

RECIPROCAL ENFORCEMENT OF JUDGMENTS AND SERVICE OF PROCESSES IN MALAYSIA*

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Chapter I

RECIPROCAL ENFORCEMENT OF JUDGMENTS

I. RULE IN MALAYSIA

British colonisation brought with it English judges, English lawyers and English law. Whether it was through statutory introduction as in the case of the former Straits Settlements (Singapore, Penang and Malacca) under the provisions of the Charters of Justice of 1807, 1826 and 1855, or by direct legislation patterned on English model or by instructive reliance on English law by English judges and English lawyers who were almost entirely trained and educated in English law as in the case of the former Malay States, the result was the adoption of the English Common Law and the Common Law System in this country. Hence the Civil Law Enactment of 1937 which gave statutory authority for the introduction of English common law and equity in the Federated Malay States did not effect any great change in the *de facto* situation. All it meant was that authority was given to the courts to do what they had already been doing long before the passing of this legislation.¹

Reported cases show that the courts in the various states of what are now known as Malaysia and Singapore were in the late 19th century and the early 20th century already applying the English common law principles in deciding cases involving enforcement of foreign judgments, in much the same way as the judges in England were then doing. (See *Kader Nina Merican v. Kadir Meydin* (1876) 1 S.S.L.R. 3, *J.S. Lyon & Co. v. Meyer & Goldenberg* (1891) 1 S.S.L.R. 19, *R.M.S. Veerappa Chitty v. M.P.L. Mootappa Chitty* (1893) 2 S.S.L.R. 12, *A.C. Muthucaruppan Chetty v. Chan Chin Aik* (1908) 1 F.M.S.L.R. 29).

The Civil Law Enactment of 1937 was extended to the former unfederated Malay States (Kedah, Perlis, Kelantan, Trengganu and Johore) in 1951 under the Civil Law (Extension) Ordinance after those states became part of the Federation of Malaya in 1948. The two Enactments were replaced by the Civil Law Ordinance, 1956 which was also made applicable to Penang and Malacca. With the formation of Malaysia in 1963 it became necessary to harmonise the law to include Sabah and Sarawak so that it was repealed by the Civil Law Act, 1956 (Revised 1972).² This Act is now in force throughout Malaysia. It provides, *inter alia*, that the courts shall apply the common law of England and the rules of equity as administered in England at given dates for different parts of Malaysia.³

Specific legislation on reciprocal enforcement of judgments was first introduced in the Straits Settlements in 1921⁴ and in the following year in the Federated Malay States,⁵ Kedah⁶ and Johore.⁷ With the formation of the Federation of Malaya in 1948 these

laws were repealed and replaced by the Reciprocal Enforcement of Judgments Ordinance, 1949. In 1958, one year after Malaya attained its independence, the Reciprocal Enforcement of Judgment Act, 1958 came into force, replacing the 1949 Ordinance. Again with the formation of Malaysia it was revised in 1972.^{7a} It is now in force throughout Malaysia.

The substantive law under the Act is substantially the same as at common law. The main difference is procedural. Whereas at common law enforcement of a foreign judgment is by instituting a fresh suit in a court of the country where the judgment is sought to be enforced based either on the judgment or on the original cause of action, under the Act, enforcement is by registration.

The Act provides for registration of judgments of superior courts of reciprocating countries.⁸

"Judgment" is defined as a judgment or order given or made by a court in any civil proceedings, or a judgment or order given in or made by a court in any criminal proceedings for payment of a sum of money in respect of compensation or damages to an injured party. In respect of a country which is a member of the Commonwealth, it includes an award in proceedings in an arbitration if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. This provision does not extend to an award made in a country not being a member of the Commonwealth.⁹

The names of the reciprocating countries and the superior courts thereof are listed in the First Schedule to the Act (See Appendix "A").

It should be noted that, as the law now stands, the only reciprocating country amongst the ASEAN countries is Singapore.

However, the Yang di-Pertuan Agong (King) may by order amend the Schedule to add any country or

* This paper was read at the 1980 General Assembly of the Asean Law Association in Manila, Philippines, November 24-29, 1980.

