The Asia-Pacific Arbitration Review

2024

Court-ordered interim measures in aid of arbitral proceedings: a Malaysian perspective

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Generated: February 8, 2024

Court-ordered interim measures in aid of arbitral proceedings: a Malaysian perspective

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Summary

IN SUMMARY

This article explores the courts' role in granting interim measures in relation to arbitral proceedings in light of changes introduced by the Arbitration (Amendment) Act 2018 (No. 2) and recent decisions of the Malaysian high courts.

DISCUSSION POINTS

- Impact of changes introduced by the Arbitration (Amendment) Act 2018 (No. 2) on court-ordered interim measures
- Concurrent jurisdiction between the court and the arbitral tribunal to grant interim relief in aid of arbitral proceedings
- Seeking interim measures against non-parties to arbitration

REFERENCED IN THIS ARTICLE

- Sections 11, 19 and 19J of the Arbitration Act 2005
- Arbitration (Amendment) Act 2018 (No. 2)
- *Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors*
- *Sigma Elevator (M) Sdn Bhd v Perbadanan Pengurusan City Plaza*
- *Jana DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd and other cases*
- *Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd*

In Malaysia, arbitral proceedings are primarily governed by the Arbitration Act 2005, which is based on the United Nations Commission on International Trade Law Model on International Commercial Arbitration (the Model Law).

IMPACT OF 2018 AMENDMENTS

The Arbitration (Amendment) Act 2018 (No. 2) came into force on 8 May 2018, adopting the 2006 amendments to the Model Law. This led to a significant impact on interim protection measures and confidentiality and reduced the recourses available against arbitral awards. For instance, section 42 of the Arbitration Act 2005, which provided for questions of law arising from an arbitral award to be referred to the high courts for determination, was repealed.

Insofar as interim measures are concerned, the Arbitration (Amendment) Act 2018 (No. 2) introduced 10 new provisions reflecting the 2006 amendments to the Model Law, as set out below:

- conditions for granting interim measures (section 19A);
- application for preliminary orders and conditions for granting preliminary orders (section 19B);
- specific regime for preliminary orders (section 19C);

- modification, suspension or termination (section 19D);
- provision of security (section 19E);
- disclosure (section 19F);
- costs and damages (section 19G);
- recognition and enforcement (section 19H);
- grounds for refusing recognition or enforcement (section 19I); and
- court-ordered interim measures (section 19J).

Further, section 11(1) of the Arbitration Act 2005 was amended to extend the high courts' jurisdiction to:

- grant interim measures to maintain or restore the status quo of the parties pending the determination of the dispute in arbitration;
- preserve the assets out of which a subsequent award may be satisfied;
- preserve evidence; and
- provide security for the costs of the dispute referred to arbitration.

Likewise, section 19(2) of the Arbitration Act 2005 was amended to include the same provisions as set out in section 11(1), items (a) to (e) (with minor differences in section 11(1)(c)) insofar as the arbitral tribunal's power to order interim measures is concerned. It is, however, pertinent to note that section 19(1) of the Arbitration Act 2005 empowers the arbitral tribunal to grant such interim measures 'unless otherwise agreed by the parties', indicating that parties can agree to exclude the jurisdiction of the arbitral tribunal and submit to the exclusive jurisdiction of the courts.

The amendments introduced in sections 11(1) and 19(2) of the Arbitration Act 2005 continue to see applications being filed before the high courts for interim relief where the arbitral tribunal also had the power to effectively grant the same (ie, maintaining concurrent jurisdictions between the court and the arbitral tribunal, as had been the case before the amendments came into force). The courts, however, have consistently upheld the principle of minimum judicial intervention in arbitration following article 5 of the Model Law, which restricts the courts' role to only the matters expressly and specifically provided for under the Arbitration Act 2005. Party autonomy is therefore always given precedence over court intervention in matters relating to arbitration.

