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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 16/2025)

The Publications Committee is pleased to circulate the 16th edition in this case note series for the year.

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Written by Arif Umar Faruq b Faiz

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Sincerely,

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

MT Ventures Sdn Bhd & Another v QM Print Sdn Bhd & Another Appeal (FC)

Civil procedure – Sections 3, 67 and 68 of the Courts of Judicature Act 1964 – Appealability of decisions – Appealability of dismissal of application to strike out claim

In **MT Ventures Sdn Bhd & Another v QM Print Sdn Bhd & Another Appeal** (Civil Appeal No.: 02(i)-6-03/2024(W)), the Federal Court clarified the scope of the application of Section 68(1)(f) Courts of Judicature Act 1964 ("**CJA**"), which reads as follows:

"No appeal shall be brought to the Court of Appeal in any of the following cases:

...

(f) where a High Court dismissed any application to strike out any writ or pleading..."

In summary, the Federal Court held that Section 68(1)(f) CJA does not exclude all appeals against dismissals of applications to strike out any writ or pleading. In essence, a party may appeal against the dismissal of an application to strike out a writ or pleading where such a dismissal finally disposes of the rights of the parties and that such dismissal would cause grave prejudice to the rights of the parties.

The Federal Court's grounds were, amongst others, as follows:

(1) The amendment to the CJA which introduced Section 68(1)(f) CJA did not alter the position in law in Sections 3 and 67 CJA on the appealability of a decision:

- (a) First, it is established that it is necessary to consider Section 3 CJA when construing Section 67 CJA. Section 3 CJA defines 'decision' as meaning '*judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties*'. Section 67(1) CJA confers general jurisdiction upon the Court of Appeal to determine appeals from '*any judgment or order...in any civil cause or matter*', subject to terms in written law regulating the bringing of appeals;
- (b) Section 68 CJA has to be read with Section 67 CJA, as Section 68 CJA provides exceptions to the general rule in Section 67 CJA. Thus, Section 3 CJA similarly ought to be considered when construing Section 68(1)(f) CJA;
- (c) Thus, Section 68(1)(f) CJA should be read to take into consideration Section 67 and Section 3 CJA, which preclude any appeal from an order which does not finally dispose of the rights of the parties. On the other hand, an order that does finally dispose of the rights of the parties would not be a 'ruling' under Section 3 CJA;
- (d) In the upshot, where a decision finally disposes of a party's rights, then a right of appeal accrues to, or vests in that party in accordance with Sections 67 and 3 CJA. That right of appeal is not taken away by Section 68(1)(f) CJA, which serves to ensure that appeals are not taken in instances where no rights have finally

been disposed of. Thus, Section 68(1)(f) CJA serves to clarify the entrenched position in law that generally no appeals are available under Sections 67 and 3 CJA where no rights of the parties have been finally disposed of;

- (e) In essence, Section 68(1)(f) CJA does not come into play where the striking out of a writ or pleading finally disposes of the parties' rights;
 - (f) Based on the above, the amendment to the CJA which introduced Section 68(1)(f) CJA simply clarified what has always been the correct reading of the law, i.e. a dismissal of a striking-out application is generally not appealable because it merely defers the decision envisaged in Section 3 CJA; and
 - (g) The amendments to the CJA were not strictly necessary for the dismissal of striking-out applications to be non-appealable, but were introduced due to the fact that litigants were, nevertheless attempting to appeal such rulings, notwithstanding that their rights which remained intact would be adjudicated upon at a later date. By amending the CJA to make matters clearer, Parliament was not legislating in vain.
- (2) The dismissal of a striking-out application which is '*in the course of*' the full hearing of the cause or matter, and does not finally dispose of the parties' rights, constitutes an unappealable '*ruling*' under Section 3 CJA. In this regard:
- (a) There is a '*final disposal of rights*' where either:
 - (i) The rights of the parties under the main suit are finally disposed of; or
 - (ii) Where the rights of the parties that are ancillary or separate from the parties' substantive rights under the suit, but are also crucial to the parties, are disposed of; and
 - (iii) Where in both instances, the indicia of the final disposal of the parties' rights is measured by an irreparable, irreversible or irrevocable loss or prejudice, which may not be easily compensated.
 - (b) On the requirement of a ruling '*in the course of*' a trial or hearing, context in the present case requires interpreting Section 3 CJA as meaning what is relevant is the ruling being '*in the course of the full case*' and not '*in the course of*' the striking-out application.
- (3) Notwithstanding the above, there will be situations where the dismissal of a striking out application will cause grave prejudice to the parties' rights, such that there is an ability to appeal. In this connection:

- (a) This is most apparent where the court does not have jurisdiction to hear the matter due to the non-fulfilment by the plaintiff of certain threshold conditions; and
- (b) For instance, where the requirements for a derivative action are not met and the court nonetheless does not strike out the action. In such a case, the rights of the parties would have been finally disposed of on an adjudication of the preliminary point.