1. *Wu Min Aun: An Introduction to the Malaysian Legal System*, 2nd Edition, p.12.
2. Act 67.
3. In West Malaysia on 7th April, 1956; in Sabah, on 1st December, 1951 and in Sarawak on 12th December, 1949: Section 3(1).
4. Chapter 46.
5. Enactment No. 2 of 1922.
6. Enactment No. 7 of 1342 (A.H.).
7. Enactment No. 68 of 1922.
- 7a. Act 99.
8. Part II.
9. Section 2.

territory to which the provision of the Act should extend. The only condition imposed by the Act is that the Yang di-Pertuan Agong must be satisfied that with such extension, substantial reciprocity of treatment would be assured as respects the enforcement in that country or territory of judgments given in the High Court of Malaysia.¹⁰

The Yang di-Pertuan Agong acts on the advice of the Cabinet.¹¹

The effect of registration of a foreign judgment under the Act is to give it for the purposes of execution the same force and effect as if the judgment were a judgment of the High Court of Malaysia. Proceedings may be taken on a registered judgment. The sum for which a judgment is registered shall carry interest. The registering court has the same control over the execution of a registered judgment as if it were its own judgment.¹²

Section 7 provides:

"No proceedings for the recovery of a sum payable under a judgment, being a judgment to which this Part (dealing with registration) applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Malaysia."

My respectful view is that the section does not take away the common law remedies in respect of non-registrable foreign judgments. It merely provides that the procedure for enforcement of a registrable judgment of a court of a reciprocating country must be by way of registration.

In ASEAN terms, the enforcement of a registrable judgment of a superior court of Singapore must be by way of registration. The enforcement of judgments of the courts of other ASEAN countries, with whom no reciprocal arrangements exist may be made by instituting fresh actions in a Malaysian Court.

II. BASIS FOR A RULE

In England in the 17th century when the English courts began enforcing foreign judgments, it was supposed that the basis for the enforcement was based on the doctrine of comity. English judges believed that the Law of Nations required the court of one country to assist those of another. They feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad.

Later this theory was superseded by the doctrine of obligation. This theory is based on the idea that a competent foreign judgment imposes a legal obligation on the defendant which is enforceable whenever he may be, in particular, if he is in England.

There is yet another theory of equivalence. This theory holds that a foreign judgment should be recognised when in the factual circumstances which arose before the foreign court, the recognising court would have been entitled to assume jurisdiction under its own rules. The most obvious example is the case where the jurisdictional rules of both court are identical.

Pre-1958 cases (the year of coming into force of the Reciprocal Enforcement of Judgments Act in Malaya) seem to show that Malaysian and Singapore courts adhered to the doctrine of obligation (for exam-

ple, see *Anthinarayana Mudaliar v. Ajit Singh* [1953] M.L.J. 228.

However, looking at the Act, it appears that enforcement of foreign judgments is based on the doctrine of reciprocity. Hence the application of the Act may be extended to judgments of a superior court of a country or territory if the Yang di-Pertuan Agong "is satisfied that in the event of the benefits conferred [by the Act] being extended to judgments given in the superior court of any country or territory outside Malaysia, substantial reciprocity of treatment will be assured as respects the enforcement in that country or territory of judgments given in the High Court [of Malaysia]."¹³ And such benefits may be rescinded or varied if "the treatment in respect of recognition and enforcement accorded by the courts of any reciprocating country to judgments given in the High Court is substantially less favourable than that accorded by the courts in Malaysia to judgments of the superior courts of that country."¹⁴

III. CONDITIONS FOR REGISTRATION

Any judgment of a superior court, other than a judgment of such a court given on appeal from a court which is not a superior court may be registered:

- (a) if it is final and conclusive as between parties thereto;
- (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
- (c) being a judgment from a country or territory added to the First Schedule (see Appendix "A"), it is given after that country or territory is added to that Schedule.¹⁵

A judgment shall not be registered if at the date of the application:

- (a) it has been wholly satisfied; or
- (b) it could not be enforced by execution in the country of the original court.¹⁶

Final and conclusive

A judgment is final and conclusive if it determines all controversies between the parties. If it may be altered in later proceedings between the same parties in the same court, it is not final and conclusive.

