

# Kluwer Arbitration Blog

## Why Should a Stranger Restrain My Arbitration?

Thayananthan Baskaran (Baskaran) · Saturday, February 29th, 2020

### Introduction

It is not uncommon for a party (or an alleged party) to an arbitration agreement to apply to the local courts for an injunction to restrain the arbitral proceedings. Such an [anti-arbitration injunction](#) is usually applied for on the grounds that the applicant is not in fact a party to the arbitration agreement and so the arbitral tribunal has no jurisdiction over the applicant, or that the arbitral proceedings are an abuse of process since the disputes have already been resolved between the parties.

Much more uncommon though, is for a stranger (*i.e.* a third party that is not party to the arbitration agreement) to apply for an anti-arbitration injunction to restrain arbitral proceedings arising from the arbitration agreement.

How should the courts consider such an application?

### The Federal Court of Malaysia's decision in *Jaya Sudhir*

This question was recently considered by Malaysia's apex court in *Jaya Sudhir a/l Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 ("*Jaya Sudhir*").

In *Jaya Sudhir*, the Federal Court held that when a person who is not a party to an arbitration agreement applies to restrain arbitral proceedings, the courts would apply the general test for interlocutory injunctions. To do so, the courts would consider the usual factors such as whether there are serious issues to be tried and where the balance of convenience lies.<sup>1)</sup>

Where there are parallel court and arbitral proceedings, the court will consider whether the arbitral proceedings:

- Create multiplicity or duplicity of proceedings;
- Create a risk of inconsistent findings; and
- Cause the interests of the party who is not party to the arbitral proceedings to be affected by the arbitral proceedings.

Further, the Federal Court recognized that whilst the policy and object of [Malaysia's Arbitration](#)

[Act 2005](#) (the “**Arbitration Act**”) is to promote “*party autonomy and self-restraint by courts when intervening in arbitral process[es]*”, those policy considerations would not apply in an application by non-parties to an arbitration agreement since the Arbitration Act does not apply to such non-parties.<sup>2)</sup> The Federal Court reasoned that a “*party*” under the Arbitration Act, including under section 10 which governs a stay of court proceedings where there are parallel arbitration proceedings, is defined in section 2 to be a party to the arbitration agreement.

## Analysis

The Federal Court’s approach in *Jaya Sudhir* is a noteworthy development in dealing with the complex issues that arise where a person who is not a party to the arbitration agreement is involved in related, ongoing or anticipated parallel court proceedings.

Traditionally, the Malaysian courts have shown a clear inclination towards arbitration proceedings.

In the context of applications to stay court proceedings pending the outcome of parallel arbitration proceedings, the courts have been willing to grant a stay even where the court proceedings involve persons who are not party to the arbitration agreement and the parallel arbitration proceedings. These decisions include the Court of Appeal’s judgment in *Renault SA v. Inokom Corporation Sdn Bhd & Anor and other Applications* [2010] 5 CLJ 32 (see paragraphs 16-18) and the High Court’s judgment in *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd* [2010] 1 LNS 1601 (see pages 9 and 10), which was affirmed by Federal Court on other issues in *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61).

However, the courts have taken a more nuanced approach to this issue in more recent judgments such as *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299 (“*Protasco*”), recognising that there are four possible options:

- First, stay all court proceedings, including those against the persons who are not party to the arbitration agreement. Here, the arbitral proceedings will proceed first, then the court proceedings;
- Second, stay the court proceedings only as between the persons who are party to the arbitration agreement, on the condition that their arbitral proceedings proceed only after the court proceedings between the other persons are concluded. Here, the court proceedings between the persons who are not party to the arbitration agreement will proceed first, followed by the arbitral proceedings between the persons who are party to the arbitration agreement;
- Third, stay the court proceedings only as between the persons who are party to the arbitration agreement, without the condition referred to in (2) above. Here, the arbitral proceedings between the persons who are party to the arbitration agreement, and the court proceedings between the persons who are not party to the arbitration agreement, will proceed concurrently; and
- Fourth, stay the court proceedings on certain issues and allow the arbitral proceedings and court proceedings to proceed concurrently in relation to other issues.

In deciding among these four options, the courts will consider the extent and areas of overlap between the arbitral proceedings and the court proceedings in terms of:

- The parties;

- The legal and factual issues;
- The facts giving rise to the causes of action;
- The principal witnesses; and
- The reliefs and remedies sought.

The Malaysian courts adopted these four options from the Singapore Court of Appeal's judgment in *Tomolugen Holdings Ltd and another appeal v. Silica Investors Ltd; and other appeals* [2015] SGCA 57 (*Protasco* at paragraph 50). The Federal Court's decision in *Jaya Sudhir* is consistent with the second of the four options referred to above.

## Conclusion

Although the Federal Court held that the Arbitration Act and its underlying policy objectives do not apply to non-parties to an arbitration agreement, it is hoped that the courts will grant applications for anti-arbitration injunctions by such non-parties sparingly. This would preserve the integrity of an arbitration agreement, prevent unnecessary delays, and maintain party autonomy to choose their desired dispute resolution forum. The issues discussed herein are presently being argued in *Federal Land Development Authority & Anor v. Tan Sri Haji Isa bin Dato' Haji Abdul Samad & 20 Ors* in the High Court of Malaya at Kuala Lumpur.

For further information, see *Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act*.

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## References

?1 See paragraphs 48, 60-62, 66-69, 81 and 98.

?2 See paragraphs 32, 38, 40 and 91.

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