

## ENFORCEABILITY OF FOREIGN COURT JUDGEMENTS IN MALAYSIA

In an increasingly interconnected world, globalization has significantly transformed economies, businesses, international relationship and personal dealings. Advances in technology, communication, and transportation have enabled cross-border transactions, international trade, and human interactions that transcend geographical boundaries.

However, this phenomenon has also created a complex web of interactions that can lead to disputes and legal challenges. For example, cross-border transactions often include clauses requiring dispute resolution to be conducted in a foreign court or tribunal. Additionally, companies with an international customer base may find themselves navigating legal proceedings in another country.

Regardless of the outcome of the legal proceeding, the winning party faces another significant hurdle: enforcing the judgment against the losing party can be impractical, particularly if the losing party lacks realizable assets in the jurisdiction where the judgment was rendered. In such cases, the successful party may have to consider enforcing the judgment in another country where the losing party does have assets, or risk the judgment remain merely a paper judgment.

Nonetheless, courts worldwide have long acknowledged this issue, allowing for the enforcement of foreign judgments in their jurisdiction subject to certain conditions. In Malaysia, the enforcement of foreign judgments falls under either one of the three (3) categories below:

- a. the Foreign Reciprocal Enforcement of Judgment Act 1958 (“REJA”);
- b. the common law principles;
- c. the Arbitration Act 2005.

### **History of Enforcement of Foreign Judgment**

Before the mid-nineteenth century, when legislation for the enforcement of foreign

judgments was introduced, English courts acknowledged foreign judgments based on the principle of comity. This principle entails recognizing the legitimate laws of other jurisdictions, with the expectation that those jurisdictions will similarly respect the laws of the adjudicating state when the need arises[1]. The US Supreme Court defined comity as:

*[N]either a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws [Hilton v Guyot [1895] 159 US 113].*

The concept of comity in England was later superseded by the doctrine of obligation[2]. In *Schibsy v Westenholz* [1870] LR 6 QB 155, Blackburn J opined:

*We think that... the true principle on which the judgments of foreign tribunals are enforced in England is... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.*

This basically means that upon the delivery of the judgment, it may be enforced anywhere. This principle also serves as the foundation of the enforcement of judgment between Malaysia and Singapore prior to the enactment of REJA[3].

### **Foreign Reciprocal Enforcement of Judgment Act 1958 ("REJA")**[4]

As explained by the Malaysian then Supreme Court in *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, the main advantage of REJA was to provide for 'direct execution of foreign judgments' and that it '*obviates the necessity of first obtaining a local judgment with the attendant requirement of establishing jurisdiction over the defendant as a pre-condition*'.

REJA provides for the direct registration of judgments obtained from the superior courts of the reciprocating countries. This means that the Malaysian courts recognize foreign judgment issued by these superior courts without requiring the judgment creditor to first obtain a local judgment to prove the debt against the debtor. The reciprocating countries listed in REJA[5] at the moment are as follows:-

- i. United Kingdom;
- ii. Hong Kong Special Administrative Region of the People's Republic of China;
- iii. Singapore;
- iv. New Zealand ;
- v. Republic of Sri Lanka (Ceylon);
- vi. India (excluding State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra);

vii. Brunei Darussalam.

The prerequisite requirement for registering foreign judgment under the REJA regime are as follows[6]:-

- i. The judgment is final and conclusive as between the parties;
- ii. There is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
- iii. The judgment is from a country or territory added to the First Schedule and was it was given after that country or territory was added to the First Schedule.

However, the judgment will not be registered by the Malaysian courts if it can be shown that[7]:-

- i. The judgment has been wholly satisfied; or
- ii. The judgment could not be enforced by execution in the country of the original court.

The procedure for registering a foreign judgment under REJA is provided under Order 67 of the Rules of Court 2012. The application shall be filed within six years after the date of the judgment or after the final appeal. The application shall be made by way of filing an originating summons at the High Court in Malaysia supported by an affidavit[8]:-

- i. exhibiting the judgment or verified or certified or otherwise duly authenticated copy of the judgment. Where the judgment is not in the English language, a translation of the judgment certified by a notary public or authenticated by affidavit;
- ii. stating the name, trade or business and the usual or last known place of abode or business of the judgment creditor and the judgment debtor;
- iii. stating to the best of the information or belief of the deponent:
  - a. that the judgment creditor is entitled to enforce the judgment;
  - b. at the date of the application, the judgment had not been satisfied;
  - c. that the judgment does not fall within any of the cases in which a judgment may not be ordered to be registered under s. 4(2) of REJA;
  - d. the amount of the interest which under the law of the country of the original court has become due under the judgment up to the time of registration;
  - e. that at the date of the application, the judgment can be enforced by execution in the country of the original court and that, if it were registered, the registration would not be liable to be set aside under s. 5 of that Act;
  - f. where the sum payable under a judgment sought to be registered is expressed in a currency other than the currency of Malaysia, the amount which that sum represents in the currency of Malaysia calculated at the rate of exchange prevailing at the date of the judgment;
- iv. accompanied by such other evidence with respect to the enforceability of the judgment by execution in the country of the original court, and of the law of that country.

