International Law Office

March 21 2023

Federal Court sheds light on evidential requirements in enforcement of non-REJA foreign judgments

Gan Partnership | Litigation - Malaysia

FOO JOON LIANG

HUI JUAN LEE

BENJAMIN KHO JIA YUAN

Introduction

There are two ways to enforce a foreign judgment in Malaysia. The first is through registration under the Reciprocal Enforcement of Judgments Act (REJA) 1958 (revised 1972). The REJA is only available to parties from reciprocating jurisdictions. If the REJA is not applicable, the second way to enforce a foreign judgment is through a common law action.

The recent Federal Court decision in *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and Another Appeal*[1] addressed the second way. In a unanimous decision delivered by a three-judge panel, the Malaysian Federal Court shed light on the salient evidential requirements under the Evidence Act (EA) 1950 with which common law actions to enforce foreign judgments in Malaysia must comply.

Facts

The respondent in the Federal Court stage (ie, the foreign judgment creditor) was appointed by a joint-venture company, SPK-Bina Puri JV, as a subcontractor in a project in Abu Dhabi, United Arab Emirates. Thereafter, the respondent allegedly obtained a default judgment (the Abu Dhabi judgment) amounting to 25,306,955.17 Malaysian ringgits in the Abu Dhabi Plenary Commercial Court, a court of first instance, against SPK-Bina Puri JV.

Lower courts

At the High Court, the respondent claimed that the two appellants (Pembinaan SPK Sdn Bhd and Bina Puri Holdings Bhd) were the named parties in the Abu Dhabi judgment and, accordingly, it could be enforced against the appellants. The High Court then made a judgment against the appellants based on the Abu Dhabi judgment. Thereafter, the appellants filed an appeal against the High Court's judgment, but the appeal was dismissed by the Court of Appeal.

Federal Court

The Federal Court granted the appellants leave for an appeal against the decision of the Court of Appeal on six questions of law. To avoid belabouring the points, only the two questions of law that were answered by the Federal Court (ie, questions one and three) are set out here. The remaining questions dealt with the matter of the defence.

- Is a foreign judgment enforceable by a common law action in Malaysia (the foreign country not being a first schedule country under the REJA) if the judgment is not proved as a foreign judgment or order in accordance with the EA 1950?
- In a common law action to enforce a foreign judgment not being a first schedule country under the REJA, without the foreign judgment being proved in accordance with Chapter V of the EA 1950, is there is a sustainable cause of action for other evidence to be admitted and weighed?

Unsurprisingly, the Abu Dhabi judgment itself – particularly its admissibility – took central stage during the appeal at the Federal Court.

At the outset, the Federal Court emphasised that it is imperative that the foreign judgment is produced in a common law action to enforce the foreign judgment.

The Federal Court then turned to the provisions in the EA 1950. It held that the original copy of a foreign judgment is primary evidence which must be proved under section 62 of the EA 1950. While recognising that secondary evidence of a foreign judgment may be accepted under section 65 of the EA 1950, the Federal Court viewed that the admissibility of a foreign judgment has another hurdle to be proven through either of the following two modes.

First, it must be proven by way of section 78 of the EA 1950. The Federal Court held that a foreign judgment is a public document by virtue of section 74 of the EA 1950. Following that, in order to render a foreign judgment – being a public document in a foreign country – admissible as evidence, the Federal Court held that it must comply with section 78 of the EA 1950. The relevant part of the provision reads as follows:

> *Proof of certain official documents*
>
> *78. (1) The following public documents may be proved as follows:*
>
> . . .
>
> *(f) public documents of any other class in a foreign country—*

by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

To meet the requirements of the provision, either the original of the foreign judgment must be produced or, if a copy of the foreign judgment is relied upon:

- the lawful keeper must certify the copy;
- a certificate under the seal of the notary public or of a consular officer of Malaysia to prove that the copy has been duly certified by the officer as having the lawful custody of the original copy must be produced; and
- the character of the document must be proved according to the law of the foreign country concerned.

Second, if the foreign judgment fulfils the requirements of section 86 of the EA 1950:

> *Presumption as to certified copies of foreign judicial records*
>
> *86. The court may presume that any document purporting to be a certified copy of any judicial record of any country not being a part of the Commonwealth is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.*

The foreign judgment (of a country not a part of the commonwealth) may be admissible under section 86 if the judgment is certified by any representative of the Yang di-Pertuan Agong in the manner commonly in use in that country for the certification of copies of judicial records.