INTERIM MEASURES

The Courts' Role

The courts have maintained that, when the interim measure is one that both the court and the arbitral tribunal is empowered to grant, the requesting party ought to first apply to the arbitral tribunal. For instance, in *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd*,[1] which was decided prior to the Arbitration (Amendment) Act 2018 (No. 2), the court held:

> As has been emphasised in numerous cases, when parties have contractually resorted to arbitration as a forum of choice, the court of law should be slow to interfere in the arbitration proceedings, and should do so only where the governing statutory framework grants it the jurisdiction. Any necessary

> application should first be made to the arbitral tribunal, unless of course the particular jurisdiction happens not to be conferred on the arbitral tribunal within the statutory framework. These principles are stated and emphasised in the leading House of Lords decision in Channel Tunnel Group Ltdv Balfour Beatty Construction [1993] AC 334.[2]
>
> The purpose of interim measures of protection . . . is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision in which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.[3]
>
> There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiffs claim is strong enough to merit protection, and on the other hand the duty of the court to respect the choice of tribunal which both parties have made, and not take out of the hands of the arbitrators . . . a power of decision which the parties have entrusted to them alone.[4]
>
> Thus there is a clear overlap between section 11(1) (a), (b), (c) and (f) with section 19(1) (a), (b), (c) and (d). Going by the basic principles as stated earlier, where there is a concurrent jurisdiction, a party should first apply before the arbitral tribunal, unless there are countervailing factors, since the role of the High Court is to "support arbitration": (NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] 2 SLR (R), a Singapore Court of Appeal decision). NCC International AB has usefully specified some instances where the court of law may intervene, namely where third parties, over whom the arbitral tribunal has no jurisdiction, are involved, where matters are very urgent or where the court's coercive powers of enforcement are required.[5]

Similarly, in *Jiwa Harmoni Offshore Sdn Bhd v ISHI Paower Sdn Bhd*,[6] the court held that:

> The powers granted to court pursuant to section 11 are powers which are not meant to be oppressively invoked by a party to arbitration proceedings. It must be exercised with utmost care and circumspection to ensure and support the arbitration mechanism and not do any act which will stifle the arbitral process. In addition, when such powers are also vested with the arbitrator, the application must first be made before the arbitrator.

P&A Management Sdn Bhd v WSH Development Sdn Bhd,[7] on the other hand, concerned an application for security for costs that was filed after the Arbitration (Amendment) Act 2018 (No. 2) came into force. Although the court recognised that an application should first be made to the arbitral tribunal, the court nevertheless found that the plaintiff was justified in bypassing the arbitral tribunal on the grounds that the defendant's conduct was unreasonably obstructive, which, in turn, would delay or prolong the arbitration process. It was held that:

> This court recognises that, in general, an application for interim measure should first be made to the arbitral tribunal. However, this is not an inflexible rule especially since co-extensive powers have been expressly given to the arbitral tribunal and the courts. In determining whether an exceptional case has been established by an applicant, the court must be vigilant in ensuring that a favourable decision for the applicant would support the arbitration mechanism and not restrain or suppress the arbitral process.[8]

Further guidance may be sought from the Court of Appeal's decision in ***KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC***,[9] wherein it was held that:

> the exercise of discretionary power under section 11 requires a careful examination of the relevant material facts against the allegations made, with a cautious restrain of determining the dispute in any definitive manner since that is a matter for determination at the arbitration and not for the court. The court is only approached to grant an interim remedy which will ultimately support or aid that arbitration.[10]

It is also pertinent to note that sections 11(3) and 19J(1) of the Arbitration Act 2005 expressly empower the court to issue interim measures in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia. Therefore, these provisions are equally applicable in international arbitration.

Measures Against Non-parties To An Arbitration

In ***Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors***,[11] the plaintiffs sought for injunctive reliefs under sections 11 and 19J of the Arbitration Act 2005 against nine defendants, wherein the first defendant was not a party to the arbitral proceedings. One of the issues in the case was therefore whether the court was empowered to grant an injunctive order against a non-party to the arbitration agreement.

The first defendant contended that the Arbitration Act 2005 does not permit for interim measures to be granted against a non-party, especially in the absence of a pre-existing cause of action against the first defendant.

The high court held that, while section 11(1) of the Arbitration Act 2005 only applies to seeking interim measures against a 'party',[12] section 19J of the Arbitration Act 2005 appeared to confer wider powers to grant interim measures 'as long as the interim measures are in relation to arbitration proceedings'. It was further explained that such an interpretation of the newly added provision in section 19J was in line with the commentary on article 9 of the Digest of Case Law on the Model Law, which stated that one of the reasons for a court to be given powers to grant interim measures is 'where a measure needs to be granted against a third party over which the arbitral tribunal has no jurisdiction'.[13]

In any event, the court remained mindful of the principle of minimal judicial intervention and emphasised that care ought to be taken in not determining or prejudging the disputes that are before the arbitral tribunal. The court further highlighted that:

> the court's role is simply to provide supportive and limited supervisory functions over the arbitration proceedings based on the powers expressly provided under the [Arbitration Act] 2015. There is no room for any residual or general powers under the common law.[14]

MERITS OF THE CLAIM IN ARBITRAL PROCEEDINGS

A rather interesting notion that was put forth in the case of *Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors* was whether the usual tests under *American Cynamid Co v Ethicom Ltd*[15] are applicable in granting interim measures to aid arbitral proceedings. The court took the view that it may not be necessary to delve into the question of whether there is a serious issue to be tried considering the fact that there exists a matter pending determination before the arbitral tribunal. Moreover, if the court were to make a finding on whether there existed a serious issue to be tried, this would equate to usurping the role of the arbitral tribunal and prejudging the matter.

As such, the court elected to adopt the approach of the dissenting judgment in *Coppe'e-Lavalin SA/NV v Ken-Ren Chemicals and Fertilisers Ltd (in liq)* and *Voest-Alpine AG v Ken-Ren Chemicals and Fertilisers Ltd (in liq)*,[16] and held as follows:

> I read the aforesaid passages to mean that if the court is of the view that an intrusion into the arbitral tribunal's functions will be required before determining whether to issue the interim measures sought, then the court will be more circumspect if the encroachment will effectively take away the decision-making process of the arbitrator. Some intrusions may be called for or even unavoidable, for example, in determining whether the status quo has been changed, but not more than is absolutely necessary to come to a view as to whether an interim measure ought to be issued. Where the necessity and urgency of the interim measures outweigh the intrusions, an order for the interim measures ought to be given in the wider interest of preventing harm to the effectiveness of the final award. Needless to say, where the arbitral tribunal has no jurisdiction to grant such interim measures, the case is all the more compelling.[17]

Although the court held that the court's decision would have been the same had the usual tests in *American Cynamid Co v Ethicom Ltd* been applied, it remains to be seen whether the courts would be inclined to adopt this approach when dealing with interim measures sought in aid of arbitral proceedings. This is especially given the Court of Appeal's decision in *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC,* which applied the tests in *American Cynamid Co v Ethicom Ltd* and is binding on the high court by precedent.

In fact, issues pertaining to section 11(1) of the Arbitration Act 2005 were only raised before the Federal Court recently in*Sigma Elevator (M) Sdn Bhd v Perbadanan Pengurusan City Plaza*.[18] This case concerned an application for security for costs, which was filed before the high court upon the arbitral tribunal's directions. The high court proceeded to allow the application without considering the merits of the claim before the arbitral tribunal. However, the high court's decision was subsequently overruled by the Court of Appeal on the grounds that the merits of the claim in the arbitration is a relevant factor to be considered in deciding whether or not to grant an application seeking for security for costs.

Given the different approaches of the courts to this end, the applicant sought for leave from the Federal Court to appeal against the decision handed down by the Court of Appeal by way of posing three questions of law. On 14 March 2023, the Federal Court proceeded to allow two such questions, which may be summarised as follows:

- Question No. 1: in the spirit of minimal interference by the courts as entrenched in section 8 of the Arbitration Act 2005, should the merits of a party's claim in arbitration

be considered by the high court in an application for interim measures under section 11(1)(e)?

- Question No. 2: if the answer to Question No. 1 is yes, how should the high court, in exercising its statutory powers under section 11(1) of the Arbitration Act 2005, approach the consideration of merits of a party's claim in arbitration without infringing upon section 8 of the Arbitration Act 2005?

The Federal Court's determination of the above is much anticipated to clarify the extent to which the minimal intervention principle remains applicable insofar as the exercise of the court's jurisdiction under section 11(1) of the Arbitration Act 2005 is concerned.

CONCURRENT JURISDICTION BETWEEN COURTS AND THE ARBITRAL TRIBUNAL

A recent decision that painstakingly focused on the concurrent jurisdiction of the arbitral tribunal and the court is *Malaysian Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd*.[19] The dispute in this case arose from a construction contract wherein the plaintiff was appointed as the main contractor for the construction and completion of a luxury resort. While the dispute was referred to arbitration – the proceedings for which were already ongoing – the plaintiff sought for security for costs to defend the defendant's counterclaim in excess of 51 million ringgit. This request was premised on alleged concerns over the defendant's financial status but was rejected by the defendant.

Prior to filing an application for security for costs before the high court, the plaintiff sought for the defendant's agreement for the same to be made before the arbitral tribunal. However, there was no direct response from the defendant to this end, save for reserving the right to fully ventilate the matters in the appropriate forum. Thereafter, the plaintiff proceeded to file the application for security for costs before the high court. No objections were raised by the defendant in any affidavits or written submissions that the application in question ought to have been made to the arbitral tribunal and not the court.

