THE RECOGNITION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

Introduction

One of the principal considerations of a conflicts lawyer when advising his client is the basis upon which he proposes to have the judgement he obtains, enforced, in a foreign jurisdiction. Where the plaintiff fails to obtain satisfaction of a judgement in his favour in the country in which the judgement in question was rendered, the question that surfaces next is whether it could be enforced in some other country in which the defendant's assets or he himself may be found. Unless this could be done, the full impact of Private International law as a system of law for the settlement of disputes with a foreign element comes to nought.

One of the difficult questions of jurisprudence that underlines the whole issue of receprocal enforcement of judgments is the Austinian theory of sovereignty. The theoretical problem is that one sovereign can not, consistently with that sovereign status, enforce a judgment obtained from a court of another sovereign. Therefore, the courts were faced with the awesome task of justifying the enforcement of foreign judgments upon some basis that did not conflict with the concept of sovereign status, without which the adherents of the Austinian school of legal theory would not believe that law was possible.[1]

During the 18th and the 19th centuries the Court tested two very different bases for justifying the enforcement of foreign judgments. First: the principle of comity.[2] Second: The principle of obligation.[3]

The principle of comity connotes that there is a sense of reciprocity that requires the recognition of such judgments as those that are given from Courts in countries which recognise the judgments given by the recognising court. This approach led to a number of theoretical and practical difficulties thus compelling the common law courts to abandon it. First, there was the difficulty in determining which courts in which countries recognised the judgments of the enforcing court. Second, reciprocity in its essence required the recognition of the foreign judgment without embarking upon a rehearing. Therefore, the only element that needed to be established before enforcement was ordered by the recognising Court, was the fact that the foreign judgment was delivered by a Court having jurisdiction. Third, it

[1] Austin, (J), *The Province of Jurisprudence Determined,* Edt., by Hart, (H.L.A.) 1965.

[2] *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681, at p. 675 and *Steves Fisk* (1884), Can. S.C. 392 (Can.).

[3] *Russell* v. *Smyth* (1842), 9 M. & W. 810; *Williams* v. *Jones* (1845), 13 M. & W. 628; *Goddard* v. *Gray* (1870), L.R. 6 Q.B. 139 and *and Kingsmill and Davis* v. *Warrender & Wheeler* (1852), 13 U.C.Q.B. 18 (Can.).

is said, that it meant that any violation of natural justice or the commission of a fraud in the judgment making process should have no effect upon the enforcing court's decision to enforce the foreign judgment.

The principle of comity was replaced by the middle of the 19th century by a much more defensible basis — the principle of obligation. The principle implies that:

> "where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced in this country by an action of debt."[4]

The principle of obligation raises a fresh obligation before the enforcing court. Once a judgment has been obtained before the foregin court, the judgment debtor there, becomes liable under a fresh obligation before the enforcing court to pay that debt.[5] In *Grant* v. *Easton*[6] Lord Esher said: "the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment."[7] The merits of this approach is that while preventing the enforcing court from re-hearing the issues by re-examining the substantive rules, it is left open for the enforcing Court to examine, if it wished, the defences of fraud and subsequent performance of the obligation. These are factors that would negative the obligation, between its first creation in the foreign court and its enforcement by the enforcing court. In addition, the enforcing court, under the 'obligation' principle, may refuse its enforcement if the foreign court in any way infringes the concept of natural justice of the enforcing court. By these means the 'principle of obligation' reconciles many important legal incidents. It prevents a collision of sovereign powers of the two relevant sovereigns. It permits the enforcing court to have a control on the enforcement of the foreign judgment. Lastly, the foreign judgment is enforced not so much as a foreign obligation but as an obligation freshly created by the local or enforcing court. Since the principle was first enunciated in *Russell* v. *Smyth*[8] in 1842, the Common Law Courts have without reservation followed that principle until this day.

Recognition and Enforcement in the Common Law

Founded upon the principle of obligation, recognition and enforcement of foreign judgments at Common Law has been subjected to a number of conditions. *First*, the common law requires that the foregin court must

[4] *Russell* v. *Smyth*, *ibid.*, at p. 819.

[5] *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155, at p. 159.

[6] (1883), 13 Q.B.D. 302.

[7] *Ibid.*, at p. 303.

[8] See n. 3.

have had jurisdiction in the International sense over the defendant.[9] Therefore, it is important to emphasise that the jurisdiction concerned here is not jurisdiction in the domestic sense but according to the rules of International Law applicable to the defendant and recognised by the Common Law. In so far as judgments *in personam* are connerned, the frequently quoted authority in the Common Law[10] is that of Buckley L.J. in *Emanuel* v. *Symon*.[11] Buckley L.J. wrote:

> "In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."[12]

As for judgments in Rem, the first question is to determine whether the matter in dispute would give rise to such a judgment. The best exposition of a judgment in rem may be found in the following passage from Evershed L.J. in *Lazarus-Barlow* v. *Regent Estates Co. Ltd.*,[13]

> "The term judgment *in rem* is one clearly understood by the law and has been defined as meaning "a judgment of a Court of Competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation)," and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matters actually decided."[14]

It is again important to emphasise that, the recognition and enforcement of a judgment in rem of a foreign court depends on whether that court had jurisdiction not in the domestic sense but in the international sense. Therefore where the judgment concerns immovables, the Court of the *Situs* has exclusive International jurisdiction.[15] As for movables the situation is

[9] Cheshire, (G.C.), Private International Law, 10th Edn. at p. 633.

[10] Dicey & Morris, *The Conflict of Laws*, 10th Edn., Stevens, 1980, at p. 1045.

[11] [1908] 1 K.B. 302, (C.A. — Eng.).

[12] *Ibid.*, at p. 309. See also: *Schibsby* v. *Westenholz* Fn 5; *Rousillon* v. *Rousillon* (1880) 14 Ch. D. 351, at p. 371; *Gurdyal Singh* v. *The Rajah of Faridkote* [1894] A.C. 670 (P.C.); *Carrick* v. *Hancock* (1895), 12 T.L.R. 59; *Littawer Globe Corporation* v. *F.W. Millington Ltd.*, (1928), 44 T.L.R. 746; *Copin* v. *Adamson* (1874), L.R. 9 Ex. 345; affirmed (1875), L.R. 1 Ex. 17; *Vagel* v. *R. and A. Kohnstamm Ltd.*, [1973] Q.B. 133; *Harris* v. *Taylor* [1915] 2 K.B. 580; *Henry* v. *Geoprosco* [1976] Q.B. 726. There are many more authorities that would support the five propositions laid down by Buckley L.J.

