitrator remains in charge of the dispute in sync ***Int. A.L.R. 159*** with the statutory policy.[67] Accordingly, the English courts have normally ordered that their order would cease to have effect upon order of the arbitrator. In Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd (was overruled on a different aspect)[68] the court observed:

"Section 44 subsection 6 provides for the court to impose a limit on any injunction given, giving the arbitrator later appointed the power to reconsider the matter or, in the current circumstances, the arbitrator now appointed to take over the matter should the court think it appropriate to make an order

in the present case. It would then be up to the arbitrator to reconsider it and decide whether or not the order should continue." [69]

The court while ordering provision of access to certain records, permitted the arbitrator to take appropriate steps as it felt necessary in regard to the court order, including any variation that may need to be made to the order.[70]

In Belair LLC v Basel LLC [71] the court granted an injunction restraining a party from selling certain assets. The court found that its order is necessary for protecting the assets until such time that the tribunal is functioning and can determine the question of interim relief for itself. In Cetelem SA v Roust Holdings Ltd,[72] the court was concerned with the granting of a mandatory interim injunction. The court provided that by framing the order appropriately and with requisite undertakings, any steps taken pursuant to the interim mandatory injunction issued by the court should not be revocable.[73] Thus, even while passing orders in the nature of interim mandatory injunction the court recognised the requirement of providing for appropriate cross undertakings and protections, such that, if required, the order or its effect is revocable subsequently by the tribunal.

In Delkor UK Ltd v Ases Havacilik Servis Ve Destek Hizmetleri AS [74] an interesting issue arose. The English court had passed orders restraining payment by a bank on a performance guarantee. A party subsequently applied to the Swiss seated tribunal to vacate the orders passed by the court. The tribunal took the view that the English court did not permit tribunal to modify the order. The party then approached the court to clarify that the court had permitted the tribunal to vary, modify or discharge its order. The court made the following interesting observations:

"The Arbitration Tribunal has reached its own conclusions without seeking or even raising the possibility of (if there were some power) seeking my interpretation. My role was functus officio, once I had decided the issue, subject to appeal, which there was not, all the more once the matter has actually gone to the Arbitration Tribunal and taken its course.

Indeed, my Order permitted by paragraph 7 the opportunity for variation or discharge. But the basis upon which any such variation or discharge application could be made, it seems to me, must plainly need to have been left for the Tribunal, and I cannot possibly say that I either did or did not have any expectation that my Order would necessarily last through to the substantive hearing. It would all be dependent upon whether there were an application to vary or discharge made by the Defendant to the Arbitration Tribunal and, if made, were successful. That must be entirely a matter for the Arbitration Tribunal."

The above judgments reflect that English courts would normally provide tribunal ability to modify or vacate its order. Further, it is a matter entirely for the tribunal to determine at its discretion if the order of the court should be modified or vacated.

However, Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd [75] reflects an exception to the normal deference given to the tribunal. The English court was specifically requested to provide that the freezing order would come to an end upon the order of the arbitrator. The court declined to leave the matter for the determination of the arbitrator given that the arbitrator could not act effectively as the order would not bind third parties or be accompanied by court sanctions.[76] Thus, the court does not permit subsequent order of the arbitrator to override court orders, when the order of the arbitrator would not be effective or bring about the desired results such as binding a third party. This approach does not deviate from the overall intent behind the model. However, given the similarity in language of the provision within the English and Singapore Acts, the above case shows that there may be a lacuna in the Singapore law.

In a situation where the tribunal is not seated in Singapore, its orders would not be enforceable in Singapore.[77] However, upon order from the foreign-seated tribunal, the court order would automatically cease to have effect. Therefore, as the order of the foreign-seated tribunal is not enforceable and the court order would not be operative, the party would be denied an enforceable interim measure in Singapore.

In the (Singapore) Ministry of Law's responses to public feedback received on the International Arbitration (Amendment) Bill it was specifically clarified that: ***Int. A.L.R. 160***

"We also chose not to follow the UK Section 44(6) as our policy intent was to give primacy to the arbitral tribunal. It is also intended that the tribunal would not be able to override the decision of a

court to which the tribunal itself has no power to make (for example, orders involving the rights of 3rd parties). In such situations, the natural thing for parties to do is to go back to the courts and there is nothing in section 12A(7) which prevents them from so doing."

