

## PRIVATE INTERNATIONAL LAW IN THE MALAYSIA COURTS

by AZMI SHAROM\*

The survey years of 2003 and 2004 were rather thin on the ground for Malaysian conflict of laws developments, with legislation and cases only on the issue of enforcement of foreign judgments, specifically the *Reciprocal Enforcements of Judgments Act 1958*<sup>1</sup> (REJA).<sup>2</sup> The legislation in question raises issues not so much with regard to its content, but more with regard to its timing. The cases are fairly straight-forward affairs, but there is one dissenting judgment which is of particular interest because of its interpretation of a related statute. These shall be discussed below.

### I. ENFORCEMENT OF FOREIGN JUDGEMENTS: AGAINST PUBLIC POLICY?—THE EXCHANGE CONTROL ACT 1953

In the case of *Tow Kong Liang v Nomura Singapore Limited*,<sup>3</sup> the respondents (a Singaporean Company) had agreed to make available to the appellant, or a private investment company nominated by the appellant, a short-term security financing facility of up to US\$10,000,000. The appellant, a Malaysian resident, nominated his investment holding company Harvey International Limited (HIL). HIL is a company incorporated in the British Virgin Islands. On 7 July 1997, HIL entered into a facility agreement with the Respondents and on the next day, the appellant signed a written guarantee and indemnity agreement with the respondent. In effect, this was a loan where the respondent was the lender, HIL the borrower and the appellant the guarantor.

HIL and the appellant defaulted on their payments and the respondent sued them both in the High Court of Singapore and obtained judgment on 30 August 1998 for the sum of RM14,294,605.61 plus interest. The respondent then applied to the High Court of Malaya to register the Singaporean judgment under the REJA.<sup>4</sup> This was duly done on 16 August 1999.

In response, the appellant applied for the registration to be set aside. The validity of the Singapore judgment was not questioned; instead the appellant relied on the argument that to enforce the judgment in Malaysia would be against public policy.<sup>5</sup> This was rejected first by the Senior Assistant Registrar and then by the High Court Judge in chambers.

\* LL.B (Sheffield), LL.M (Nottingham) PhD (SOAS, London); Deputy Dean and Associate Professor, Faculty of Law, University of Malaya.

<sup>1</sup> Revised in 1972. Laws of Malaysia Act 99.

<sup>2</sup> There are two methods of enforcing foreign judgments in Malaysia, the REJA is one and common law principles is the other.

<sup>3</sup> Civil Appeal No: W-02-906-2001. Judgment delivered 13 October 2004.

<sup>4</sup> Foreign judgments are enforced through the REJA by registration in the Courts. These judgments are then treated as if they were Malaysian judgments and enforcement is carried out accordingly.

<sup>5</sup> As provided for under section 5(1)(v) of the REJA.

The appellant's argument was that the facility transaction was in contravention of the Exchange Control Act 1953 (ECA).<sup>6</sup> Section 4(2) of the ECA basically states that a Malaysian resident who is not an authorised dealer cannot take part in a transaction involving gold or foreign currency with a foreigner. Sections 9, 11 and 15 have the same restrictions regarding the payment of money and security dealings with foreigners.

If this argument is sound, by registering the Singapore judgment, the Malaysian High Court will, in effect, be legitimising an illegal act according to Malaysian law and this will be in breach of public policy. The only flaw with the appellant's line of reasoning is that he was merely the guarantor, the actual lender was HIL and the latter does not fall under the provisions of ECA because it is a British Virgin Islands company. To get round this seemingly insurmountable fact, the appellant argued that, in *reality*, he was the true borrower. The appellant referred to clause 2 of the guarantee and indemnity agreement which stated "the guarantor shall be liable under this guarantee *as if he were the sole principal debtor*<sup>7</sup> and not merely a surety" as evidence that he was in fact a borrower. This means that he, being a Malaysian resident, falls under the purview of ECA, thus rendering the transaction invalid as permission was not obtained from the controller. It would therefore be wrong for the High Court to register a judgment made on a transaction of such unsound legality.

Following the High Court's rejection of his application, the appellant appealed to the Court of Appeal. The Court of Appeal was not moved by the appellant's creative submissions. They could not accept that HIL was not really the borrower and that the appellant was more than a guarantor. The wording of clause 2 of the guarantee and indemnity agreement was only a deeming provision which the lender would resort to if the borrower was unable to pay. It did not make the appellant a *de facto* borrower and he remains merely a guarantor and guarantors do not fall under the categories of persons covered by the ECA. The appeal was dismissed with costs and the registration stood.

## II. ENFORCEMENT OF FOREIGN JUDGEMENTS: AGAINST PUBLIC POLICY?—METHODS OF SERVICE OF FOREIGN WRITS IN MALAYSIA

In the case of *Ng An Chin v Panin International Credit (S) Pte Ltd*,<sup>8</sup> the appellant was a Malaysian with a business based in Kuala Lumpur. The respondent was a Singaporean company. There was a dispute and the respondent sued the appellant in Singapore. Because the appellant was in Malaysia, the service of the writ of summons for the Singapore hearing was effected in Kuala Lumpur by personal service through the agent of the respondent, a Malaysian law firm. This service outside jurisdiction was done by the Singapore court in accordance with O 11 r 3(8)(a) of the Rules of Court 1996 of the Republic of Singapore.