An illustration is afforded by *Blohn v. Asesser* [1961] 3 All E.R. 1. In that case, an action was brought against the defendant personally upon an Austrian judgment that had been given not against her individually, but against a firm of which she was a member. To have rendered her personally liable under Austrian law, would have necessitated a separate action against her individually, but in this event certain defences would have been available to her that

10. Section 3(2).

11. Article 40(1) of the Federal Constitution.

12. Section 4(2).

13. Section 3(2).

14. Section 9.

15. Section 3(3).

16. Section 4(1).

could not have been raised in the proceedings against the firm. Therefore, even if it could be regarded as given against her personally, it was not final and conclusive.

A judgment in default of appearance is final and conclusive.¹⁷

A judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal.¹⁸

IV. SETTING ASIDE A REGISTERED JUDGMENT

On an application by a judgment debtor, a registered judgment must be set aside if the registering court is satisfied —

- (i) that the judgment is not a judgment of a superior court of a reciprocating country or was registered in contravention of the Act;
- (ii) that the court of the country of the original court had no jurisdiction in the circumstances of the case;
- (iii) that the judgment debtor, being a 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;
- (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made.

The registering court has a discretion to set aside the registration if it 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 subject of a final and conclusive judgment by a court having jurisdiction in the matter.¹⁹

(a) Jurisdiction

(i) Action *in personam*

In an action *in personam*, the foreign court is deemed to have had jurisdiction —

(a) if the judgment debtor being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court.²⁰ It has been held that even where a defendant has been duly served with the process of the foreign court under its powers to serve its process outside its own jurisdiction, if the defendant does not submit to the jurisdiction of that court, the registration of the foreign judgment obtained against him in default of appearance will be set aside.²¹

If, however, the defendant who does not appear in the proceedings before the foreign court and suffers a default judgment to be entered against him but then applies to that court to appeal out of time and

further appeals from the refusal of the foreign court to extend his time, and his solicitors had stated that all disputes between the parties had to be before that foreign court, the defendant will be treated as having submitted to the jurisdiction of that court.²²

Similarly, a defendant who made an application in a foreign court to set aside the order for service out of jurisdiction entered against him was held to have voluntarily submitted to the jurisdiction of the court. So also was his application to stay proceedings under the Arbitration Act.²³

When a defendant appears with the sole object of protesting against the jurisdiction, he cannot be said to submit to the jurisdiction of the court.²⁴

Mere presence in a foreign country does not constitute submission to the jurisdiction of the court of that country. Thus in *R.M.S. Veerappa Chitty v. M.P.L. Mootappa Chitty*²⁵ the court in Singapore held that a defendant, a British-Indian subject and a Singapore resident who went to Johore for a day on business, during which time a summons issued (before his arrival) by the court in Johore was served on him to which he did not appear, had not submitted to the jurisdiction of the Johore Court.

Similarly, it was held in *Tunku Abaidah & Anor. v. Tan Boon Hoe*²⁶ that the mere fact the appellant, being a subject of a foreign country (Kedah), happened to be temporarily residing in the country of the original court (Penang) at the date when the promissory note was executed (and not when the action was instituted), was not in itself sufficient to confer upon the court at Penang jurisdiction over her in respect of that note.

(b) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;²⁷

(c) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject-matter of the proceedings to submit to the jurisdiction of that court or to the courts of the country of that court.²⁸

An illustration of agreement to submit is where a contract provides that all disputes between the parties shall be referred to the jurisdiction of a foreign tribunal.²⁹ An agreement to submit may also take the form

17. *Ho Hong Bank Ltd. v. Ho Kai Neo & Anor.* [1932] M.L.J. 76.

