

## PRIVATE INTERNATIONAL LAW IN THE MALAYSIA COURTS

by AZMI SHAROM\*

There were four noteworthy cases in the Malaysia Courts in 2005. Two of these cases dealt with Malaysians getting into debt due to gambling abroad and both have arguably misused the public policy argument. They serve as a warning to casinos the world over against giving credit to Malaysian gamblers. In light of Singapore's newfound ambitions in that field, perhaps these cases should be noted by the Republic's legal fraternity.

The issue of the service of writ for foreign proceedings in Malaysia has been one that needs a sound and definitive judgment. This has been provided for in one of the cases discussed here, where the High Court decided that the overly restrictive approach taken by many Malaysian judges is unfounded and based on the misinterpretation of a judgment of Lord Denning's.

Finally there is a case that uses the principle of *forum non conveniens* in a sensible manner which serves to emphasise one of the ideals that is the foundation of private international law, the comity of nations.

### I. MISUSE OF PUBLIC POLICY ARGUMENT

#### A. *The Ritz Carlton Casino Ltd & Anor v Datuk Seri Osu Haji Sukam*<sup>1</sup>

In this case, heard in the High Court of Kota Kinabalu, the defendant, an ex-Chief Minister of the state of Sabah, had got into debt gambling at the Ritz Carlton Casino in London. He owed the casino approximately seven million Malaysian Ringgit (RM 7,000,000). He did not pay and the plaintiffs had obtained judgment from the English High Court. The plaintiffs then sought to have that judgment enforced in Malaysia under the *Reciprocal Enforcement of Judgment Act 1958* (REJA).<sup>2</sup>

Two issues were raised in defence. Firstly, that the foreign process served on the defendant was in contravention of Order 65 of the Rules of the High Court 1980<sup>3</sup> because the service was done by a private agent. Secondly, that for the court to enforce the judgment would be against Malaysian public policy. Regarding the first line of defence, the judge held that despite his misgivings and an earlier decision<sup>4</sup> of his that held that the service of foreign processes by private agents was not permissible, because that decision had been reversed by the Court of Appeal, he reluctantly had to allow the foreign process to be deemed properly served in this case.

The judge then went on to discuss the issue of public policy. Equating gambling with prostitution, he stated that based on the Malaysian Rukun Negara (national principles) which lists the belief in God and good social behaviour amongst them, it was not possible for gambling to be an acceptable activity in Malaysia. He then went on to quote extensively from

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<sup>1</sup> [2005] 6 M.L.J. 760.

<sup>2</sup> Revised in 1972. Laws of Malaysia Act 99.

<sup>3</sup> PU(A) 50/1980, which deals with the service of foreign process.

<sup>4</sup> *United Overseas Bank v Wong Hai Ong* [1999] 1 M.L.J. 474 (High Court, Kuching).

the Koran, the Bible, Hindu Scripture and Buddhist philosophy, all condemning gambling, to prove his point that gambling is a heinous act.

The defendant, being a Muslim, was obviously acting contrary to the tenets of his faith. However, the judge in his mercy, chose instead to focus on the immorality of the casino granting credit facilities to a man who might then voluntarily use it and drive himself and his family into poverty. The judge refused to look into similar cases decided in other countries because they did not follow the "God fearing principles" found in Malaysia. The fact that gambling is legal (provided it is licensed) in Malaysia was conveniently and bafflingly sidestepped as being for the good of the nation as it helps to prevent gambling activities from being run by the underworld.

The judge ruled in favour of the defendant and the judgment of the English High Court was not to be enforced. Costs were not awarded to the defendant though because the judge was of the opinion that he did not deserve it as he had been involved in an activity frowned upon by his religion. It is submitted that perhaps it would have been better to find for the plaintiff and let the defendant learn his lesson by simply paying what he owed.

