



STAY PENDING ARBITRATION: FEDERAL COURT CLARIFIES THE APPROACH TO “STEPS IN THE PROCEEDINGS”

**UNIVERSITI MALAYA V ESA JURUTERA
PERUNDING SDN BHD [2026] 6 CLJ 497**

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ISSUES

In our February 2025 update, we discussed the Court of Appeal's decision in *Universiti Malaya v Esa Jurutera Perunding Sdn Bhd*, where the Court of Appeal held that the requests for extensions of time, the issuance of a Notice to Produce Documents Referred to in Pleadings and the subsequent filing of a Defence pursuant to the Court's directions did not necessarily constitute "steps in the proceedings".

The Federal Court has now affirmed the Court of Appeal's decision and, more importantly, provided further guidance on the approach to determining whether a party has taken "steps in the proceedings" for the purposes of section 10 of the Arbitration Act 2005 ("AA 2005").

In particular, the Federal Court considered whether the inquiry should be undertaken by examining each procedural act in isolation or through a holistic assessment of the surrounding circumstances, whether the principles established in *Sanwell Corp v Trans Resources Corp Sdn Bhd* [2002] 2 MLJ 625 (FC) ("**Sanwell**") continue to provide the guiding framework, and the relevant factors in determining whether a party has objectively demonstrated a clear and unequivocal intention to abandon arbitration and submit to the jurisdiction of the Court.

These questions were revisited and answered by the Federal Court in **Universiti Malaya v Esa Jurutera Perunding Sdn Bhd [2026] 6 CLJ 497**.

BRIEF FACTS

The brief facts of the case are as follows:-

- Pursuant to a Letter of Appointment dated 14.02.2008, the Plaintiff appointed the Defendant as the civil and structural engineering consultant for the construction and completion of the project known as "*Cadangan Pembinaan Bangunan Tambahan Dewan Perperiksaan / Dewan Kuliah, Universiti Malaya*".
- The contractual relationship between the parties was governed, amongst others, by a Memorandum of Agreement dated 03.06.2008 ("**MoA**"), the Conditions of Engagement of Consulting Engineer for Professional Services ("**CoE**") and the Schedule to the Condition of Engagement ("**Schedule**"). Clause 4 of the CoE contains an arbitration clause.
- Following disputes between the parties, the Plaintiff commenced proceedings against the Defendant in the Kuala Lumpur High Court, alleging that the Defendant had failed, refused and/or neglected to fulfil its contractual obligations.
- The Writ and Statement of Claim were served on the Defendant on 06.10.2022. The Defendant entered appearance on 17.10.2022 and the High Court directed the Defendant to file its Defence by 03.11.2022.
- Before the expiry of the deadline, the Defendant requested an extension of time to file its Defence until 17.11.2022, which the Plaintiff agreed to. Shortly before the extended deadline, the Defendant sought a further extension until 01.12.2022, which was likewise consented to by the Plaintiff.



- Thereafter, the Defendant served a Notice to Produce Documents Referred to in Pleadings dated 24.11.2022 to the Plaintiff, requesting inspection of documents referred to in the Statement of Claim for the purposes of preparing its Defence. In its correspondence, the Defendant expressly reserved all its rights.
- On 30.11.2022, the Plaintiff responded by providing all the documents requested pursuant to a Notice Where Documents May Be Inspected. On the same day, the Defendant informed the Plaintiff that it required additional time to finalise its Defence after receiving those documents.
- On 01.12.2022, before filing its Defence, the Defendant served a Notice of Arbitration pursuant to Clause 4 of the CoE. The following day, the Defendant filed an application under section 10 of the AA 2005 to stay the High Court proceedings in favour of arbitration. Pending the disposal of the stay application, the High Court directed that the Defendant need not file its Defence.
- The High Court subsequently dismissed the Stay application. On appeal, the Court of Appeal allowed the Defendant's appeal and granted a stay of proceedings pending arbitration. The Plaintiff thereafter obtained leave to appeal to the Federal Court.

ISSUES BEFORE THE FEDERAL COURT

The appeal presented the Federal Court with an opportunity to clarify the proper approach in determining whether a party has taken "steps in the proceedings" under section 10 of the AA 2005, thereby being regarded as having waived its right to seek a stay in favour of arbitration.

In particular, the Federal Court considered the following issues:

- Whether the principles established in *Sanwell* continue to provide the guiding framework for the interpretation of "steps in the proceedings" under section 10 of AA 2005.
- Whether the determination of "steps in the proceedings" should be undertaken by examining each procedural act in isolation or by adopting a holistic assessment of the party's conduct.
- What factors are relevant in determining whether a party has objectively demonstrated a clear and unequivocal intention to abandon arbitration and submit to the jurisdiction of the Court.