Appeals before the Federal Court

There were two appeals before the Federal Court for determination:

(1) **MT Ventures Sdn Bhd & Anor v QM Print Sdn Bhd**

- (a) The basis of the defendants' striking-out application was a challenge to the *locus standi* of the plaintiffs, where the defendants argued that the damage claimed was suffered by a third party and therefore, the plaintiffs do not have a right to sue;
- (b) In this regard, where a party does not have *locus standi* to bring an action, the court will not have the jurisdiction to determine the issue; and
- (c) Thus, as the objection the defendants make is jurisdictional, they have a right to appeal the dismissal of the striking-out application.

(2) **Azinal Sdn Bhd v Jannath Gani & Ors**

- (a) The dispute in this case centred on whether the claim brought was bound by *res judicata*; and
- (b) Thus, the issue raised was a true jurisdictional objection. If the matter was indeed *res judicata*, the defendants had a right not to be tried. The dismissal of the striking-out application finally disposed of their right not to be subjected to duplicative litigation. Therefore, the defendants were permitted to appeal.

Alternative approach

The Federal Court also considered the appeals in an alternative approach. In the appeals before the Federal Court, the original proceedings were filed prior to the amendment introducing Section 68(1)(f) CJA. Thus, the question was whether the **Macnaghten** presumption (i.e. that the right of appeal vests at the time of the institution of the original proceedings) applies or whether it was displaced by a purposive interpretation of the amendment to Section 68 CJA.

On this issue, the Federal Court held, amongst others, as follows:

- (1) The right to appeal is a substantive right. Where statutes take away substantive rights of parties, they are to apply prospectively unless the contrary is made clear expressly or by necessary implication. In the present case, there is no contrary indication that justifies construing Section 68(1)(f) CJA as being retrospective;
- (2) Section 68 CJA should not be read as displacing the **Macnaghten** presumption or as operating retrospectively to take away the vested right of appeal that both parties possessed in the present case;
- (3) Thus, even if one reads Section 68(1)(f) CJA literally so as to remove the parties' rights to appeal the dismissal of a striking-out application, this cannot apply so as to remove the vested rights of the parties. The substantive right of both appellants in this case to appeal the dismissal of their striking-out applications were vested in them at the time the respective suits were filed; and
- (4) Therefore, even under this alternative ground, the Appellants were held to have possessed a right to appeal the dismissal of their striking-out applications.

Conclusion

In view of the above, the Federal Court did not answer the leave questions posed by the parties. The Federal Court allowed both appeals, ordering that both appeals be reinstated and heard in full before the Court of Appeal.

Written by
Priscilla Faith Lim
Member, Publications Committee

Brief Facts

1. The Federal Court's decision in **Public Bank Berhad v National Feedlot Corporation Sdn Bhd & Another Appeal** (Civil Appeal No.: 02(f)-14-05/2024(W) [**"Appeal 14"**] & Civil Appeal 02(f)-15-05/2024(W) [**"Appeal 15"**]) concerned:
 - (i) Appeal 14 which was Public Bank's appeal against the decision of the Court of Appeal allowing the Respondents' appeal on liability; and
 - (ii) Appeal 15 which was the Respondents appeal against the Court of Appeal's decision awarding them only nominal damages of RM10,000.00 despite having proved liability against Public Bank.
2. In its Statement of Claim, the Respondents sought the following relief:
 - (i) General damages of RM 60,000,000.00;
 - (ii) Exemplary damages of RM 250,000,000.00; and
 - (iii) Aggravated damages of RM 250,000,000.00
3. The general damages claimed by the Respondents were calculated based on the net income suffered by all of the Respondents as at year 2013. The tabulation of quantification of damages amounting to RM60 million are based on the audited accounts.
4. The Respondents sought:
 - (i) Exemplary damages as a result of the disclosure of confidential information, affecting the reputation of the 5th Respondent's family; and
 - (ii) Aggravated damages of RM250 million against Public Bank for the damages suffered by the Respondents. In this regard, as a result of the disclosure by Public Bank, Respondents contended that they had lost the opportunity to generate future income in the business of all the companies and could not continue with their business.