[13] [1949] 2 K.B. 465.

[14] *Ibid.*, at p. 475.

[15] *Companhia de Mocambique* v. *British South Africa Co.*, [1893] A.C. 692 (H.L.) and *Re Trepca Mines Ltd.*, [1960] W.L.R. 1273.

more complicated. This may be considered under two separate headings. First, judgments which have the effect of vesting property in persons who may claim that property right against the whole world. This may be a case of a proceeding before a Court of Admiralty where a vessel is condemned as a prize or a proceeding before an ordinary court seeking a decree of sale of a moveable in satisfaction of a debt or a claim against the movable itself.[16] In each of these cases, International jurisdiction is satisfied when the judgment is obtained from the court within which jurisdiction the ship or movable is situated. The second group of cases concerning movables is where the judgment orders the movables to be sold as a part of the administration of estates. In the case of succession on death, jurisdiction to make such an order resides in the court of the country where the deceased died domiciled. A sale under an order by such a court would bind the whole world. In addition to these judgments *in rem* concerning corporeal rights, there are other judgments *in rem* concerning incorporeal rights too. These are judgments concerning the adjudication of status[17] and the court in possession of International jurisdiction is the court of the place of the domicile of the party whose status the court is called upon to determine.[18]

Second, requirement in the common law is that the foreign judgment in the court in which it was obtained must be final and conclusive. It must be such that it is *res judicata* by the law of the country where it was obtained.[19] Strictly, under the common law, even a foreign judgment which is under appeal in the foreign jurisdiction is enforceable.[20] Finality and conclusiveness means no more than that the matter was conclusive in that court and final at that level of adjudication.[21] However, if an appeal is either pending or the period for appealing at the foreign jurisdiction had not passed, the common law courts may exercise its equitable jurisdiction to order a stay of enforcement of the foreign judgment until the appeal process in the foreign jurisdiction was exhausted.[22] That, however, is a resort to equity and not an incident of the common law. Aside from this, the foreign judgment is enforceable even though the foreign court may have

[16] *Castrique* v. *Imre* (1870), L.R. 4. H.L. 414; *Minna Craig Steamship Co.* v. *The Chartered Bank of India* [1897] 1 Q.B. 400; *The City of Mecca* (1879), 5 P.D. 28 (on appeal the decision was reversed on the grounds that the judgment was a judgment *in personam*. However, it does not alter the point of law regarding jurisdiction for *in rem* judgments — (1881), 6 P.D. 106); *S.S. Pacific Star* v. *Bank of America National Trust and Savings Association* [1965] Western Australia Reports, 159.

[17] *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641, see Viscount Haldane at pp. 652-653.

[18] Dicey & Morris, *op. cit.*, Rule 50.

[19] *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; *Re Riddell* (1888), 20 Q.B.D. 512, at p. 516; *Blohn* v. *Desser* [1962] 2 Q.B. 116.

[20] *Beatty* v. *Beatty* [1924] 1 K.B. 807; *Patton* v. *Reed* (1972), 30 D.L.R. (3d) 494; Lear v. Lear (1974), 51 D.L.R. (3d) 56 (Can.).

[21] *Scott* v. *Pilkington* (1862), 2 B & S 11 and *Colt Industries Inc.* v. *Sorlie* (No. 2) [1966] 1 W.L.R. 1287.

[22] Cheshire, (C.G.), *loc. cit.*, at p. 651.

been mistaken as to the facts of the dispute[23] or as to its own law.[24]

Third, in the case of a foreign judgment the judgment must if enforceable be for a definite sum of money. This is essential because the basis for enforcement of a foreign judgment is founded on a debt-obligation.[25] This must necessarily mean that no foreign judgment ordering specific performance or for the delivery of a specific chattel or for restitution of a chattel is enforceable.[26]

Provided that the foreign judgment creditor was able to establish to the satisfaction of the enforcing court that the three aforementioned ingredients are satisfied, the foreign judgment could well be enforced. The only defences that the foreign judgment debtor may raise against the enforcement of such a judgment are: Fraud,[27] public policy[28] and natural justice.[29] It is essential to note that in the common law, the enforcement of a foreign judgment is initiated by the institution of fresh legal proceedings. As this may present a somewhat onerous proposition to judgment creditors from friendly nations, the U.K. in 1933[30] and followed in Malaysia in 1958,[31] made enforcement of foreign judgments statutory.

The Reciprocal Enforcement of Judgments Act, 1958 of Malaysia

(i) *Some preliminary remarks*

The Act is in *para materia* with the U.K. Act of 1933. The pith and substance of the Act is one of reciprocity and where reciprocity is applicable, the foreign judgment may be enforced without instituting a fresh action, unlike what was required by the common law. The enforcement under the Act is by Registration under Part II of the Act. The oft-quoted dictum of Greer L.J. in *Yukon Consolidated Gold Corporation* v. *Clark*[32] concerning the need for the U.K. Act of 1933, may well rationalise the Malaysian legislation too. There Greer L.J. said:

> "It was fully appreciated by those who thought about foreign judgments, that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this

[23] *Henderson* v. *Henderson* (1844), 6 Q.B. 280 and *Ellis* v. *M'Henry* (1871), L.R. 6 C.P. 288.

[24] *Goddard* v. *Gray* (1870), L.R. 6 Q.B. 139.

[25] *Salder* v. *Robins* (1808), 1 Camp. 253 at 256.

[26] Cheshire, (C.G.), n. 22.

[27] *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310 and Cheshire, *op. cit.*, at pp. 659-661.

[28] *Re Macartney* [1921] 1 Ch. 522 and Cheshire, op. cit., at pp. 661-663.

[29] *Gray (Orse Formosa)* v. *Formosa* [1963] Probate 259, per Denning M.R. and Cheshire, *op. cit.*, at pp. 663-665.

[30] Foreign Judgments (Reciprocal Enforcement) Act 1933.

