TUMPUAN MEGAH DEVELOPMENT SDN BHD v ING BANK N V & ANOR

CaseAnalysis
[2024] MLJU 44

Tumpuan Megah Development Sdn Bhd v Ing Bank N V & Anor [2024] MLJU 44

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

LEE SWEE SENG, SEE MEE CHUN AND MOHAMED ZAINI MAZLAN JJCA

RAYUAN SIVIL NO W-02(IM)-66-01/2022

3 January 2024

Nahendran Navaratnam (with Wong Wye Wah, Brandon Toh and Derrick Chan) (CK Chan Law Practice) for the appellant.
Sharon Chong Tze Ying (with Muhammad Suhaib bin Mohamed Ibrahim) (Skrine) for the respondent.

Lee Swee Seng JCA:

JUDGMENT OF THE COURT

[1] The plaintiffs in the High Court below had applied for registration of a judgment of a UK High Court under our Reciprocal Enforcement of Judgment Act 1958 ("REJA"). It is generally understood that in such an application, the defendant against whom the UK judgment had been obtained, cannot raise defence on the substantive merits of the plaintiffs' claim.

[2] However, the defendant argued that this particular case is different as the UK judgment had emanated from an Arbitral Award, supposedly with its seat in London and that under our Arbitration Act 2005 ("AA 2005"), any recognition and

enforcement of the Arbitral Award in Malaysia may be objected to under s 38 AA 2005 on the grounds allowed under s 39, often referred to as the passive remedy.

[3] The objection in this case is that there was no arbitration agreement at all as the alleged arbitration agreement was contained in two Invoices which the defendant argued before the Arbitral Tribunal to have been issued by the 2nd plaintiff fraudulently. Moreover, the relevant arbitration agreement is to be found in a set-off agreement between the parties wherein the seat of arbitration is not in London under the London International Maritime Arbitration Association ("LIMAA") Rules but in Kuala Lumpur under the KLRCA Arbitration Rules.

[4] The defendant contended that as the challenge goes towards the very jurisdiction of the Arbitral Tribunal, that challenge may be raised even at the Enforcement Court at Kuala Lumpur without an application being made to set aside the Arbitral Award at the Court where the seat of the Arbitration is said to be, in London.

[5] The defendant further contended that its failure to oppose the recognition and enforcement of the Arbitral Award in the UK Court does not bar them from objecting to the recognition and enforcement of the Award at Kuala Lumpur. The defendant's stand is that the plaintiffs cannot deprive it of the passive remedy available under s 38 AA 2005 even though the plaintiffs had chosen not to have the Award recognised and enforced under the AA 2005 but instead under what the plaintiffs perceived to be a more advantageous mode of enforcement under the REJA where the Enforcement Court would ordinarily not be allowed to go behind the foreign judgment in the defendant's attempt to set aside the registration of the foreign judgment.

At the High Court

[6] The plaintiffs obtained an *ex-parte* order on 22.3.2021 for the foreign judgment to be registered in the High Court of Malaya. The defendant duly applied to the High Court on 27.4.2021 in Enclosure 17 for the registration to be set aside under sections 5(1)(a)(i), 5(1)(a)(ii), 5(1)(a)(iii), 5(1)(a)(iv), 5(1)(a)(v) and 5(3)(b) of the REJA ("the Setting Aside REJA Application").

[7] The 1st and 2nd plaintiffs are ING Bank N. V. and O.W. Bunker Far East (Singapore) Pte Ltd respectively and shall be referred to collectively as the Judgment Creditors ("JCs") or sometime as the 1st JC or the 2nd JC where the context requires and the defendant, Tumpuan Megah Development Sdn Bhd as the Judgment Debtor ("JD").

[8] Pending the hearing of the application to set aside the ex-parte order, the defendant applied in Enclosure 24 on 3.6.2021 under Order 67 rule 9(2) and/or Order 92 rule 4 of the Rules of Court 2012 ("ROC") for the following orders:

> (a) that the issues between the JCs and the JD be tried in any manner in which an action may be ordered to be tried under Order 67 Rule 9(2) of the ROC where oral and documentary evidence may be adduced as follows:
>
> (i) whether there was a contract between the parties which incorporates the O.W Bunker Group Terms and Conditions (OWB Terms) and the arbitration agreement contained therein;
>
> (ii) whether the 2nd JC was engaging in a money lending transaction with a third party, Straits Energy Ltd, that was being disguised as a purchase of marine bunker fuels by the 2nd JC from Straits Energy Ltd for delivery to the JD;
>
> (iii) whether there was an actual sale and delivery of marine gas oil from the 2nd JC to the JD; and
>
> (iv) whether the English High Court Judgment was obtained by fraud in the circumstances of this case. (collectively referred to as "Potential Issues");

[9] Order 67 rule 9(2) of the ROC provides as follows:

> "(2) 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."

[10] In the affidavit in support of the application, the defendant alluded to the issue of whether there was a contract that incorporates an arbitration agreement where the seat of arbitration is in London ought to be tried with oral and/or documentary evidence by this Court as the said contract in the two invoices were fraudulently issued. The 1st JC was a party to the arbitration by virtue of an assignment of the Invoices by the 2nd JC to the 1st JC as part of the security for the financing given by the 1st JC to the 2nd JC.

[11] It was further alleged that the issue of whether the 2nd JC was engaged in a money lending transaction with a third party, Straits Energy Ltd, that was being disguised as a purchase of marine bunker fuels by the 2nd JC from Straits Energy Ltd for delivery to the JD when there was no actual sale and delivery of marine gas oil from the 2nd JC to the JD ought to be tried with oral and/or documentary evidence by the High Court below.

[12] The JD argued that there are high authorities to support its contention that when the defence of passive remedy is raised with respect to the absence of a binding arbitration agreement with the result that the arbitral tribunal has no jurisdiction, the High Court hearing the objection to the recognition and enforcement of an Arbitral Award must hear the matter afresh (*de novo*). It was also highlighted that though under the doctrine of *kompetenze-kompetenze* the Arbitral Tribunal may decide on its own jurisdiction, its decision cannot be final and

is always open to challenge even at the recognition and enforcement of the Arbitral Award stage.

[13] It was further highlighted that the decision of the Arbitral Tribunal on its own jurisdiction, even if this involves finding of fact, has no legal or evidential value and that the High Court before which the issue of jurisdiction is raised, is duty-bound to hear the matter afresh and be independently satisfied that the arbitrator indeed has jurisdiction to hear the dispute.

[14] As there is a conflict in the affidavit evidence on the validity and applicability of the arbitration agreement, it was argued that the special facts and circumstances of the case require oral and documentary evidence to be led.

[15] The defendant in its affidavit further sought to persuade the High Court that expert witness and/or expert evidence on the standard documents for the purchase and supply of the marine bunker is required to determine the issues between parties including expert witness and/or expert evidence on English law.

[16] The core of the challenge thus goes to the very jurisdiction of the Arbitral Tribunal. If there is no contract at all to begin with then there cannot be found an arbitration agreement in that which does not exist. It would be different from a case where there was a contract which was later discovered to be illegal and void, in which case, it may be argued that the arbitration agreement may be severed or separated from the underlying contract and still survives as in having a life of its own.