High Court's decision

5. The High Court found that Public Bank was not liable and that the Respondents failed to prove the claim for general damages, aggravated and exemplary damages.

Court of Appeal's decision

6. The Court of Appeal allowed the Respondent's appeal on liability, but was of the opinion that the High Court Judge's approach and reasoning on damages was not erroneous or flawed. Nevertheless, the Court of Appeal ordered nominal damages of RM10,000 with interest to the Respondents, as the Respondents succeeded on liability but failed in their claim for substantial or any damages.

Federal Court's decision

7. The Federal Court held *inter alia* that:
 - (i) Monetary remedy can be awarded by courts in equity when a party in a position of trust breaches their duty, thus causing a loss or harm;
 - (ii) To justify reversing the decision on the question of the amount of damages, the Courts must have acted upon some wrong principle of law, or awarded an amount so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The Federal Court found that the Courts below failed to consider the evidence, both oral and documentary. Hence, made an entirely erroneous award of the damages;
 - (iii) The Court of Appeal erred in holding that the Respondents failed to establish their claim for damages due to insufficient evidence, when in fact there was an abundance of financial evidence adduced by the Respondents such as comprehensive financial reports and audited accounts, supported by testimony from its expert witness, PW3. Public Bank, however, did not adduce any evidence to rebut these documents—neither through expert testimony, bank records, nor other documentary materials. Instead, their only course of attack concerned PW3's qualifications or credibility;
 - (iv) It is a well-established principle of law that where evidence is tendered but not challenged or contradicted by the opposing party, the court is entitled—and indeed obliged—to act on that unchallenged evidence. Documentary evidence which is neither challenged nor debunked remains good, credible and should be relied upon. Thus, in the absence of any expert rebuttal or documentary evidence, the financial reports and audited accounts remain uncontroverted. Public Bank's challenge on PW3's standing could not substitute for meaningful cross-examination or contrary evidence, and did not undermine the reliability of the underlying financial documents; and
 - (v) Upon examining the detailed financial reports and audited accounts which was adduced as evidence and not challenged by Public Bank, the Federal Court found that the Respondents had suffered loss and damages. In this regard, the Federal Court awarded the following to the Respondents with interests:
 - (a) Equitable damages of RM 30million;
 - (b) Exemplary damages of RM 30 million; and
 - (c) Aggravated damages of RM 30 million
8. The Federal Court allowed the Respondents Appeal 15 and dismissed Public Bank's Appeal 14. The decision of the Court of Appeal on damages was set aside. The decision of the High Court on liability and damages was also set aside.

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Bhavanash Sharma Gurchan Singh Sharma v Jogmohan Singh Sandhu; Allen David Martin (Intervener) (CA)

Legal profession – Sections 37 and 40 of the Legal Profession Act 1976 – Conduct of unauthorized persons – Scope of the anti-touting provision

In **Bhavanash Sharma Gurchan Singh Sharma v Jogmohan Singh Sandhu; Allen David Martin (Intervener) (Civil Appeal No.: W-04(NCvC)(W)-53-02/2023)**, the Court of Appeal addressed important points on the scope of the prohibition against touting and the provision of legal services by persons who are not qualified as lawyers, under the Legal Profession Act 1976 (“LPA”).

The Respondent’s claim was premised upon an agreement he had with the Appellant for the division of a sum paid in settlement of a debt recovery suit filed by Martech Consultants (“**Martech**”) against E-Pay (M) Sdn. Bhd. (“**E-Pay**”).

The Respondent was not an Advocate and Solicitor qualified under the LPA. The Appellant was an Advocate and Solicitor. The Appellant practiced at a law firm in Kuala Lumpur.

Martech appointed the Respondent as a “consultant” for a debt recovery dispute that the former had with E-Pay. The Respondent’s appointment with Martech was on these terms, amongst others:

- (1) Martech agreed to pay the Respondent RM20,000.00 as an upfront retainer fee and 10% of any sum recovered from E-pay in the dispute;
- (2) The Respondent was required to recommend and appoint solicitors to act on behalf of Martech in the debt recovery suit; and
- (3) The Respondent would settle the legal fees of the lawyers appointed for Martech in the suit.

