Foreign Arbitral Award : Enforcement Confined to Arbitration Act or Extends to Reciprocal Enforcement of Judgments Act?

ING BANK NV & ANOR v TUMPUAN MEGAH DEVELOPMENT SDN BHD [2025] 8 CLJ 873

29th December 2025

ISSUES

The primary issue in this case is whether a foreign arbitral award that has been converted into a judgment in the seat country may be enforced in Malaysia under the Reciprocal Enforcement of Judgments Act 1958 ("**REJA**"), or whether enforcement is confined to the Arbitration Act 2005 ("**MAA**").

In applying to set aside the ex parte registration of a foreign judgment confirming an arbitral award, can the courts examine the underlying arbitral award to determine issues of jurisdiction and/or fraud? Or is such review confined to the confirmation judgment and does not extend to the underlying arbitral award?

Further, where lack of jurisdiction or fraud is alleged in an application to set aside an ex parte registration under REJA, should the courts order a de novo hearing to examine the allegations, or should the courts exercise minimal curial review?

The Federal Court addressed these questions in the recent case of **ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd [2025] 8 CLJ 873**.

BRIEF FACTS

The brief facts of the case are as follows:-

(a) The subject matter of the arbitration is a dispute arising out of two bunker supply transactions allegedly entered between O.W. Bunker Far East (Singapore) Pte Ltd ("**O.W. Singapore**") and Tumpuan Megah Development Sdn Bhd ("**Tumpuan Megah**") in late 2014.

(b) ING Bank NV ("**ING Bank**") was the security agent and assignee of receivables under an omnibus security arrangement involving O.W. Singapore's parent company in Denmark (ING Bank and O.W. Singapore are hereafter referred to as the "**Appellants**").

(c) Tumpuan Megah denied the existence of the supply contracts and thus the validity of the arbitration agreements thereunder, and maintained that no bunkers or marine gas oil were ever supplied.

(d) In 2017, the Appellants commenced arbitration in London pursuant to the arbitration clause in the supply contracts.

(e) Tumpuan Megah participated under protest, later advancing an alternative defence based on an alleged set-off agreement providing for arbitration in Kuala Lumpur.

(f) The London Tribunal rejected this defence, affirmed its jurisdiction and issued a final award in favour of the Appellants in February 2020 ("**UK Award**"). Tumpuan Megah did not challenge the UK Award.

(g) On 22.12.2020, the Appellants obtained an order from the English High Court, registering the UK Award as a judgment. The order was served on the Respondent, who made no attempt to have it set aside or appeal from the same.

(h) On 22.03.2021, the Appellants applied to register the English Judgment under REJA and obtained an ex-parte order to that effect.

(i) In response, Tumpuan Megah applied to set aside the registration under Section 5(1)(a)(ii) and (iv) of REJA, alleging amongst others, that the English High Court lacked jurisdiction to enforce the UK Award and that the English Judgment was obtained by fraud ("**Setting Aside Application**").

(j) Tumpuan Megah also sought a trial of issues under Order 67 rule 9 of the Rules of Court 2012, identifying four 'potential issues' that require a trial prior to determination of the Setting Aside Application ("**Application for Trial**"). For context, Order 67 rule 9 of the ROC provides that:-

> *"The Court hearing such application may order any issue between the judgment creditor and the judgment debtor to be tried in any manner in which an issue in an action may be ordered to be tried."*

(k) Amongst the issues identified were whether there was a contract between parties incorporating the arbitration clause (jurisdiction related) and whether an actual sale or delivery of such bunkers to the Respondent and thus, whether the English judgment was obtained by fraud (fraud related).

(l) On 22.12.2021, the High Court dismissed the Application for Trial, amongst others, on the ground that none of the issues raised required oral evidence to be adduced or for a trial to be conducted.

(m) Dissatisfied with the High Court's Decision, Tumpuan Megah appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

The Court of Appeal reversed the High Court's decision and held, amongst others, that:-

(1) Section 8 of the MAA, "*which precludes a court from intervening in matters governed under it, save where specified*", would preclude "*the winning party in an arbitral award from pursuing registration and enforcement of an arbitral award in any manner other than vide the MAA. This would include a judgment registered and enforced in the supervisory jurisdiction, such that REJA is not an available means of registering and enforcing the judgment obtained pursuant to an arbitral award*".