On the day of the hearing, the parties were requested to address the court as to whether the application should have been made to the arbitral tribunal instead, in light of the principles of party autonomy and minimal intervention of the courts in arbitral proceedings. The parties were directed to file further written submissions on the following issue highlighted by the court:

> The issue that I raised with counsel revolves around the application of section 11(1) and section 19(1) of the [Arbitration Act] 2005 which I have set out above. On the plain reading of these sections, the court and the arbitral tribunal appear to possess concurrent jurisdiction to grant interim measures. However, it is unclear under what circumstances would it be appropriate for parties to apply to the court for the grant of interim measures without being looked upon as usurping the functions of the arbitral tribunal or pre-empting its decision. Is a party completely free to seek interim reliefs from either the court or the arbitral tribunal without any pre-conditions?[20]

Upon hearing both the parties, the high court proceeded to dismiss the application without hearing on the merits premised on, among other things, the following analysis:

> In Malaysia, our section 19(1) of the [Arbitration Act] 2005 provides the power for the arbitral tribunal to grant interim measures if requested for by a party

to the arbitration 'unless otherwise agreed by the parties'. By this I take it to mean that parties to the arbitration can agree to exclude the jurisdiction of the arbitral tribunal to grant interim measures and instead leaving it exclusively to the courts to order such measures. For convenience, I would refer to such agreement as 'exclusion agreement'.

This means that under our [Arbitration Act] 2005, if there is no exclusion agreement, both the arbitral tribunal and the Court will have concurrent jurisdiction to grant interim measures in respect of the arbitration proceedings.

Although it is not explicit in our [Arbitration Act] 2005, particularly under sections 11(1) and 19(1) thereto, that relegates the role of the court in granting interim measures to that of a subsidiary or supporting role, it is my judgment that in the exercise of the concurrent jurisdiction, it will be wholly inconsistent with the fundamental principles of party autonomy and minimal judicial intervention if the court were to adopt a 'complete freedom of choice' approach as canvassed by learned counsel for the plaintiff.

. . .

Based on the aforesaid principle, it is only natural that when parties agreed to have their disputes to be determined by an arbitral tribunal, all applications including application seeking interim measures relating to their disputes ought to be made before the said tribunal. This necessarily imposes limitations to the parties' choice of forum on matters pertaining to their disputes. It seems to me incongruous that a party who, on the one hand, has agreed to the arbitral tribunal's jurisdiction to determine the disputes including the granting of interim measures, to nevertheless, be at liberty on the other hand to prefer his application for interim measures to be determined by the courts. To my mind this is inconsistent with the principle of party autonomy that underlies the [Arbitration Act] 2005.

Thus, even though the arbitral tribunal is not the only forum that is empowered to grant interim measures in connection with the arbitral proceedings because the [Arbitration Act] 2005 confers on the court concurrent jurisdiction to entertain and grant interim measures as well, it does not mean that a party has a free choice to file the application for interim measures in either the courts or before the arbitral tribunal. Quite apart from the obvious potential conflicts that may arise with both the court and the arbitral tribunal having concurrent jurisdiction, there is also the need to coordinate the powers and competences of the court and the arbitral tribunal in the exercise of the jurisdiction in order to avoid any abuse of procedure. This is best avoided by requiring a party seeking interim measures to first resort to the arbitral tribunal and only subsidiarily to the court.

It is true that sections 11(1) and 19(1) of the [Arbitration Act] 2005 do not state that an application for interim measures has to be first made to the arbitral tribunal. Neither do these provisions state that a party is not permitted to file the application to both the court and the arbitral tribunal. A wide and liberal interpretation of these provisions would permit a party to first file an application before the court and thereafter, if the decision is not in his favour, to

> file a similar application before the arbitral tribunal. Quite clearly, this cannot be the intended purpose of Parliament giving concurrent jurisdiction to the court and the arbitral tribunal.
>
> The sections must be approached in a manner that is consistent with the court's role in arbitration proceedings under the . . . Model Law which is to facilitate, support and aid the arbitral tribunal to ensure that the award of the arbitral tribunal will not be rendered impotent and or unenforceable. Following from the principles of party autonomy, the court should respect the parties' choice and assume a subsidiary role and refrain from entertaining and granting any application for interim measures which should first be made before the arbitral tribunal save for certain exceptional circumstances.[21]

The plaintiff's submission consisted of further contentions that the application ought to be heard by the court instead, as summarised below.