The registration of the foreign judgment can be set aside by the Malaysian courts if it is satisfied that[9]:-

- i. the judgment is not a judgment to which REJA applies;
- ii. the original court had no jurisdiction in the circumstances of the case;
- iii. the judgment debtor in the proceedings in the original court did not receive sufficient notice of the proceeding to appear;
- iv. the judgment was obtained by fraud;
- v. the enforcement of the judgment would be contrary to Malaysian public policy;
- vi. the rights under the judgment are not vested in applicant; or
- vii. the matter has been subject to a final and conclusive judgment by a court having jurisdiction in the matter.

### **Enforcement of Foreign Judgment under Common Law**

A foreign judgment that falls outside REJA may still be enforced by the Malaysian courts through the principle of common law. As explained by the Malaysian Federal Court in *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor* and another appeal, at common law, a foreign judgment is treated as an implied obligation to pay a debt which provides a cause of action on which the debtor can be sued in another country. It is the judgment that is obtained from the Malaysian court and not the foreign judgment that is enforceable as a judgment in Malaysia[10].

The requirements for enforcing a foreign judgment in Malaysia are as follows[11]:-

- i. the foreign court exercised a jurisdiction which the Malaysian courts will recognise;
- ii. must be for a definite sum;
- iii. must be final and conclusive;
- iv. for a sum other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty;
- v. excludes other reliefs such as declaratory orders, specific performance, injunctions and claims in rem;
- vi. the original copy of the foreign judgment is produced, or if a copy is relied on, then the copy must be certified with proof of the character of the document according to the law of the foreign country, in accordance with Section 78(1)(f) or Section 86 of the Malaysian Evidence Act[12].

The Malaysian court may reject recognizing the foreign judgment if it can be shown that[13]:-

- i. the foreign court had no jurisdiction over the defendant;
- ii. the judgment was obtained by fraud;
- iii. the judgment would be contrary to public policy; and

iv. the proceedings in which the judgment was obtained were opposed to natural justice.

The foreign court is said to have jurisdiction over the defendant/debtor when[14]:-

- i. the defendant is a subject of the foreign country in which judgment has been obtained;
- ii. the defendant was resident in the foreign country when the action began;
- iii. the defendant has, in character of the plaintiff, selected the forum in which he afterwards sues;
- iv. the defendant has voluntarily appeared and defended the case;
- v. the defendant has contracted to submit himself to the forum in which judgment was obtained.

Enforcement of the foreign judgment in Malaysia under the principle of common law typically starts with the judgment creditor filing a writ action together with the statement of claim outlining the requirements mentioned above. Once the writ and statement of claim have been served on the defendant/debtor, the plaintiff/creditor may then file an application for summary judgment on the basis that the defendant/debtor has no defence to the claim. Unless it can be shown that there are triable issues or that the defendant/debtor has defence with merits against the claim, the Court may award summary judgment in favour of the plaintiff/creditor without the need for the parties to go through lengthy trial at all.

Upon obtaining the local judgment, the plaintiff/creditor may now proceed with the usual execution process provided under the Malaysian legal systems, such as bankruptcy, winding up, writ of seizure and sale, garnishee, among others.

### **Arbitration Award via Arbitration Act 2005**

The primary advantage of international arbitration over court litigation is its enforceability, in that an international arbitration award is enforceable in most countries. Additional benefits of international arbitration include the ability to select a neutral forum to resolve disputes, the finality of arbitration awards – typically not subject to appeal, the flexibility to choose procedures tailored to the needs of the parties, and the confidentiality of the proceedings[15].

Similar to court judgments, unless the assets of the losing party are located in the country where the arbitral award was rendered, the successful party must obtain a court judgment in the jurisdiction where the losing party resides or where its assets are situated to enforce it. It is through a treaty on recognition of arbitral awards between the country where the award is rendered and the country where the successful party seeks to enforce the award, that the successful party will be able to use the award to for execution against the debtor[16].

