

# Competing claims in curial and arbitral proceedings: recent anti-arbitration injunction developments

17 November 2020 | Contributed by [Gan Partnership](#)

## Introduction

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Comment

## Introduction

In its recent decision in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*,<sup>(1)</sup> the Federal Court acknowledged that:

*As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it.*

Are the Malaysian courts adopting a minimalist judicial intervention approach in considering anti-arbitration injunctions? This article discusses the recent Federal Court decision of *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd*<sup>(2)</sup> and two recent high court decisions that made reference thereto.

## *Jaya Sudhir*

In *Jaya Sudhir*, the Federal Court had to deal with the issue of competing claims in curial and arbitral proceedings where not all parties were before both forums.

## Facts

There were three respondents in this case. The first and second respondents were shareholders in the third respondent. The three respondents entered into a shareholders' agreement.

The appellant was an investor in a project of the third respondent and was not a party to the shareholders' agreement. The main thrust of the appellant's claim was premised on a collateral understanding that the first and second respondents would transfer him their shares in the third respondent.

The second respondent transferred 10% of the shares to the appellant, allegedly pursuant to the collateral understanding. However, the first respondent denied such understanding and contended that by transferring the shares to the appellant, the second and third respondents had acted in breach of the shareholders' agreement. Thus, the first respondent commenced arbitration proceedings against the second and third respondents.

## High court

In the high court, the appellant sought a declaration that, among other things, the first respondent was bound by the terms of the collateral understanding and that he was the legal and registered beneficial owner of the shares in the third respondent that had been transferred to him.

The appellant also applied for an injunction to restrain the first respondent from, among other things, continuing the arbitration proceedings. He argued that the arbitration proceedings would affect his rights attached to his shares in the third respondent.

## Federal Court decision

The Federal Court was required to answer the following questions of law:

- whether the requirements of Section 10 of the Arbitration Act 2005 (Act 646)<sup>(3)</sup> must be met by a party

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litigant seeking an injunction to restrain the prosecution of an arbitration to which they are not a party but which would affect their proprietary rights; and

- whether Section 8 of Act 646(4) applies to a party litigant which is not a party to an arbitration agreement or arbitration proceedings.

The Federal Court answered the two questions in the negative because Act 646 does not apply to third parties, such as the appellant. While the court observed that the policy and object of Act 646 are to promote respect for party autonomy and self-restraint by the courts when intervening in the arbitral process, the court held that such a policy could not logically be extended to a non-party.

Following that, the Federal Court held that the test to grant an injunction to a non-party to restrain arbitral proceedings is the general test for interlocutory injunctions as established in *Keet Gerald Francis*. The more stringent test of *J Jarvis* applies only to a party to an arbitration agreement whereby Act 646 applies. The test in *J Jarvis* is said to be a higher threshold for an anti-arbitration injunction because the applicant must fulfil the following conditions to obtain an 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.

In *J Jarvis*, the court also cautioned that the court's discretion to grant such an injunction should be exercised only sparingly and with due regard to the principles upon which the arbitration act is expressly based.

The imposition of a higher threshold is not without reason. The rationale is simply that the parties have agreed that the disputes be dealt with by arbitration and it is desirable and important that the parties carry out their agreement.

Applying the *Keet Gerald Francis* test to the facts, the Federal Court upheld the high court decision in granting the injunction to the appellant.

A significant factor considered by the Federal Court in granting the injunction was the multiplicity of proceedings and risk of inconsistent findings. It is expressed in the grounds of judgment that the courts may decline to give effect to an exclusive jurisdiction or arbitration clause where the interests of third parties are involved or there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

### **Recent high court decisions**

*Jaya Sudhir* was referred to in two recent high court decisions:

- *FELDA Investment Corporation Sdn Bhd v Synergy Promenade Sdn Bhd*;(5) and
- *Federal Land Development Authority v Tan Sri Haji Mohd. Isa Bin Dato' Haji Abdul Samad*.(6)

In *FELDA*, *Jaya Sudhir* was distinguished on fact as the plaintiff and applicant for the injunction was a party to the arbitration agreement and the arbitral proceedings. The high court applied the principle as established in *Jaya Sudhir* and tested the application against the higher threshold for an anti-arbitration injunction.

On the other hand, in *Federal Land Development Authority*, the plaintiffs and applicants were not parties to either the arbitration agreement or the arbitral proceedings. The high court followed *Jaya Sudhir* and applied the general *Keet Gerald Francis* test in determining the injunction application.

The high court also found that the issues in the arbitration proceedings and the court proceedings could not be divided distinctly. In other words, there were overlapping issues and a risk of inconsistent decisions. The high court then examined the two key considerations as affirmed in *Jaya Sudhir* - namely, the court's desire to:

- hold commercial parties to their agreements; and
- avoid disruptions and multiple or parallel proceedings.

The high court concluded that it was in the interest of justice for the court proceedings to proceed first; hence, it granted the plaintiffs' injunction.

### **Comment**

As far as a party to an arbitration agreement and arbitral proceedings is concerned, Act 646 applies, as does the minimal judicial intervention policy. The courts will ordinarily hold parties to the bargain that they strike and give effect to an arbitration agreement. Thus, to obtain an anti-arbitration injunction, the applicant must satisfy the higher threshold set out in *J Jarvis*.

When the applicant is not a party to either an arbitration agreement or arbitral proceedings, Act 646 does not apply. The courts will more readily grant an anti-arbitration injunction to a non-party if the *Keet Gerald Francis* requirements are fulfilled, to avoid multiple proceedings.

For further information on this topic please contact *Gan Khong Aik* or *Kang Mei Yee* at Gan Partnership by telephone (+603 2201 1130) or email ([khongaik@ganlaw.my](mailto:khongaik@ganlaw.my) or [meiyee@ganlaw.my](mailto:meiyee@ganlaw.my)). The Gan Partnership website can be accessed at [www.ganlaw.my](http://www.ganlaw.my).

#### **Endnotes**

(1) *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 9 CLJ 213.

(2) *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd* [2019] 5 MLJ 1.

(3) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement must, 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.

(4) No court may intervene in matters governed by Act 646, except where so provided in such act.

(5) *FELDA Investment Corporation Sdn Bhd v Synergy Promenade Sdn Bhd* [2020] MLJU 1645.

(6) *Federal Land Development Authority v Tan Sri Haji Mohd. Isa Bin Dato' Haji Abdul Samad* [2020] MLJU 1587.

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