Lack Of Consent

The plaintiff contended that the defendant did not in clear and express terms agree to have the application be brought before the arbitral tribunal. This was based on the conclusion reached in *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd*.[22] In this case, it was not in dispute that the plaintiff wrote to the defendant seeking to have the arbitral tribunal determine an application for security for costs. The defendant, however, did not consent to the proposal and the court found that 'the net effect is that no agreement or consensus could be achieved between the parties for the arbitral tribunal to determine this issue of security for costs', which justified the court's intervention to grant the application for security for costs. The high court, however, elected to depart from this decision and took the view that:

> Section 19(1) of the [Arbitration Act] 2005 opens with the party autonomy statement – 'Unless otherwise agreed by the parties'. It grants maximum freedom to the parties to agree to decide whether to exclude the arbitral tribunal's jurisdiction to grant interim measures. The parties may by agreement decide not to grant jurisdiction to the arbitral tribunal to grant interim measures. Absence such an agreement, section 19(1) stipulates that the arbitral tribunal will have the jurisdiction to grant interim measures once a request is made by a party to the arbitration proceedings. In other words, by default, either party may apply to the arbitral tribunal for interim measures. The party is not duty-bound or legally obliged to ask for consent from the other party before he can make the application.
>
> The aforesaid means that there is in law no requirement for any party to seek the consent from the other party before an application is made to the arbitral tribunal for interim measures. It follows that even when consent is sought from the other party to bring an application for interim measures before the arbitral tribunal and such consent is either rejected or not responded to, it does not deprive the requesting party to make the application for interim measures from the arbitral tribunal at all. Put simply, the jurisdiction of the arbitral tribunal to order interim measures is not excluded in such a case.

> The phrase 'Unless otherwise agreed by the parties' in section 19(1) means that the parties to the arbitration proceedings must reach a consensus ad idem or a positive agreement that the application for interim measures for the arbitration proceedings would be made to the courts instead of the arbitral tribunal. The parties must enter into an exclusion agreement. A rejection or dismissal of a request from a party seeking consent to an application being made to the arbitral tribunal does not give rise to an exclusion agreement.
>
> Premised on the reasoning above, it is my judgment that there was no agreement in this case between the plaintiff and the defendant for the application to be brought for determination to the court instead of to the arbitral tribunal.[23]

Estoppel

The plaintiff's second contention was that, from the filing of the application on 1 April 2022 to the day of the hearing on 17 August 2022, the defendant did not at any time raise a preliminary objection that the application ought to have been heard before the arbitral tribunal. The defendant, having elected to adopt such an approach and given the concurrent jurisdiction available, was estopped from objecting to the court's jurisdiction to hear the application due to its lack of objection. It was further contended that the defendant had committed an unequivocal act by electing to actively participate in the high court proceedings without raising any objection and ought not to be allowed to pursue another alternative course thereafter.

The high court, nevertheless, took the view that the issue of estoppel has no bearing on the court's decision since:

> it is not the jurisdiction of the court that is put in dispute but the exercise of the court's discretion. Therefore, estoppel cannot be applied to tie the hands of the court resulting in the court encroaching on the arbitral tribunal's jurisdiction, which is inconsistent with the underlying policy of the [Arbitration Act] 2005.

Predicated on the foregoing, the high court elected to refrain from intervening in the arbitral process and directed the parties to re-file all cause papers, including the written submissions, before the arbitral tribunal.

Remarks

Although sections 11(1) and 19(1) of the Arbitration Act 2005 expressly empower both the court and the arbitral tribunal with concurrent jurisdiction to grant certain interim measures, *Malaysian Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd* serves to illustrate that parties to an arbitral proceeding ought to apply to the arbitral tribunal first before resorting to the courts. In other words, the default position in applying for an interim measure that falls within the purview of the arbitral tribunal is to be made to the arbitral tribunal at the first instance. This is notwithstanding the absence of an order prescribed in the provisions.