[31] Reciprocal Enforcement of Judgments Act, 1958, *Laws of Malaysia, Act No. 99 (Revised in 1978).*

[32] [1938] 2 K.B. 241.

country. Whereas we enforced foreign judgments by means of action in this country, foreign countries refused to enforce the judgments obtained in this country, and it was to deal with that situation that the Act of 1933 was passed. . .''[33]

By a combination of sections 3 and 9 of the Act, which empowers the Yang Di-Pertuan Agong to expand, contract, amend or limit the list of countries and the extent to which recognition should be given to their judgments, the Act closely conforms to the need for strict reciprocity of Malaysian judgments if judgments of foreign courts are to be enforced in Malaysia. Under section 9:

> ''If it appears to the Yang Di-Pertuan Agong that 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 the judgments of the superior courts of that country. . . Yang Di-Pertuan Agong by order. . .amend the First Schedule. . . to remove any inconsistency therewith. . .''

The First Schedule which contains a list of twelve jurisdictions in six commonwealth countries[34] and the colony of Hong Kong is not necessarily the complete list for any given point of time. The Schedule in addition indicates the judgments of which courts that the Malaysian courts are empowered to recognise and enforce. Except for Sri Lanka, in every case the judgments of the High Courts or the Supreme Courts are recognised and enforced. In Sri Lanka both the District court judgments and the High Court judgments are given recognition.

Following the common law rule only judgments rendered for the payment of a sum of money is recognised for enforcement. Where the judgment was in a foreign currency, ''the judgment shall be registered as if it were a judgment for such sum in Malaysian currency. . . on the basis of the rate of exchange prevailing at the date of the judgment of the original court. . .''[35] Registration under the Malaysian Act is permitted for judgments obtained in criminal proceedings too, provided that the judgment orders ''the payment of a sum of money in respect of compensation or damages to an injured party.''[36] In addition recognition and enforcement is allowed for arbitral awards provided that they are from a Commonwealth country recognised in the First Schedule and the award is such that it amounts to a judgment of the High Court of the country in question.[37] Where a judgment of a High Court had been appealed, the

[33] *Ibid.*, at p. 253.

[34] The United Kingdom, Singapore, New Zealand, Sri Lanka, India and Australia.

[35] fn. 31, S. 4(3).

[36] *Ibid.*, S. 2. This is similar to S. 11(1) of the U.K. Act. See n. 30.

[37] *Ibid.*

judgment on appeal will under the Act be considered as a judgment of the High Court for the purposes of recognition and enforcement.[38] The Act expressly excludes: matrimonial matters or causes, administration of estates of deceased persons, bankruptcies, winding up of companies, lunacy or guardianship of infants from within its purview, even if these were in the form of judgments for a fixed sum of money.[39] The point, therefore, must be made that for these and other matters recognition and enforcement must be left to the principles of International Law that have been adopted and applied by the Malaysian courts.

(ii) *Registration of judgments from reciprocating courts in reciprocating jurisdictions*

Reciprocating countries are chosen by the exercise of the sovereign power[40] of Malaysia by the Yang Di-Pertuan Agong. The list of reciprocating jurisdictions is kept under review by that sovereign authority and is subject to change depending on the extent to which reciprocation is awarded by the courts in question in the foreign jurisdiction, to Malaysian judgments. Besides this, the foreign judgment must have been delivered after the inclusion of the particular court of that jurisdiction in the First Schedule of the Malaysian Act.[41] Matters concerning the registration of judgments are concerned in Part II of the Malaysian Act[42] and is in *pari materia* with the U.K. Act of 1933.[43] These matters may be examined under three sub-headings.

(a) *What kinds of judgments would the Act permit registration?*

It is basic that the foreign judgment must be from the jurisdiction and the court in that jurisdiction which is listed in the First Schedule to the Act. In addition the judgment must be final and conclusive.[44] It is final and conclusive even when there is an appeal pending or the period available for appeal in the foreign jurisdiction had not lapsed. These matters are all co-terminous with the Common Law and have been considered at an early stage of this paper.[45] Further, the foreign judgment must be for a fixed sum of money which must not be a collection of revenue or tax or a fine or some other penalty.[46]

[38] *Ibid.*

[39] Ibid. This is similar to S. 11(2) of the U.K. Act — see n. 30.

[40] fn. 31, Ss. 3 and 9.

[41] fn. 31, S. 3(4).

[42] See n. 31.

[43] See n. 30.

[44] See n. 31, S. 3(3)(a).

[45] See n. 19-24 above.

[46] See n. 31, S. 3(3)(b).

That one sovereign shall not be the fiscal for another has been established since the 18th century. Lord Mansfield, in *Holman* v. *Johnson*[47] stated the rule in 1775 that one sovereign shall not be the tax collector for another. Of equal antiquity is the rule that "the penal laws of one country cannot be taken notice of in another."[48] The books on private International Law are replete with authorities[49] supporting these propositions.

(b) *What is the effect of Registration?*

The foreign judgment creditor may apply to have the judgment of the foreign court registered in the High Court of Malaysia. That application must be made within six months of judgment from the foreign court or within six months of judgment of any appeal court in the foreign jurisdiction which had heard the judgment in question on appeal.[50] The Act[51] empowers the High Court to make rules concerning the mode of proof of matters required to be established as a pre-requisite to the registration of a foreign judgment. *Inter alia*, the High Court may make rules providing for the service on the judgment debtor of notice of the registration, the method by which the registering court[52] may determine whether the judgment was enforceable at the jurisdiction where it was delivered and what interest was payable in the jurisdiction of the relevant foreign court.[53]

There are two basic prohibitions which the Act lays down against registration. These are the direct resultants of the "debt-obligation" principle which underlies the Common Law justifying its recognition and enforcement of foreign judgments. These two prohibitions are: (a) where the foreign judgment has been wholly satisfied. If the judgment had been partly satisfied then the portion that remains due may be registered. That by itself constitutes a 'debt-obligation' upon the foreign judgment debtor. (b) Where the foreign judgment can not be enforced by execution in the jurisdiction in which the judgment was rendered. Here too, the 'debt-obligation' would be negatived in the absence of which there is no basis for registering the

[47](1775), 1 Cowp. 341 at p. 343.

[48]*Folliott* v. *Ogden* (1789), 3 Term Rep. 726, at p. 733.

[49]Against the recognition and enforcement of foreign Revenue Laws see: *Government of India* v. *Taylor* [1955] A.C. 491; *Rossano* v. *Manufacturer's Life Insurance Co.* [1963] 2 Q.B. 352; *Brokaw* v. *Seatrain U.K., Ltd.*, [1971] 2 Q.B. 476; *Peter Buchanan* v. *Mc Vey* [1955] A.C. 516 n (Eire); *U.S.A.* v. *Harden* (1964), 41 D.L.R. (2d) 721. Against the recognition and enforcement of foreign penal laws see: *Huntington* v. *Attrill [1893] A.C. 150 (can-P.C.), Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140.