(2) The "*focus of the Respondent was on the formation of the arbitration agreement, it went to the root of the jurisdiction of the arbitral tribunal. The court therefore had to hear the issue independently and afresh, irrespective of the decision of the arbitral tribunal…*"

(3) Alternatively, "*if the route of registering a foreign arbitral award as a foreign judgment under REJA is allowed, the same objection on jurisdiction may be raised. The judgment debtor… should not be disadvantaged or suffer any prejudice in any way by reason of opting for this means of enforcement. It should be entitled to oppose the registration and enforcement in the same manner as under a section 38 MAA enforcement application*".

Accordingly, the Court of Appeal allowed the appeal, set aside the High Court's decision, and ordered that the issues of jurisdiction and fraud be tried pursuant to Order 67 rule 9 of the Rules of Court 2012 in the REJA proceedings.

To this end, the Federal Court made the following observation of the Court of Appeal's decision:-

"[53] In effect, the Court of Appeal determined that a new trial involving the adducing of witnesses for both sides could be held without being influenced by the finding of facts of the arbitral tribunal. As such if fraud could be established, it would unravel everything including the arbitration agreement."

ISSUES BEFORE THE FEDERAL COURT

The key issues considered by the Federal Court are, amongst others, as follows:-

(1) Can a foreign arbitral award be enforced under REJA or is enforcement confined to the MAA?

(2) If it can be enforced under REJA, can the court examine or review the underlying foreign arbitral award, or is the review confined to the confirmation judgment, i.e. the judgment entered on the terms of the arbitral award?

(3) If the underlying arbitral award can be examined or reviewed, to what extent can the arbitral award be scrutinised? Should the scrutiny extend to a de novo hearing?

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS VIA CONFIRMATION JUDGMENTS IS NOT CONFINED TO THE MAA

After analysing the legislative history and intents of both the REJA and MAA, the Federal Court finds that the REJA and MAA are two distinct sources or modes of registration and enforcement of arbitral awards, affording the award holder with two discrete avenues for enforcement.

"[109] These two statutes therefore comprise two separate and discrete modes or avenues for the registration and enforcement of foreign arbitral awards - REJA through the recognition of confirmation judgments premised on an arbitral award in respect of a relatively few and select states as expressly provided for in the Act, while the MAA provides a direct route for the registration and enforcement of foreign arbitral awards generally. ***As such these two distinct sources or modes of registration and enforcement of arbitral awards under the two independent statutes provide two discrete avenues for award holders to proceed****. It must be emphasised, although obvious, that* ***REJA is neither a treaty nor a convention, but a statute which has not been repealed nor amended in any manner in relation to the registration and enforcement of judgments, which includes confirmation judgments arising from arbitral awards, in relation to the select countries afforded reciprocity under REJA****."*

[Emphasis added]

The Federal Court further rejects the notion that MAA ousts REJA. Neither can it be construed that REJA is subject to the MAA. As such, the passive remedy available under the MAA cannot be read into REJA as REJA contains its own provision allowing for non-registration of foreign judgment, including confirmation judgment premised on an arbitral award.

> *"[143] Put simply, **a confirmation judgment premised on an arbitral award is a judgment and is, to that extent, expressly recognised and enforceable under REJA**, while an arbitral award per se is recognised and enforceable under the MAA. **Section 8 cannot expand its reach to encroach on REJA. Any such interpretation is unsound, as the express words of section 8 itself are limited to the MAA** (see Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam [2018] 1 CLJ 693 (FC)) …*
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> *[157] In conclusion on this point, **REJA** and the **MAA** are separate laws premised on their respective treaty arrangements, governing different rights. As such, **REJA cannot be construed so as to be subject to the MAA such that it overrides the MAA**. The issue of conflict or inconsistency arising between the two statutes does not arise because they provide different modes of enforcement. It then follows that **the passive remedy recognised and utilised in the setting aside of arbitral awards under the MAA cannot be read into REJA. REJA contains its own provisions allowing for the nonregistration** of a judgment including a confirmation judgment and these provisions govern such setting aside."*
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> [Emphasis added]

In the upshot, the Federal Court concludes that the award creditor is not restricted to enforcing a foreign arbitral award solely under the MAA. Where a foreign arbitral award has been validly converted into a judgment in the seat court, enforcement in Malaysia may be pursued under REJA.

