Shearn Delamore &co.

Arbitration Update

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The Overlapping Powers of the Courts and Arbitral Tribunal to Grant Interim Relief

Introduction

Under section 11(1) of the **Arbitration Act 2005** ("AA 2005"), the Malaysian courts are conferred with the power and jurisdiction to grant interim relief before or even during arbitral proceedings. Since the process to formally constitute an arbitral tribunal may take time, any party who wishes to obtain urgent interim relief may seek the same from the court by relying on section 11(1) of the AA 2005.

Once an arbitral tribunal is constituted, the arbitral tribunal then has the power to grant certain types of interim measures pursuant to section 19(1) of the AA 2005[1], which includes the phrase "*unless otherwise agreed by the parties*". This essentially means that parties may agree to exclude the arbitral tribunal's jurisdiction to grant interim measures and instead pursue the same from the courts. However, in the absence of such an agreement and to the extent where the interim measures under both section 11 and section 19 may overlap, there exists a concurrent jurisdiction of the arbitration tribunal and the Malaysian courts to grant the same.

In such a scenario, the pertinent question now arises: Do parties have the freedom to choose?

The Unwritten Rule

In the recent High Court case of **Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd**[2], this same scenario was posed to the bench. Although there was an ongoing arbitration, the Plaintiff, who was the Claimant in the arbitration, filed an application for security for costs in the High Court instead of making the application to the arbitral tribunal.

It was the Plaintiff's case that, considering the concurrent jurisdiction of the Court and arbitral tribunal in this matter, parties have complete freedom of choice to apply to whichever body they so wish. The application was objected to by the Defendant, who instead argued that it should have been made to the arbitral tribunal.

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Ong Chee Kwan J meticulously examined the drafting history of the AA 2005 and referred to case laws from jurisdictions such as Singapore and the United Kingdom. His Lordship drew parallels between the AA 2005 on the one hand and the **Singapore International Arbitration Act 1994** ("SIAA 1994") and the old UK Arbitration Act 1950[3] on the other.

What his Lordship concluded was this: it is an unwritten rule in the AA 2005 that a party must resort to the arbitral tribunal first notwithstanding the court's parallel jurisdiction. This is considering his analysis that:

1. *The approach must be consistent with the principle of minimum judicial intervention adopted from the UNCITRAL Model Law.*

   As reflected in section 8 of the AA 2005[4], the Malaysian Parliament has adopted the principle of minimum judicial intervention in arbitration, following Art. 5 of the *UNCITRAL Model Law*. Hence, it will be wholly inconsistent with this principle if the Court were to adopt a "*complete freedom of choice*" for parties to choose which forum to go[5]. Rather, the Court's role is to facilitate, support and aid the arbitral tribunal to ensure that the latter's award will not be rendered impotent[6]. The Court should assume a subsidiary role and refrain from entertaining any application for interim measures which should first be made before the arbitral tribunal[7].

2. *Freedom to choose the forum clashes with the nature of being bound to an arbitration agreement.*

   It is only natural that, upon agreeing to refer their disputes to an arbitral tribunal, all applications including that seeking interim measures relating to the said disputes, ought to be made before the said tribunal[8]. It is incongruous for a party in such a situation to be at liberty to prefer his application for interim measures to be determined by the courts.

3. *There is a need to coordinate the overlapping powers.*

   There is a need to coordinate the concurrent powers of the courts and the arbitral tribunal to avoid any abuse of procedure. The best way to do this is by requiring a party seeking interim measures to first resort to the arbitral tribunal and only subsidiarily to the Court[9].

4. *The rationale behind the insertion of section 12A of the SIAA 1994[10].*

   Section 12A of the SIAA 1994 was inserted in 2009. It expressly limits the High Court's role in granting interim measures in exceptional circumstances. Prior to the insertion of section 12A of the SIAA, the repealed section 12(7) which

previously governed court-ordered interim measures was substantially *similar* to section 11(1) of our AA 2005; there was no express limitation on the said power of the Court. However, even prior to the insertion of section 12A, Singapore courts[11] had limited the Court's role by deciding that parties should not be allowed to bypass seeking interim measures from an arbitral tribunal merely because there exists this alternative route[12]. Rather, assistance from the court should only be pursued when arbitration is inappropriate, ineffective, or incapable of securing the particular form of relief sought.

5. *The House of Lords' decision in Channel Tunnel is instructive.*

Section 12(6) of the old UK Arbitration Act 1950 is similar to section 11(1) of the AA 2005 and the repealed section 12(7) of the SIAA 1994. In **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd**[13], the House of Lords held that an English Court is vested with the same powers as the arbitral tribunal to grant interim measures[14]. Despite the absence of express limitation of the Court's power, the House of Lords held that the Court's duty to respect the choice of tribunal which both parties have made must prevail. The Court must not take away the power of decision from the hands of the arbitrators which the parties have entrusted to[15]. This dictum was applied by the Malaysian courts in cases like **Cobrain Holdings v GDP Special Projects Sdn Bhd**[16] and **Jiwa Harmoni Offshore Sdn Bhd v ISHI Power Sdn Bhd**[17].