SANWELL REMAINS THE GUIDING FRAMEWORK

The Federal Court revisited its earlier decision in *Sanwell*, where it explained the principles governing what constitutes "*steps in the proceedings*" under section 10 of AA 2005.



In *Sanwell*, the Federal Court identified three categories of procedural acts:

*"[52] The second requirement, which is procedural in nature, requires that the referral to arbitration be sought "before taking any other steps in the proceedings". In **Sanwell**, this Court enumerated what constitutes "other steps in the proceedings" at page 638 as follows:*

"(a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;

(c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration."

The Federal Court then clarified that its observation in *Sanwell* that a request for an extension of time to file a Defence constitutes a step in the proceedings was merely obiter dicta and does not affect the remainder of the decision.

Accordingly, the Federal Court reaffirmed that the three-limb framework in *Sanwell* continues to provide useful guidance in determining whether a particular act constitutes a step in the proceedings. However, such guidance is not to be applied rigidly. Rather, the ultimate inquiry remains whether, viewed holistically, the party has demonstrated a clear and unequivocal intention to abandon arbitration and submit to the jurisdiction of the Court.

*"[117] The implication of our finding that this Court's observation in **Sanwell**, to the effect that a request for an extension of time to file a Defence constitutes a step in the proceedings, is obiter dicta is that it does not in any way affect the remainder of the judgment in *Sanwell*. *Sanwell* remains the authority for the position that an entry of appearance is a permitted step which does not amount to a step in the proceedings within the meaning of section 6 of Act 93, now subsection 10(1). This is especially important since the entry of appearance is not expressly excluded as a step in subsection 10(1), unlike in some other jurisdictions.*



*[118] Further, the three (3) limbs in **Sanwell** continue to provide useful guidance in determining whether a particular act may be regarded as a step in the proceedings. However, as alluded to above, given that **Sanwell** was decided prior to the legislative developments that solidified the pro-arbitration stance, such guidance should not be applied rigidly. As this Court held in **Yeo Eng Lam**, whether there is a clear and unequivocal intention not to arbitrate and to submit to the jurisdiction of the Court is a question of fact, and the Court is to adopt a holistic approach in determining whether a party has unequivocally waived its right to have the dispute resolved by arbitration."*

A HOLISTIC ASSESSMENT OF "STEPS IN THE PROCEEDINGS"

Building on its earlier unreported decision in **Yeo Eng Lam v. Infinity Vantage Sdn Bhd** [02(i)-20-03/2019(W)], the Federal Court clarified that the determination of whether a party has taken "steps in the proceedings" should not be undertaken mechanically by examining each procedural act in isolation. Instead, the Court held that the inquiry is a fact-sensitive exercise requiring a holistic assessment of the surrounding circumstances

*"[119] ...In our considered view, in the absence of further consideration of the circumstances of a particular case, a blanket approach which treats a request for an extension of time to file a Defence secured through extra-judicial agreement as not constituting a step, while treating a formal application for the same to the Court culminating in a formal order as constituting a step, renders the inquiry a mechanical exercise which flies in the face of the holistic approach underscored in **Yeo Eng Lam**. In the context of the Rules of Court 2012 [P.U.(A) 205/2012], such a blanket approach limits further inquiry into the circumstances attending a formal application for an extension of time under, on the one hand, Order 3 Rule 5(1) and, on the other, a request for the same under Order 3 Rule 5(3), read together with Order 18 Rule 2(1). The same applies to the background circumstances surrounding the issuance and service of Notice to Produce Documents under Order 24 Rule 10 and a formal application under Order 24 Rule 11."*

RELEVANT FACTORS IN DETERMINING WHETHER A PARTY HAS TAKEN STEPS IN THE PROCEEDINGS

Having clarified that the inquiry is a holistic and fact-sensitive exercise, the Federal Court identified a number of factors that may be relevant in determining whether a party has objectively demonstrated a clear and unequivocal intention to abandon arbitration and submit to the jurisdiction of the Court. These factors are discussed below.

- **Reservation of Rights Remains an Important but Not Determinative Factor**

The Federal Court held that whilst an express reservation of rights remains a relevant factor in determining whether a party has taken "steps in the proceedings", it is not determinative. Rather, the reservation of rights must be considered together with the overall factual circumstances of the case.

*"[120] As alluded to above, a Defendant who fails to assert its rights at the proper time, or takes action inconsistent with its assertion, may be held to have waived it. This underlies the practice of including an express reservation of rights in correspondence with the Court and the Plaintiff by a Defendant desirous of relying on the arbitration clause... While a reservation of rights clause is a relevant factor, it is not to be considered in isolation, but in the context of the overall factual circumstances. As this Court held in **Yeo Eng Lam**, a reservation of rights, per se, does not automatically preclude a finding that a step has been taken in the proceedings."*

Applying the above principles, the Federal Court rejected the Plaintiff's contention that the Defendant's general reservation of rights was insufficient merely because it did not expressly refer to the arbitration clause or an intention to apply for a stay.