[50]See n. 31, S. 4(1).

[51]Reciprocal Enforcement of Judgments Act, Act No. 99, of Malaysia, 1958 (Revised — 1972).

[52]*Ibid.*, S. 2: "Registering Court — in relation to any judgment means the Court to which an application to register the judgment is made".

[53]Ibid., S. 11(1)(a) — (f).

foreign judgment. In both these instances, the registering court has been empowered to decline to register the foreign judgment.[54]

Once the judgment is registered, it shall have the same effect and would be subject to the rules of the registering Court, as if it had been delivered by that Court on the day of such registration.[55] The process for the enforcement of that judgment thereafter would follow the same steps as the Court would take in enforcing one of its own judgments. This is a notable difference and a departure from the Common Law in that the Common Law required a fresh judicial proceeding for the enforcement of a foreign judgment while under the statute its mere registration would suffice to set in motion the process leading to its enforcement.

The enforcement of such judgments may be delayed by order of the registering Court if an application had been made by any interested party to that Court to have the registration set aside.[56] In a separate section[57] of the Act, the grounds for such an application to have the registration set aside have been made statutory. Therefore the categories of reasons that the judgment debtor or any other interested party may proffer to have the registration set aside are closed and are limited by the statute.[58] Where an application for setting aside the registration is made, enforcement of the judgment shall be halted by order of the registering Court until the application to set aside has been determined.[59]

The registered judgment shall only be for a fixed sum of money.[60] which includes: the principal sum due plus interest charges until the date of registeration, allowed by the foreign court upon that sum and any reasonable expenses incurred which were incidental to registration including the costs incurred in obtaining a certified copy of the judgment from the original court as required by the Act.[61] It is normal that a judgment of a foreign Court will be in the currency of that Court.[62] However, the

[54] *Ibid.*, S. 4(1) (a) and (b).

[55] *Ibid.*, S. 4(2)(d).

[56] S. 5(1).

[57] *Ibid.*, S. 5.

[58] *Ibid.*, S. 4(2)(d) proviso. fn. 30, S. 2(2) proviso (U.K.). Accordingly a stay of execution will not be allowed on the grounds that an action is pending between the same parties and raising the same issues in the jurisdiction of the registering Court as this will not fall under S. 5 of the Act. See: *Ferdinand Wagner (a firm)* v. *Laubscher Bros. & Co. (a firm)* [1970] 2 Q.B. 313.

[59] *Ibid.*, S. 4(2)(d) proviso. Also see: fn. 30, S. 2(2) proviso (U.K.).

[60] "Fixed sum of money" has been judicially explained in *Sadler* v. *Robins* (1808), 1 Camp. 253, at p. 256. There a Court in Jamaica had judged the defendant liable to pay a sum of £3,670 1sh. 9¼d after deducting the full costs expended by the defendant subsequent to these being taxed by a master of the Court. It was held that until taxation the judgment did not constitute a "fixed some of money".

[61] See n. 52, s. 4(6).

[62] See Lord Simon in *Miliangos* v. *George Frank (Textiles)* [1976] A.C. 443 (H.L.), where the House of Lords for the first time departed from the traditional view that the judgment for a some of money

registering Court is required to register the judgment in the currency of the registering Court, in this case in Malaysian currency, "on the basis of the rate of exchange prevailing at the date of the judgment of the original court."[63] Although the accumulation of interest charges as from the date of the foreign judgment stops upon registering, the Act provides for the re-commencement of interest charges to run from the date of registration.[64] The latter will be linked to the rate of interest allowed by the registering Court which may well be different from that of the foreign Court.

The Malaysian Act has adopted from the U.K.,[65] what Cheshire characterises for the U.K. Act as an "innovation of outstanding importance".[66] That may be found in section 7 of the Malaysian Act which reads:

> "No proceedings for the recovery of a sum payable under a judgment of a superior Court, being a judgment to which this part applies, other than proceedings by way of registration of the judgment, shall be entertained by any Court in Malaysia."

This is a badly drafted section, somewhat convoluted and is a direct copy of section 6 of the U.K. Act. It means that no proceedings may be brought upon a foreign judgment which is registrable, so as to enforce the payment of the sum awarded by the foreign judgment, through a fresh proceeding in a Court of Law. The much contested question is whether the judgment creditor could commence an action before a Malaysian Court, *de novo*, on the original transaction. He may perhaps take this step if he considers that the award made in the Foreign Court as inadequate. Subjecting the section to a closer analysis it might become evident that the judgment creditor in the foreign Court may have a second bite at the apple; for the section merely prohitibts the foreign judgment being enforced through fresh proceedings and not the foreign cause of action being proceeded *de novo* through a fresh course of action. The defendants' recourse in such a circumstance is one of "oppressive and vexatious litigation" and have the writ set aside in his favour. There is no authority that determines the impact of section 7 upon the law of Malaysia. There is no authority that determines the effect of the corresponding section in the U.K. either.

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must always be in the currency of the jurisdiction in which the Court happens to sit. See also Cheshire, *loc. cit.*, pages 713-720.

[63] See n. 52, S. 4(3).

[64] *Ibid.*, S. 4(2)(c).

[65] See n. 30, s. 6. *In Re a Judgment Debtor (no. 2176 of 1938)*, [1938] Ch. 601.

[66] Cheshire, *loc. cit.*, p. 674.

(c) *What grounds does the Act provide for the setting aside of Registration?*

(i) *A survey of the proposed grounds*

The Act provides a number of grounds for the setting aside of the application to register a foreign judgment. Following the ancient equitable jurisdiction which the Common Law Courts adopted to stay execution, where an appeal is pending, the Act provides a similar power to the registering court. Under the Act the registering Court may "either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the Court to be reasonably sufficient to enable the applicant to take necessary steps to have the appeal disposed of by the competent tribunal."[67] Where the court sets aside the application instead of causing an adjournment, the judgment creditor may re-apply to have his judgment re-registered[68] after the appeal in question was heard, provided that it was unsuccessful.