The Respondent recommended the Appellant be appointed as counsel and another firm of solicitors act as the solicitors for Martech. The Respondent also agreed to pay half of the 10% sum recovered by Martech from E-Pay in the debt recovery suit (if so recovered).

Following the institution of the debt recovery suit by Martech against E-Pay, Martech discharged its firm of solicitors and the Appellant’s firm were appointed as the new solicitors in the suit.

The debt recovery suit was then settled and the sum of RM4,800,000.00 was to be paid to Martech as part of the settlement. The said RM4,800,000.00 sum was paid to the Appellant’s firm (as Martech’s solicitors). The Appellant’s firm retained 10% of the sum (i.e. RM480,000.00).

The Respondent then demanded from the Appellant his share from the 10% retained by the Appellant (i.e. RM240,000.00), pursuant to the previous agreement between the parties. The Appellant did not remit to the Respondent the RM240,000.00 demanded.

The Appellant denied that there was any agreement with the Respondent for the sharing of the 10% retained by the Appellant

from the sum paid in settlement of the debt recovery suit. The Appellant further argued, in any event, that any such agreement with the Respondent was illegal and void as being reflective of a touting arrangement.

The Sessions Court ruled in favour of the Respondent and allowed the claim of RM240,000.00 with interest. The High Court upheld the decision of the Sessions Court.

The Court of Appeal allowed the appeal and dismissed the Respondent’s claim after holding that the agreement on which the Respondent’s claim was founded was an illegal contract.

Justice Collin Sequerah JCA, who wrote for the Court of Appeal, first addressed whether the Respondent provided services as an Advocate and Solicitor in violation of Section 37 of the LPA. Section 37 was held to be “*designed to impose restrictions upon and an unauthorised person performing services that only an advocate and solicitor can perform*”.

It was held that “*the acts and services performed by the Respondent...falls within the prohibition envisaged by s 37*”. This was because the Respondent provided services that included, amongst others, handling the internal legal portfolio for Martech, recommending and appointing external solicitors and counsel to act for Martech, drafting and vetting contracts and authorization documents for Martech and providing legal advice on the prospects of success in legal actions.

This resulted in the finding that the Respondent’s claim violated Sections 37 and 40 of the LPA.

The Court of Appeal then addressed whether the Respondent’s claim was founded upon a touting arrangement that was void and unenforceable under Section 24 of the Contracts Act 1950.

In examining the nature of services of the Respondent, it was found that the Respondent “*was to identify and enter into an arrangement with a lawyer where the latter would make remuneration to him in exchange for referring the case to him. There was accordingly no attempt to secure the services of a lawyer on the basis of competence or price competitiveness but purely on the basis of a favourable remuneration for the Respondent*”.

This led to the Court of Appeal’s finding that the Respondent sought to recover from the Appellant in this claim his fee in exchange for appointing the Appellant to act as Martech’s lawyer.

It was thus held that “*any which way that one looks at it, this was a “touting” arrangement which is prohibited by r 51 of the Legal Profession (Practice & Etiquette) Rules 1978...which is prohibited*”.

The Respondent was therefore barred from the recovery of any sum in this claim and the claim was dismissed.

The Court of Appeal then made certain consequential orders as *"the Appellant being an advocate and solicitor, was aware that his appointment was on the sole basis that he agreed to share half of the 10% recovered with the Respondent"* and that *"the Appellant had been in pari delicto, a balance according to the notions of equity and fairness has to be struck between the parties"*.

Accordingly, in addition to allowing the appeal, the Court of Appeal ordered that *"the sum of RM240,000.00 plus all interest and the costs totalling the sum of RM309,325.00 held in the clients-account of"* the firm of the Respondent's solicitors under an Order of the High Court, with all interests accrued, be paid to the solicitors for *"the intervener, Allen David Martinez (formerly trading under the name and style of Martech Consultants) within 7 days from the date of service of the sealed order"* of the Court of Appeal.

Written by
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Chairperson, Publications Committee

ING Bank N V & another v Tumpuan Megah Development Sdn Bhd (FC)

Arbitration – Enforcement of foreign arbitral awards – Reciprocal Enforcement of Judgments Act 1958 – Scope for Malaysian Court to order trial of issue where issue has been tried in arbitration – Jurisdiction of Courts in the context of Sections 37 and 39 of the Arbitration Act 2005

In **ING Bank N V & Another v Tumpuan Megah Development Sdn Bhd (Civil Appeal No.: 02(i)-19-06/2024(W))**, the Federal Court had the opportunity to consider whether a judgment of the English High Court that ordered the enforcement of a foreign arbitral award could be enforced in the Malaysian courts pursuant to the Reciprocal Enforcement of Judgments Act 1958 (“**REJA**”).