Thus, in cases where the tribunal does not have power to act (e.g. lack of power to pass an order against third party) a subsequent order of the tribunal would not override the order of the court. However, non-enforceability of an order may not be construed as lack of the tribunal's power. The clarifications provided by the (Singapore) Ministry of Law on the public feedback to s.12A(6), also indicates that enforceability pertains to effectiveness of the arbitrator's order.[78]

This shows that the flexibility preserved in the (English) Act [79] may be critical to safeguard the effectiveness of the interim order in appropriate situations. As has been discussed above, effectiveness of the tribunal is determined in light of facts and circumstances of each individual case. It is difficult to provide a definite test for gauging effectiveness. Thus, the flexibility under the English Act cannot be substituted by a fixed rule. However, as experience has shown and given the intent behind the model, in normal circumstances the order of the tribunal should prevail over the order of the court. Therefore, it is suggested that the current model in England and Singapore may be modified such that: where the arbitrator has the power, its order should immediately and automatically override the order of the court, unless the court in light of the lack of effectiveness of the arbitrator's order specifically orders against cessation of its order. This approach gives primacy to the tribunal while ensuring that in circumstances where the tribunal cannot act effectively court orders can continue to be operative.

**Inherent obligation to proceed expeditiously**

If the role of the court is only to fill the gap until such time that the tribunal is able to start functioning and act effectively, it may then be a fortiori argued that the party applying for the interim relief is obligated to take the necessary steps towards prompt and swift constitution of the tribunal.[80] The court should ideally refrain from granting the relief if the urgency is self-inflicted or created. Even where the court does grant the relief, it is the parties' obligation to take quick steps towards the constitution of the tribunal.[81] Such obligation is inherent in the "court-subsidiarity" model.

**Conclusion:**

The developments in the arbitration world have been aimed at empowering the arbitrator and reducing the role of the courts. In context of interim measures, the "court-subsidiarity" model is a product of this thought process. The model advocates primacy of the tribunal over the courts in issuance of interim measures, while ensuring that a party has access to effective remedy at all times.

The author now proposes the following systematic approach that may be applied while dealing with applications for interim measure under the "court-subsidiarity" model:

The "urgency" test should be determined in the following manner:

Could effective relief be obtained from the emergency arbitrator? If yes, then the court should dismiss the application

If no then—

Does the relevant timescale permit the party to obtain permission of the tribunal to make an application in the court?

If yes, the timescale permits a party to obtain the permission of the tribunal (with the possibility of expedited formation), then the application to the court should be dismissed.

The tribunal while considering an application for permission to apply to the court, should take into account (i) its own powers and effectiveness; and (ii) that the application is not a dilatory tactic. The tribunal may also consider the merits of the request for interim measures. This would have an impact on the subsequent assessment of the court. However, given that there is always a degree of urgency associated with interim measures and that consideration of merits would lead to duplication of process, a tribunal should refrain from making such assessment where it would cause unreasonable delay and costs.

If a tribunal refuses a party's request for permission, then a court should refrain from entertaining a subsequent application for that interim relief.

If a tribunal does grant the permission to apply to court, the court should then consider that the "power and effectiveness" ***Int. A.L.R. 161*** test is satisfied on the basis of this permission, unless the opposing party is able to establish to the contrary due to factors like change in circumstances.

The "power and effectiveness" test contains two distinct aspects. The power refers to arbitrator's ability to pass the required orders. Effectiveness, on the other hand, refers to whether the orders of the arbitrator could be delivered in time and if so whether those orders would have the desired impact. These aspects have to be determined in facts and circumstances of each individual case. Overall the test aims at analysing whether the parties could be duly protected through the arbitral process.

Under the model, there is an inherent obligation upon the party applying to the court for interim relief to promptly take all necessary steps for the establishment of a functioning tribunal.

In the event the court passes an interim order, a subsequent order of the tribunal should generally override such order. The court order should only operate until such time that the tribunal starts functioning and is able to act effectively. England and Singapore have different statutory rules towards dealing with the impact of subsequent tribunal orders. The Singaporean approach is preferred over the English approach. Singapore provides that the court order automatically ceases to have effect upon order from the tribunal. However, flexibility of the courts to order against such automatic cessation of court order should be reserved for situations where the tribunal may have power to issue orders, but its orders may not be effective. In Singapore, this lack of flexibility may cause court orders to be vacated by orders of foreign-seated tribunals. Further, orders of the foreign-seated tribunal would not be enforceable in Singapore leaving a gap in the protection. Therefore, it is suggested that the court order should automatically cease to operate unless the court has specifically ordered against such cessation to ensure effective protection for the parties.