Jurisdiction of the foreign court is fundamental to the power to register under the Act. Where the foreign Court had no jurisdiction, the registration of the foreign judgment may be set aside.[69] Jurisdiction is founded under the Act, exclusively according to the several grounds enumerated under S. 5(2). Those are the only grounds that the Act recognises for jurisdiction of a foreign Court for the purposes of registration of foreign judgments. However, even where jurisdiction is found under S. 5(2), the Act enumerates six reasons for setting aside the registration. These are adopted from the common law and therefore are co-terminus with common law authorities referred to at an earlier stage of this paper. These six reasons are: *First,*[70] that the judgment has been registered in error and it falls outside the purview of this Act[71] as enumerated in section 2. *Second,*[72] the defendant in the foreign Court, notwithstanding the service of process, did not receive such process in sufficient time to enable him to defend the proceedings *and* did not appear. The failure to appear is conjunctive and without which the application to set aside the registration would not succeed. If the defendant had appeared in Court despite the lack of opportunity to defend himself, the registration would not be set aside. *Third,*[73] the judgment was obtained by fraud. What is relevant is the proof that the foreign judgment was obtained by fraud. Fraud upon the pro-

[67] See n. 52, S. 6(1).

[68] See n. 52, S. 6(2).

[69] See n. 52, S. 5(1)(a)(ii).

[70] See n. 52, S. 5(1)(a)(i).

[71] Proceedings in connection with matrimonial matters, administration of estates of deceased persons, bankcruptcy proceedings, winding up of companies, lunacy or guardianship of infants.

[72] See n. 52, S. 5(1)(a)(iii).

[73] *Ibid.*, S. 5(1)(a)(iv).

cess of the Court abounds with authorities[74] and is applicable to set aside not only foreign judgments but also domestic judgments. *Fourth,*[75] that the enforcement of the judgment would be contrary to public policy. Here too, the Courts will apply the distinctive public policy of the forum and here too there is no difference between the common law concept of public policy and the concept under the Act. However unlike fraud, the courts adopt a different concept of public policy when seized with a matter having a foreign element[76] from when it is sitting solely as a domestic tribunal. In *Addison* v. *Brown*[77] the English Court did not think that an agreement to oust the jurisdiction of a foreign Court should be against the public policy of English Courts, although an agreement to oust the jurisdiction of an English Court would be. The point here is that English Courts take a more liberal view when the public policy involved is not concerning one of their own judgments but one of a foreign country.[78] *Fifth,*[79] that the applicant for registration is not the judgment creditor under the foreign judgment. *Sixth,*[80] that the foreign judgment concerns a matter which was *res judicata* in the foreign Court.

(ii) *Jurisdiction as the core-element for registration and de-registration*

Due to a recent judicial pronouncement,[81] jurisdiction has become a somewhat confusing element in the enforcement of foreign judgments in the common law world. Before dealing with that aspect of the problem, which indeed is the central issue concerning jurisdiction today, it is necessary to provide a general survey of the sections of the Act that deal with jurisdiction.

The Act categorically declares that the foreign court would have had no jurisdiction, had there been an enforceable express choice of jurisdiction to which exclusively the parties had agreed to submit which did not include the foreign Court in question.[82] This section may be supported by the decision in *The Eleftheria,*[83] where it was held that when the parties by agreement chose to submit to a particular jurisdiction, giving it exclusive jurisdiction in the matter in question, no other jurisdiction has the power

[74]Cheshire, *loc. cit.*, at pp. 659-663.

[75]*Ibid.*, S. 5(1)(a)(v).

[76]*Addison* v. *Brown* [1954] 2 All E.R. 213.

[77]*Ibid.*

[78]Cheshire, *loc. cit.*, at pp. 147-149 and 414-415.

[79]See n. 52, S. 5(1)(a)(vi).

[80]*Ibid.*, S. 5(b).

[81]*Henry* v. *Geoprosco International Ltd.*, [1976] Q.B. 726, (C.A.-Eng.) and see: Marasinghe, (M.L.), "A Case note on *Henry* v. *Geoprosco International*" in Vol. 23, *Mc Gill Law Journal*, (1977) pp., 118-124.

[82]See n. 52, S. 5(3)(b).

[83][1970] Probate 94.

to adjudicate on a dispute that arises from that particular matter. Further, the Act denies jurisdiction to the foreign Court where the judgment debtor was a person who was entitled to sovereign immunity under private international law and had not submitted to the foreign jurisdiction.[84]

In some countries, particularly in the U.K.[85] and in Canada[86] sovereign immunity is now governed by legislation. The two statutes in question are not a part of the private international law but are a part of the domestic law of the land. Upon a strict interpretation of the section the recognition of sovereign immunity is limited to that of in private international law. That would surely raise the whole debate as to whether the recognition must be considered upon a restrictivist view[87] or upon an absolutist view.[88] The former limits the immunity to *acta jure imperii* while the latter would allow immunity for both acts: in *jure imperii* and *acta jure gastionis*.[89] The difference between the two approaches leave a significant gap. The restrictivisits limits the defence to diplomatic functions while the absolutists expand the defence to include non-diplomatic and commercial functions too. Therefore it is important to determine which of these two approaches the Malaysian Courts would take when applying this aspect of jurisdiction of a foreign court. Historically, it may be established that the view taken by jurists and the Courts until the middle of the 19th century was the restrictivist view. It was an aberration based upon a misinterpretation of a judgment, that caused the emphasis of the absolutist view. It is, therefore, suggested that Malaysian Courts should avoid the aberration and follow the restrictivist view which has its roots in sound theory and deep antiquity. These matters have been considered in an earlier writing.[90]

Aside from these preliminary matters, the Act proceeds to enumerate in several sub-sections an extensive list of grounds upon which the foreign Court might find its jurisdiction. Those grounds are exclusively for the purposes of this Act and therefore comprise of the only grounds upon which foreign judgments may satisfy the jurisdictional requirements for registration.

As for foreign judgments *in rem* the Act follows the Common Law in so far as the need to find jurisdiction for the foreign Court. The immovable property in question or the movable property which is the subject of the *in rem* proceedings, must have been situated within the foreign

[84] See n. 52, S. 5(3)(c).

[85] The State Immunity Act, 1978, Chap. 33 (U.K.).

[86] The State Immunity Act, 1980-81, Chap S-19 (Canada).

[87] *The Philippine Admiral* [1977] A.C. 373 (P.C.); Denning M.R. in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379 at p. 422 (H.L.).