18. Section 3(4).

19. Section 5.

20. Section 5(2)(a)(i).

21. *Societe Co-operative Sidmetal v. Titan International Ltd.* [1965] 3 W.L.J. 847.

22. *S.A. Consortium General Textile v. Sun and Sand Agencies Ltd.* [1978] 2 W.L.R. 1.

23. *Henry v. Geopresco International Ltd.* [1975] 2 All E.R. 702.

24. *Re Dulles' Settlement Trusts* [1951] 2 All E.R. 69.

25. (1894) 2 S.S.L.R. 12.

26. [1935] M.L.J. 214.

27. Section 5(2)(a)(ii).

28. Section 5(2)(a)(iii).

29. *Law v. Garrett* (1878) 8 Ch. D. 26 (C.A.).

of an agreement to accept service of process at a designated address.³⁰

An agreement to the jurisdiction of a foreign court must be expressed: it cannot be implied.³¹ Thus it could not be implied from the execution of a promissory note in a foreign country that the debtor agreed to submit to the jurisdiction of the court of that country: *Tunku Abaidah & Anor. v. Tan Boon Hoe, supra.*

(d) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court.³²

(e) if the judgment debtor being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.³³

This case is not only limited to corporate defendants.

It must be noted that the Act expressly provides that "action *in personam*" shall not be deemed to include matrimonial cause or any proceedings in connection with any matrimonial matters, administration of the estates of a deceased person, bankruptcy, winding-up of companies, lunacy or guardianship of infants.³⁴

(ii) *Action in rem*

In the case of a judgment given in an action of which the subject-matter was immovable property or in an action *in rem* of which the subject-matter was movable property, the original court is deemed to have had jurisdiction if the property in question was at the time of proceedings in the original court situated in the country of that court.³⁵

(iii) *Other cases*

In the case of a judgment given in an action other than any action mentioned above, the original court is deemed to have had jurisdiction if the jurisdiction of that court is recognised by the law of Malaysia.³⁶

The Act provides three instances where the original court is deemed not to have had jurisdiction.

These are:

- (i) if the subject-matter of the proceedings was immovable property outside the country of the original court;
- (ii) if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court. This proviso does not apply to cases mentioned in subsection (2)(a)(i), (ii) and (c) of section 5.³⁷
- (iii) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of

the country of the original court and did not submit to the jurisdiction of that court.³⁸

(b) *Fraud*

Fraud may take the form of an abuse of the procedure of the foreign court through the suppression of material information, as in the case of *Macalpine v. Macalpine*³⁹ where the court refused to recognize as valid a decree of divorce of the state of the husband's domicile, since he had falsely told the trial court that he did not know and could not ascertain his wife's address for service of process.

Again the foreign court itself may be biased in favour of one party or the other, for instance, in the case where the judges of the foreign court were themselves interested in the subject-matter of the action.⁴⁰

The decisive test appears to be whether the foreign court was deceived by the party relying on the judgment in the registering court.⁴¹

When the alleged fraud consists of the perjury of a witness, the possibility of setting up such perjury as a defence in the registering court will depend on whether the perjury was committed by or at the instance of the party relying on the judgment, and whether in fact, it misled the foreign court.⁴²

It is immaterial that the facts on which the defendants relied to establish fraud were known to them and could have been raised in the original proceedings, and the defendants are entitled to have a retrial on the issue of a fraud in the registering court.⁴³

(c) *Public Policy*

I am unable to find any judgment of a Malaysian court on the meaning and application of public policy in this context. Even in England there are very few reported cases in which foreign judgments have been denied enforcement or recognition for reasons of public policy. However, in England the term is used in a general sense to include English ideas of morality, both domestic and commercial. Thus in *Re Macartney*,⁴⁴ the English court refused to enforce a judgment obtained in Malta granting permanent maintenance in respect of any illegitimate child out of the estate of the putative father, apparently because such a grant was not limited to the child's minority. But it must be noted that this case was also decided on

30. *Feyerick v. Hubbard* (1902) 71 L.J.K.B. 509.