It is to be noted that the current UK **Arbitration Act 1996** has expressly included certain limitations on the Court's powers in support of arbitral proceedings under section 44. For example, Section 44(3) of the UK **Arbitration Act 1996** provides that if the case is not urgent, the Court shall grant certain orders[18] only on the application of a party to the arbitral proceedings made with the permission of the tribunal or the agreement in writing of the other parties. The priority accorded to the arbitral tribunal in granting the same orders is clearly illustrated by section 44(5), which states that, in any case, the Court shall act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.

The Exceptional Circumstances to Bypass the Arbitral Tribunal's Power

The Court acknowledged several exceptional circumstances which may justify the courts to bypass arbitral tribunals in granting interim relief, which includes[19]:

i. The interim measure is sought against a third party over whom the arbitral tribunal has no jurisdiction;
ii. The issue in question is very urgent;
iii. The High Court's coercive powers of enforcement are needed; or
iv. The arbitral tribunal has not been constituted.

Conclusion

This case has clearly clarified the supporting role of the courts when the issue in question touches on interim measures in arbitration. When the power of the Court to grant interim relief overlaps with that conferred on the tribunal, an application must be made first to the latter. This priority accorded to the arbitral tribunal, however, may be overridden by the Court in exceptional circumstances.

Perhaps this whole scenario may be well settled with the amendment of AA 2005 to reflect similar changes made in Singapore and in the UK, vide section 12A of the SIAA 1994 and section 44 of the UK **Arbitration Act 1996** respectively.

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[1] These interim measures are listed under section 19(2)(a) - (e) of the AA 2005 which, amongst others, to maintain or restore the status quo pending the determination of the dispute and to provide security for the costs of the dispute.
[2] [2023] 4 CLJ 91.
[3] Section 12(6) of the old UK Arbitration Act 1950 bears a similar structure with section 11(1) of the AA 2005, before the Act was repealed and replaced by the UK **Arbitration Act 1996**.
[4] Section 8 provides that, "*No court shall intervene in matters governed by this Act, except where so provided in this Act*".
[5] At [46] & [47] of Ong Chee Kwan J's judgment ("the Judgment").
[6] At [51] of the Judgment.
[7] At [51] of the Judgment.
[8] At [48] of the Judgment.
[9] At [49] of the Judgment.
[10] At [54] to [59] of the Judgment.
[11] See Singapore Court of Appeal case of **NCC International AB v Alliance Concrete Singapore Pte Ltd** [2008] SGCA 5 at [40].
[12] This approach was reached by the Singapore Court of Appeal upon tracing back the drafting history of sections 12(1) and 12(7) of the SIAA 1994, as well as the *UNCITRAL Model Law Commentary*.
[13] [1993] AC 334.
[14] A page 367 at lines F to H.
[15] **Channel Tunnel** (supra) at page 367.
[16] [2010] 1 LNS 1834; [2010] MLJU 2140. In this case, notwithstanding that the arbitration proceedings had commenced, the Plaintiff applied to the High Court for an order that the Defendant set aside RM16,329.59 as a retention sum for the Plaintiff. The Plaintiff invoked section 11 of the AA 2005. While at [4], the Court recognised that the order sought is interim in nature, pending the conclusion and disposal of the arbitration proceedings between the Plaintiff and the Defendant, nevertheless the Court held at [8] that, when parties have agreed to commence arbitration proceedings, the court should be slow to interfere. Citing the Channel Tunnel case, the Court held that any necessary application should first be made to the arbitral tribunal unless the tribunal is not conferred with the jurisdiction to order the relief sought. The Plaintiff's application was therefore dismissed.
[17] [2009] 1 LNS 849. The Plaintiff in this case (who was the Claimant in the arbitration proceeding) sought for security for costs in respect of an ongoing arbitration against the Defendant. The Defendant objected on the grounds that, inter alia, the powers to order for security has been conferred on the arbitral tribunal by virtue of section 19 of the AA 2005. In dismissing the Plaintiff's application, the High Court held at [2(a)] that the powers granted to the court under section 11 must be exercised with utmost care as to not stifle the arbitral process. The Court, citing Lord Mustill in the Channel Tunnel case, held that when such powers are also vested with the arbitrator, the application must first be made to the arbitrator.
[18] These are in relation to the matters listed under section 44(2) of the UK **Arbitration Act 1996**.
[19] These circumstances have been laid down by the Justice Mohamad Ariff Md Yusof (as he then was) in the case of **Cobrain Holdings Sdn Bhd** (supra) at [32], which were outlined in the Judgment at [52]. This is in line with the view expressed in Leslie K H Chew, *Singapore Arbitration Handbook* (LexisNexis, 2003) at p 105, referred by the Singapore Court of Appeal in the case of **NCC International AB** (supra) at [41].