[88] *The Cristina* [1938] A.C. 485 at p. 490 (H.L.).

[89] Marasinghe, (M.L.), "Reassessment of Sovereign Immunity" in Vol. 9, *Ottawa Law Review*, (1977), at pp. 474-504.

[90] *Ibid.*

jurisdiction.[91] This is the same as what was required under the common law for the recognition and enforcement of foreign judgments. This has been discussed earlier. Under a salvor clause[92] the foreign court is deemed to have jurisdiction if its jurisdiction is recognised on some other basis or for some other reason by the Malaysian Courts. This appears to mean that the conditions upon which jurisdiction for such actions is recognised is left by the Statute to the judicial decision making process. Namely, the Courts.

The Act provides an elaborate list of conditions for finding jurisdiction for foreign judgments *in personam*. The foreign Court is deemed to have jurisdiction where the foreign judgment creditor was the plaintiff in the foreign Court or had counter-claimed at the foreign proceedings.[93] Equally, where the judgment creditor had consented to submit to the foreign Court for the proceedings in question and had expressed that consent prior to the commencement of such action, the foreign Court shall be a court having jurisdiction under this Act.[94] Again, where the judgment debtor was resident at the jurisdiction when the proceedings were instituted or being a body corporate had its principle place of business within the foreign jurisdiction, the foreign court in question would be recognised as having jurisdiction for the purposes of the Act in both such instances.[95] Similarly, where the judgment debtor was neither a body corporate nor a resident in the foreign jurisdiction, but merely had an office or a place of business within it, the foreign court would be found to have had jurisdiction provided that the transaction in question which is the subject of the judgment was transacted through or at the office.[96]

Finally, S. 5(2)(a)(i) reads:

> "if the judgment debtor, being a defendant in the original Court, submitted to the jurisdiction of that Court by voluntarily appearing in the 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."

the foreign Court shall have jurisdiction.

This section is in *pari materiae* with s. 4(2)(a)(i) of the *Foreign Judgment (Reciprocal Enforcement) Act*, 1933[97] of the United Kingdom. Recent case law has raised a legal conundrum concerning the effect of a 'voluntary appearance to contest the jurisdiction of a foreign Court' This will be examined in detail in the next part of this paper.

[91] See n. 52, S. 5(2)(b). See n. 30, S. 4(2)(b) (U.K.).

[92] *Ibid.*, S. 5(2)(c). See *ibid.*, S. 4(2)(c) (U.K.).

[93] *Ibid.*, S. 5(2)(a)(ii). See *ibid.*, S. 4(2)(a)(ii) (U.K.).

[94] *Ibid.*, S. 5(2)(a)(iii). See *ibid.*, S. 4(2)(a)(iii) (U.K.).

[95] *Ibid.*, S. 5(2)(a)(iv) See *ibid.*, S4(2)(a)(iv) (U.K.).

[96] *Ibid.*, S. 5(2)(a)(v). See *ibid.*, S. 4(2)(a)(v) (U.K.).

[97] See n. 30.

(d) *The effect of a voluntary appearance to contest the jurisdiction of the foreign court*

The effect of a voluntary appearance in a foreign court to contest its jurisdiction was considered to have been settled as early as in 1915 in *Harris* v. *Taylor*[98]. There the plaintiff sued the defendant in the Isle of Man. The defendant was neither domiciled nor resident there. Therefore leave of Court was sought and was granted to serve the writ upon him out of jurisdiction. The defendant appeared before the Court in the Isle of Man, conditionally, through counsel, to have the proceedings stopped on three grounds. *First,* that the Manx High Court had not authorized the service of the writ out of jurisdiction; *second,* that no cause of action had arisen within the jurisdiction and *third,* that he was not domiciled within the jurisdiction. This application to have the proceedings stopped was tantamount to a contest of jurisdiction. The Manx Court dismissed the application holding that it had jurisdiction to entertain the proceedings. The defendant, thereafter took no part in the proceedings. Judgment was nevertheless given against him for £800. The present proceedings were instituted in England by the plaintiff to have that judgment enforced. As there was no statutory process of registration for the enforcement of a foreign judgment until 1933, the plaintiff was compelled to institute fresh proceedings as required by the common law. The defendant raised the defence of non-submission to jurisdiction. The crisp issue was the effect of voluntary appearance to contest jurisdiction. Would such an appearance, to protest jurisdiction amount to a submission to jurisdiction? The Court of Appeal thought it would. *Harris* v. *Taylor* therefore laid down the rule that an appearance limited to a protest of jurisdiction was sufficient submission to the foreign Court.

The decision in *Harris* v. *Taylor* has been the subject of much criticism. Academics have taken the view that despite *Harris* v. *Taylor* a person does not voluntarily submit to the jurisdiction of a foreign court when his appearance before it is for the limited purpose of protesting jurisdiction. As Professor Cheshire wrote in 1935.

> On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot properly be said to constitute submission.[99]

Professor Chesire maintained, that as a matter of judicial policy, *Harris* v. *Taylor* was wrong in denying the defendant the right to protest the jurisdiction of the court without involving himself in litigation on the merits.[100] Further, he also attempted to undermine the authority of *Harris* v. *Taylor:*

[98] [1915] 2 K.B. 580.

[99] Private International Law, 1st Edn., (1935), p. 494.

[100] *Ibid.*, at pp. 495-496.

> It is submitted, though without conviction, that there was one fact in the proceedings which prevents *Harris* v. *Taylor* from being regarded as a decisive authority for the crude proposition that every form of protest against jurisdiction is sufficient to render the defendant amenable to the Court. This was that the defendant did more than protest the jurisdiction, for he expressly pleaded that there was no cause of action against him according to Manx law. This would appear to be an attack on the merits of the plaintiff's claim, and therefore in itself a sufficiently strong reason for preventing a denial of submission.[101]

In subsequent editions, both Cheshire and his editors have maintained this stance. In the ninth edition North,[102] having first referred to *Harris* v. *Taylor* as a "troublesome case",[103] proceeded to state the rule in the following way:

> Despite this decision [Harris v. Taylor], however, it can be said with some assurance that to protest is not necessarily to submit.[104]

Rule 180 of the current edition of Dicey's *Conflict of Laws* has remained unchanged throughout nine editions:

> Subject to the Exceptions hereinafter mentioned, a court of a foreign country has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in England in the following Cases:
>
> *First Case* — If the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property or theatened with seizure, in the proceedings or *of contesting the jurisdiction* of that court.[105]

Thus, until 1951, both Chesire and Dicey relied on a combination of slender judicial authority[106] and their own academic standing to meet and refute the view expressed by Buckley L.J. in *Harris* v. *Taylor*. The judgment of Denning L.J. in *In re Dulles' Settlement (No. 2)* was, therefore, of the greatest significance to the distinguished authors. The dispute in that case concerned the wardship of an infant[107] and as a part of the proceedings,

[101] *Ibid.*, at p. 496.