Brief Facts and Background

In a London arbitration which concluded in 2020, the Appellants successfully obtained an arbitral award against the Respondents whereby the Respondents were found liable for the payment of a sum due and owing to the Appellants pursuant to a contract for the supply of marine bunkers (the “**London Arbitral Award**”). In the London arbitration, the arbitrator had also ruled that it had jurisdiction to hear the arbitration, despite an objection raised by the Respondents as to the arbitral tribunal’s jurisdiction.

The Respondent did not comply with the London Arbitral Award, nor did it apply to have it set aside. The Appellants therefore applied to the English High Court to obtain an order for leave to enforce the London Arbitral Award the (“**EWHC Confirmation Judgment**”). The Respondent did not challenge the application to the English High Court, nor did it apply to set aside or appeal against the EWHC Confirmation Judgment.

At the High Court

In 2021, the Appellants obtained an *ex-parte* order from the High Court to register the EWHC Confirmation Judgment under REJA (“**REJA Order**”). The Respondent filed an application to set aside the REJA Order and also filed an application for trial, submitting that there were potential issues requiring a trial prior to the determination of its setting-aside application. The High Court dismissed the Respondent’s application for trial (please see paragraph [35] of the judgment).

At the Court of Appeal

The said dismissal by the High Court was reversed by the Court of Appeal. In summary, the Court of Appeal held, among others, as follows:

- (i) Where a foreign arbitral award is sought to be enforced in Malaysia, the appropriate mode of enforcement is the Malaysian Arbitration Act 2005 (“**MAA**”), which is the specific legislation for matters relating to or arising out of arbitration, and not REJA, which is of general application for all judgments: please see paragraphs [36] – [46] of the judgment;
- (ii) Seeking to enforce the London Arbitral Award by registering the EWHC Confirmation Judgment through REJA amounted to a “judgment on a judgment”, which constitutes “judgment laundering”: please see paragraphs [47] – [49] of the judgment; and

- (iii) Although the Appellants’ application was made under **REJA**, the High Court below should have heard the Respondent’s objections as to a lack of jurisdiction of the arbitral tribunal *de novo* (i.e. by way of a rehearing as opposed to a review of the arbitral tribunal’s decision on jurisdiction), particularly as **s. 5(1)(ii) REJA** recognises that the registration of a judgment can be set aside where the courts of the country of the original court had no jurisdiction. The Court of Appeal drew a comparison between the said **s.5(1)(ii) REJA** with **s. 39 MAA**, which allows jurisdictional challenges against the arbitral tribunal that rendered the award to be raised afresh in an application for recognition or enforcement of that award under **s. 38 MAA**: please see paragraphs [50] – [57] of the judgment.

The Federal Court’s Decision on Enforcement through REJA vs Enforcement through the MAA

In the Appellants’ appeal to the Federal Court, the following four main issues were considered by the Federal Court:

- (i) Whether the winning party in an arbitration is entitled to enforce a foreign arbitral award which has been registered in the foreign jurisdiction in which the award was handed down under REJA and/or the MAA, or is the winning party restricting to enforcing the fruits of its arbitration only under the MAA?
- (ii) Is REJA (in relation to a foreign arbitral award which has been converted to a judgment in the foreign jurisdiction) displaced in the Malaysian jurisdiction by the MAA?
- (iii) Is REJA displaced on the grounds that it is *lex specialis*?
- (iv) Is REJA to be read subject to the MAA?

The Federal Court held that REJA and MAA are distinct, legitimate mechanisms for the recognition and enforcement of arbitral awards in Malaysia. Accordingly, the Federal Court disagreed with the Court of Appeal’s judgment, for the reasons summarised below.

