

Singapore

Malaysian Courts versus Arbitral Tribunals' Powers to Order Interim Relief: Do They Conflict?

Sections 11(1) and 19(1) of the Malaysian Arbitration Act 2005 (“MAA”) provide for the concurrent jurisdiction of both the court and the arbitral tribunal to grant interim measures.

In principle, both the courts and the arbitral tribunal are able to grant a party interim relief. However, given the parties' agreement to have their disputes arbitrated, a question arose as to whether the parties are obliged to request that an interim measure be granted before an arbitral tribunal first.

Position under Malaysian law

This issue was considered recently by the Malaysian High Court.

In *Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd* [2022] MLJU 3355, the court reaffirmed the position according to which, where the same interim relief can be granted by the arbitral tribunal and the courts, the party seeking said relief must first apply to the arbitral tribunal.

The court's decision was largely premised on the deference to the principle of party autonomy in arbitration.

The court reasoned that Section 11(1) of the MAA must be read in a manner that is consistent with the court's subsidiary role, which consists only in facilitating, supporting and aiding the arbitral tribunal. The court should therefore refrain from ordering interim measures where the arbitral tribunal is also empowered to do so, save in exceptional circumstances¹.

Should the court's power be curtailed?

There are jurisdictions like Singapore and England which impose considerable limits on a court's power to grant interim measures.

Under the Singapore International Arbitration Act 1994, the court has power to grant interim measures only when (i) in case of emergency, and for the purpose of preserving evidence or assets²; (ii) in cases where there is no urgency, but the application is made with the permission of the arbitral tribunal or with the written agreement of the other party³; and (iii) in cases in which the arbitral tribunal has no power or is unable for the time being to act effectively⁴.

Similarly, the English Arbitration Act 1996 contains express statutory limitations imposed on the courts in relation to their power to grant interim measures⁵. The UK Law Commission for the Review of the Arbitration Act 1996 has recently discussed this point.

It was held that historically, the inclusion of statutory limitations similar to those under Section 44 was a result of criticisms that “*the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation*”. Such statutory limitations ensure that the courts “*only intervene in order to support rather than displace the arbitral process*”⁶.

Hong Kong, however, allows courts to order interim measures, irrespective of whether similar powers can be exercised by the arbitral tribunal. However the court may decline to grant an interim measure simply where it considers it “more appropriate” for the interim measure request to be dealt with by the tribunal⁷.

The interaction between state courts’ and arbitral tribunal’s powers to order interim measures will differ depending on the forum and/or applicable law/statute. Unlike in Singapore and England, there are no such statutory limitations imposed on the court’s power to grant interim relief in Malaysia. The Malaysian High Court acknowledged this difference, but nevertheless held that, in giving concurrent jurisdiction to the court and the tribunal to order interim measures, it could not have been the intention of the parliament to depart from the principle of party autonomy that underpins an UNCITRAL Model Law arbitration⁸.

[1] Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd [2022] MLJU 3355 at [51].

[2] Section 12A(4) of the Singapore International Arbitration Act 1994.

[3] Section 12A(5) of the Singapore International Arbitration Act 1994.

[4] Section 12A(6) of the Singapore International Arbitration Act 1994.

[5] Sections 44(3), (4) and (5) of the UK Arbitration Act 1996.

[6] Consultation Paper of the UK Law Commission for the Review of the Arbitration Act 1996 (September 2022) at [7.64]–[7.65].

[7] Section 45 of the Hong Kong Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong).

[8] Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd [2022] MLJU 3355 at [50]–[51].

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