"[135] With all due respect, we disagree. The Defendant had expressly stated its reservation in its covering letters dated 24.11.2022 and 7.3.2023, its Notice of Arbitration dated 1.12.2022, and its Statement of Defence and Counterclaim dated 7.3.2023. In our view, the wording of the reservation is sufficiently clear and wide, and therefore, ample notice had been given to the Plaintiff of the Defendant's position and its reservation of right to arbitration."

- **Delay May Constitute Waiver**

The Federal Court held that delay is a relevant factor in determining whether a party has waived its right to arbitrate. Whilst the mere passage of time does not, in itself, result in a waiver, a defendant should nevertheless act promptly to avoid any impression of tactical manoeuvring.

"[121] In an appropriate case, delay may constitute an aspect of waiver, to be assessed in light of the Defendant's conduct as a whole. The mere passage of time does not, in itself, result in a Defendant losing the right to a stay of Court proceedings in favour of arbitration. However, a Defendant seeking a stay should act promptly so as to avoid any impression of tactical manoeuvring by stringing the Plaintiff along. A pro-arbitration stance should not be taken to condone inordinate delay where there has been a significant lapse of time since the service of the Statement of Claim before an application for a stay in favour of arbitration is made."

- **The Reason for Seeking and Extension of Time Matters**

The Federal Court emphasised that whether a request for an extension of time constitutes a step in the proceedings depends on the surrounding circumstances. In determining whether such a request evinces an unequivocal intention to proceed with the suit, the Court may consider, amongst other factors, the reasons for seeking the extension and whether the request was made in good faith.

"[129] We are of the considered view that unequivocal intention ought not to be determined by mere assumptions or implication, but must be arrived at objectively by reference to the evidence before us. As appears from its Affidavit in Reply affirmed on 4.1.2023 in response to the Plaintiff's Affidavit in Reply, the Defendant deposed that more time was required as the events and documents dated as far back as 2008 and that some documents were not in its possession. This averment was neither challenged nor contradicted by the Plaintiff. In our view, the reasons given by the Defendant for the extensions of time are reasonable, and the requests were necessary and made in good faith..."

...Therefore, based on the foregoing discussion, we are of the considered view that requests for extensions of time to file a Defence, as well as a mere indication in the Defendant's correspondence of an intention to file a Defence, do not evince an unequivocal intention to proceed with the suit and, consequently, do not amount to steps in the proceedings as contended by the Plaintiff. This is particularly so given that such indication was made before the Defendant had access to documents not in its possession."

- **Procedural Steps that Do Not Advance the Merits of the Dispute**

The Federal Court clarified that a necessary but peripheral procedural step which does not touch on the merits of the substantive dispute does not constitute a step in the proceedings. In the present case, the Defendant's issuance of a Notice to Produce Documents was held to be reasonable, necessary and made in good faith, and therefore did not evince an intention to waive its right to arbitrate.

*"[131] With all due respect, we disagree. Guided by the principles laid down in **Yeo Eng Lam**, a necessary but peripheral application or action that does not touch on the merits of the substantive dispute does not constitute a step in the proceedings...*

...Additionally, the nature of a Notice to Produce Documents is to enable the inspection of documents referred to in the pleadings. It is, though not an application, purely peripheral to the substantive disputes between the parties and does not advance the merits of the case in any manner. As made clear by the Defendant in its letter dated 8.12.2022 and Affidavit in Reply affirmed on 4.1.2023 in response to the Plaintiff's Affidavit in Reply, some documents referred in the Statement of Claim were not in the Defendant's possession. In our view, the Defendant's Notice to Produce Documents is reasonable and necessary, and was issued and served in good faith. Therefore, we are of the considered view that the serving of Notice to Produce Documents by the Defendant's solicitors does not indicate an intention to waive arbitration rights."

DECISION OF THE FEDERAL COURT

For the foregoing reasons, the Federal Court dismissed the Plaintiff's appeal and affirmed the decision of the Court of Appeal granting a stay of the High Court proceedings in favour of arbitration.

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) The determination of whether a party has taken "steps in the proceedings" is a fact-sensitive inquiry requiring a holistic assessment of the surrounding circumstances, rather than a rigid or mechanical approach by examining each procedural act in isolation.
- (b) Whilst *Sanwell Corp v Trans Resources Corp Sdn Bhd* continues to provide the guiding framework for determining what constitutes "steps in the proceedings", it is not to be applied rigidly. The ultimate inquiry remains whether the party has objectively demonstrated a clear and unequivocal intention to abandon arbitration.



(c) In undertaking the above inquiry, the Court may consider, amongst other factors, the reservation of rights, delay, the reasons for seeking an extension of time, and whether the procedural act merely facilitates the proceedings without advancing the merits of the substantive dispute.

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