*B. Jupiters Limited (Trading as Conrad International Treasury Casino) v  
Lim Kin Tong*<sup>5</sup>

This is another case of a Malaysian who got into debt gambling overseas and refused to pay. The defendant in this case had opened a Cheque Cashing Facility (C.C.F.) in a casino in Queensland, Australia. He had issued two cheques which totalled approximately two million Malaysian Ringgit (RM 2,000,000). He went on to incur losses and when the casino later presented the cheques, they discovered that the defendant had counter-manded them. He later made part-payment of his debt but there remained an outstanding balance. It is this outstanding sum that was being claimed.

Unlike the *Ritz Carlton* case, however, judgment was not obtained abroad. In this case, the plaintiffs had commenced proceedings in Malaysia to claim the outstanding sum. The question before the court was whether what is essentially a gaming debt, enforceable in Queensland, can become the subject of proceedings in Malaysia.

It was held in the Kuala Lumpur High Court that it could not because the *Civil Law Act 1956*<sup>6</sup> (sections 26(2) and 26(4)) and the *Contracts Act 1950*<sup>7</sup> (section 31(1)) both specifically prohibit the enforcement of agreements based on gambling. Section 26(2) of the *Civil Law Act* reads:

No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

Section 26(4) of the *Civil Law Act* states:

Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

<sup>5</sup> Unreported judgment, [2005] M.L.J. 534.

<sup>6</sup> Revised in 1972. Laws of Malaysia Act 67.

<sup>7</sup> Revised in 1974. Laws of Malaysia Act 136.

Section 31(1) of the *Contracts Act* reads:

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

The argument by the plaintiff that the issue was one of dishonoured cheques and not gaming, and therefore fell under the auspices of the *Bills of Exchange Act 1949*,<sup>8</sup> was rejected by the court. This was because the nature of the transaction (the C.C.F.) was purely for the purpose of gaming in the casino.

The fact that the proceedings were based on a foreign gaming transaction did not matter because the question before the court was one of procedure (the *Civil Law Act* being one governing procedural law) and therefore Malaysian law as the *lex fori* should govern. The judge then went on to state that, as a policy, gambling contracts should not be enforced in Malaysia, and to justify this reasoning he quoted *verbatim* the *Ritz Carlton* judgment, in particular the parts reciting scripture. The judge ruled in favour of the defendant but as with the *Ritz Carlton* case, costs were not awarded as it was held that the defendant was not deserving, having partaken in an activity frowned upon by religion.

## II. SERVICE OF WRIT FOR FOREIGN PROCEEDINGS IN MALAYSIA

### *Malayan Banking Berhad v Ng Man Heng*<sup>9</sup>

In the *Ritz Carlton* case above, the judge had mentioned the issue of whether service for foreign proceedings done by a private agent is acceptable by the Malaysian courts. This issue has split the Malaysian judiciary and there are both cases that hold that service of foreign proceedings by private agents is acceptable and cases that hold that it is not. In the present case, Justice Syed Ahmad Helmy, in an excellent and clear judgment, hopefully puts the matter to rest.

Here, the judgment creditor had obtained a judgment from the Singapore High Court and was trying to get that judgment enforced in Malaysia by virtue of registration under the REJA. The judgment debtor objected to this registration based on three grounds:

- (a) The original service of writ upon him by the judgment creditors was done by a private agent. This was an unacceptable method of service of foreign proceedings and therefore the Singapore Court had no jurisdiction to hear the case because the initial service was invalid;
- (b) The judgment debtor was ill and illiterate (in both Malay and English); and
- (c) The judgment creditor had misrepresented and/or induced the judgment debtor to sign the guarantee upon which the substantive issue of the case was based.

The final two grounds were quickly disposed of by the judge who held that illness and illiteracy were not grounds to reject a REJA application and with regard to misrepresentation and/or inducement, seeing as it is a substantive matter, it should be dealt with in the court where the substance of the case was heard (*i.e.*, Singapore) and he was not going to intervene.

