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## Section 11 Of The Arbitration Act 2005: Power Of Court To Grant Interim Measures

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In the recent High Court decision of *LKL Advance Metaltech Sdn Bhd v Crecom Burj Gloves Sdn Bhd*<sup>1</sup>, the issue was in relation to the Court's power under Section 11 of the Arbitration Act 2005 (AA) to grant a *mareva injunction* as an interim measure to maintain status quo pending the determination of the dispute in such arbitral proceedings.

### Brief Facts

The Plaintiff in this case entered into an agreement to purchase gloves from the Defendant and made multiple payments pursuant thereto (SPA). Less than two months after the SPA was signed, the Defendant, out of the blue, wrote to the Plaintiff and claimed force majeure. The Plaintiff tried to get particulars of the alleged *force majeure* but the attempts were futile. The Plaintiff then demanded for a refund of monies that have been paid less payment for such gloves that have been received by the Plaintiff. The Defendant in reply reiterated the claim of force majeure and demanded for the balance payment under the contract.

Subsequently, the Plaintiff hired a private investigator to conduct an investigation on the Defendant and found out amongst others that the Defendant's factory was a mere façade without manufacturing operations nor any machinery. The Plaintiff further received communication from an advocate and solicitor representing a third party, informing the Plaintiff that the Defendant has used the same *modus operandi* to defraud other parties.

Pursuant to the above, the Plaintiff filed an originating summons seeking a *mareva injunction* to prevent the Defendant from amongst others, depleting its asset up to a certain sum pending the resolution of the arbitration. The Plaintiff also filed an *ex-parte* application seeking interim relief pending disposal of the originating summons which was

<sup>1</sup> [2021] MLJU 778

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granted by the Court. The *inter-partes* injunction application and originating summons were heard together as they essentially sought the same relief. The SPA contained an arbitration clause and the Plaintiff's originating summons and interim injunction application was premised on Section 11 of the AA 2005.

## High Court's Decision

The High Court first referred to Section 11(1) of the AA which provides as follows:

*"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-*

- (a) maintain or restore the status quo pending the determination of the dispute;*
- (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;*
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;*
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or*
- (e) provide security for the costs of the dispute."*

The High Court noted that at the point where the court granted the *ex-parte* application, the arbitral proceedings had not been started. Nevertheless, the Court stated that the aforementioned fact has no bearing on the case as the express wordings of the Act allowed a party to apply for an interim measure before or during arbitral proceedings.

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Further, the High Court stated that it is clear that the *mareva injunction* sought by the Plaintiff was not a permanent injunction but merely an application to maintain status quo pending the determination of the dispute between the parties in arbitration.

Consequently, the High Court held that it is clearly cloaked with the necessary power to grant the orders sought by the Plaintiff. In support of its decision, the High Court referred to the decision in *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd*<sup>2</sup> which dealt with a similar application for *mareva injunction* pending conclusion of arbitral proceedings:

*“[11] ... In that case, the Plaintiff had filed the suit seeking a mareva injunction against the Defendant’s assets pending conclusion of arbitral proceedings and also for the Defendant to disclose its assets. In allowing the Plaintiffs application the Court there held that Section 11 of the AA 2005 enabled the Court to grant interim leave even before commencement of arbitral proceedings. It was further held in that case as follows:-*

*“Section 11(1) AA expressly allows judicial ‘intervention’ in a very limited form - the court may grant interim (and not permanent) relief pending the disposal of arbitration. An applicant for interim relief under s, 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the five following matters: (a) the applicant must have a cause of action against the party whom interim relief is sought; (b) there must be an ‘arbitration agreement’ as understood in ss. 2(1) and 9(1) to (5) AA; (c) the relief sought must be interim in nature and cannot be permanent in effect; (d) the interim relief must support, assist; aid and/or facilitate the proposed arbitral proceedings; (e) arbitral proceedings should be commenced within a reasonable time. If the five matters are*

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<sup>2</sup> [2015] 5 CLJ 652

*fulfilled by an applicant, in deciding an application for interim relief under s. 11(1) AA, the court should not decide on the merits of the dispute which should be decided solely by the arbitral tribunal. Despite the court not making a final pronouncement on the merits of the dispute in deciding whether to grant interim relief or not under s. 11(1) AA, the court may nevertheless have to assess the strength of the parties' case in deciding certain applications for interim relief, such as Mareva injunction applications..."*

Having determined that it has the power to grant the order sought by the Plaintiff, the High Court went on to look at the requirements to be satisfied to grant a *mareva injunction* application. The High Court referred to the case of *Jasa Keramat Sdn Bhd v Monatech (Malaysia) Sdn Bhd*<sup>3</sup> and *Bumi Armada* which set out the following requirements:

- (i) the plaintiff should have 'a good and arguable case';
- (ii) the defendant has assets within the jurisdiction;
- (iii) there is a risk of dissipation of the defendant's assets; and
- (iv) the balance convenience should be in favour of granting the *mareva injunction*.

The High Court found that firstly, the Plaintiff has a good and arguable case that they are entitled to refund of the monies paid. Secondly, the Defendant had conceded that they had assets in their CIMB account. Thirdly, the evidence shows a lack of honesty on the part of the Defendant and it can be inferred that there is a real risk of dissipation. Lastly, the balance of convenience lay in favour of granting a *mareva injunction*. In view of the foregoing, the High Court granted an order in terms of the originating summons.

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<sup>3</sup> [1999] 4 CLJ 30

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## Key Takeaway

The decision in *LKL Advance* confirms that parties to an agreement which has an arbitration clause stipulated therein may go to the High Court to seek interim measures while the arbitration proceedings are ongoing or even before such arbitral proceedings have commenced. The High Court has the power to grant interim measures provided the requirements to grant such interim measures have been satisfied.

Authored by Khey Ken Lim, an associate with the firm's Dispute Resolution practice.

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