UNDERLYING ARBITRAL AWARD MAY BE REVIEWED TO DETERMINE REJA DEFENCES

Following the above, the Federal Court went on to consider whether the court, in an application to set aside the ex-parte registration of a foreign judgment under REJA, is confined to a review of the confirmation judgment only or can review be extended to the underlying arbitral award itself.

For context, section 5(1)(a) of REJA provides several grounds upon which the ex-parte registration shall set aside, including:-

"(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case…

(iv) that the judgment was obtained by fraud"

On this issue, the Federal Court held that the underlying foreign arbitral award in a confirmation judgment can be examined or reviewed in a REJA application. The confirmation judgment is premised entirely on the arbitral award, and the judgment debtor will be deprived of its real defence if the underlying arbitral award cannot be reviewed.

*"[180] **In our considered view, any real adjudication of the six matters set out in section 5 of REJA in the case of a confirmation judgment premised on a foreign arbitral award, should allow for an examination or review of these issues in relation to the arbitral award, and not be confined solely to the confirmation judgment**. The latter approach would not allow any real form of examination of these issues. A restriction to that effect would deprive the award or judgment debtor of real defences it may wish to raise, so as to form the basis for a setting aside of the confirmation judgment. The confirmation judgment is premised entirely on the arbitral award… **Therefore, based on a purposive construction of the provisions of sections 2 and 5 of REJA we find that the defences in section 5 should be construed and applied in relation to the award as well as the confirmation judgment.**"*

[Emphasis added]

EXTENT OF SCRUTINY – A DE NOVO HEARING IS THE EXCEPTION, NOT THE RULE

The Federal Court held that the review of the underlying arbitral award should be confined to whether the alleged fraud affected the tribunal's jurisdiction to hear the dispute, and not whether the tribunal made the correct findings of facts of fraud when determining the merits of the case.

*"[265] In this context, we reiterate that in view of our earlier conclusion, we are dealing with **REJA** and not the **MAA** here. In keeping with our earlier conclusion that the registering court under **REJA** is entitled to review the arbitral award underlying the confirmation judgment, it would follow that the **Art V** defences as set out in section 5 of REJA enable the registering court to consider the issue of jurisdiction, but again in terms as envisaged under **REJA**.*

[266] This means that a review would be undertaken only where it is truly a question of whether the arbitral tribunal had the power and jurisdiction to hear the dispute, as opposed to a review of the factual findings of the arbitral tribunal relating to fraud as a part of the factual matrix of the case. In other words, fraud arising from an adjudication on the factual merits of the case ought not to be open to a full review."

After considering the applicable tests in other jurisdictions to determine whether the alleged fraud affects the jurisdiction of the tribunal (extrinsic) or whether the alleged fraud only affects the merits of the case (intrinsic), the Federal Court finds that the preferred test should be focused on **materiality** and the **availability of remedy in the foreign court** relating to the alleged fraud.

> *"[275] Questions that might be asked in relation to an allegation of fraud rendering the judgment unsafe and unregistrable for enforcement might include:*
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> *(i) Was the fraud likely to have changed the result?*
> *(ii) Was there a realistic opportunity to uncover or challenge it in the foreign proceeding?*
> *(iii) Is the foreign system capable of addressing this type of fraud?*
> *(iv) Would enforcement contravene Malaysia's public policy sensitivities?*
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> *[276] With respect to **questions (ii) and (iii) it would follow that given the relationship of reciprocity under REJA**, with its specifically named counterpart countries, **these reciprocating countries would be in a position to identify and prevent fraud as envisaged**. With respect to (ii), there was a realistic opportunity accorded to challenge the 'fraud' in the UK proceedings both at arbitration and in the section 66 **proceedings**. And with respect to (iii), the English courts are capable of addressing this form of allegation of fraud.*
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> *[277] As for questions **(i) and (iv)**, these are pertinent questions that **can be answered by the registering court and would lead to an efficient and fair disposal of the fraud claim, without having to re-examine afresh, proof of the same**.*
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> *[278] This functional and materiality test works well to enable the registering court to determine whether the judgment ought to be set aside or not."*
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> [Emphasis added]

In determining whether the scrutiny should extend to a de novo hearing, the Federal Court held that the correct approach is not to undertake a de novo re-hearing of evidence that was already presented to the arbitral tribunal, for purposes of a jurisdictional challenge.

