

Enforcing a Foreign Judgment in Malaysia

As Malaysian companies venture abroad they are increasingly exposed to disputes in foreign countries. Contracts made with foreign entities are also likely to have provisions requiring dispute resolution in a foreign court or tribunal. A judgment obtained against a Malaysian party may have little clout if the Malaysian party had little or no assets overseas and therefore compliance with the judgment may only be compelled if action was taken against the Malaysian party in Malaysia.

A foreign judgment refers to a judgment that is handed down by a superior court outside Malaysia. Under Malaysian law, a foreign judgment cannot be directly or summarily executed (enforced) in Malaysia. The judgment must first be recognized by a Malaysian court either under applicable Malaysian statutes or in accordance with common law principles. Whilst a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises¹.

The Reciprocal Enforcement of Judgment Act 1958 (“REJA”)

REJA allows enforcement of judgments from courts of certain commonwealth countries outlined in the First Schedule to REJA, namely the United Kingdom, Hong Kong, Singapore, New Zealand, Republic of Sri Lanka, India and Brunei (“the reciprocating countries”). Where a foreign judgment from a reciprocating country is brought before a Malaysian court for enforcement, that foreign judgment may be registered under section 4(1) of REJA and thereafter enforced provided that it is a civil judgment for a monetary sum that has not been wholly

¹ Dicey, Morris and Collins – The Conflict of Laws

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satisfied and is a judgment that may be enforced in the country of the original court. Once a foreign judgment is registered, it will have the same force and effect as a Malaysian judgment.

The procedure for registration is as follows²:

- The judgment creditor must file an originating summons supported by affidavit with the High Court exhibiting a copy of the duly verified foreign judgment;
- If the judgment is not in English, a translation certified by a notary public is required, with the view to verifying its authenticity;
- The affidavit must state:
 - the name, trade or business and the usual or last known place of abode or business of the judgment creditor and the judgment debtor;
 - that the judgment creditor is entitled to enforce the judgment,
 - at the date of the application the judgment debt has not been satisfied;
 - that the judgment does not fall within any cases in which a judgment may not be ordered to be registered under section 4(2) of REJA;
 - that at the date of the application, the judgment can be enforced in the original country, and if it were registered in Malaysia, the registration would not be liable to be set aside under section 5 of REJA,
 - the amount of the interest which under the law of the country of the original court has become due under the judgment up to the time of registration.

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² Rules of Court 2012, Order 67

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A Malaysian court may set aside the registration of a foreign judgment if it is satisfied that:

- it is not a judgment to which REJA applies;
- the original court had no jurisdiction in the matter;
- the defendant did not receive sufficient notice of the proceedings to appear;
- the judgement was obtained by fraud³;
- the judgment was contrary to public policy;
- the rights under the judgment are not vested in the applicant; or
- the matter has been previously determined by a court having jurisdiction in the matter.

Enforcement of Foreign Judgment under Common Law

A foreign judgment pronounced by a country that falls outside REJA may still be enforced by the Malaysian Courts through principles for the recognition of foreign judgments under common law. The common law rules applicable to the recognition of a foreign judgment come within the area of law known as private international law and have been adopted into Malaysian jurisprudence by virtue of Section 3 of the Civil Law Act 1956. This section allows the application of English Common Law and rules of equity in Malaysia.

A plethora of cases from English courts derived from principles binding on Malaysian courts by virtue of the Civil Law Act 1956, have established the following requirements for an enforcement of a foreign judgment under the common law:

³ Abouloff v Oppenheimer (1882) 10 QB 295

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- (a) The judgment is for a fixed sum of debt⁴, (not being a sum payable in taxes⁵ or the like);
- (b) The judgment is final and conclusive⁶;
- (c) The foreign court has a competent jurisdiction⁷ to decide on the case.

The prerequisite that a foreign judgment must be for a fixed sum excludes (as in the case of REJA) the enforcement of declaratory orders and injunctions and claims *in rem*.

The test of finality is proof that a judgment given by the foreign court is *res judicata*. For this it must be shown that the foreign court has established the existence of the debt based on the evidence and which conclusively determined a liability on the part of the defendant.⁸ In other words, the finality and conclusiveness of the judgment must base itself on the merits⁹.

Jurisdictional incompetence of the foreign court is a common ground for challenging foreign judgements. In order to meet this requirement, the following elements of a jurisdictional competence were described by Buckley L.J. in *Emanuel v Symon*¹⁰ as follows –

- (i) The defendant is a subject of the foreign country at the time the judgment is pronounced;
- (ii) The defendant resides in the foreign country when the action began;

⁴ Sadler v Robins (1808) 1 Camp 253

⁵ Government of India v Taylor [1955] A.C. 491; Rossano v Manufacturers Life insurance Co Ltd [1963] 2 QB 352

⁶ Nouvion v Freeman (1889) 15 App. Cas. 1,9; Blohn v Desser [1962] 2 Q.B. 116

⁷ Emanuel v Symon [1908] 1 KB 302

⁸ Nouvion v Freeman (1889) 15 App. Cas. 1,9

⁹ The Seminar (No.2) [1985] 1 WLR 490

¹⁰ [1908] 1 KB 302

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- (iii) The defendant has, in character of the plaintiff, selected the forum;
- (iv) The defendant has voluntarily appeared and defended the case; or
- (v) The defendant has contracted to submit himself to the jurisdiction of the court.

Presence of the Defendant: A foreign court may have jurisdiction over a defendant that is present in the jurisdiction of that court¹¹ (*Adam v Cape Industries*¹²). When the defendant is a corporation, the test of presence is to be determined by considering whether the defendant has a place of business in the foreign country, or whether the corporation has a local representative who has been carrying on the corporation's business in the foreign country.¹³

Selection of forum: A person who goes to the court for a claim must also bind himself to the outcome. Likewise, a defendant who resorts to a counterclaim in a proceeding in a foreign court clearly submits himself to the jurisdiction thereof.

A defendant can be said to have submitted himself to the foreign jurisdiction in the following circumstances. Firstly, when he entered appearance in the foreign action and defended himself in that suit without contesting the jurisdiction. Secondly, he contested the jurisdiction of the foreign court but nevertheless pleaded the merits of the case. Thirdly, submission can also be inferred when the defendant did not appear at the first instance but proceeded to appeal against the judgment at the foreign country.¹⁴

¹¹ Carrick v Hancock (1895) 12 T.L.R. 59

¹² [1990] Ch. 433

¹³ F&K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139; Adams v Cape Industries [1990] Ch. 433, 531

¹⁴ SA Consortium General Textiles v Sun & Sand Agencies [1978] 1 QB 279

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Agreement to submit: If a contract provides that all disputes shall be referred to the exclusive jurisdiction of a foreign court, the foreign court is deemed to have jurisdiction over the defendant. The agreement to submit to foreign jurisdiction may also come in the form of accepting service of process in the foreign country.

Typically, the enforcement of a foreign judgment under the common law in Malaysia is done by taking out a writ action on the basis of the foreign order or judgment and providing the evidence of the elements stated above. Once the writ and statement of claim have been served on the defendant and the defendant has entered appearance to the action, the plaintiff may, on the ground that the defendant has no defence to the action, apply for a summary judgment to be entered against the defendant. Unless there is a triable issue, the court may give such judgment for the plaintiff by granting an order in terms of the foreign judgement.

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