

Case Comment

ANTI-SUIT INJUNCTIONS – A RACE AGAINST TIME

*Sun Travels & Tours Pvt Ltd v Hilton International Manage
(Maldives) Pvt Ltd* [2019] 1 SLR 732

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I. Introduction

1 Parties entering into arbitration agreements ordinarily abide by their contractually chosen dispute resolution mechanism and proceed accordingly. Sometimes, one encounters a counterparty who takes it upon himself to start proceedings in a foreign jurisdiction in breach of an arbitration clause. How does an innocent party restrain such conduct?

2 The Court of Appeal (“SGCA”) in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*¹ (“*Sun Travels*”) laid down firm guidance that a party who finds itself in this scenario should act as fast as possible to restrain the counterparty by way of an anti-suit injunction (“ASI”). The SGCA clarified that once a judgment (including one subject to appeal) has been issued in the foreign court, it is too late for injunctive relief to be sought or obtained in the seat court.

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1 [2019] 1 SLR 732.

3 The question remains as to when one attempts to obtain ASI relief before a judgment has been handed down by the foreign court. Seeing as an ASI is an equitable relief, and dilatory and unconscionable conduct can bar one from obtaining such relief, one should proceed promptly and before the proceedings are too far advanced in the foreign jurisdiction to secure such relief. In other words, the aggrieved party should move quickly (and as soon as practicable) once the breach of the arbitration agreement is discovered to seek the ASI in the Singapore courts.

II. Facts of the case

4 Sun Travels & Tours Pvt Ltd (“Sun”) is a resort operator that owns a hotel in the Maldives. Hilton International Manage (Maldives) Pvt Ltd (“Hilton”) is a Maldivian incorporated company in the hotels and resort industry and is affiliated with the global hospitality group, Hilton.²

5 Sun and Hilton entered into a hotel management agreement in February 2009. Sun was later dissatisfied with the performance of the hotel as managed by Hilton and gave notice in 2013 to terminate the management agreement. Hilton accepted the termination on the basis that it was a wrongful repudiation of the management agreement.³

6 Hilton later commenced arbitration proceedings pursuant to the arbitration clause in the management agreement. In 2013, the International Chamber of Commerce (“ICC”) Court of Arbitration fixed Singapore as the seat of arbitration.⁴ Midway through the arbitration proceedings, and after a partial award was delivered, Sun stopped participating in the proceedings even though it was given several opportunities

2 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [4].

3 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [8].

4 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [9]–[10].

by the tribunal to do so. The tribunal later issued a final award ordering Sun to pay Hilton damages amounting to US\$20,945,000 plus interest, and US\$342,500 for Hilton's share of the fees and expenses of the ICC and the tribunal.⁵

7 After the final award was issued, Hilton commenced enforcement proceedings in the Maldivian courts in relation to the arbitral awards. After some procedural hiccups around the proper court to commence the enforcement proceedings, Hilton obtained a judgment in its favour and commenced proceedings in the Enforcement Division of the Maldivian courts to start the second enforcement proceedings.⁶

8 After the first ruling by the court that the Enforcement Division of the Maldivian Courts was the proper court, and before Hilton commenced proceedings in the proper court, Sun commenced a civil action in the Maldives against Hilton. The civil suit essentially concerned the same issues, disputes and relief as that decided by the arbitral tribunal in the partial and final awards.⁷

9 In January 2017, the Maldivian Civil Court decided that it would determine both the procedural and jurisdictional matters at the same time when it heard the merits of the case on Sun's civil suit.⁸ The Maldivian Civil Court later delivered a judgment in March 2017, holding that Sun had made out its claims against Hilton (the "March Judgment"). The March Judgment was subsequently relied upon by the Enforcement Division Civil Court to refuse Hilton's second enforcement proceedings. Hilton appealed against the March Judgment and the appeal was still

5 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [14].

6 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [18]–[22].

7 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [23].

8 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [28].

pending at the time the SGCA delivered its judgment in the Singapore courts.⁹

10 In July 2017, Hilton filed an application in the Singapore High Court (“SGHC”) against Sun. One of the reliefs sought was a permanent ASI to restrain Sun from taking any steps in the Maldivian courts in reliance on the March Judgment. The SGHC judge decided in Hilton’s favour. Sun appealed against the order to the SGCA.

III. Applicable principles for granting anti-suit injunction

11 The SGCA confirmed the fact that the jurisdiction to grant ASI relief is an equitable one, and that this jurisdiction is only to be exercised when the “ends of justice” require it. The SGCA also clarified that the ASI was being issued against the party seeking to continue proceedings in a foreign court, and that its order was not directed at the foreign court.¹⁰

12 As for the applicable principles governing whether an ASI was appropriate on the facts of a case, the SGCA endorsed the following five relevant factors:¹¹

- (a) the amenability of the defendant to the jurisdiction of the Singapore court;
- (b) the natural forum to resolve the dispute;
- (c) whether the foreign proceedings would be vexatious or oppressive to the plaintiff if allowed to continue;
- (d) the injustice caused by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

9 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [34]–[36].

10 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [65].

11 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [66].

(e) whether the institution or continuation of foreign proceedings was or would breach any agreement between the parties.