[102] P.M. North, Fellow of Kebel College, Oxford.

[103] Cheshire, Private International Law, 9th Edn. (1974) at p. 638.

[104] *Ibid.*

[105] Conflict of Laws, 9th Edn., (1973) at p. 993.

[106] *Tallack* v. *Tallack Broekema* [1927] Probate 211, at p. 222 per Lord Merrivale.

[107] The facts are found in the earlier proceedings concerning this dispute reported as *In re Dulles Settlement. Dulles* v. *Vidler* [1951] 1 Ch. 265. Roskill L.J. gives a summary of the facts in his judgment in *Henry* v. *Geoprosco* [1976] 1 Q.B. 726 at pp. 742-43.

the mother sought an order for the infant's maintenance. The infant's father, an American citizen resident outside the jurisdiction of the English Court, instructed counsel to appear for the limited purpose of opposing the mother's application under the *Guardianship of Infants' Act*, 1925.[108] The father lost his claim to be appointed the infant's guardian and the child was awarded to the mother. The Court proceeded to hear her claim for the infant's maintenance but the father took no further part in the proceedings. At the conclusion of the hearing, Romer J. refused to make an order for maintenance on the grounds that the father had not submitted to the jurisdiction of the Court with reference to the claim for maintenance. The mother appealed to the Divisional Court[109] of the Queen's Bench on behalf of the infant and the appeal was heard by two judges, Sir Raymond Evershed M.R. and Denning L.J. It was in the course of affirming the decision of Romer J., and dismissing the appeal that Denning L.J. wrote the passage which later came to be considered as the cornerstone of jurisdiction in private international law.

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.[110]

Denning L.J. distinguished *Harris* v. *Taylor* which he found to be an authority on *res judicata* and not on jurisdiction,[111] so strengthening the position taken by Cheshire and Dicey. The impact of this twist to *Harris* v. *Taylor* was felt across the Atlantic. The Canadian authors adopted this line of authority;[112] Williston and Rolls agreed that *In Re Dulles' Settlement (No. 2)* expressed "the more sensible view".[113] After waiting patiently for a quarter of a century the Court of Appeal seized its opportunity to correct what it thought was an aberration of the Common Law, and chastise Dicey, Cheshire and anyone else who had been preaching a heresey over the past few decades. The opportunity arrived in 1976 when the Court

[108] 15 and 16 Geo. V, C. 45.

[109] The authority of a decision of the Court of Appeal, a branch of the Queen's Bench, is higher than a decision of the Divisional Court of the Queen's Bench. Two judges preside in the latter; three preside in the former.

[110] [1951] Ch. 842, at p. 850.

[111] *Ibid.*, at p. 850.

[112] See Castel, (J.), *Canadian Conflict of Laws*, (1975), at p. 224 and the Ontario Rules of Practice, 1970, Reg. 545.

[113] The Law of Civil Procedure, Vol. I, 1970, pp. 21-22.

of Appeal had before them *Henry* v. *Geoprosco International,*[114] a case with a Canadian connection.

In *Henry* v. *Geoprosco,*[115] the plaintiff-appellant, on 27th May 1970 entered into an agreement in writing with the defendant-respondents in Calgary, Alberta. The defendants were a limited liability company, registered in Jersey in the Channel Islands, with their head office in London, England. Under the written agreement, the defendants had agreed to employ the plaintiff as a member of an oil well work-over party in the Trucial States. Clause 13(b) of the agreement was an arbitration clause, and by Clause 14 the parties subjected the agreement to English law. A few days after the agreement was signed, the plaintiff assumed his duties in the Trucial States, but on September 22nd 1970 the defendants summarily dismissed him indicating that they had reasons to justify their actions. As a result of this dismissal, the plaintiff instituted an action in the Alberta Supreme Court claiming a sum of $42,502.22 by way of damages for wrongful dismissal. The plaintiff contended that the Alberta Court had jurisdiction on the grounds that the contract was in fact made in Calgary. Accordingly, Alberta was claimed to be the *loci contractus.*

The defendants were advised in England to retain counsel in Alberta for the limited purpose of contesting the claim of jurisdiction made by the plaintiff before the Supreme Court of Alberta. Both the Trial and the Appellate Divisions held against the defendants on the question of jurisdiction; at both levels, the Court decided in favour of the claim of jurisdiction, on the ground that Alberta was the *loci contractus.*

The Supreme Court of Alberta then proceeded to hear the case on its merits, and as the defendants took no part in these procedings, the Court awarded $41,879 in damages by default.

In order to have the Alberta judgment enforced, the plaintiff went before the Queen's Bench Division in England.[116] In these proceedings the defendants raised the only defence open to them, namely, that they had not voluntarily submitted to the jurisdiction of the Alberta courts. Relying on Cheshire,[117] Dicey[118] and Denning L.J (as he then was) in *In re Dulles' Settlement (No. 2)*[119] the defendants argued that an appearance before a court to protest jurisdiction did not in any way amount to a submission to jurisdiction. Adopting this argument, Willis J. at first instance gave judgment for the defendants:

[114][1976] 1 Q.B. 726.

[115][1976] 1 Q.B. 726 (C.A. — Eng). See Collier (1975) 34 Camb. L.J. 219; Solomons (1976) 25 Int. & Comp. L.Q. 665; Marasinghe (1977) 23 McGill L.J. 118.

[116][1974] 2 Lloyd's Rep. 536.

[117]*Private International Law,* 9th Edn., (1974), 638-36. At the time of the hearing the 10th Edn., was not available to the Court.

[118]*Conflict of Laws,* 9th Edn., (1973), Rule 180 and pp. 996-97. At the time of the hearing the 10th Edn., was not available to the Court.

[119][1951] Ch. 842.