We pause at this juncture to highlight a slightly earlier decision of the high court in *Jana DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd and other cases*,[24] wherein the court was tasked with deciding, among other matters, whether it had the jurisdiction to hear an application for a ***Mareva*** injunction in light of the power conferred by section 19(2) of the

Arbitration Act 2005 to the arbitral tribunal. The high court answered in the affirmative and proceeded to hear the application premised on the following reasoning:

> As can be seen from [section] 19(1) of the [Arbitration Act] 2005, an arbitral tribunal's power to grant interim measures, including Mareva injunctions, is subject to the request by one of the parties to the arbitral proceedings and the condition that the parties do not agree otherwise. Whereas, there is no similar condition of 'unless otherwise agreed by the parties' in [section] 11(1) of the [Arbitration Act] 2005 restricting the High Court's power to grant interim reliefs.
>
> The High Court's power to grant interim reliefs pursuant to its civil jurisdiction and its admiralty jurisdiction under the [Courts of Judicature Act 1964] is reflected in [section] 11(1) of the [Arbitration Act] 2005 which states that 'A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to'.
>
> For all the reasons above, I find that the High Court's power to grant interim measures for preserving assets before or during arbitral proceedings is not limited to the arrests of ships, bail or security pursuant to its admiralty jurisdiction. Such power includes the discretion to grant other interim measures pursuant to its civil jurisdiction under the [Courts of Judicature Act 1964], including the power to grant Mareva injunctions for purposes of preservation of property out of which a subsequent arbitration award may be satisfied before or during arbitral proceedings.[25]

While one line of decisions appears to suggest that the general rule of first applying to the arbitral tribunal is not strictly inflexible,[26] another line appears to suggest that the default position is to apply to the arbitral tribunal at the first instance, other than in exceptional circumstances.[27]

CONCLUSION

It is pertinent to note that the interplay between sections 11(1) and 19(1) of the Arbitration Act 2005 as enunciated in *Malaysian Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd* has yet to be considered by the appellate courts in Malaysia as at April 2023. A decision by the appellate courts would prove to be useful to affirm the stance to be adopted by the courts when faced with an application seeking an interim measure that also falls within the jurisdiction of an arbitral tribunal. This is especially important given the divergence in the high courts' approach to date in dealing with such applications at first instance.

Based on the limited authorities available to date, it is perhaps safe to conclude that the exceptional circumstances under which parties may seek interim measures from the court at first instance would include:

- interim measures sought against a third party (ie, a non-party to the arbitral proceeding);
- matters of urgency; and
- cases in which:
    - the arbitral tribunal has yet to be constituted;

- the interim measure requires the court's coercive powers of enforcement; and
- the parties have agreed to exclude the arbitral tribunal's jurisdiction to grant the interim relief in question and have it referred to the court for determination.

Endnotes

1 [2010] MJLU 2140. Back to section

2 id., paragraph 8. Back to section

3 id., page 365. Back to section

4 id., pages 367–368. Back to section

5 id., paragraph 14. Back to section

6 [2009] 1 LNS 849. Back to section

7 [2022] MLJU 825. Back to section

8 id., paragraph 29. Back to section

9 [2020] 1 LNS 479. Back to section

10 id., paragraph 36. Back to section

11 [2022] 8 CLJ 671. Back to section

12 Section 2(1) of the Arbitration Act 2005 defines 'party' as 'a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, . . . a party to the arbitration'. Back to section

13 *Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors*, paragraph 40. Back to section

14 id., paragraph 37. Back to section

15 [1975] AC 396. These principles were adopted by Malaysian jurisprudence in the case of *Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors* [1995] 1 MLJ 193. Back to section

16 [1994] 2 All ER 449. Back to section

17 *Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors* [2022] 8 CLJ 671, paragraph 60. Back to section

18 Federal Court Civil Application No. 08(f)-512-11/2022(J). Back to section

19 [2022] MLJU 3355. Two of the authors of this article, Tan Sri Dato' Cecil W M Abraham and Shabana Farhaana Amirudin, acted for Malaysian Resources Corporation Berhad in this matter. Back to section

20 id., paragraph 27. Back to section

21 id., paragraphs 43–45, 48–51. Back to section

22 [2014] 3 CLJ 915. One of the authors of this article, Tan Sri Dato' Cecil W M Abraham, acted for Measat Broadcast Networks Systems Sdn Bhd in this matter. Back to section

23 id., paragraphs 76–79. Back to section

24 [2022] 8 MLJ 201. Back to section

25 id., paragraphs 35–37. Back to section

26 See *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd, P&A Management Sdn Bhd v WSH Development Sdn Bhd*, *Jana DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd* and other cases. Back to section

27 See *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd, Jiwa Harmoni Offshore Sdn Bhd v ISHI Paower Sdn Bhd* and *Malaysian Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd.* Back to section

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