The main part of the decision was focused on the issue of service of writ for foreign proceedings. The problem can be traced to Order 65 rule 2 (O65 r2) of the Rules of the High Court 1980. It would be helpful to reproduce the rule here:

O65 r2 (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

<sup>8</sup> Revised in 1978. Laws of Malaysia Act 204.

<sup>9</sup> [2005] 1 M.L.J. 470.

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.

r2 (3) Subject to paragraph (4) and to any written law which provides for the manner in which documents may be served on bodies corporate, service of the process shall be effected by leaving a copy of it and of the translation with the person to be served. Service shall be effected by the process server.

In earlier cases such as *United Overseas Bank Ltd v Wong Hai Ong*<sup>10</sup> and *Commerzbank (South East Asia Ltd) v Tow Kong Lian*,<sup>11</sup> it was held that this rule was the method by which notice of service from foreign countries had to be served. Failure to do so would be an affront to the sovereignty of Malaysia. The precedence for the matter of sovereignty was taken from *Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The Vrontados)*<sup>12</sup> a case decided by Lord Denning MR (as he then was). Lord Denning had held that "... service of writ out of the jurisdiction is an exercise of sovereignty within the country in which service is effected. It can only be done with the consent of that country".<sup>13</sup> The courts in *United Overseas Bank* and *Commerzbank* held that, based on *The Vrontados*, it would follow that service of foreign proceedings would have to be according to O65 r2. Service by a private agent is unacceptable (as O65 states that service should be done by a process server) and because it was done without the Malaysian government's consent, it was an affront on her sovereignty and this would mean that it is against public policy to accept the validity of such service.

However, Justice Syed Ahmad Helmy disputed this interpretation. He held that O65 was to be read within its ordinary meaning, that is to say, it is to be used *only* in cases where one government has made a request to the Malaysian government to serve a notice of writ on one of its residents. It is not intended to mean that *all* forms of service of foreign proceedings are to be done in that manner.

On the matter of state sovereignty, he held that the earlier cases had misunderstood Lord Denning's decision by not reading it in its entirety. Lord Denning indeed had stated that serving a writ out of jurisdiction can be construed as interfering with the sovereignty of another nation:

That is why our rules provide for service through the judicial authorities of that country: or through a British Consular authority in that country, see RSC, O11 rr 5(5) and 6. The practice is for the documents to be lodged here with the master's secretary who forwards them to the Foreign Office. If an individual is served ... by means of that machinery... In the foreign country, he need not be served personally so long as it is served on him in accordance with the law of that foreign country, e.g. by registered post addressed to him in that foreign country, see O11 r 5(3)(a). But that only applies to individuals. There is no similar rule to tell us how a foreign company is served out of jurisdiction. In my opinion, it must be served in the country in which it is incorporated and domiciled. It must then be served ... through the machinery of our Foreign Office... in accordance with the way in which a company is served in its own country.<sup>14</sup>

It was held that taking Lord Denning's decision as a whole, what he had actually meant was that being aware of the sensitivities of sovereignty, a legal system would have its own

<sup>10</sup> *Supra* note 4.

<sup>11</sup> [2002] 2 M.L.J. 353 (High Court, Johor Bahru).

<sup>12</sup> [1982] 2 Lloyd's Rep 241.

<sup>13</sup> *Ibid.* at 245.

<sup>14</sup> *Ibid.*

procedures for the service of a writ abroad. It is those procedures that have to be followed. He did not mean that for every single writ to be served abroad, one needs to first obtain that country's permission. Of course, in the foreign country itself, the manner in which the writ is served must be in accordance with the law of that country. This line of reasoning was followed by the court in *Sunkyong International Inc v Malaysian Rubber Dvpt Corp Bhd*<sup>15</sup> and *Saeed U Khan v Lee Kok Hooi*.<sup>16</sup> In *Saeed U Khan*, it was also held that service by a private agent is a perfectly acceptable method of serving a writ in Malaysia. Justice Syed Ahmad Helmy went on to say that there is nothing in O65 that states that service for a foreign proceedings cannot be done via a private agent. The registration of the Singapore judgment under the REJA was allowed to stand.