[17] On the other hand, the JCs argued that the issue of whether there is a valid arbitration in the two Invoices and whether these invoices were issued fraudulently or a sham had been ventilated before the Arbitral Tribunal and evidence had been adduced by both sides in support of their respective positions and the arbitrator had decided in the JCs' favour. There was no application to set aside the Arbitral Award filed by the defendant in the English High Court and so the matter had become *res*.

[18] The JCs also argued that the JD is estopped from resuscitating the issue of a lack of an arbitration agreement as the JD had not applied to set aside the Arbitral Award nor challenged the recognition and enforcement of the Arbitral Award granted by the High Court of Justice, Business and Property Courts of England & Wales that had exercised jurisdiction to grant the Order dated 13.11.2020 in favour of the JCs.

[19] The JCs' argument found favour with the High Court and it dismissed the JD's application for directions to be given for oral and documentary evidence to be adduced based on its failed argument that there was no arbitration agreement and hence the arbitrator has no substantive jurisdiction to hear the dispute.

[20] The JD is the appellant before us and the JCs the respondents. Where appropriate the JCs are sometime referred to as the Award Creditors and the JD as the Award Debtor.

In the Court of Appeal

[21] On appeal, learned counsel for the JD reiterated that the sole question is whether the Setting Aside REJA Application ought to be heard with oral evidence.

[22] Learned counsel for the appellant JD submitted that the learned High Court had erred in holding that the JD cannot challenge the validity of the arbitration proceedings or the UK Award in its Setting Aside REJA Application as these are irrelevant for the purposes of the registration of the UK Judgment. The appellant JD "*should have taken steps to challenge it according to the avenues available under the UK Arbitration Act 1996 within the stipulated time period*". The High Court "*as a registering court is not the forum to deal with these issues*" (paragraphs 25 to 28 and 31 to 41 of the Grounds of Judgment).

[23] It was further submitted that the High Court erred in holding that there was a lack of particulars relating to fraud on or before the UK Court and/or that the UK Court was deceived into granting the order (paragraphs 22, 29 to 30 and 40 of the Grounds of Judgment).

[24] It is not disputed that the JD had participated in the London Arbitration subject to a reservation as to the jurisdiction of the London's Arbitral Tribunal. After a 3 day oral hearing the Arbitral Tribunal delivered its Award in favour of the Award Creditors on both jurisdiction and merits. The Arbitral Award required the Award Debtor to pay the Award Creditors the sum of USD937,373.24 and costs of Arbitration of GBP105,535.00 together with interest.

Whether the lack of jurisdiction of an Arbitral Tribunal in an international arbitration may be raised by a JD in its application to set aside an ex-parte registration of a foreign judgment under the REJA when it has not applied to set aside the International Arbitral Award nor opposed its enforcement as a judgment of the UK Court in its seat in London

[25] The learned Judge appeared to have proceeded from the premise that as the

JD cannot be allowed to challenge at the High Court below the validity of the arbitration proceedings or the UK Arbitral Award, then the main and ultimate relief of setting aside the *ex-parte* judgment entered under the REJA cannot succeed in any event and would have to be dismissed. That being the case, then the application before it, which though interlocutory in nature as to a matter of procedure only, would have to be dismissed too as it would be pointless and an exercise in futility.

[26] Convinced of the soundness of its approach, the High Court observed and concluded as follows:

> "34. It is trite that a court order is valid until it is set aside and that a positive step must be taken to set it aside.
>
> ***35. The JD did not take any steps to challenge the Arbitral Award within the stipulated time period despite having had the opportunity to do so under** section 67 **of the UK Arbitration Act 1996 nor did the JD take any steps to oppose the enforcement proceedings commenced by the JCs in the English High Court despite being well aware of the same.**
>
> 36. It is clear that the UK Arbitration Act 1996 provides avenues for the JD to seek recourse where it is dissatisfied with the Arbitral Award.
>
> 37. Upon perusal of the cause papers filed, I find that the JD's explanations show that it was well aware of the avenues available to them under the UK Arbitration Act 1996 to challenge the Arbitral Award but have instead chosen to ignore the same at their own risk.
>
> …
>
> 41. To me, not only does this go against the very concept of comity and substantial reciprocity between the nations which is enshrined in the REJA, but it also goes against the doctrine of *res judicata* and estoppel." (emphasis added)

[27] With the greatest of respect to the High Court, the premise that it proceeded from is contrary to the approach that our Courts and others have taken when confronted with the same issue. One must not lose sight of the fact that with respect to arbitration and in this case the matter of recognition and enforcement of a foreign Arbitral Award, there is a specific statute governing it. It is the AA 2005 which specifically provides under s 8 thereof that:

> "No court shall intervene in matters governed by this Act, except where so provided in this Act."

[28] Matters of "Recognition and enforcement" of Arbitral Awards are governed by s 38 and "Grounds for refusing recognition or enforcement" are expressly provided in s 39 of the AA 2005. It would appear that to proceed under the REJA would fly in the face of the clear language of s 8 AA 2005. For ease of reference, ss 38 and 39 of the AA 2005 are set out below:

“38. Recognition and enforcement

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

(2) In an application under subsection (1) the applicant shall produce-

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(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.

39. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked-

(a) where that party provides to the High Court proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) **the arbitration agreement is not valid under the law to which the parties have subjected it**, or, failing any indication thereon, under the laws of the State where the award was made;

(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) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to 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 this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(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, or under the law of which, that award was made; or

(b) if the High Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”

(emphasis added)

[29] It is a reasonable proposition that registration of a UK Arbitral Award as a UK Judgment only allows enforcement of the Award as a judgment within the jurisdiction (i.e., in the UK only). It can thus be argued that such a registration does not extend to enforcement of an arbitral award as a judgment overseas. Lord Thomas of Cwmgiedd ("Lord Thomas") in his expert opinion exhibited by the JD in support of its application opined as follows:

> "43. section 66 of the 1996 *Act must be construed in accordance with the purpose of the 1996 Act and the overall legislative scheme. The New York Convention has established a special regime for the enforcement of international arbitration awards distinct from the regime applicable to the enforcement of judgments of courts. Effect is given to that regime by sections 100-104.* Section 66(4) *makes clear that nothing in* section 66 *is to affect the recognition or enforcement of an award under any other enactment or rule of law or under the New York Convention. Put in this context and in the context of the other matters I have set out,* **it is in my view clear that in** section 66(1) **the term "enforce as a judgment" means enforcement of the judgment within the jurisdiction. It does not encompass enforcement of an arbitral award as a judgment overseas, as the regime of the New York Convention is the regime for use for that purpose;** the express provision in section 66(4) reinforces this construction. **An Order made under** section 66(1) and any judgment entered under section 66(2) *in the circumstances of this case therefore cannot be relied on as enforcement for the purposes of the New York Convention.* It is of course possible, that an overseas arbitration debtor will submit to the jurisdiction of England and Wales to contest an application under section 66(1) **to enforce the judgment. If the arbitration debtor does so submit and the arbitration debtor fails and the court makes an Order for enforcement, then the arbitration debtor may be precluded from contesting enforcement elsewhere on the principles mentioned in Dallah. But that is the result of a decision after submission to the jurisdiction for the purposes of contesting enforcement.**
>
> …
>
> 45. Thus, in my view it is clear that it is not within the scope of section 66 to use the process in that section to enforce the award in Malaysia. The provisions of the New York Convention were the provisions to be used for that purpose. The Order of Cockerill J therefore does not as a matter of English law determine the issue of the jurisdiction of the LMAA Arbitral Tribunal for the purposes of enforcement overseas and cannot be relied on as precluding TMD from asking the High Court of Malaya to determine that issue for itself."
>
> (emphasis added)

[30] It is a given that an Arbitral Tribunal may decide on whether it has jurisdiction to hear the matter before it under the doctrine of *kompetenz- kompetenz.* However, its decision on its own jurisdiction is never final and it is always open to challenge in the Court of the Seat of the Arbitration ("the Seat Court") or in the Court before which the Arbitral Award is sought to be enforced ("the Enforcement Court") which would normally be where the assets of the losing party is found.