The new developments in the arbitration regime when considered through the lenses of the "court-subsidiarity" model, would lead to reduction in curial intervention. In fact, as more countries change their laws in sync with these developments, the role of the courts could be substantially reduced if not eliminated. Indeed, there are aspects and issues, which arise under the model that could be further analysed. However, at this juncture the author concludes that the "court-subsidiarity" model offers a unique approach that does not sacrifice efficiency in the name of curial non-intervention. The evolved approach towards application of this model would reduce the prevalent ambiguities and enhance the primacy of the arbitral process.

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1. See *Report of the UNCITRAL Secretary-General, Possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate, A/CN.9/WG.II/WP.111, 12 October 2000, paras 6 and 7* .

2. American Cyanamid Co v Ethicon Ltd (No.1) [1975] A.C. 396 .

3. United Kingdom v Council of the European Union (C-656/11 R) [2014] 3 C.M.L.R. 11 at [31]; Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro v European Commission (C-506/13 P-R) at [18]; Evonik Degussa GmbH v European Commission (C-162/15 P-R) [2016] 5 C.M.L.R. 1 at [82]; Commission of the European Communities v Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd (C-7/04) at [36].

4. See *Report of the UNCITRAL Secretary-General, Possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate, A/CN.9/WG.II/WP.111, 12 October 2000, para.6* : "Interim measures of protection play an essential role in every legal system in facilitating the process of dispute resolution. The aims of such measures are broadly twofold: to preserve the position of the parties pending resolution of their dispute and to ensure the enforceability of the final judgment."

5. Report of the UNCITRAL Working Group on Arbitration on the work of its thirty-second session (Vienna, 20–31 March 2000), A/CN.9/468, 10 April 2000: "There was general recognition in the Working Group of the fact that interim measures of protection were increasingly being found in the practice of international commercial arbitration and that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures."

6. *Gary B. Born, International Commercial Arbitration 2nd edn, Vol.II (Wolters Kluwer, 2014), p.2431* .

7. Joseph Lee, "Court—Subsidiarity and Interim Measures in Commercial Arbitration: A Comparative Study of U.K., Singapore & Taiwan" (2013) 6 Contemp. Asia Arb. J. 227; *Pierre A. Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please", in Albert Jan van den Berg (ed.), International Arbitration and National Courts: The Never Ending Story, ICCA Congress Series, Vol.10 (Kluwer Law International, 2001), p.97* .

8. *Julian D.M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration (Kluwer Law International, 2003), paras 23–10 to 23–14* .

9. *Born, International Commercial Arbitration 2nd edn, Vol.II (2014), p.2544* .

10. See *Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, Vol.12 (Kluwer Law International, 2005), pp.49–54* .

11. See Report of the Secretary-General (12 October 2000) at fn.5 above.

12. See *Yesilirmak, Provisional Measures in International Commercial Arbitration, Vol.12 (Kluwer Law International, 2005), pp.68–75* ; *Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 3rd edn (Oceana Publications Inc) p.471* ; *David Sutton, Judith Gill and Mathew Gearing (eds), Russell on Arbitration 23rd edn (Sweet & Maxwell, 2007), para.5–075* ; *Born, International Commercial Arbitration 2nd edn, Vol.II (2014), p.2444* .

13. *Born, International Commercial Arbitration 2nd edn, Vol.II (2014), p.2451* .

14. See Note by the *UNCITRAL Secretariat, Interim measures of protection, A/CN.9/WG.II/WP.125, 2 October 2003 at para.44* .

15. *Donald Francis Donovan, "The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal", in Albert Jan van den Berg (ed.), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series, Vol.12 (Kluwer Law International, 2005), p.206* ; See also Jan K. Schaefer, "New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared" (1998) 2(2) Electronic J. Comp. L.

16. Schaefer, "New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared" (1998) 2(2) Electronic J. Comp. L.

17. Schaefer, "New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared" (1998) 2(2) Electronic J. Comp. L.

18. See s.44(3) and (4) of the (English) Arbitration Act 1996 .

19. The author did not come across any case where an application was made to the court under s.44(4) of the (English) Arbitration Act 1996 pursuant to an agreement between the parties. However, there may be situations where parties may arrive at such agreement, for example, where both parties have competing claims for interim reliefs in regard to which the tribunal does not have the power to grant or cannot act effectively.

