Kluwer Arbitration Blog

Anti-Arbitration Injunctions in Malaysia: Where to Now?

Tse Wei Lim (Herbert Smith Freehills LLP) · Tuesday, July 27th, 2021 · AIAC Young Practitioners Group (AIAC YPG)

An increasing number of anti-arbitration injunctions applications have come before the Malaysian courts within the last two years. Anti-arbitration injunctions can take various forms but are essentially judicial orders restraining the initiation or continuation of arbitration proceedings in Malaysia or, as the case may be, a foreign jurisdiction. What has emerged from the Malaysian courts is a two-track approach that lowers the bar for curial intervention where an anti-arbitration injunction is sought by a non-signatory to an arbitration agreement. Notably, this deviates from the reluctance of other common law jurisdictions to grant this exceptional relief (here). Additionally, when restraining foreign-seated arbitrations, Malaysian courts have also appeared to adopt a lighter touch approach than that used in other parts of the Commonwealth. These post discusses the question whether a reconsideration of the current Malaysian approach to anti-arbitration injunctions might be beneficial.

The modern treatment of anti-arbitration injunctions in Malaysia were studied in the line of cases leading to the Malaysian Federal Court's decision in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1. *Jaya Sudhir* involved a dispute between three shareholders as to whether a shareholders' agreement (containing an arbitration clause) permitted an executed transfer of shares to a third party investor. The shareholders commenced a Malaysian arbitration to which the investor was not privy. Concerned that an arbitration award given in its absence could adversely affect its proprietary rights to the shares, the investor applied to the Malaysian High Court for an injunction to restrain the arbitration.

The Malaysian Federal Court allowed the anti-arbitration injunction and delivered a noteworthy decision. It found that an anti-arbitration injunction sought by a non-party to an arbitration agreement should not be determined any differently from an ordinary interlocutory injunction. This was because the Malaysian Arbitration Act 2005 and its policy objectives were inapplicable to non-arbitral parties, and should be disregarded when determining such applications. Therefore, the Federal Court held that when a non-party applies to restrain arbitral proceedings, Malaysian courts should apply the general test for interlocutory injunctions – in essence, the test in *American Cyanamid.*

In so assessing, the Malaysian Federal Court placed significant weight on achieving the "*fairest approach to all parties* [in the application]", in particular whether:

- the target arbitration would affect the interests of non-parties;
- there is a risk of parallel proceedings; and

- there is a risk of inconsistent decisions arising from the arbitration.

A Departure from Wider Common Law?

An argument throughout the *Jaya Sudhir* cases was that anti-arbitration injunctions should be assessed differently from ordinary interlocutory injunctions and that the court's discretion to grant anti-arbitration injunctions should be exercised sparingly with due regard to the principles of domestic arbitral legislation. To that end, anti-arbitration injunctions should be subjected to the more stringent test in the English case of *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC), requiring applicants to demonstrate the following to obtain an anti-arbitration injunction:

- the injunction must not cause injustice to the claimant in the arbitration? and
- the continuance of the arbitration must be oppressive, vexatious, unconscionable or an abuse of process.

The higher threshold is generally thought to apply as an anti-arbitration injunction involves an interference with the fundamental principle of international arbitration that courts should generally uphold, and therefore not interfere with arbitration agreements. However, the Federal Court found that the *J Jarvis* test would only apply to injunctions sought by a party to an arbitration agreement, and not the scenario before it where the application was brought by a non-party. This effectively created a two-track approach to determining anti-arbitration injunctions in Malaysia that would depend on the contracting status of the applicant.

It is interesting to note that this finding was based upon the Federal Court's survey of English and Hong Kong case law, which it concluded did not support the application of the *J Jarvis* test to non-parties to an arbitration agreement. However, it appears that prior to the Federal Court's decision, the English courts have applied the *J Jarvis* principles in situations where anti-arbitration injunctions were sought by non-parties. An example is *Excalibur Ventures LLC v Texas Keystone Inc and others* [2011] EWHC 1624 (Comm) where the English court, applying *J Jarvis* principles, granted an injunction to restrain a New York-seated arbitration where there was a strong arguable case that the applicant was not a party to the arbitration agreement.

Post-*Jaya Sudhir*

Following the Federal Court's decision in *Jaya Sudhir*, anti-arbitration injunctions have again come before the Malaysian courts on several occasions. On two such occasions, the High Court demonstrated the differential approach to anti-arbitration injunctions applications by parties and non-parties to a Malaysian arbitration, as adopted by the Federal Court in *Jaya Sudhir* (*FELDA Investment Corporation Sdn Bhd v Synergy Promenade Sdn Bhd [2020] MLJU 1465*; *Federal Land Development Authority v Tan Sri Haji Mohd. Isa Bin Dato' Haji Abdul Samad [2021] 8 MLJ 214*).

Interestingly, the Malaysian courts also had two opportunities to consider injunctions to restrain arbitrations seated outside Malaysia, specifically London (*MISC Berhad v Cockett Marine Oil (Asia) Pte Ltd* [2021] MLJU 563) and Madrid (*Government of Malaysia v Nurhima Kiram Fornan*

& Ors [2020] MLJU 425). The injunctions sought were granted by the High Court in both instances. These are noteworthy decisions as they illustrate the Malaysian court's approach to anti-arbitration injunctions in its capacity as a court not having supervisory jurisdiction over the relevant arbitration proceedings.

The High Court did not consider *Jaya Sudhir* on both occasions above but focussed on whether there was a valid arbitration agreement binding the applicants. This was found in the negative in both cases. In *Nurhima*, this negative finding (premised on sovereign immunity) was sufficient for the granting of the relief sought and the court did not consider any tests for interlocutory injunctions. Meanwhile, in *MISC Berhad*, the High Court applied the general test for interlocutory injunctions. At first glance, this mirrors the substance of the Federal Court's decision in *Jaya Sudhir*.

Two observations arise from the *MISC Berhad* and *Nurhima* decisions. First, the High Court did not refer to the possibility of a more stringent test applying to granting of anti-arbitration injunctions. Second, and more fundamentally, there was also no discussion of the wider common law position that where the arbitration to be restrained has a foreign seat, a court should be cautious about intervening and should do so only as an exceptional step (see *Sabbagh v Khoury and others [2019] EWCA Civ 1219*). Although Malaysian law has consistently strived to align itself to English law, these cases appear to be different. In general, supervision of an arbitration is reserved to the courts of the arbitral seat, which the English courts have recognised is a principle of the New York Convention.

Conclusion

The Malaysian experience with anti-arbitration injunctions over the past two years shows that there are unanswered questions in its jurisprudence on this relief. It is hoped that the Malaysian courts will give further guidance on its approach in restraining foreign-seated arbitration, in particular its views on the general reservation of judicial intervention to curial courts. It is also hoped that the courts will grant anti-arbitration injunctions sought by non-parties sparingly. A potential risk of the current two-track approach is that applications for anti-arbitration injunctions could be used as a backdoor to ventilate substantial jurisdictional challenges before national courts where such issues are generally reserved for arbitral tribunals, as reflected in the court's approach to applications to stay of court proceedings pending arbitration. That said, anti-arbitration injunctions raise complex questions where arbitration law and policy intersect with third party interests. It is hoped that the Malaysian courts will deal with these anti-arbitration injunctions with a view to preserve the integrity of arbitration agreements, prevent unnecessary delays and give effect to parties' choices on desired dispute resolution forum.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, July 27th, 2021 at 8:00 am and is filed under Anti-suit injunction, Malaysia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.