[31] The challenge at the Seat Court by an Award Debtor in setting aside an Arbitral Award is referred to as active remedy as opposed to a challenge to resist the recognition and enforcement of an Arbitral Award by an Award Debtor, which is called passive remedy. Both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") and the United Nations Commission on International Trade Law ("UNCITRAL") Model

Law on International Commercial Arbitration ("Model Law") regimes recognise the availability of the active and passive remedies.

[32] The fact that our Parliament had allowed the same grounds under a setting aside of an Award under s 37(1) of the AA 2005 to be repeated in an application to oppose recognition and enforcement under s 39(1) would mean that Parliament does not consider the same grounds to be redundant. For ease of reference, s 37(1) of the AA 2005 is reproduced below:

> **"37. Application for setting aside**
>
> (1) An award may be set aside by the High Court only if-
>
> (a) the party making the application provides proof that-
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) **the arbitration agreement is not valid under the law to which the parties have subjected it**, or, failing any indication thereon, 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) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (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 this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
>
> (b) the High Court finds that-
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
>
> (ii) the award is in conflict with the public policy of Malaysia."
>
> (emphasis added)

[33] In *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another case* [2018] 12 MLJ 706 it was observed by the High Court at paragraph [23] that in a domestic arbitration, both an application for setting aside under s 37 and also a corresponding application under s 38 of the AA 2005 to recognise and enforce the Award, the Court would generally hear both applications together as one would be a flip side of the other in that if the Award is set aside then correspondingly it will not be enforced and conversely if not set aside it would generally be enforced.

[34] However, in the case of an international arbitration, the setting aside is at the Court where the seat of arbitration is which may well be different from the

jurisdiction where a party may want to enforce an Award in its favour. An Award for instance may be against the public policy of the State where the Award is sought to be enforced though the same Award is not successfully set aside by the Court where the seat of arbitration is or even when the Award has been enforced in the Seat Court. See paragraph [24] of **Kejuruteraan Bintai Kindenko** (supra)**.**

[35] As both sections 37 and 39 of the AA 2005 are applicable to international arbitration as well, it would appear that generally there is no bar to an award debtor who did not apply to set aside an Arbitral Award, to later oppose an Enforcement Application under s 39 AA 2005 and to raise the issue of a lack of jurisdiction because of the absence of a valid arbitration agreement. A challenge to an Arbitral Award may be by way of setting aside the Arbitral Award in the Seat Court or to oppose or resist enforcement in the Enforcement Court. See paragraph [26] of **Kejuruteraan Bintai Kindenko** (supra).

[36] Our Supreme Court, as far back as the case of the *State Government of Sarawak v Chin Hwa Engineering Development Company* [1995] 3 MLJ 237, had recognised passive remedy even under the old Arbitration Act 1952. His Lordship Edgar Joseph Jr FCJ observed at page 245 as follows:

> "We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. Mustill and Boyd on *Commercial Arbitration* (2nd Ed) at p 546 have instanced two situations when the passive remedy would be available; namely: (1) where the award is so defective in form or substance that it is incapable of enforcement; (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator."

[37] The Singapore Court of Appeal wrestled with this issue of "passive remedy" in *PT First Media TBK v Astro Nusantara International BV and Ors* [2013] SGCA 57; [2014] 1 SLR 372 and delved deep into their legislative history of its International Arbitration Act and recognised its applicability under the Singapore arbitration regime in resisting an application to enforce an international Arbitral Award. This is because s 3(1) of their Act provides that the Model Law, with the exception of Chapter VIII of the Model Law, has the force of law in Singapore. Article 36 of the Model Law on enforcement of an arbitral award is in Chapter VIII.

[38] The Chief Justice of Singapore Sundaresh Menon CJ in writing for their Court of Appeal in **PT First Media TBK v Astro Nusantara International BV and Ors** (supra) concluded as follows:

> "84. As we have held, the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the IAA which, as we have stated, is to embrace the Model Law. Given that de- emphasising the seat of arbitration by maintaining the award debtor's 'choice of remedies' and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of

giving full effect to the Model Law philosophy would, in our view, be to recognise that the same grounds for resisting enforcement under art 36(1) are equally available to a party resisting enforcement under s 19 of the IAA."

[39] For us, Article 36 of the UNCITRAL Model Law is reproduced in our s 39 AA 2005 and as was observed in **Kejuruteraan Bintai Kindenko'**s case (supra):

"[33] …The reproduction in section 39 following the same grounds in a setting aside of an award under section 37 cannot be for decorative purposes but for the deliberate design of permitting the same grounds not raised because there was no previous application to set aside under section 37 to be raised in resisting or opposing an application under section 39 of the AA 2005. The repetition of the same grounds has nothing to do with it being redundant but everything to do with reiteration as in making those same grounds available in resisting an enforcement application under section 39 of the AA 2005."

[40] Thus, there is no place for the Award Creditors to argue that *res judicata* applies in that the JD could have applied to set aside the Arbitral Award at the seat of the arbitration in London but chose not to and thus is barred or estopped from objecting to the enforcement of the Arbitral Award now in the High Court of Malaya.

[41] Neither is it a valid ground for the Award Creditors to say that since the Award Debtor did not resist the enforcement of the Arbitral Award in London, then it is estopped from objecting it now in the Malaysian High Court. Availability of the passive remedy debunks the argument of *res judicata* or issue estoppel having set in.

[42] This was precisely the argument raised by the appellant in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763**, [2012] EWHC 3518** (Comm) where the UK Supreme Court speaking through Lord Mance had no compunction in dismissing it as follows:

"[22] …Second, *Dallah's* case quotes extensively from Fouchard, Gaillard, Goldman on *International Commercial Arbitration* (1999) para 658, pointing out that arbitral tribunals are free to rule on their own jurisdiction, but ignores the ensuring para 659, which says, pertinently, that:

'Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, **the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award**.'

[23] In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the government's deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submission before the Supreme Court, under reference to the government's recent application to set aside the tribunal's awards in France. But, in my judgment, **the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the**

arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement."

(emphasis added)

[43] Even Part Two of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 has this helpful information on its Article 16 on which our s 18 of the AA 2005 is copied from or modelled after:

"**4. Jurisdiction of arbitral tribunal**

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause." ***Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court.** Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. **The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control**. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. **In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36**."

(emphasis added)

[44] Section 18(1) and (2) of our AA 2005 reads:

"Competence of arbitral tribunal to rule on its jurisdiction

18.

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the **existence** or **validity of the arbitration agreement.**

(2) For the purposes of subsection (1)—

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is **null and void shall not *ipso jure* entail the invalidity of the arbitration clause**."

