

Federal Court rules that Arbitration Act provisions do not apply to non-parties to arbitration agreements

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Litigation, Malaysia

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In *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd*(1) the Federal Court held that Sections 8 and 10 of the Arbitration Act 2005 do not apply to a non-party to an arbitration agreement.

Facts

The appellant commenced an action in the high court against the first to third respondents. The claim concerned 10% of the shares in the third respondent, which had been registered in the second respondent's name but subsequently transferred to the appellant.

The appellant pleaded that the third respondent was a joint venture company, which had been formed to undertake a project by Vale Malaysia Minerals Sdn Bhd and had the first and second respondents as its initial shareholders.

The appellant claimed that as the third respondent had needed funds to carry out the Vale Project, he had come in as an investor pursuant to a collateral understanding between himself and the first and second respondents. Pursuant to that collateral understanding, the appellant had requested that 10% of shares in the third respondent be transferred from the second respondent to himself.

The first respondent alleged that the transfer of shares to the appellant had contravened the shareholders' agreement. The first respondent commenced an arbitration proceeding pursuant to the arbitration clause in the shareholders' agreement.

In the action, the appellant sought an injunction to restrain, among other things, the first respondent from commencing and continuing any legal proceedings or arbitration which affected the rights attached to the 10% of shares registered in the appellant's name without the appellant's presence as a party to such legal proceedings or arbitration (the injunction application).

The high court allowed the injunction application. It was subsequently set aside by the Court of Appeal on the first respondent's appeal.

Appeal to Federal Court

The appellant was granted leave to appeal to the Federal Court on two questions of law:

- whether the requirements of Section 10 of the act must be met by a party litigant seeking an injunction to restrain the prosecution of an arbitration to which it is not a party but which would affect its proprietary rights;

and

- whether Section 8 of the act applies to party litigants that are not a party to an arbitration agreement or arbitration proceedings.

Section 8 of the act states that "no court shall intervene in matters governed by this Act, except where so provided in this Act". Section 10 states that:

A court before which

proceedings are brought in respect of a matter which is a subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Emphasis added.)

The critical issue for the Federal Court's determination which emerges from the leave questions is whether the appellant, who was not a party to the arbitration proceedings, should be given the right to have his claim on the shares heard first and restrain the respondents which were privy to the arbitration agreement from proceeding with the arbitration proceedings (the anti-arbitration injunction).

Federal Court decision

The first respondent submitted that in considering whether to grant the anti-arbitration injunction, the court should not completely ignore Sections 8 and 10 of the act, which provide for respect for party autonomy and a non-interventionist court policy. It argued that the court should not allow the appellant to derail the pending arbitration proceedings just because he was not a party to the arbitration agreement and the arbitration proceedings.

On examination of Section 10 of the act, the Federal Court held that the word 'proceedings' therein refers to court proceedings which are brought in respect of a matter which is the subject of an arbitration agreement. Thus, where the plaintiff commences court proceedings against a defendant and the subject matter falls within the agreement to arbitrate, a mandatory stay will be granted unless the court finds that the arbitration is null and void, inoperative or incapable of being performed.

Based on the facts, the Federal Court found that:

- the appellant was not a party to the arbitration agreement;
- the appellant's claim was not the subject matter of the arbitration agreement; and
- the appellant was not a party to the arbitration proceedings.

Hence, the court held that Section 10 of the act was not applicable. There was no need for the appellant to show that the arbitration agreement was null and void, inoperative or incapable of being performed. For the same reasons, Section 8 was not applicable either.

The Federal Court also proceeded to consider the test for the anti-arbitration injunction.

The Court of Appeal rejected the general test of interlocutory injunctions in *Keet Gerald Francis Noel John v Mohd Noor*.⁽²⁾ Instead, it adopted the higher threshold set out in *J Jarvis & Sons Limited v Blue Circle Dartfort Estates Limited*,⁽³⁾ on the basis that the act's rationale and objective would be seriously undermined by a non-party to arbitration if a stranger to an arbitration agreement was allowed to easily restrain arbitration proceedings. According to the *J Jarvis* test, the power to grant an anti-arbitration injunction may be exercised if:

- the injunction causes no injustice to the claimant in the arbitration; and
- the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

The Federal Court held that the imposition of a higher threshold test was flawed because the act did not apply to the appellant in the present case. *J Jarvis* can be distinguished from the present appeal because in the former case, the parties seeking an injunction to restrain arbitration proceedings were the contracting parties to the arbitration agreement. It was held that the Court of Appeal had misdirected itself in rejecting the *Keet Gerald Francis* test.

For the aforesaid reasons, the Federal Court restored the high court's order and issued an injunction. Both leave questions were answered in the negative.

Comment

Although the Federal Court rejected the application of *J Jarvis*, it was on the premise that *J Jarvis* could be distinguished from the present appeal, which concerned an application by a non-party to an arbitration agreement to restrain arbitration proceedings. The *J Jarvis* test remains relevant in cases where a party to arbitral proceedings seeks to restrain the continuance of the arbitration proceedings.

Apart from the finding that there was no arbitration agreement between the appellant and the respondents, the Federal Court's decision was also based on the grounds that the appellant's claim was not the subject matter of the arbitration agreement and that the appellant was not a party to the arbitration proceedings. It may have been decided differently if an application had been made by a non-party to an arbitration agreement whose claim was the subject matter of the arbitration agreement and the non-party had been willing to be made a party to the arbitration proceedings.

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Endnotes

(1) [2019] 7 CLJ 395.

(2) [1995] 1 CLJ 293.

(3) [2007] EWHC 1262.

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