The Federal Court acknowledged that the entire basis for REJA rests on the concept of comity and substantial reciprocity between the ‘reciprocating countries’ listed therein. Noting that the definition of ‘judgment’ in **s. 2 REJA** includes “... an award in proceedings in an arbitration if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place...”, the Federal Court held that the principles of comity and reciprocity which underly REJA comprises an independent mode of recognition of arbitral awards through ‘confirmation judgments’ given by the courts of the reciprocating countries: please see paragraphs [96] – [109] of the judgment. As regards the genesis of REJA and the MAA, the Federal Court explained as follows:

- (i) The MAA's genesis is the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), which is inextricably linked to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). The MAA, which was based off the Model Law, "*encompasses and brings into its content the ethos and philosophy of the New York Convention*" (see paragraph [107] of the judgment); and
- (ii) REJA on the other hand, which is neither a treaty nor a convention, is a wholly different and separate regime which has not been repealed nor amended.

The Federal Court also held that the MAA neither displaces nor prevails over REJA. In summary, the Federal Court's reasoning was as follows:

- (i) It was held that in the absence of any express amendments, provisions or repealing of REJA, it could not be said that the MAA displaces or prevails over REJA. At paragraph [132] of its judgment, the Federal Court stated that "*it is not possible under the ordinary rules of statutory interpretation to oust or make unenforceable express provisions of REJA which constitute an important part of the enforcement framework.*";
- (ii) To the Federal Court, interpreting the MAA in such a way would also run contrary to the underlying purpose and object of the Model Law and the New York Convention, which is to, among others, facilitate the efficient enforcement of a foreign commercial arbitral award. As stated at paragraph [134] of the judgment, "*this is certainly not achieved by seeking to prohibit another possible avenue of enforcement of such awards vide national statutes...*", like REJA;
- (iii) The Respondent argued that its position that the MAA was a self-contained regime on matters to do with the enforcement of foreign arbitral awards is reinforced by the non-inclusion of Article VII of the New York Convention – a provision which seeks to, *inter alia*, expressly preserve the right of a party to avail itself of an arbitral award in a manner allowed by domestic law (for example, REJA) – from the MAA. However, the Federal Court disagreed that such non-inclusion could be construed as an implied repealing of REJA: please see paragraphs [117] – [134] of the judgment;
- (iv) The Respondent also relied on **s. 8 MAA**, which provides that "*no court shall intervene in matters governed by [the MAA], except where so provided in [the MAA]*", to support its submission that the MAA is the specific enactment relating to the recognition and enforcement of foreign arbitral awards and therefore ought to prevail over general provisions in REJA. The Federal Court disagreed, and held that the reach of **s. 8 MAA** could not be expanded to encroach upon REJA: please see paragraphs [135] – [148] of the judgment;
- (v) The Federal Court was also not persuaded that the MAA could be considered as *lex specialis* (i.e. a specific legislation on arbitral matters which should prevail), and that REJA could be considered as *lex generalis* (i.e. a general

legislation which ought to succumb to the *lex specialis*). The Federal Court held that REJA was a *lex specialis* in and of itself, emphasising the nuance that, in the context of the present case, it relates to the recognition and enforcement of confirmation judgments rendered by specific jurisdictions, whereas the MAA relates to the recognition and enforcement of original arbitral awards. Accordingly, the Federal Court held that "*it would be incorrect to even compare the two modes of enforcement as it would not be a comparison of lex generalis with lex specialis. It is in effect comparing two statutes that comprise lex specialis in themselves*": please see paragraphs [149] – [152] of the judgment; and

- (vi) Lastly, emphasising again that REJA and MAA constituted separate, disparate and distinct statutory regimes with different geneses, the Federal Court held that it would be incorrect in law to subject REJA to the terms of the MAA: please see paragraphs [156] – [158] of the judgment.

The Federal Court's Decision on "Judgment Laundering"

Insofar as the Court of Appeal's finding of "judgment laundering", or a tactical device to register a judgment on a judgment, is concerned, the Federal Court held as follows (please see paragraphs [230] – [250] of the judgment):

- (i) The case of ***Strategic Technologies v Procurement Bureau of the Republic of China Ministry of Defence [2020] EWCA Civ 1604 ("Strategic Technologies")***, an authority for the concept of 'judgment laundering'; is distinguishable from the enforcement of confirmation judgments through REJA. In that case, the claimant had obtained a default judgment against the defendant in Singapore, and then utilised that Singaporean judgment in proceedings before the Grand Court of the Cayman Islands, where it also obtained a default judgment against the defendant. The claimant registered the Cayman Islands judgment in the English High Court. The English Court of Appeal set aside the registration on the basis that the Cayman Islands judgment, being predicated on the Singaporean judgment, constituted a "judgment on a judgment" and was not a judgment that was registrable and enforceable under the English Administration of Justice Act 1920 (which similar to REJA, provides for the recognition and enforcement of foreign judgments in England & Wales); and
- (ii) The Federal Court held that the facts of ***Strategic Technologies*** differed considerably from the present case in that there were in effect two separate judgments in existence before the Cayman Islands judgment was sought to be enforced. This does not arise in the present case where there is only one confirmation judgment, which is specifically recognised as being registrable and enforced under REJA.