31. *Sirdar Gurdval Singh v. Rajah of Faridkote* [1894] A.C. 670 P.C.; *Emmanuel v. Symore* [1908] 1 K.B. 302 (C.S.); *Vogel v. R.A. Kohnstamm Ltd.* [1971] 3 W.L.R. 537.

32. Section 5(2)(a)(iv).

33. Section 5(2)(a)(v).

34. Section 2.

35. Section 5(2)(b).

36. Section 5(2)(c).

37. Section 5(3)(b).

38. Section 5(3)(c).

39. [1958] P. 35.

40. *Price v. Dewhurst* (1837) 8 Sim 279.

41. *Ochsenbein v. Papelier* (1873) L.R. 8 Ch. App. 695.

42. *Ellermaw Lines v. Read* [1938] 2 K.B. 144.

43. *Syal v. Heyward* [1948] 2 All E.R. 576.

44. [1921] 1 Ch. 522.

two other grounds, namely (a) the cause of action — a posthumous affiliation order — was unknown to English law and (b) the judgment was not final and conclusive, which by itself would clearly have been sufficient to dispose of the case.

V. GENERAL EFFECT OF CERTAIN JUDGMENTS

The Act⁴⁵ also provides that, a judgment to which Part II (dealing with Registration) applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in Malaysia as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

However, there are two exceptions.

- (a) where the judgment has been registered and the registration thereof has been set aside on some grounds other than:
 - (i) that a sum of money was not payable under the judgment;
 - (ii) that the judgment had been wholly or partly satisfied; or
 - (iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or
- (b) where a judgment has not been registered, it is shown that had it been registered the registration would have been set aside on the grounds other than those stated above.

A court in Malaysia may recognise any judgment as conclusive of any matter of law or fact if that judgment would have been recognised before the coming into force of the Act.

VI. PROOF OF FOREIGN JUDGMENTS

For purposes of registration, a foreign judgment may be proved by an affidavit exhibiting the judgment or a certified or verified or otherwise authenticated copy of the judgment.⁴⁶

A judgment holder is entitled to his provisional order as a matter of course, and the onus is cast upon the debtor to assail registration later.⁴⁷ He may do so by an application to set aside the registration on any of the grounds specified in the Act. The court hearing the 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.⁴⁸ In other words either by oral or documentary evidence or both.

VII. MAINTENANCE ORDERS

In Malaysia, there is also in force the Maintenance Orders (Facilities for Enforcement) Act, 1949 (Revised 1971). This Act applies throughout Malaysia. The object of the Act is to "facilitate the enforcement in Malaysia of maintenance orders made in reciprocating countries and vice versa." Reciprocating countries are specified in the Schedule (see Appendix "B"). Again it must be noted that the only ASEAN country to which the Act applies is Singapore. The Yang

di-Pertuan Agong may by order amend the Schedule to extend the Act to any country or territory if he is satisfied that reciprocal provisions have been or will be made by the legislature of any country or territory for the enforcement within that country or territory of maintenance orders made by the courts in Malaysia.⁴⁹

Maintenance Order is defined as "an order, other than an order of affiliation, for the periodical payment of sums of money towards the maintenance of the wife or other dependents of the person against whom the order is made..."

The Act provides for the registration of maintenance orders made in a court of a reciprocating country in Malaysia. Upon registration the order shall have the same force and effect as if it were an order of a Malaysian court. All proceedings may be taken on the order and the Malaysian court shall have the power to enforce the order accordingly.