(emphasis added)

[45] As can be discerned above, a distinction is drawn between the effect of the existence or otherwise of an arbitration clause as opposed to one which existence is not in dispute but which agreement, of which the arbitration clause is a part of, is found to be null and void in which case, the arbitration clause still survives and is not invalid under the doctrine of separability. See the English case of *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] 3 All ER 580 at [44] – [47] and the Singapore Court of Appeal *COT v COU & Ors* [2023] SGCA 31 para [30].

[46] The first instance under s 18(1) AA 2005 with respect to the existence of the arbitration clause would go to the root of the jurisdiction of the Arbitral Tribunal such that if there is no arbitration clause because of a lack of an agreement whether it be a case of importation by reference or that of the exchange of documents referring to an arbitration clause has not resulted in a *consensus ad idem* between the parties or that the arbitration clause is contained in a document issued fraudulently or that the document is a sham. The focus is on the formation of the arbitration clause or agreement.

[47] That is what the Court is called to hear independently and afresh irrespective of how the Arbitral Tribunal itself had arrived at the decision that it has jurisdiction to hear the matter referred to it.

[48] The second instance with respect to the validity of the arbitration clause has nothing to do with the formation of the agreement containing the arbitration clause but the performance of it which may result in the agreement being held by the Arbitral Tribunal to be null and void and thus affecting the validity of the concluded contract. Precisely because of the doctrine of separability of the arbitration agreement from the main or principal or underlying agreement, the arbitration agreement will survive the underlying agreement that the Arbitral Tribunal may find to be null and void.

[49] The Court is not concerned with the challenge on finding of facts en-route to the Arbitral Tribunal's decision on the underlying agreement being null and void. That is within the exclusive domain of the Arbitral Tribunal.

[50] The JCs cannot deprive the JD of the latter's passive remedy by strategically electing to enforce the Arbitral Award that had been enforced in the UK High Court as a judgment of the Court by way of registering the foreign judgment in the High Court of Malaya under the REJA.

[51] We are conscious of the fact that the REJA has referred to Arbitral Awards in its definition of "judgment" but like all definitions in an Act of Parliament, it is always qualified by the opening words on the Interpretation section in this case s 2 as follows:

> "2. In this Act, unless the context otherwise requires —"
>
> See the Federal Court's decision in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113**.**

[52] The REJA of 1958 cannot supersede the AA 2005 which came later and is a more specific legislation governing all matters relating to or arising out of arbitration. In the event of an apparent conflict or confusion, a latter legislation would prevail and be the more appropriate legislation when it is a more specific legislation pertaining to enforcement of an Arbitral Award compared to the REJA which is of a general application to all judgments. See the Court of Appeal case of *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554. The principle of *generalia specialibus non derogant* would apply with the result of a specific statute overriding and prevailing upon a general one.

[53] The scheme of enforcement of a foreign Arbitral Award in our jurisdiction is by way of a s 38 AA 2005 application consistent with our treaty commitment under the New York Convention and the UNCITRAL Model Law where the jurisprudence is different from a registration of a foreign judgment *per se.*

[54] In this regard it is pertinent to refer to the observation of the Federal Court in *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 6 MLJ 255 as follows:

> **"[140]** To apply the well-known Latin maxim of *generalia specialibus non derogant,* a special law prevails over a general law. In any event, **arbitration is a completely distinct and disparate dispute resolution process in comparison to the adjudication of civil disputes. The concepts and philosophy of these two modes of dispute resolution are completely different. These two modes are accordingly governed by distinct and separate legislation. As such, in the present context, the AA is the relevant legislation, not the CJA.** The two ought not to be conflated. In an arbitration dispute, the cause of action which may be, for example, breach of contract, is determined finally. The civil courts are approached not for the purposes of trying the same cause of action, but purely for the purposes of recognition and to a very narrow extent, the setting aside of the arbitral award. **In that sense, the jurisdiction of the civil courts as stipulated in the AA is not engaged as it would be in a normal civil matter. Therefore, this takes the cause of action which has merged in the arbitration award out of the scope of the CJA and brings it into the purview of the AA.**
>
> **[141]** In this context it is important to reiterate again that the provisions of the CJA and the RC are general codes that provide the substantive and procedural basis for deciding disputes arising from general civil disputes. These laws do not limit nor affect any special law such as the AA. **The AA is a special law codified to govern arbitration proceedings, both domestic and international.** It gives effect to the principle of party autonomy by giving the parties the freedom to choose courts under the seat of arbitration that will have supervisory jurisdiction."

(emphasis added)

[55] We are conscious of the fact that s 4 of the Courts of Judicature Act 1964 that provides as follows:

"Provision to prevent conflict of laws

4. In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail."

[56] However, there is no similar clause in the REJA which is clearly a statute of general application.

[57] Learned counsel for the JD had referred to the written opinion of Lord Thomas who opined that it would be illegitimate to enforce an Arbitral Award obtained in the UK in the form of a UK Judgment and to then proceed to register it under the REJA as that would be to deliberately bypass ss 38 and 39 of the AA 2005 and thus taking a foreign Arbitral Award outside the regime provided under the New York Convention regime to which Malaysia is a signatory party to the Treaty as well as outside the UNCITRAL Model Law regime.

[58] In fact, Lord Thomas castigated it as judgment laundering and opined at paragraphs 50, 51 and 58 of his Expert Report as follows:

"50. In this connection it is useful to refer to the decision of the Court of Appeal of England and Wales in *Strategic Technologies v Procurement Bureau of the Republic of China Ministry of Defence*… (to which I will refer as *Strategic*). The claimant in that case had obtained a default judgment in 1999 in the High Court of Singapore against the defendant which was held to have submitted to the jurisdiction of Singapore; damages were assessed in 2002. In 2009 the claimant obtained a default judgment on the basis of the Singapore judgment in the Grand Court of Cayman Islands against the defendant which was also held to have submitted to that jurisdiction. The claimant then registered the Cayman Islands judgment in the High Court of England and Wales under section 9 of the AJA 1920. When the registration came before the Court of Appeal of England and Wales the issue was whether a judgment on a judgment could be registered under section 9.

51. The Court of Appeal held that on a literal reading of section 12 of the AJA 1920 a judgment (the judgment of the Grand Court of the Cayman Islands) on a judgment (the judgment of the High Court of Singapore) could be within the literal wording of the section. However, it was wrong to construe the section literally. It should be construed in the light of the purpose and scheme of the legislation. Considering the approach to the AJA 1920 in that way, the Court of Appeal held that a judgment on a judgment was not a judgment within the Act for two essential reasons:

(1) the principle of reciprocity on which the provisions in the AJA 1920 and the subsequent Foreign Judgment (Reciprocal Enforcement) Act 1933 should not be unbalanced by permitting a judgment on a judgment to be recognised. As Males LJ stated at paragraph 55:

It would mean that a judgment given in a state with which no such [reciprocal] arrangements existed and which was not even in the Commonwealth (for example, the United States) could in effect be registered for enforcement

> here by the expedient of an action to enforce that judgment in an intermediate state to which the 1920 Act does apply, an expedient sometimes described somewhat pejoratively as “judgment laundering”.
>
> …
>
> 58. For these reasons I have set out in the three preceding sections of this opinion, the answers to the specific questions I have been asked:
>
> …
>
> I. I do not consider as a matter of English law TMD’s refusal to avail itself of its active remedy in England and Wales would prevent TMD advancing the contention that this is a “judgment laundering exercise” similar to that which was attempted in *Strategic*…”

[59] We do not need at this stage of the hearing of the appeal on Enclosure 24 which is essentially praying for an order pursuant to O. 67 r. 9(2) ROC that the matter should proceed to trial, to determine if the opinion on a question of foreign law, ought to be accepted by our Courts. We agree that the effect of the UK Judgment arising as it does from a UK Award is governed by English law. The application of English law in Malaysian proceedings is a question of fact and as such Lord Thomas’ Opinion would be relevant.