These are the two modes to admit a foreign judgment as evidence, one of which must be used. On that premise, the Federal Court turned to the facts of the case and made two crucial observations.

First, the Abu Dhabi judgment, which was handed down in Arabic by the Abu Dhabi Plenary Commercial Court, was not itself tendered by the respondent, be it the original or a copy of the original. Instead, it was merely exhibited as an attachment to another document – the translation. For completeness, four English translations were produced. The first three each had a copy of the Abu Dhabi judgment. The fourth did not and the respondent had eventually relied on the fourth translation of the Abu Dhabi judgment, alleging that the names of the appellants were purportedly accurate.

Second, the copy of the Abu Dhabi judgment was intrinsically inadmissible for want of compliance with either section 78 or 86 of the EA 1950. Inclusion of the exhibit copy in part B of the bundles of documents does not render an inadmissible document, admissible.

Following these observations, the Federal Court found that there was no proof of the Abu Dhabi judgment, which was central and critical to the underlying cause of action.

Upon a detailed analysis of the evidential requirements, the Federal Court answered the two abovementioned questions of law in the negative.

- A foreign judgment is not enforceable by a common law action in Malaysia (the foreign country not being a first schedule country under the REJA) if the judgment is not proved as a foreign judgment in accordance with the EA 1950.
- In a common law action to enforce a foreign judgment (the foreign country not being a first schedule country under the REJA), without the foreign judgment being proved in accordance with Chapter V of the EA 1950, there is no sustainable cause of action for other evidence to be admitted and weighed.

In the absence of a properly admitted Abu Dhabi judgment, the Federal Court viewed that the respondent's claim remained unproved and, accordingly, the issue of defence did not arise. It was on this premise that the Federal Court did not examine the four other leave questions. Accordingly, the Federal Court set aside both the Court of Appeal's and the High Court's decisions.

Comment

It is not difficult to see the impact of the Federal Court's decision. The decision turned the spotlight on often-overlooked, weighty weaponry to defend the enforcement of a foreign judgment (ie, non-compliance with the evidential requirements set out in the EA 1950 concerning the admissibility of a foreign judgment, particularly sections 78 and 86 thereof). These provisions have always been there since the inception of EA 1950, but were languishing for want of attention.

There are some other important takeaways from this decision.

- First, the Federal Court noted that neither the original nor a copy of the original Abu Dhabi judgment was itself tendered by the respondent. It was merely attached to the translation of the Abu Dhabi judgment. This approach was problematic as its focus was on the translation, not the original text of the judgment.
- Second, the Federal Court reiterated the trite principle that inadmissible evidence remains inadmissible notwithstanding the absence of objections from the parties, including when a foreign judgment has been erroneously admitted contrary to the provisions under the EA 1950. This appears to suggest that, even if all parties have categorised a foreign judgment as a part B document – wherein only the contents are disputed and not the authenticity – for the foreign judgment to be admissible, it still has to comply with the evidential requirements under the EA 1950. By extrapolation, it may now be more difficult to argue that if a document has been included in part B of the bundle of documents, such inclusion admits the document into evidence. It still hinges on whether other evidential rules have been adhered to. Arguably, this must be read in light of the fact that only the translation was admitted into evidence through part B in this case, and not the original text of the judgment.
- Third, while the Federal Court has set out two modes to prove a foreign judgment (ie, either through sections 78 or 86 of the EA 1950), there is a catch. Section 86 only applies to foreign judgments of a country not part of the commonwealth. While some commonwealth countries are reciprocating jurisdictions under the REJA (ie, United Kingdom, Singapore, New Zealand, Brunei and Sri Lanka), most are not (eg, Australia, Canada, South Africa, Pakistan and Nigeria). This would effectively mean that, for those

non-REJA commonwealth countries, the only mode to prove a foreign judgment given by the courts of those countries is through section 78 of the EA 1950.

Evidential requirements in enforcing a foreign judgment have commonly been overlooked. This should no longer be the case, as the Federal Court has confirmed that non-compliance is no mere technical irregularity, but a fundamental evidentiary shortcoming. Foreign judgment creditors are now implored to take heed of the Federal Court's decision, lest a judgment obtained after a hard-fought legal proceeding in a foreign country be left with a mere paper judgment in Malaysia.

For further information on this topic please contact Foo Joon Liang, Lee Hui Juan or Kho Jia Yuan (Benjamin) at Gan Partnership by telephone (+603 7931 7060) or email (joonliang@ganlaw.my, huijuan@ganlaw.my or jiayuan@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2023] 2 MLJ 324.