13 Having set out these general principles, the SGCA confirmed that in cases involving a breach of an arbitration agreement or an exclusive jurisdiction clause, the threshold for obtaining an ASI was much lower. In such cases, it would suffice to show breach of such an agreement, and ASI relief would ordinarily follow, unless there are strong reasons not to allow such relief. Crucially, the SGCA confirmed that there is no need to adduce additional evidence of unconscionable conduct in such cases. This is, however, subject to an important caveat that the court must not feel diffident in granting an ASI. For example, this may occur if the applicant did not seek ASI relief promptly, resulting in the foreign proceedings being too far advanced.¹²

14 The SGCA also expounded on the relationship between the delay in applying for an ASI and the concept of comity. While an ASI operates *in personam*, it obviously interferes with foreign proceedings indirectly because it disregards the foreign court's decision to assume jurisdiction over the proceedings.¹³ Conceptually, one can understand why granting the ASI on the basis of a breach of an arbitration agreement or exclusive jurisdiction clause is less objectionable. This is because the local court is merely enforcing the prior agreement between parties without arrogating itself jurisdiction over a dispute that a foreign court has already assumed jurisdiction over. However, and to a lesser extent, comity considerations are still relevant in such cases, and in particular where delay has been occasioned by the party seeking the ASI relief. In this regard, the SGCA enunciated two principles:¹⁴

12 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [68].

13 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [69].

14 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [82]–[84].

(a) First, the longer the delay and the more advanced the foreign court proceedings become, the less likely the Singapore court is to grant an ASI given the time, effort and judicial resources that will be wasted by the abandonment of the foreign proceedings following the grant of an ASI.

(b) Second, what matters is the extent to which the delay has allowed the foreign court proceedings to have progressed. Pertinently, the SGCA clarified that delay cannot be justified on the basis that jurisdictional objections are being made in the foreign court proceedings. Indeed, allowing such conduct on the part of the applicant would effectively give the applicant “two bites at the cherry” – to encourage one to seek an ASI when its challenge in the foreign court has failed.

IV. Circumstances where anti-enforcement injunction may be granted

15 The SGCA then went on discuss the limited and exceptional circumstances seen to be appropriate to grant an anti-enforcement injunction (“AEI”) even after a judgment has been issued by the foreign court.

16 To this end, the authorities speak with one voice on the need to exercise great caution in granting such injunctions, because of the way they interfere with foreign proceedings. AEIs call for special consideration as their very nature, *ie*, that a judgment has already been granted in the foreign proceedings, implies an undue (and potentially prejudicial) delay by the applicant in seeking relief.¹⁵

17 Two aspects stand out in this regard. First, such an injunction would preclude other foreign courts from considering whether the judgment in question should be recognised and

15 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [89].

enforced. Second, allowing such relief would be an indirect interference with the execution of the judgment in the jurisdiction where the judgment was given and where the judgment can expect to be obeyed.¹⁶ Therefore, it is clear that in order for one to obtain an AEI (rather than an ASI), one would have to show exceptional circumstances over and above the granting of an ASI.

18 The SGCA surveyed the considerations and cases where AEIs were found to have been justified and agreed that they are few and far between. Such categories of cases include:¹⁷

- (a) where the judgment has been procured by fraud in the foreign jurisdiction; or
- (b) where the applicant had no means at all of knowing that judgment was being sought against him until it was served, such as:
 - (i) where the judgment was obtained too quickly; or
 - (ii) secretly to enable an injunctive relief to be obtained.

19 These recognised categories of exceptional circumstances are themselves grounded in equitable considerations and are tied to the notion of unconscionability.¹⁸ By way of illustration, in the case of fraud, an AEI is justifiable as a direct response to unconscionable conduct. Similarly, where an applicant does not have knowledge of the foreign proceedings until judgment is rendered, such an applicant similarly cannot be accused of unconscionable delay in bringing the application for the AEI. Therefore, the balance of equities lies in favour of the applicant in such cases.

16 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [97].

17 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [100] and [101].

18 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [105].

V. Declaratory relief

20 On the facts, as elaborated on above, the SGCA did not approve of the applicant's conduct in seeking an anti-suit injunction only after the foreign proceedings had progressed substantially (even leading all the way to a judgment).¹⁹ The injunctions granted by the court below were accordingly set aside.

21 Notwithstanding that, the SGCA clarified that, as the court of the seat of arbitration, it has the discretion to grant declaratory relief (and did so grant such relief) to signify to the foreign court that the defendant breached the arbitration agreement by instituting civil proceedings in the foreign jurisdiction when arbitration award(s) on the same dispute had already been issued. In the SGCA's words, "these orders serve to uphold the integrity of the arbitration agreements and the awards rendered on the basis of these agreements".²⁰

VI. Key takeaways

22 This decision is significant to any party who has entered into an arbitration agreement, with Singapore as the seat of the arbitration. In the light of *Sun Travels*, when the other contracting party has, in breach of the arbitration agreement, instituted civil proceedings in a foreign jurisdiction, the aggrieved party must act with speed in making an ASI application as soon as possible after it discovers the existence of the foreign proceedings. In particular, it should not seek to resist the foreign proceedings on the basis of an arbitration clause and only after that has failed, move to restrain the counterparty by commencing ASI relief in the Singapore courts. Further, the SGCA has clarified that after judgment is issued in the foreign

19 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [118].

20 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [143].

proceedings, injunctive relief is almost impossible save in very exceptional circumstances (as enumerated above).

23 The question remains where foreign proceedings have commenced but the aggrieved party applies for an ASI before a judgment is issued. While this situation was not specifically dealt with by the SGCA, the courts will conduct the usual balancing exercise by considering a multitude of factors, including:

- (a) how far advanced the foreign proceedings are;
- (b) whether the aggrieved party's conduct in the foreign proceedings is inconsistent/incompatible with his rights to arbitrate the dispute under the arbitration agreement;
- (c) reasons for the delay/not seeking the injunction earlier; and
- (d) whether there is any dilatory or unconscionable conduct by the aggrieved party that should deprive him of the equitable relief.

24 It is therefore clear that time is of the essence if the counterparty commences foreign proceedings in breach of an arbitration clause, so the aggrieved party should move quickly (and as soon as practicable) once the breach of the arbitration agreement is discovered and seek the ASI relief in the Singapore courts.