[60] Suffice to say that the opinion presents an arguable case on behalf of the JD for the High Court to make a finding on it when it is fully argued at the hearing of Enclosure 17, the Setting Aside REJA Application as under s 5(1)(a)(i) the registration of the foreign judgment shall be set aside if the judgment is registered in contravention of the Act.

[61] As the application before us in Enclosure 24 is only for the very limited relief of a trial being had where oral and written evidence as well as expert evidence be adduced for the purpose of setting aside the *ex- parte* order for registering the foreign judgment that had emanated from an Arbitral Award and as there is no application by the JD to strike out the JCs’ Originating Summons, we need say nothing more at this stage.

[62] We are of the further view that assuming the route of registering a foreign Arbitral Award as a foreign judgment under the REJA in the Malaysian High Court is allowed, the same objection on jurisdiction may be raised. As it is, as the JCs here had chosen the REJA route instead of the UNCITRAL Model Law route under our AA 2005, the JD should not be disadvantaged or suffer any prejudice in any way as opposed to a s 38 AA 2005 Enforcement Application.

Whether in applying to set aside an *ex-parte* order for registration of a foreign judgment emanating from an International Arbitral Award under the REJA, the High Court below should hear the objection of a lack of jurisdiction of the Arbitral Tribunal *de novo*

[63] It has been well established, at least since *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 **[2012] EWHC 3518** (Comm) where it was observed as follows:

> **"**[30] The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. **The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion.** It is also so whatever the composition of the tribunal—a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's 'eminence', 'high standing and great experience'…"
>
> (emphasis added)

[64] That approach was followed by the High Court of England in *Central Trading & Exports Ltd v Fioralba Shipping Company the Kalisti* [2015] 1 All ER (Comm) 580 as follows:

> "[9] **A series of first instance cases has made clear that a s 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators**' reasoning, but effectively starts again. That approach has been confirmed by the Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, ; [2011] 1 All ER 485, ; [2011] 1 AC 763, which also makes clear that the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the court."
>
> (emphasis added)

[65] Section 67 of the English Arbitration Act 1996 provides as follows:

> "Challenging the award: substantive jurisdiction.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court —
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

[66] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763; [2012] EWHC 3518 (Comm) have

been applied by our Courts in *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and Another Application* [2012] 8 MLJ 585 **(HC)** *Agrovenus LLP v Pacific Inter-Link Sdn Bhd & Another Appeal* [2014] 4 CLJ 525 **(CA)** and *SPNB- LTAT Sdn Bhd v ABI Construction Sdn Bhd* [2016]7 CLJ 275 **(HC)** *Thai-Lao Lignite Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2017] 9 CLJ 273 and *The Government of India v Vedanta Limited & Anor* [2018] MLJU 630.

[67] The JCs' argument is that even assuming for a moment that the above may be so for a s 38 application under the AA 2005, the instant application before the High Court below is one under s 5 of the REJA. We are fully conscious and cognisant of that. We do not think that the JCs here can harness any perceived strategic advantage by the REJA route of registering the foreign judgment here in Malaysia. Where jurisdiction and fraud issues are raised bona fide before the Court, it cannot be simply brushed aside on ground that it should have been raised in the foreign original Court where the judgment had been taken where the JD had not participated in the Enforcement Application before the foreign Court.

[68] Neither can it be raised that as the Award Debtor had not applied to set aside the Arbitral Award, then it is barred from objecting to its enforcement both in UK and in other jurisdictions under either the provision of s 39 of the AA 2005 in the case of enforcing a foreign Arbitral Award Malaysia or under the REJA.

[69] Even s 5 of the REJA itself recognises that a jurisdictional objection may be raised that the original court that registered the Arbitral Award as a judgment of that court has no jurisdiction to do so in the circumstances of the case.

[70] The relevant parts of s 5 of the REJA read as follows:

"**5. Cases in which registered judgments must, or may, be set aside**

(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-

(i) that **the judgment is not a judgment** to which this Part applies or was **registered in contravention of this Act**

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

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) that the judgment was obtained by fraud;

(v) **that the enforcement of the judgment would be contrary to public policy in Malaysia** or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

(b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

(emphasis added)

[71] Learned counsel for the JD submitted that fraud in the issuance of the 2 Invoices which contained the arbitration agreement were issued fraudulently and if it were given an opportunity to successfully prove that, then the arbitration agreement would fall with it as being part of the poison tree. From the discussion of the relevant cases above, the fact that the Arbitral Tribunal had heard the JD's witnesses and evidence and dismissed it, does not prevent the JD from raising them in what is essentially an opposition to an Enforcement Application under s 38 of the AA 2005. When so raised the Court would need to hear the issue *de novo* as the Arbitral Tribunal's decision on its own jurisdiction is never final.

[72] The fraud here is with respect to the formation of the contract where if it is proved to be a fraud or a sham, then there is no contract to begin with and in which instance there would be no arbitration agreement with the result that the Arbitral Tribunal would have no jurisdiction to hear the matter.

[73] Whether that is true or not, is a matter that the High Court below must independently arrive at by hearing evidence that may be adduced by both sides without being influenced at all by the finding of facts of the Arbitral Tribunal where fraud if proved, would unravel everything including the arbitration agreement.

[74] This is not the place to go into the merits of the fraudulent allegations as that is best left to the High Court to decide under the directions that the JD had prayed for with respect to the tendering of documentary evidence, the calling of witnesses and the evidence of the expert as to what English law is with respect to Enforcement Application in UK under the UK Arbitration Act 1996.

[75] The Enforcement Court in the UK would have no jurisdiction if fraud could be proved which would go to the very root of the existence of the contract. Here the Arbitration Agreement is not separable as it is not a case of fraud affecting the validity of the contract in its performance or implementation but fraud affecting the very existence of the contract at the very inception in its formation.

[76] As highlighted by learned counsel for the JD, it is pertinent that the lack of jurisdiction of the original court is spoken of in the context of "the circumstances of the case" which is flexible enough an expression to address the issue of

jurisdiction being raised in the registering Court where the foreign judgment emanating from an arbitral award is to be registered.

[77] The very presence of this ground for setting aside the foreign judgment that is sought to be registered in the registering High Court is indicative enough that such a ground of a lack of jurisdiction of the foreign original Court may be properly raised where there are bona fide grounds substantiating it for the registering Court to inquire into and to analyse and assess whether there was an arbitration agreement to begin with since the JD had furnished some prima facie evidence to that effect which is to be tested in the crucible of cross-examination.

[78] After all the High Court below has a broad power under O. 67 r. 9(3) ROC, should it decide to allow the application to set aside the registration of the foreign judgment, and may do so for the reason that it is not just or convenient that the judgment should be enforced in Malaysia or that there is some other sufficient reason for setting aside the registration.