Justice Syed Ahmad Helmy closed with a summation of the principles behind the rules of the REJA and a warning against the overly lenient use of the public policy argument:

In application for registration of foreign judgments the court must be slow to refuse registration on tenuous ground as it will lead to our judgments not being accorded reciprocity by the courts of reciprocating countries. This is the rationale behind s 5(1) of REJA, which limits and specifies the grounds on which registration can be challenged. If we begin to widen the scope set out by Parliament in s 5(1) of REJA, which is the very same scope in the legislation of reciprocating countries such as Singapore, then we can expect refusal to register our judgments in foreign courts on tenuous grounds. Even the public policy limb must be interpreted restrictively because it is "a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law", per Burrough J in *Richardson v Mellish* [1824].<sup>17</sup>

It is hoped that this case should settle the matter of service for foreign proceedings in Malaysia once and for all, and in the future, there will be no more decisions that do not serve to protect the nation's sovereignty but only to hinder the principle of the comity of nations and the smooth administration of justice.

### III. FORUM NON CONVENIENS

#### *Yii Chee Meng v Teo Ash King @ Teo Cho Teck & Anor*<sup>18</sup>

The background of this case is as follows. The defendants had in 1999 made a stay application in the Malaysian court to stay the proceedings in favour of Singapore, which was rejected. During the application in 1999, the salient issue in this case was whether a sum of money that was exchanged between the plaintiff and defendant was a loan or a gift. However, after the application for a stay of proceedings was rejected, the plaintiffs applied for leave to re-amend their writ of summons and statement of claim.

The new claim then included the original sum of money contested and a declaration that one of the defendants was holding a share in property (bought with the contested money) on a resulting or a constructive trust for the plaintiffs. The property was situated in Singapore.

The defendants then requested that the proceedings based on the amended claims be stayed as Singapore would be the better forum. Applying the principles of *forum non conveniens* established in *The Spiliada*,<sup>19</sup> Justice Lau Bee Lan held that three elements have

<sup>15</sup> [1992] 2 M.L.J. 146 (Supreme Court).

<sup>16</sup> [2001] 5 M.L.J. 416 (High Court, Kuala Lumpur).

<sup>17</sup> *Ibid.* at 492.

<sup>18</sup> [2005] 5 M.L.J. 354 (High Court, Kuching).

<sup>19</sup> [1987] A.C. 460.

to be examined when determining whether to stay a proceeding:

- (a) Is there a more appropriate forum where the case can be heard in the interest of the parties and to serve the ends of justice;
- (b) the defendant bears this burden of proof; and
- (c) would it cause an injustice to the plaintiff if the case was heard elsewhere.

Taking these matters into consideration, it was held that Singapore was indeed the better forum. This decision was based primarily on the fact that when it comes to matter of land, it is really the *lex situs* that governs; seeing as how Singapore is the *lex situs* it would be improper for a Malaysian court to make decisions that will ultimately affect land in Singapore.

The precedence for this decision was the Singapore case of *Eng Liat Kiang v Eng Bak Hern & Ors*<sup>20</sup> where the situation was reversed and the Singapore court had been asked to stay proceedings because the case dealt with land in Malaysia. This they duly did.

Furthermore, it was held that the plaintiff would suffer no injustice if the case were heard in Singapore. The plaintiff was the only witness and having to cross the causeway to have his case heard would not put him at any disadvantage. The issue of *res judicata* was also dismissed seeing as how the initial 1999 decision denying a stay was made when the issue of trust in property was not amongst the claims being made by the plaintiff.

<sup>20</sup> [1995] 1 Sing.L.R. 577.