20. *Sutton, Gill and Gearing (eds), Russell on Arbitration 23rd edn (Sweet & Maxwell, 2007), para.7–187* .

21. See s.44(5) of the (English) Arbitration Act 1996 .

22. See the *Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, paras 214–216* .

23. *See* Cetelem SA v. Roust Holdings Ltd, [2005] 1 W.L.R. 3555 , para 35; SAB Miller Africa v. East African Breweries, 2009 WL 6043698 , para 11: " *The measures contained especially in sections 44(5) and (6) are, in my view, of particular importance as ensuring that the power to grant interim relief is conformable with the arbitral tribunal's being in charge of the dispute, conformable indeed with the statutory policies expressed in section 1(c) ."*

24. [2006] EWHC 1568 (Comm)

25. NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] 2 S.L.R. 565 at [20]–[69].

26. Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd,[2013] S.G.C.A. 16 : "As the opening words of s 12A(2) make clear, the court is conferred such powers '[s]ubject to' the constraints that are laid down in ss 12A(3) to 12A(6)."

27. In the (Singapore) Ministry of Law's responses to public feedback received on the International Arbitration (Amendment) Bill it was specifically clarified that: "Section 12A(7) was drafted to reduce this uncertainty by making the court order lapse only upon the tribunal's order which expressly relates to the whole or part of the court order. We also chose not to follow the UK Section 44(6) as our policy intent was to give primacy to the arbitral tribunal. It is also intended that the tribunal would not be able to override the decision of a court to which the tribunal itself has no power to make (for example, orders involving the rights of 3rd parties). In such situations, the natural thing for parties to do is to go back to the courts and there is nothing in section 12A(7) which prevents them from so doing"; Second Reading Speech by Law Minister K. Shanmugam on the International Arbitration (Amendment) Bill, 19 October 2009: "Once the tribunal is able to act, it should be accorded primacy. Accordingly, the amendment makes clear that any order granted by the court may cease to have effect, should an arbitral tribunal make an order, which expressly relates to the previous court order. This is in line with our policy of facilitating arbitration and minimising judicial intervention in the process."

28. See the *Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para.215* .

29. *Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para.215* ; see also Zim Integrated Shipping Services Ltd v European Container KS [2013] EWHC 3581 (Comm) at [21].

30. Jacobs E&C Ltd v Laker Vent Engineering Ltd [2014] EWHC 4818 (TCC) at [39].

31. See also Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm) at [81]: "Here it is for Mobil to show that an urgent

order is needed from me without waiting for permission from the ICC arbitrators as would normally be required under s. 44(4) of the 1996 Act."

32. Gerald Metals SA v Timis [2016] EWHC 2327 (Ch).

33. Starlight Shipping v Tai Ping Insurance [2008] 1 Lloyd's Rep. 230 at [22], [24] and [27].

34. See Cetelem SA v Roust Holdings Ltd [2005] 1 W.L.R. 3555; Permasteelisa Japan KK v Bouyguesstroi, 2007 WL 5747037; Seele Middle East FZE v Drake & Scull International [2014] EWHC 435 (TCC); Belair LLC v Basel LLC [2009] EWHC 725 (Comm).

35. Barnwell Enterprises Ltd (as successor-in-title to Shivaan Enterprises Ltd), Rishi Ltd, Alok Ltd, GNR Reddy v ECP Africa FII Investments LLC [2013] EWHC 2517 (Comm).

36. Shashoua v Sharma [2009] EWHC 957 (Comm) at [2].

37. *Lew, Mistelis, et al., Comparative International Commercial Arbitration (Kluwer Law International, 2003), para.23–14*.

38. Lew, Mistelis, et al., Comparative International Commercial Arbitration (Kluwer Law International, 2003), para.23–14.

39. See the *Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para.215*.

40. Starlight Shipping Co v Tai Ping Insurance Co Ltd, Hubei Branch [2007] EWHC 1893 (Comm).

41. Starlight Shipping Co [2007] EWHC 1893 (Comm) at [31].

42. Starlight Shipping [2007] EWHC 1893 (Comm) at [31].

43. *The Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para.214*.

44. Second Reading Speech by Law Minister K. Shanmugam on the International Arbitration (Amendment) Bill, 19 October 2009.

45. See "Court involvement for interim measures", above.

46. *Born, International Commercial Arbitration 2nd edn, Vol.II (2014), p.2451*.