Whether the issue of fraud in the formation of the contract that contain the arbitration agreement and thus affecting jurisdiction of the Arbitral Tribunal, had been set out with sufficient particularity such that a trial of the issue where witnesses are called would be a proper exercise of discretion

[79] Whether in an O. 67 r. 9 ROC application, the High Court should order a trial where witnesses may be called on the issue of jurisdiction is a matter of discretion of the High Court. Like all exercise of discretion, it must be done by correctly applying the relevant legal principles, taking relevant factors into consideration and disregarding irrelevant factors such the discretion may be said to have been exercised fairly and reasonably, having regard to the overall justice of the case.

[80] As narrated by the JCs themselves in their submissions, the 1st JC is a company incorporated in the Netherlands and it is in the business of providing banking services. The 2nd JC is a company incorporated in Singapore and it was involved in the business of the sale, supply and trading of bunkers to supply fuel to ships at hubs and ports. It had around 13.11.2014 filed for bankruptcy.

[81] The 1st JC was appointed on behalf of a syndicate of banks to act as a security agent under a revolving borrowing base facilities agreement dated 19.12.2013 (“Facilities Agreement”) between *inter alia* O.W. Bunker & Trading A/S (“OWBAS”) and the 1st JC.

[82] As part of the Facilities Agreement, the 1st JC entered into an omnibus security agreement dated 19.12.2013 (“Security Agreement”) with OWBAS and a

number of OWBAS's subsidiaries, under which OWBAS and the relevant OWBAS subsidiaries assigned to the 1st JC all of their rights, title and interest in any amount owed or to be owed to them under any Supply Contract (as defined in the Security Agreement) including the supply contracts entered into between the JD and the 2nd JC which formed the subject matter of the Arbitral Award.

[83] We are not for a moment suggesting that the moment fraud is raised, and in this case, in the context of jurisdiction or a lack of it, then the Court in a *de novo* hearing must conduct a full trial with witnesses called just to determine the question of jurisdiction. The Court must always have regard to the peculiar and particular facts of each case set out with sufficient particularities.

[84] There would well be cases where even in an independent rehearing of a jurisdictional issue as in that the arbitral tribunal lacks jurisdiction, all that the Court needs to do may be to interpret the relevant documents where for instance, the arbitration agreement is said to have been imported by reference. These would be cases where the Court needs only to interpret contractual documents containing a reference to an arbitration agreement. After all interpretation of contract is a question of law.

[85] The more difficult cases where witnesses may need to be called would be whether there was a concluded agreement to begin with which agreement contains the arbitration clause and in such cases the conduct of the parties during the negotiations of the contract and subsequent conduct in the performance of the so-called concluded contract may be relevant and may need witnesses to be called.

[86] In **Dallah's** case (supra) it was whether there was a concluded contract involving the Ministry of Religious Affairs of Pakistan when it was not a signatory to the agreement but instead a statutory trust body was the signatory and where the Ministry has an interest in the proper implementation of the contract. Witnesses were called to prove that the Ministry was not a party to the contract and though the foreign Arbitral Award was made by the Paris ICC Arbitral Tribunal in favour of Dallah, the English Courts refused to enforce it with the decision to dismiss enforcement by the UK High Court being affirmed in the Court of Appeal and then by the apex UK Supreme Court.

[87] Where there are allegations of fraud that go towards the formation of the contract and there are conflicts of affidavit evidence, then it behoves the Court to direct that a trial be had with witnesses called and evidence adduced, including expert evidence if necessary, so as to be able to separate truth from falsehood

and half-truths. It is difficult if not impossible to resolve what is true by a mere reading of affidavit evidence in conflict. Lawyers have honed the art of cross-examination to be deployed to distill the truth from witnesses, to display contradictions and to destroy credibility of some in the process. It is not every case of conflict of testimonies that can be resolved with the Solomonic sanction of severing “the baby into two”. It is in the crucible of cross-examination that the dross of deception is burnt and the gold of guarded truth refined.

[88] Learned counsel for the JD had used the analogy of why a summary judgment application heard via affidavit evidence is not allowed where the plaintiff is alleging fraud for there would invariably be conflict of affidavit evidence. While that may be so, the converse is not true in that the defendant may allege fraud and the Court in hearing the summary judgment application would examine if there is prima facie evidence of fraud as alleged by the defendant and whether there is sufficient particularity as to justify a trial to resolve conflict in affidavit evidence. In other words, it must be raised bona fide and not for the purpose of delaying the just and expeditious disposal of the dispute.

[89] It was submitted by learned counsel for the JCs that the Arbitral Tribunal had sieved through and scrutinised all the evidence of fraud and found none. The matter was said to be res, and that it would be an abuse of the Court’s process to have the witnesses testify again, this time before a High Court Judge. The High Court in its Grounds of Judgment had categorically stated as follows:

> “40. All in all, I find that besides the fact that the JD failed to provide particulars of the alleged fraud upon the English High Court, the JD appears to be suggesting that not only oral evidence of factual witnesses (each party put forward three witnesses who provided witness statements in the London Arbitration) ought to be presented to this Court, further documentary evidence and oral evidence from an expert witness and/or expert evidence is required.
>
> 41. To me, not only does this go against the very concept of comity and substantial reciprocity between the nations which is enshrined in the REJA, **but it also goes against the doctrine of res judicata and estoppel**.”
>
> (emphasis added)

[90] Unfortunately for the JCs, res judicata is not engaged here as the Arbitral Tribunal, no matter how eminent it may be constituted of, cannot be the final judge of its own jurisdiction. It may decide but its decision is not determinative and final and when raised either in the context of a Setting Aside Application in the Seat Court or in an Enforcement Application in whichever jurisdictions the Award Debtor may have assets, the Court would hear the evidence afresh on jurisdiction or the lack of it. In fact, no deference is paid to the decision of the Arbitral Tribunal on the finding of fact with respect to jurisdiction; such a finding of fact has no legal or evidential value. See para [30] Dallah’s case (supra).

[91] We are of the considered opinion that the JD had raised sufficient particulars of fraud in the formation of the contract in dispute in paragraphs 41 to 43 and 49 to 51 of the affidavit of the JD in Enclosure 18 at the High Court as follows, wherein paragraphs 41, 42 and 50 are reproduced herewith:

> "**41. … there never was a supply of MGO/ bunker by OWBFE to the Vessels on the alleged dates, there can be no Alleged Contract. With no Alleged Contract, there can be no incorporation of the OWB Terms between the parties. With no incorporation of the OWB Terms, there are no grounds for the Judgment Creditors to argue that the London Tribunal had jurisdiction to hear the dispute between the parties. By that reason, the English High Court thus had no jurisdiction to hear the Judgment Creditors' ex-parte Order to enforce the London Arbitration Award**.
>
> 42. I hereby state that the proper agreement between the parties is the 2014 Agreement. I understand that the purpose of the 2014 Agreement was for all TMD's transactions with OWBFE for sale and purchase of bunkers would be negotiated on a case by case basis with detailed terms to be agreed on similarly and any conflict in terms would be superseded by the 2014 Agreement. This is expressly provided in Clause 11.2, that the 2014 Agreement prevails over any other agreements in conflict.
>
> 50. As the London Tribunal had no jurisdiction to hear the dispute between the parties in the first place, it follows that the English High Court would have no jurisdiction to hear the Judgment Creditors' ex-parte application and to make the English High Court Judgment on that basis."