The Federal Court's Decision on Jurisdictional Objections Under REJA

In addition to the issues described above, the following issues were also considered by the Federal Court:

- (i) Whether a challenge put forward as a 'jurisdictional' challenge, which is predicated on factual findings of fraud, is in law a true jurisdictional challenge; and
- (ii) To what extent does a court review the evidence relating to fraud under the provisions of REJA and Order 67 rule 9(2) ROC when those issues have been tried and determined by the foreign arbitral tribunal and registered in that foreign jurisdiction? Does it extend to the Malaysian Court ordering a trial of issues between the judgment creditor and the judgment debtor under the provisions of REJA?

In respect of the first issue described above, the Federal Court considered whether factual findings of fraud made by the arbitral tribunal in relation to the factual matrix of the case could be utilised to sustain a jurisdictional objection against the arbitral tribunal. The Federal Court, emphasising again that the regime to be considered here is that under REJA, considered specifically the provisions in **ss. 5(1)(a)(ii) and (iv) REJA** which provide as follows:

- (1) *On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment –*
 - (a) *shall be set aside if the registering court is satisfied –*
 - [...]
 - (ii) *that the courts of the country of the original court had no jurisdiction in the circumstances of the case;*
 - [...]
 - (iii) *that the judgment was obtained by fraud*

The important question was whether the considerations under the above sections "*relate to the actual factual controversy comprising the subject matter of the original dispute between the parties such that the registering court undertakes a complete review of the factual matrix of the case?*" Or rather, does the relevant enquiry only involve the court looking at "*whether a fraud was perpetrated on the original arbitral tribunal or the registering court with a view to ascertaining whether there was fraud on the court?*": please see paragraph [261] of the judgment.

Firstly, in assessing **s. 5 REJA** and the scope of jurisdictional challenges and challenges to enforcement on the basis that a judgment was obtained by fraud, the Federal Court interpreted **s. 5 REJA** such that the relevant enquiry pursuant thereto can involve a review of both the confirmation judgment and the underlying arbitral award. It came to this conclusion based on

what is labelled the 'limited-in-scope merger approach' (see for example paragraphs [221] – [227] of the judgment), which in summary, provides that once an award creditor has registered and enforced the arbitral award within one jurisdiction as a confirmation judgment, the award merges with the confirmation judgment. However, under the 'limited-in-scope merger approach', such merger only occurs within the jurisdiction rendering the confirmation judgment, and not extraterritorially. Applying this approach, the Federal Court held that the enforcement of a confirmation judgment under REJA cannot be considered separately from the arbitral award, given that no merger has occurred. Importantly, if it were otherwise, the Respondent in this case would only be able to sustain a (valid) jurisdictional challenge by reference to only the terms of the confirmation judgment, which may be limiting.

However, the Federal Court took the view that a true "jurisdictional challenge", including those in the context of fraud, would involve allegations (including of fraud) that would go towards "the power of the tribunal to hear a case" (please see paragraph [264] of the judgment). The Federal Court described such allegations that go towards the power of the tribunal (and could therefore properly be put forth as jurisdictional challenges) as "extrinsic fraud", whereas allegations that are relevant towards the substantive determination on the merits of a case are described as "intrinsic fraud" (please see paragraphs [269] – [273] of the judgment). Applying this to the present case, the Federal Court found that the allegations raised by the Respondent were intrinsic, and were not matters which "strike at the arbitrator's power and jurisdiction to hear and adjudicate on the matter" (please see paragraph [307] of the judgment).

Against the above backdrop, although the Federal Court recognised that exceptionally, a full review by way of re-hearing was available under REJA (see paragraph [306] of the judgment), the nature of the Respondent's objections did not warrant one and a 'limited curial review' was appropriate. To the Federal Court, a *de novo* approach, as endorsed by the Court of Appeal, would be a "*disproportionate attack on the principle of finality*": please see in particular paragraphs [306] – [320] of the judgment.

Accordingly, the Appellants appeal was allowed by the Federal Court and the judgment of the Court of Appeal was set aside.

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