The procedure is simplified. All that the foreign court has to do is to transmit a certified true copy of the order to the Minister charged with responsibility for the judiciary in Malaysia. The Minister shall then cause a copy to be sent to the appropriate local court and upon receipt thereof the court shall register the order.⁵⁰

In the same way, an order of a Malaysian court may be registered in a reciprocating country.⁵¹

The Act also empowers a local court to make provisional orders of maintenance against persons resident in reciprocating countries. The order may be made in the absence of the person against whom the order is sought to be made, if after hearing the evidence it is satisfied of the justice of the application. However the order shall have no effect until it is confirmed by a competent court in the reciprocating country.⁵²

When the order is made, the court shall send to the Minister charged with responsibility for foreign affairs for transmission to the appropriate authority in the reciprocating country the depositions so taken and a certified copy of the order together with a certificate stating the grounds on which the making of the order might have been opposed and such information as the court possesses for facilitating the identification of that person, and ascertaining his whereabouts.⁵³

The court in the reciprocating country may then confirm the order or may remit the order, through the Minister, to the local court for the purpose of taking further evidence, in which case the local court, after the taking of further evidence will remit back the order to the court of the reciprocating country for confirmation.

46. O. 67 r. 3, R.H.C., 1980.

47. *Ho Hong Bank Ltd. v. Ho Kai Neo & Anor.* [1932] M.L.J. 76.

48. O. 67 r. (2), R.H.C., 1980.

49. Section 11.

50. Section 3.

51. Section 4.

52. Section 5(1).

53. Section 5(3).

The confirmation of the order does not affect any power of a local court to vary or rescind the order provided that such variation or rescission is confirmed by the court of the reciprocating country.⁵⁴

The local court has similar power to confirm a provisional order made by a court of the reciprocating country.⁵⁵

VIII. PROBATE AND ADMINISTRATION

The Probate and Administration Act 1959 (Revised 1972) empowers the High Court of Malaysia to re-seal a grant of probate or letters of administration issued by a Court of Probate of a Commonwealth country. Applications for re-sealing are made where a deceased died possessed of certain property in Malaysia. The application is made by petition. A certified copy of the grant must be produced and deposited in court. The administrator or his attorney is required to give security by a bond for the due administration of the estate. In certain cases, the court may also require the administrator or his attorney to give security for the payment of debts due to creditors residing in Malaysia.

The petition is heard in chambers either by a Judge or a Registrar. The court will not re-seal the probate or letters of administration if it appears to them that at the time of his death, the deceased was not domiciled within the jurisdiction of the court from which the grant was issued unless the grant was such that a High Court in Malaysia would have made.

The effect of re-sealing is to render such grant the same force and effect as if it were a grant made by a High Court in Malaysia.

IX. OTHER LAWS

Reciprocal provisions are also found in other laws.

Section 104 of the Bankruptcy Act, 1967 provides that the High Court and its officers shall act in aid and auxiliary to the courts in the Republic of Singapore in all bankruptcy and insolvency matters so long as the law thereof requires its courts to act in aid of and be auxiliary to the courts of Malaysia. It also provides for agreement to be entered between the Governments of the two countries to recognise each other's office of Official Assignees. The effect of the agreement is that when a person is adjudged bankrupt in Singapore, his property in Malaysia will vest in the Official Assignee of Malaysia as if he were adjudged bankrupt by a Malaysian court. All courts in Malaysia will recognise the title of the Official Assignee. The Official Assignee of the Republic of Singapore may sue or be sued in any court in Malaysia.

The Employment Ordinance, 1955, section 83, empowers the Minister to make reciprocal provisions between Malaysia and Singapore for the service, execution and enforcement of summonses, warrants and orders of court.

Chapter II

SERVICE OF PROCESS

I. CIVIL

(a) *Service of Process of Malaysian Courts out of Jurisdiction*

Service of Process of Malaysian courts out of the jurisdiction is provided in O.11, R.H.C., 1980. It is

very complicated and technical. I shall try to summarize it.