[92] The issue of fraud, though it does not affect the judgment obtained pursuant to an Enforcement Application before the UK High Court as there was no fraud practised on the UK Enforcement Court as such, does nevertheless arise in an acute sense with respect to the issue of whether there was a concluded arbitration agreement in the two impugned Invoices dated 17.10.2014 and 1.11.2014 such that if the impugned Invoices were fraudulently issued then the arbitration clause in the impugned Invoices would fall with it being the fruit of the poison tree. To that extent the allegations of fraud that goes towards jurisdiction is relevant to be decided at a trial of the issue which is best done where witnesses are allowed to be called.

[93] Thus, learned counsel for the JD had premised the submission as fraud on the part of the JCs as stemming from fraudulent transactions and claims based on the two impugned Invoices containing the arbitration agreement as can be seen in Enclosure 29 at the High Court at paragraphs 16 to 18 as follows:

> "The English High Court Judgment is obtained by Fraud
>
> 16. I am advised and verily believe that fraud on the part of the Judgment Creditors stems from their insistence on proceeding with the London Arbitration and the accompanying enforcement of the London Arbitration Award well knowing that they did not have the basis to do so.
>
> <u>The London Arbitration Award is premised on Fraudulent Transactions and</u> <u>Fraudulent Claims by the Judgment Creditors against the Judgment Debtor</u>

17.1 I aver in paragraph 22 … that the Judgment Creditors were unable to produce any evidence to support the existence of the alleged oral contracts between the Judgment Debtor and the Judgment Creditors for the supply of marine bunker fuels to Straits 1 and Dolphin 1. However, in spite of being aware that they have no evidence of the said oral agreements, the Judgment Creditors commenced arbitration proceedings against the Judgment Debtor. This is a clear indication of fraud.

17.2 …Mr Han-Chen Cheah, the trader who allegedly entered into the oral contract with the Judgment Debtor had confirmed in his statement that he had no "specific recollection" of the alleged oral contracts. The Judgment Creditors cannot claim that the London Tribunal is a tribunal of competent jurisdiction where no evidence of the existence of such an agreement had been provided by the Judgment Creditors during the course of the London Arbitration proceedings.

17.4 …that the deliveries of the marine bunker could not have occurred because the tank capacity of Straits 1 and Dolphin 1 were much smaller than the alleged amount of marine bunker fuels delivered. Even though it was impossible for the alleged amount marine bunker fuels to be delivered, the Judgment Creditors continued to maintain their claim in spite of knowledge of its impossibility. This is yet another example of the Judgment Creditors' fraudulent conduct.

17.5 … that the daily reports for Straits l show that at the material date, the vessel was in the Kuantan region and not at the port of Pasir Gudang. This is clear evidence that the ships could not possibly have received the said marine bunker fuels. However, in spite of the above evidence, the Judgment Creditors persisted in their claim that marine bunker fuels were delivered to Straits l even though this clearly contradicted the evidence they were relying on (i.e. the BRRs). Their continued persistence in maintaining their claim in spite of the evidence is clearly fraudulent conduct.

17.6 … that the daily reports for Dolphin 1 show that at the material date, the vessel was in the South China Sea en route to Miri in Sarawak and not at the port of Kuantan as alleged by the Judgment Creditors. Yet again, this is clear evidence that the ships could not possibly have received the said marine bunker fuels… This is yet another example of the Judgment Creditors' fraudulent conduct."

[94] At this stage we suspend any determination as to whether the particularised allegations are true or otherwise as that are to be determined at the trial on the issue of jurisdiction which is inextricably linked to whether the impugned Invoices were fraudulent transactions. Suffice to say that there is sufficient prima facie evidence raised on a bona fide basis for the JCs to answer which answers have to be tried and tested in the crucible of cross-examination.

[95] The allegation of fraud assumes greater importance as there is another earlier written arbitration agreement contained in a Set Off Agreement dated 7.4.2014 between the JD and the 2nd JC which contained an "entire agreement" clause. This earlier arbitration agreement provided for arbitration in Malaysia under Malaysian law with arbitration under the then KLRCA Rules. Whether the London Arbitral Tribunal had wrongly ignored the Malaysian Arbitration Agreement and thus assuming jurisdiction when there was none is a matter to be heard *de novo* by the Malaysian High Court below.

[96] The relevant arbitration clause and related clauses in the Set Off Agreement reads as follows:

"10. Settlement of dispute

10.1 **Any dispute arising out of or in connection with this Agreement** and the Transaction Agreements, including any question regarding its existence, validity or termination, shall be referred to and **finally resolved by arbitration in accordance with the Rules of the Kuala Lumpur Regional Centre for Arbitration (KLRCA)** which Rules are deemed to be incorporated by reference into this clause.

10.2 The **seat**, or legal place, of arbitration shall be in **Kuala Lumpur,** Malaysia.

10.3 The language to be used in the arbitral proceedings shall be English.

10.4 Any arbitral award shall be enforceable in accordance with the Rules of the 1958 Convention of the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The award rendered may be entered in any court or other authority having jurisdiction or application may be made to said court or other authority for a judicial acceptance of the award and an order of enforcement, as the case may be."

11. Miscellaneous

11.1 **This Agreement constitutes the entire understanding of the Parties with respect to the subject matter hereof.** No amendment, modification or alteration of any term in this Agreement shall be binding on either Party unless the same shall be made in writing, and executed by or on behalf of the Parties hereto.

11.2 **This Agreement shall be dominant and shall prevail over any other agreement(s) in conflict with this Agreement,** including but not limited to the Transaction Agreements, unless such priority is expressly negated."

(emphasis added)

[97] As there is the "entire agreement" clause in Clause 11.1 coupled with the "prevailing clause in the event of conflict" in Clause 11.2, it is certainly an arguable case on the lack of jurisdiction of the London Arbitral Tribunal to assume jurisdiction even assuming for a moment that there was no fraud in the formation of the contracts in the two impugned Invoices.

[98] All that the JD is asking for at this stage is for the issue of jurisdiction to be determined at trial where oral evidence may be adduced through and not determined via conflicting affidavit evidence. We see no good reason why this should not be allowed in the light of the prima facie allegation of fraud in the issuance of the two impugned invoices and the prevailing arbitration agreement in the event of conflict.

Whether non-recognition of the English High Court's Judgment would be in violation of the principle of international comity and substantial reciprocity as statutorily provided under the REJA

[99] It would not be unfair to say that in deciding to dismiss the application in Enclosure 24 filed by the JD for a trial to be had on the issue of jurisdiction, the

High Court had laboured under the misconception that it is not to inquire into the merits of the challenge on jurisdiction when it observed as follows:

> "32. Further, it is my considered opinion that the non-recognition of the English High Court Judgment would be in violation of the principle of international comity and substantial reciprocity as statutorily provided under the REJA. The mechanisms of registration of a foreign judgment are part of the administration of justice in Malaysia.
>
> 33. It is to be noted that the English High Court Judgment is final and conclusive. It was also not the function of the registering country, which Malaysia was in this case, to examine the merits of the English High Court Judgment or even to criticize the English High Court Judgment."

[100] What has perhaps been overlooked is the fact that Malaysia is a party to the New York Convention, reputed to be one of the most widely recognised and ratified Treaties in the world with 169 member States. Our ss. 38 and 39 AA 2005 are substantially a reproduction of Article V of the New York Convention.

[101] The UNCITRAL Model Law on International Commercial Arbitration 1985 is another international instrument that Malaysia has adopted and our AA 2005 is clearly modelled after the UNCITRAL Model Law. The UNCITRAL Model Law does not supplant the New York Convention but rather it synchronises with and supplements and strengthens it. Our ss. 38 and 39 AA 2005 are clearly a reproduction of Article 35 and 36 respectively of the UNCITRAL Model Law.