> *"[289] Ultimately therefore, under the provisions of **REJA**, more particularly section 5(1)(a)(ii) and (iv), the approach of the Court is **not to undertake a de novo re-hearing of the evidence that was undertaken before the arbitral tribunal relating to the allegations of fraud afresh, for the purposes of a jurisdictional challenge.** This is all the more so where such findings were scrutinised by the supervisory court under section 66 of the English Arbitration Act 1996."*

[Emphasis added]

Applying the proposed test to the facts of the matter, the Federal Court finds that the allegation of fraud in the instant case does not warrant a de novo hearing as it relates to the evidence already presented to the tribunal on the validity of the claim (existence of the 2 transactions). To allow a fresh hearing would tantamount to giving the Respondent a second bite of the cherry.

> *"[291] The point to be made for the purposes of this appeal is that the exercise does not warrant the High Court embarking on a full de novo hearing, including cross-examination of witnesses, to determine whether the two disputed documents are fraudulent or otherwise. That would amount to a re-hearing of the evidential findings of the arbitral tribunal which is not the correct approach to be undertaken…*
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> *[307] **As we have pointed out earlier on in the judgment, the full review by way of a de novo hearing is not the correct approach given the nature of the objections raised in relation to jurisdiction** as well as the need for finality. **It is evident from a perusal of the objections made that many if not most of the allegations relate to evidential matters or legal conclusions arrived at on the basis of the evidence presented to the tribunal**. In short, they are matters intrinsic to the adjudication process undertaken by the arbitral tribunal. **They are essentially matters of evidence which require determination by the tribunal in relation to the validity of the claim itself, as opposed to pure matters of law which strike at the arbitrators' powers and jurisdiction to hear and adjudicate on the matter.***
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> *[308] The courts should be slow to encourage a full-blown rehearing which would effectively amount to a second bite of the cherry in relation to some of the issues raised. Where the issues relate to the construction of contracts, no oral evidence is warranted."*
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> [Emphasis added]

Whilst the doors to a de novo hearing is not closed, the Federal Court states that there should be minimal curial review and the de novo approach should be the exception rather than the norm.

> *"[292] If the position was that there was some fraud perpetrated on the Court, that might allow for some new and material evidence to be elicited to establish the fraud and the jurisdictional point. But this would require evidence that is strong and clear. Even findings of perjury during the course of the arbitral hearing have been found to be insufficient to set aside an award. That is not the case here…*

*[318] In conclusion a minimal curial review of the foreign judgment is consistent with the ethos and philosophy of **REJA** which is based on reciprocity. With respect to matters of jurisdiction, such as a lack of jurisdiction by reason of fraud (as is the case in the instant appeal) it is best to adopt the functional and materiality test to ascertain on the information available on record whether the fraud was material, and whether remedies were available at the foreign arbitral tribunal as well as the seat court, to determine whether this is, indeed, a true jurisdictional challenge.*

[319] The de novo approach should be an exception rather than the rule."

[Emphasis added]

DECISION OF THE FEDERAL COURT

In the upshot, the Federal Court allowed the appeal and reversed the Court of Appeal's decision in allowing the de novo hearing.

KEY TAKEAWAY

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

(a) **Enforcement is not confined to the Arbitration Act**: Where a foreign arbitral award has been converted into a judgment in the seat court, enforcement in Malaysia may be pursued either under the Arbitration Act 2005 or by registration under REJA, which operates as a separate and parallel enforcement regime.

(b) **The underlying arbitral award may be reviewed, but only for REJA purposes**: In a REJA setting-aside application, the court may examine the underlying arbitral award to determine jurisdictional or fraud-based defences, but not to reopen the merits of the dispute.

(c) **De novo hearings are the exception, not the rule**: Allegations of fraud or lack of jurisdiction do not automatically justify a de novo hearing; Malaysian courts should exercise minimal curial review where the issues were, or could have been, addressed before the arbitral tribunal or the seat court.

If you have any questions or comments on this article, please contact:-

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