- (i) Service out of the jurisdiction may take place with leave of the court if (a) either of the parties to a contract had agreed that the High Court shall have jurisdiction in any litigation arising out of the contract⁵⁶ (b) one of the twelve situations listed in Order 11, rule 1(i) is present — e.g. that the whole subject-matter of the action is heard within the jurisdiction, or that relief is being sought against a person who is domiciled or ordinarily resident within the jurisdiction, or that the action is founded on a tort committed within the jurisdiction.
 - (ii) An application for leave to serve out of jurisdiction must be supported by an affidavit, stating amongst other things, in what place or country the defendant is, or probably may be found.⁵⁷
 - (iii) Only notice of the writ may be served out of the jurisdiction, not the writ itself.
 - (iv) With regard to the mode of service, the notice need not be served personally on the defendant if it is served on him in accordance with the law of the place of service.⁵⁸ If the defendant is in Singapore or Brunei, the notice of a writ may be sent by post or otherwise by the Registrar to the Magistrate, Registrar or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying in business.⁵⁹ In a country with which Malaysia has a Civil Procedure Convention, the notice may be served either through the Government of that country where the Government is willing to effect service, or through a Malaysian consular authority in that country, if service through such an authority is not contrary to the law of that country.⁶⁰
- (b) *Service of Foreign Process*
- Process of a foreign court in connection with civil proceedings pending in such courts may be served in Malaysia. The procedure is as follows:
- (i) the foreign court sends the process with a letter of request to the Minister charged with the responsibility for foreign affairs in Malaysia;
 - (ii) the Minister forwards it to the High Court with an intimation that it is desirable that effect should be given to the request;
 - (iii) service is done by the process server of the court by leaving a copy of it with the person to be served;
 - (iv) on application by the Attorney General the court may make an order for and serve by way of substituted service.
 - (v) when the process is served the process server is requested to file an affidavit of service. If the process server attempts but fails to serve, he files

54. Section 5(5).

55. Section 6.

56. O. 11 r. 2.

57. O. 11 r. 4(1).

58. O. 11 r. 5(3).

59. O. 11 r. 5(8).

60. O. 11 r. 6.

an affidavit of non-service, giving details of his attempts;

- (vi) the Registrar then gives a certificate:
- (aa) identifying the documents.
 - (bb) certifying that the method and the proof of service are such as required by the rules of court in Malaysia. If the service could not be effected, the Registrar certifies that it could not be effected for the reasons specified in the certificate.
 - (cc) certifying that the amount specified in the costs of effecting or attempting to effect service.
- (vii) the certificate is sealed with the seal of the High Court and sent to the Minister.

If a foreign country requesting the service of the process of its court is a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, the letter of request and the process to be served may be sent direct to the Registrar. The rest of the procedure is the same.

II. CRIMINAL

Reciprocal arrangements with respect to service of summonses, subpoenae and warrants in criminal cases between Singapore and Malaysia are governed by the Summonses and Warrants (Special Provisions) Act, 1971. Even though the Act envisages reciprocal arrangements with Singapore and "certain other countries," to date it applies only to Singapore. No order under section 7 has so far been made by the Minister to extend it to any other country. The Act provides for the service of summonses and execution of warrants issued by a Malaysian Court in a reciprocating country and vice versa.

"Summons" includes any subpoena or other process for requiring the attendance of a witness in a criminal trial, criminal enquiry or other criminal proceeding." But it does not include a summons to a juror or an assessor.⁶¹

This is how the arrangement works:

- (i) When a Singapore Court issues a summons requiring a person accused of an offence to appear before a court in Singapore and such person is, or is suspected of being in or on his way to Malaysia, the summons is transmitted to a Magistrate in Malaysia.
- (ii) The Magistrate in Malaysia, if he is satisfied that the summons was issued by a court or a Magistrate in Singapore, endorses the summons with his name and designation and seals it with the seal of his court.
- (iii) The summons then may be served on such person as if it were a summons issued by a Magistrate in Malaysia.
- (iv) When the summons is served such person is legally bound to obey the summons. If he intentionally omits to obey the summons he is guilty of an offence punishable, upon conviction, with imprisonment for a term not exceeding six months, or

with a fine not exceeding five hundred dollars or with both.