The appellant did not turn up and the respondent obtained a judgment in default in the Singapore High Court. In order to enforce that judgment, they had applied to the Malaysian High Court to register the judgment under the REJA. This was done *inter partes* because the appellant objected to the registration and applied for it to be struck out. The Malaysian High Court registered the Singapore judgment and rejected the appellant's request for the registration to be struck out. The appellant then appealed to the Court of Appeal. Pending the decisions of the Court of Appeal, the appellant requested that the High Court stay the execution of the registered Singapore judgment. This was also rejected by the High Court. The appellant appealed to the Court of Appeal against the High Court's decision not to stay execution and it is this second appeal that is discussed here.

The two-third majority decision of the Court of Appeal was to allow the appeal. Mohd Saari JCA delivered the judgment with Mokhtar Sidin JCA concurring. The fundamental

<sup>6</sup> Revised in 1969. Laws of Malaysia Act 17.

<sup>7</sup> Emphasis added.

<sup>8</sup> [2003] 3 MLJ 279.

*ratio* of this decision was that there were sufficient grounds for the appellant to appeal the earlier judgment of the High Court rejecting their request to strike out the registration. This is because to enforce the Singapore judgment would be against public policy.

The public policy issue arises because the initial service of the writ of summons on the appellant was done in contravention of O65 of the Rules of the High Court 1980.<sup>9</sup> The relevant sections are as follows:

*Rule 2. Service of foreign legal process. (O. 65 r. 2)*

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a Court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

*Rule 3. Service of foreign legal process under Civil Procedure Convention. (O. 65 r. 3)*

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a Court or other tribunal of a foreign country, being a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, where a letter of request from a consular or other authority of that country requesting service on a person in Malaysia of any such process sent with the letter is received by the Registrar.<sup>10</sup>

The learned judge held that although under O11 of the Rules of Court 1996 of the Republic of Singapore, the Singapore Court could serve a writ outside jurisdiction, the method with which that writ is to be served must be in compliance with O65 of the Malaysian Rules of the High Court. To do otherwise would mean that the Singapore Court was, in effect, challenging the sovereignty of Malaysia by extending their own jurisdiction. The precedent for this proposition was established in the cases of *United Overseas Bank Ltd v Wong Hai Ong*<sup>11</sup> and *Commerzbank (South East Asia Ltd) v Tow Kong Lian*<sup>12</sup> where it was held that according to O65, there are two ways to serve a writ in Malaysia in situations where the case is being heard in a foreign jurisdiction. A letter of request from the court or foreign tribunal requesting service upon a person in Malaysia must be received by the Minister who then sends it to the High Court with a request that this service take place. Alternatively, where there is a Civil Procedure Convention between the foreign country and Malaysia, the request may be made directly to the registrar by way of a request from a consular or any other authority of that foreign country.

*United Overseas Bank Ltd v Wong Hai Ong* was however disputed by the case of *Saeed U Khan v Lee Kok Hooi*.<sup>13</sup> This being the case, it was held that it is best to allow the issue to be settled by the Court of Appeal, as first requested by the appellant, and the stay of execution should be allowed by the High Court pending the said appeal.

Furthermore, if a stay of execution was not granted by the High Court and if the appellant won their first appeal in the Court of Appeal, their appeal would be nugatory as there is a strong likelihood that they will not be compensated or restituted as the respondents had no property in Malaysia.

In his clearly written dissenting judgment, Abdul Aziz JCA did not agree with these two points made by his fellow judges. Regarding the issue of the possibility of the registration

<sup>9</sup> PU(A) 50/1980.

<sup>10</sup> Emphasis added.

<sup>11</sup> [1999] 1 MLJ 474.

<sup>12</sup> [2002] 2 MLJ 353.

<sup>13</sup> [2001] 5 MLJ 416.

being against public policy, he submitted that this is not a good argument because O65 had been misread by the judges in the *United Overseas Bank* case and the *Commerzbank* case. According to him, O65 is “to apply only in cases where there is government to government request for service of a foreign process on a person in Malaysia. Order 65 of the Rules of the High Court does not lay down that service of a foreign process in Malaysia may *only*<sup>14</sup> be done on a government to government request”.

The Singapore Court had allowed for the service of writ outside jurisdiction in accordance with their O11, namely rule 4(2) which states such a service should be done in Malaysia “by a method of service authorized by the law of that country for service of any originating process issued by that country”. No rules were broken and neither does the question of public policy arise as O65 does not apply to all services of foreign processes. Thus, non-compliance with it does not mean that Malaysian law was being challenged.