[102] There is no good reason why the principle of international comity and substantial reciprocity should not be invoked with respect to recognition and enforcement of a foreign Arbitral Award, both under the New York Convention and under the UNCITRAL Model Law which are international instruments compared to REJA which is more bilateral rather than multilateral.

[103] Here the JCs have the upper hand on deciding under which provisions of the Malaysian statute to proceed under with respect to the enforcement of a foreign judgment. Whilst we have expressed the view that the more appropriate statute to do this is under our AA 2005, we do not think that by electing to proceed under the REJA, the JD should be deprived of any of its defences that may be available to it had the enforcement been under ss 38 and 39 AA 2005. As we have shown, even under the permitted defences or objections, the JD is always allowed to raise the issue of a lack of jurisdiction in the foreign Court enforcing the Arbitral Award under s 5(1)(a)(ii) of the REJA on the ground that "the courts of the country of the original court had no jurisdiction in the circumstances of the case."

[104] Learned counsel for the JCs cited the Court of Appeal's case of *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] 6 CLJ 475 (CA) ("**Mann Holdings**"), where it was held that any challenge towards the merits or propriety of

the foreign judgment must necessarily be undertaken in the original jurisdiction where the judgment was pronounced, and not the Malaysian courts:

> "[55] In the case of judgments from a superior court of another jurisdiction, the Reciprocal Enforcement of Judgments Act 1958 is a specific statute enacted to provide the mechanism for how such judgments from recognised jurisdictions such as the High Court of Singapore may be enforced in Malaysia. That specific mechanism involves a **mandatory registration process** with adequate timelines enacted for setting aside the registration, before such judgment may be enforced or executed. After such judgments are registered, it is the registration that is challenged and **not the merits or propriety** of the judgment. That exercise must necessarily be **undertaken in the original jurisdiction** where the judgment was pronounced."
>
> (emphasis added)

[105] We have no issue with the sound principle propounded in the above case. It must be remembered that **Mann Holdings** (supra) is not a case involving an arbitral award where the participation of the JD, in the instant case, in the London Arbitration was with reservation on the Arbitral Tribunal's jurisdiction to hear the matter in dispute. In the above case the judgment debtor had fully participated in the trial which decision in favour of the judgment creditor had been affirmed by the Singapore Court of Appeal, not to mention a previous challenge on the jurisdiction of the Singapore Court to hear the dispute which also had been affirmed by the Singapore Court of Appeal.

[106] We were also referred to our Supreme Court case of *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1986] 2 MLJ 107 (SC) (**"See Hua Daily News"**) where learned counsel for the JCs summarised the principles as follows:

(1) Burden is on the party requesting for a trial of the issues to prove the existence of the triable issue;

(2) The party requesting for a trial must condescend to particulars of the allegations in their affidavits;

(3) The allegations must not be frivolous or vexatious; and

(4) The allegations must be made *bona fide*.

[107] We are in full agreement with the propositions above. We also wish to add that **See Hua Daily News** (supra) was not a case proceeding from an arbitral award in Brunei. The fraud raised there was not a fraud going towards jurisdiction of the original Court in Brunei nor the registering Court in Malaysia. It was a summary judgment where fraud was raised by the judgment debtor and it was in that context that the Supreme Court pointed out that no steps had been taken to set aside the judgment in Brunei and observed as follows:

> "But they have alleged fraud and not mistake. Thus, even on its very face the alleged fraud is **clearly frivolous and**

> **vexatious**. The nature of the alleged fraud is such that it **cannot have been made bona fide**. Since the **burden of providing the existence of the triable issue is on the appellants**, it is the more reason that **they must condescend to particulars of the alleged fraud** in their affidavits. In the **absence of particularization** we must, on the authority of *Wallingford* case agree with the learned trial judge that the affidavits of Mr. Lin are **insufficient to raise a triable issue on fraud.**…
>
> The question is, can they now have a second bite at the cherry and be allowed to retract their voluntary admissions, and can they now adduce fresh evidence to show that it was not their own carelessness but it was in fact the respondents themselves who had ordered the publication? On this particular issue, in our view the appellants are estopped from denying the admissions. Further, before fresh evidence can be adduced after judgment, **the appellants must show that such evidence is not only material and credible**, but also that they could not have been obtained with reasonable diligence for use at the original trial."
>
> (emphasis added)

[108] The above case has no nexus whatsoever to the issue of jurisdiction that arises from fraud with respect to the formation of the contract containing the arbitration agreement. The differences are poles apart.

[109] There is no place for the unfounded fear that the Malaysian High Court would be sitting in judgment over the final decision of a competent court of another jurisdiction as here we are dealing with an arbitral tribunal's decision on its own jurisdiction and that jurisdiction is now being challenged in our High Court. We are not dealing with a judgment arising from a cause of action brought and heard in the High Court in the UK.

Decision

[110] Having considered the submissions of the parties, we are more than satisfied that the High Court had erred in law and applied the wrong legal principles when the passive remedy was always open and available to the JD as the appellant, to raise the lack of jurisdiction arising from no arbitration agreement in the two impugned Invoices said to have been issued fraudulently.

[111] The Arbitral Tribunal's decision on its own jurisdiction is never final and a Court in hearing what is essentially an enforcement of the Arbitral Award must inquire into whether there was an arbitration agreement in the light of the allegations of fraud at the stage of formation of the contract, which allegations have been raised bona fide and with sufficient particularities qualifying as prima facie evidence of fraud. See the tests enunciated in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709, *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 and *Sathiaseelan a/l Nagappan v Ketua Pengarah, Pertubuhan Keselamatan Sosial* [2023] MLJU 671**.**

[112] We have kept in the forefront of our mind that the JCs' application was made not under s 38 AA 2005 but under s 5 of the REJA. Be that as it may, being essentially an enforcement of an Arbitral Award, we see the test in the circumstances of this case, to be no less different than one made under the AA 2005. It is a challenge to the Arbitral Tribunal's jurisdiction which our High Court must be independently satisfied. The High Court had failed to take into account relevant factors and had taken into account irrelevant factors in refusing the Application for Trial of the issue of jurisdiction. We were thus constrained to allow the appeal and to set aside the order of the High Court.

[113] We had therefore allowed the Application for Trial of the issue of jurisdiction in Enclosure 24 under Order 67 rule 9(2) ROC. We awarded costs of RM15,000.00 to the appellant subject to allocator.

[114] As the High Court had already inadvertently proceeded to decide on the merits of the main Originating Summons, we direct that the Originating Summons be heard before a different Judge.

[115] It goes without saying that the High Court in hearing the Originating Summons after a trial may affirm its decision to register the foreign judgment as a judgment of the High Court or alternatively set aside the ex-parte order for the registration of the foreign judgment for the reasons set out in O.67 r.9(3) ROC as follows:

> "(3) Where the Court hearing an application to set aside the registration of a judgment registered under the Act is satisfied that the judgment falls within any of the cases in which a judgment may not be ordered to be registered under subsection 3(2) of the Act or that it is not just or convenient that the judgment should be enforced in Malaysia or that there is some other sufficient reason for setting aside the registration, it may order the registration of the judgment to be set aside on such terms as it thinks fit."

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