The same procedure applies in respect of a summons issued by a Magistrate's Court in Malaysia for service in Singapore.⁶²

The same procedure also applies in respect of a summons to a witness except that a witness is only legally bound to obey the summons if a reasonable amount is paid or tendered for his expenses.⁶³

A warrant issued by a Singapore Court is executed in the same way in Malaysia and vice versa. The arrested person is produced before a Magistrate of the country executing the warrant. If the Magistrate is satisfied that he is the person specified in the warrant, he will direct the arrested person to be transferred forthwith in custody to the appropriate court which issues the warrant. He may also release the arrested person on bail to appear in the court which issued the warrant at a specified time. Breach of the bond entails forfeiture of the bond besides being guilty of an offence punishable, upon conviction, with imprisonment for a term not exceeding six months, or with a fine not exceeding five hundred dollars, or with both.⁶⁴

Malaysia also has an arrangement with Commonwealth countries for the extradition of fugitive criminals. It is governed by the Commonwealth Fugitive Criminals Act, 1967. But as the subject is outside the scope of this paper, I shall say no more.

Chapter III RECOMMENDATIONS

Malaysia has reciprocal arrangements with countries in Europe, Africa, Asia, Australia and some perhaps relatively unknown islands in the Pacific like Nieu and Western Samoa. The only thing in common amongst these countries appears to be that once upon a time they were parts of the British Empire or Commonwealth and have inherited and perhaps still practise a common-law system.

On the other hand, out of the four other ASEAN countries with whom Malaysia shares a common border, the only country with which Malaysia has such arrangements is Singapore. Considering that historically Singapore and Malaysia came under the same administration on more than one occasion and that both are members of the Commonwealth, that is not surprising.

But what is surprising is that we, the people of ASEAN, who look alike, who are next-door neighbours, who speak the same or similar language, who share the same or similar culture and who have been trading with one another ever since our forefathers knew how to build boats, are such strangers in law.

Presuming, therefore, that in this paper I have struck a sympathetic chord amongst all of us and I have given expression to a common desire that

61. Section 2.

62. Section 3.

63. Section 4.

64. Section 5.

lies in our hearts, then, may I with every respect suggest a study on the possibility of introducing a procedure for the reciprocal enforcements of judgments in all the member States of ASEAN. Whether it be on the principle of comity and reciprocity of brother nations, or on the doctrine of obligation or the theory of equivalence, surely it is not impossible

for us to discover a common thread in the judicial systems of our countries, even though not all derived from the common-law system, that will enable us to dispense with membership in the British Commonwealth as a prerequisite and reach a confident basis for the introduction of the very convenient legal procedure.

Appendix "A"

FIRST SCHEDULE

RECIPROCATING COUNTRIES

<i>Reciprocating Country</i>	<i>Superior Courts</i>
United Kingdom	<ol style="list-style-type: none"> 1. The High Court in England; 2. The Court of Session in Scotland; 3. The High Court in Northern Ireland; 4. The Court of Chancery of the County Palatine of Lancaster. 5. The Court of Chancery of the County of Palatine of Durham.
Hong Kong	The High Court.
Singapore	The High Court.
New Zealand	The High Court.
Republic of Sri Lanka (Ceylon)	<ol style="list-style-type: none"> 1. The High Court. 2. The District Courts.
India (excluding State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the State of Madras and Andhra)	The High Court.
South Australia	The Supreme Court.
New South Wales	The Supreme Court.
Victoria	The Supreme Court.
Capital Territory of Australia	The Supreme Court.
Northern Territory of Australia	The Supreme Court.

Appendix "B"

SCHEDULE

RECIPROCATING COUNTRIES

Australia —	Hong Kong, Colony of;
State of New South Wales;	India (excluding Jammu and Kashmir), Republic of;
State of Queensland;	Jersey, Island of;
State of South Australia;	Man, Isle of;
State of Tasmania;	New Zealand;
State of Victoria;	Cook Islands (including Niue);
State of Western Australia;	Western Samoa, Trust Territory of;
Capital Territory of Australia;	Northern Ireland;
Territory of Norfolk Island;	North Island;
Northern Territory of Australia;	Pakistan, Republic of;
Territory of Papua;	Singapore, Republic of;
Cocos (Keeling Island);	South Africa, Union of;
Brunei, State of;	Wales.
Ceylon, Dominion of;	
England;	
Guernsey, Bailwick of the Island of;	