On the matter of the appellant facing the risk of a nugatory appeal, the judge held that if the respondents had no property in Malaysia, there is nothing to stop the appellant from enforcing the Malaysian judgment in the Singaporean court.

It is humbly submitted that Abdul Aziz JCA’s dissenting judgment makes a lot of sense and that there is a strong possibility that O65 has been misread and the law, as it stands, is too restrictive regarding the service of writs within Malaysia by foreign courts. The concern here is one of comity. If the service of foreign writs within Malaysian soil is too restrictive, this could mean that sound judgments made abroad could be disregarded and left un-enforced due to a technicality. For example, a Malaysian debtor fails to repay his loan to an Indonesian bank. The Bank sues in Jakarta and a writ is served in Malaysia on the defendant using Malaysian lawyers. The defendant does not appear and the Bank wins the case. When it comes to enforcing the judgment in Malaysia, registration is rejected on the grounds that the troublesome procedure of a government to government request was not made. Applying the reasoning espoused in Abdul Aziz JCA’s judgment, such an outcome would not occur.

### III. RECIPROCAL ENFORCEMENT OF JUDGEMENTS—EXTENSION TO THE HONG KONG SPECIAL ADMINISTRATIVE REGION

As its name implies, the *Malaysian Reciprocal Enforcement of Judgments Act* (REJA) works only for countries that will reciprocate the REJA registration system with Malaysian judgments in their courts. These countries are listed in the First Schedule of the REJA. Judgments of countries not listed in this schedule can only be enforced by common law.

On 11 December 2003, the *Reciprocal Enforcement of Judgments (Extension of Part II) Order 2003* (2003 Order)<sup>15</sup> was made. This subsidiary legislation amended the First Schedule by changing “Hong Kong” to “Hong Kong Special Administrative Region of the People’s Republic of China”.

By this change, the Malaysian government has recognised the change in the legal personality that was once Hong Kong into the Hong Kong Special Administrative Region of the People’s Republic of China (HKSAR). However, the HKSAR was created on 1 July 1997 and the amendment to the First Schedule of the REJA was only made on 11 December 2003. What then was the status of HKSAR in the intervening period?

Following a strict interpretation of REJA and the 2003 Order, it is submitted that the REJA did not apply to the HKSAR in that period. This is because the REJA does not provide for the making of retrospective subsidiary legislation. Therefore, *prima facie*, any subsidiary legislation made under the REJA will not have any retrospective effect.

<sup>14</sup> Emphasis added.

<sup>15</sup> PU(A) 34/2004.

Admittedly, section 20 of the Interpretations Act 1948 and 1967<sup>16</sup> does provide for subsidiary legislation to be made retrospectively.<sup>17</sup> However, judicial decisions<sup>18</sup> have stated that if this were the case, then the subsidiary legislation must be specific and express in its intention to have such an effect. As the 2003 Order does not mention having a retrospective effect, it can be said that it is not meant to be retrospective.

Alternatively, it can be argued that the change of Hong Kong to the HKSAR in the REJA was merely an administrative matter and substantially, the Malaysian courts would have still recognised judgments from the HKSAR even without the necessary subsidiary legislation being made. It is submitted that this line of reasoning can only be justified in two situations.

Firstly, if there were Malaysian judicial decisions using the REJA to enforce HKSAR judgments during the 1997–2003 period. With the existence of such cases, it may be argued that this shows practice on the part of the Malaysian courts and would thus set the precedence that despite the fact that Hong Kong's change of status was not expressly noted in the REJA, the courts will still recognise and enforce judgments from the new entity, which is the HKSAR. This is however not the case as there are no such judgments during that period.

Secondly, if there is a definitive statement by the Malaysian government as to their stand regarding the enforcement of HKSAR judgments before the 2003 Order; a formal declaration that judgments made by the HKSAR between 1 July 1997 and 11 December 2003 would have been enforced under REJA despite the delay in changing the First Schedule. There are no such express statements.

Because the 2003 Order is a subsidiary legislation, there were no parliamentary debates before its passing. The decision was an executive decision made by Cabinet. Therefore, any debate or argument regarding the Order will not be generally available to the public. Thus one cannot resort to such sources to impliedly determine the Malaysian government's intentions.

It is submitted that, currently, there is no indication as to what the Malaysian courts would have done if they were faced with a judgment by the HKSAR between 1 July 1997 and 11 December 2003. Neither is there any statement, express or implied, by the Malaysian government as to their stand on HKSAR judgments before the 2003 Order. Therefore, applying the golden rule of statutory interpretation and upon examination of the REJA and the 2003 Order, the Act does not apply to HKSAR judgments before 11 December 2003. Conversely, it can be presumed that HKSAR law, the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) can be disapplied for Malaysian judgments in the same time period and common law principles would have to be used.

<sup>16</sup> Laws of Malaysia Act 388.

<sup>17</sup> Section 20 reads: "Subsidiary legislation may be retrospective. Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made: Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published".

<sup>18</sup> James Foong J, in *Kajing Tubek v Ekran Bhd* [1996] 2MLJ 388.