Under the Arbitration Act 2005 ("**AA 2005**"), the recognition and enforcement of arbitral awards covers both domestic and international arbitration. Section 38 of the AA 2005 provides:

*“(1) On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of an award or by action.*

*... (4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.”*

According to the United Nation website, the convention currently has been ratified, approved or accepted by 172 participating states[17].

The application for recognition of an arbitration award (domestic or international) shall be made by way of an originating summon filed in the Malaysian High Court[18]. The procedure entails the applicant producing[19]:-

- i. the duly authenticated original award or a duly certified copy of the award;
- ii. the original arbitration agreement or a duly certified copy of the agreement;
- iii. where the award or arbitration agreement is in a language other than the national language or the English language, a duly certified translation of the award or agreement in the English language.

The Malaysian High Court may refuse the recognition or enforcement of the foreign award where it is shown that[20]:-

- i. a party to the arbitration agreement was under any incapacity;
- ii. the arbitration agreement is not valid under the law to which the party has been subjected it under the laws of Malaysia;
- iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- iv. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- v. the award contains decision on matters beyond the scope of the submission to the arbitration;
- vi. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the AA 2005 from which the parties cannot derogate) or was not in accordance with this Act;
- vii. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was made;
- viii. the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- ix. the award is in conflict with the public policy of Malaysia.

## Conclusion

The Reciprocal Enforcement of Judgments Act 1952 (REJA) is limited to the enforcement of judgments from superior courts of the reciprocating countries only and applies exclusively to monetary judgments. It does not cater for pre-judgment reliefs, such as Mareva injunction, as such this limitation may hamper efforts to protect against the dissipation of assets pending registration. Despite these limitations, since its inception in 1958, REJA has played a crucial role in facilitating the enforcement of foreign judgments in Malaysia and will continue to do so in the future[21].

On foreign judgment falling outside the ambit of REJA, the Malaysian court is readily armed to recognize the foreign judgment under the principle of common law.

In addition, the introduction of the Arbitration Act 2005 marks a significant advancement in modernizing Malaysia's arbitration system. This Act facilitates the recognition and swift enforcement of foreign arbitral awards, aligning with the global demands of today[22].

As can be seen, the Malaysian legal system has evolved to continuously cater to the global demands ensuring that foreign parties can promptly reap the benefits of their efforts. The structured process as defined above reflects the nation's commitment to upholding international legal standards.

While the framework is in place, foreign parties may benefit from legal advice to navigate the complexities of cross-border enforcement effectively. As globalization continues to shape legal practices, understanding the enforcement mechanisms available in Malaysia becomes increasingly important for individuals and businesses engaged in international transactions.

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1. Enforcement of Foreign Judgments And Arbitral Awards In Domestic Civil Courts by Pretam Singh Darshan Singh, [2010] 4 CLJ(A) i.
  2. Ibid.
  3. Standard Chartered Bank (Singapore) Limited v Pioneer Smith (M) Sdn Bhd [2015] MLJU 710.
  4. Sakuragawa Pump (S) Pte Ltd v Perkapalan Mesra Sdn Bhd [2007] 7 MLJ 555.
  5. First Schedule of REJA.
  6. Section 3 of REJA.
  7. Section 4(1) of REJA.
  8. Order 67 of Rules of Court 2012.
  9. Section 5 and 6 of REJA.
  10. [2023] 2 MLJ 324.
  11. Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor [2023] 2 MLJ 324; Sakuragawa Pump (S) Pte Ltd v Perkapalan Mesra Sdn Bhd [2007] 7 MLJ 555.
  12. Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and another appeal [2023] 2 MLJ 324.
  13. See Hua Daily News Bhd v Tan Thien Chin & Ors [1986] 2 MLJ 107.
  14. PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd [2021] MLJU 1063; Halsbury's Laws of Malaysia, Vol 3(2), 2015 Reissue, LexisNexis, p. 86, para [90.95].
  15. Enforcement of Foreign Judgments And Arbitral Awards In Domestic Civil Courts by Pretam Singh Darshan Singh, [2010] 4 CLJ(A) i.

16. Ibid.
17. [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).
18. Section 50 of the AA 2005, Order 7 and Order 69 of the Rules of Court 2012.
19. Section 38 of the AA 2005.
20. Section 39 of the AA 2005.
21. Enforcement of Foreign Judgments And Arbitral Awards In Domestic Civil Courts by Pretam Singh Darshan Singh, [2010] 4 CLJ(A) i.
22. Ibid.

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