47. Cetelem SA v Roust Holdings Ltd [2005] 1 W.L.R. 3555 (the court granted interim mandatory injunction given that the relief was urgently required and that the tribunal did not stand constituted); Belair LLC [2009] EWHC 725 (Comm) (the court determined that the order for perseveration of assets is urgently required which could not await the constitution of the tribunal).

48. See "Impact of new developments", below

49. See "Inherent obligation to proceed expeditiously", below.

50. See ss.38 and 39 of the (English) Arbitration Act 1996.

51. Kastner v Jackson, [2004] EWCA Civ 1599 at [19].

52. See the Response to feedback received on s.12A(6) of the IAA in (Singapore) Ministry of Law's responses to public feedback received on the International Arbitration (Amendment) Bill.

53. Southport Success SA v Tsingshan Holding Group Co Ltd [2015] EWHC 1974 (Comm) at [27]; Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd [2007] EWHC 2319 (Comm) at [80].

54. See s.12(6) of the (Singapore) International Arbitration Act read with Report of Sub-Committee on Review of Arbitration Laws, Singapore, August 1993, para.35.

55. See fn.67 above.

56. Sheffield United Football Club Ltd v West Ham United Football Club plc [2008] EWHC 2855 (Comm).

57. Article 9B of the LCIA Rules 2014; r.30 of the SIAC Rules 2016; art.23 of the HKIAC Rules 2013; app.II of the SCC Rules 2017; art.29 of the ICC Rules 2017.

58. Article 9A of the LCIA Rules 2014.

59. Grant Hanessian and E. Alexandra Dosman, "Songs of Innocence and Experience: Ten Years of Emergency Arbitration" (2016) 27 Am. Rev. Int'l Arb. 215; Chan Leng Sun S.C. and Tan Weiyi, "Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief" (2013) 6 Contemp. Asia Arb. J. 349.

60. Edgardo Munoz, "How Urgent Shall an Emergency Be?—The Standards Required to Grant Urgent Relief by Emergency Arbitrators" (2015) 4 Y.B. on Int'l Arb. 43; Jason Fry, "The Emergency Arbitrator—Flawed Fashion or Sensible Solution?" (2013) 7 Disp. Resol. Int'l 179.

61. Gerald Metals SA v Timis [2016] EWHC 2327 (Ch).

62. Seele Middle East FZE v Drake & Scull International SA Co [2014] EWHC 435 (TCC).

63. PT Pukuafu Indah v Newmont Indonesia Ltd [2012] SGHC 187.

64. *Born, International Commercial Arbitration 2nd edn, Vol.II (2014), p.2451*.

65. See s.12A(7) of the (Singapore) International Arbitration Act.

66. See s.44(6) of the (English) Arbitration Act 1996.

67. SAB Miller Africa v East African Breweries, 2009 WL 6043698 at [11].

68. Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd [2004] EWHC 479 (Comm).

69. Hiscox Underwriting Ltd [2004] EWHC 479 (Comm) at [34].

70. Hiscox Underwriting Ltd [2004] EWHC 479 (Comm) at [64].

71. Belair LLC [2009] EWHC 725 (Comm).

72. Cetelem SA v Roust Holdings Ltd [2005] 1 W.L.R. 3555.

73. Cetelem SA [2005] 1 W.L.R. 3555 at [64].

74. Delkor UK Ltd v Ases Havacilik Servis Ve Destek Hizmetleri AS [2014] EWHC 1473 (Comm).

75. Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd [2007] EWHC 2319 (Comm).

76. Pacific Maritime (Asia) Ltd [2007] EWHC 2319 (Comm) at [78]–[81].

77. Section 12(6) of the (Singapore) International Arbitration Act is only applicable to arbitrations seated in Singapore.

78. See the Response to feedback received on s.12A(6) of the IAA in (Singapore) Ministry of Law's responses to public feedback received on the International Arbitration (Amendment) Bill.

79. See s.44(6) of the (English) Arbitration Act 1996 whereby the court orders in each case what the impact of subsequent order of arbitrator would have on the court's order.

80. Belair LLC [2009] EWHC 725 (Comm) at [23]: "I entirely accept that when a party seeks the assistance of the Court under s. 44(3) Arbitration Act 1996, it should be able to demonstrate that it has done what is required on its part to get the arbitral tribunal in place."

81. Econet Wireless Ltd v Vee Networks Ltd [2006] EWHC 1568 (Comm) at [14]; Belair LLC [2009] EWHC 725 (Comm) at [51].