> The real issue between the parties on the merits was whether the defendants had committed a breach of contract and wrongfully dismissed the plaintiff in circumstances which entitled him to damages, or whether it was the plaintiff who was in breach of contract in circumstances which justified the defendants in dismissing him. This issue was never before the Albertan Court in document or argument. The defendants' case on the merits went by default, and it is not, I think, in any way to be assumed that by taking no further part in the proceedings after failing to secure a stay they were conceding the case on the merits. They clearly wanted to contest the claim not in the Albertan Court but by arbitration, and were urging the Alberta Court not to assume jurisdiction. What happened seems to me to be within the words of Lord Justice Denning, in the well-known passage in *Re Dulles'*:
>
> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case not only on the jurisdiction but also on the merits he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits, and he cannot be allowed at one and the same time to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction. . ." Their sole object, to my mind, was to protest against the jurisdiction, and, by taking them, the defendants did not voluntarily submit to the jurisdiction of the Albertan Courts.[120]

The plaintiff appealed to the Court of Appeal. In a unanimous decision of the Court, the plaintiff's appeal was allowed.[121] This decision fundamentally altered that part of private International Law which governs voluntary submission to jurisdiction in a proceeding before a foreign Court. In their judgment, the judges not only overruled Denning L.J. *In Re Dulles* but also both Cheshire and Dicey. In doing so they re-established the authority of *Harris* v. *Taylor* and expounded the law relating to voluntary submission for the purposes of lending jurisdiction to a foreign Court.

Having first rejected Denning L.J. *In re Dulles,* the Court expressed their unreserved acceptance[122] of Buckley L.J.'s reasoning in *Harris* v. *Taylor* some sixty years earlier. As for Cheshire and Dicey, Roskill L.J. had the following comment to make:

[120] See n. 116, at p. 539.

[121] The unanimous decision of the Court, comprised of Lord Justice Cairns, Roskill and Browne and as written by Roskill L.J.

[122] [1976] 1 Q.B. 726 at p. 746.

> "We need hardly say that we have considered with the utmost care and respect the views expressed by the editors of Dicey's *Conflict of Laws* in successive editions of that work, by way of criticism of *Harris* v. *Taylor*, culminating in the views expressed in the 9th ed. (1973) to which we have already referred, as well as the views of Professor Cheshire in various editions of *Cheshire's Private International Law*. But however distinguished the authors and editors of these textbooks the law must be taken to be as laid down by the courts, however much their decisions may be criticized by writers of such great distinction."[123]

The Court of Appeal found that for almost 150 years,[124] beginning with *Buchanan* v. *Rucker*[125] in 1808, the law was as set forth by Buckley L.J. in the following passage from *Harris* v. *Taylor:*

> "When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court, and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he was bound by it and it became his duty to appear in the action and as he chose not to appear and to defend the action he must abide by the consequence which follow from his not having done so."[126]

Having thus established the respectability and the antiquity of the rule, the Court of Appeal "with the most profound respect"[127] for Denning, proceeded to refute his view[128] in *In re Dulles' Settlement (No. 2)*. Of the several reasons which the Court advanced[129] to support their overruling Denning, there were three which could be considered basic. First, the Court thought that Denning had misunderstood the facts of *Harris* v. *Taylor* in concluding that it was not an authority for jurisdiction but for *res judicata*.

[123] *Ibid.*

[124] *Ibid.*, at pp. 739-742.

[125] (1808) 9 East 192.

[126] [1915] 2 K.B. 580, at pp. 587-588.

[127] See n. 122, at p. 745.

[128] See n. 119, at p. 850.

[129] See n. 122, at pp. 744-45.

It was on this ground that Denning L.J. distinguished *Harris* v. *Taylor* from the Dulles case). Secondly, it was implicit that the Court thought that the portion of Denning's judgment in which he distinguished *Harris* v. *Taylor* was, in any event, *obiter,* thus not warranting the attention it had received from the academics and from the Bench. Thirdly, the Court noted that *In re Dulles' Settlement* the Bench was comprised by two judges; such a judgment is of no authority when it conflicts with a previous decision of the Court of Appeal. In any event, the Court of Appeal possessed the power to overrule *In re Dulles' Settlement* and this the Court did without hesitation.

Having thus re-established the rule espoused by Buckley L.J.[130] Roskill L.J., for the Court, formulated the law on submission to a foreign jurisdiction as follows:

> "Taking this view of the decided cases which bind this court, it seems to us that they justify at least the following three propositions: (1) The English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him. (2) English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court. (3) The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law."[131]

This decision, in refuting the views of Cheshire and Dicey naturally affects Canada and other Commonwealth countries where the courts closely follow these authorities in deciding issues of Private International Law. In the past, the courts have held that a person may protest the jurisdiction of a foreign court without thereby submitting to its jurisdiction. Henceforth, this issue will have to be resolved differently since the defendant may be considered to have submitted to the foreign court's jurisdiction. As a result of *Henry* v. *Geoprosco International,* subsequent decisions in Commonwealth courts in this area of law will, in all likelihood, undergo a radical change and the standard works on Private International Law will require rewriting. Until the House of Lords re-examines the authorities, courts and academics alike must take cognizance of the three rules laid down by Roskill L.J.[132]. For "the law must be taken to be as laid down by the courts,

[130] See n. 126, at pp. 587-588.

[131] See n. 122, at pp. 746-747.

[132] *Ibid.* Roskill L.J. has recently been followed by the Ontario Court of Appeal in Clinton v. Ford (1982) 137 D.L.R. (3d) 281.

however much their decisions may be critized by writers of. . . great distinction."[133]

Reflections

(i) *The Response of Cheshire*

The present editor of Chesire[134] (in line with the posture taken by Professor Cheshire throughout his academic life towards *Harris* v. *Taylor*), has accepted[135] the Court of Appeal in *Henry* v. *Geoprosco* with many reservations. In a preface to a well articulated piece of criticism[136] Dr. North wrote:

> "Both in what it did, and did not, decide this decision has caused grave anxiety to those involved in international business. If they appear before a foreign Court merely to protest against its jurisdiction, they now do not know whether, by so doing, they put their English assets at risk."[137]

Dr. North takes the view that *Henry* v. *Geoprosco* was an authority only for the proposition that: a voluntary appearance before the foreign Court to invite that Court to exercise its discretion not to exercise their jurisdiction is submission. Therefore, he suggests, that the Court left open the question as to whether a voluntary appearance to deny the foreign Courts' jurisdiction by protesting its jurisdication amounted to a submission. Having made that distinction Dr. North proceeded to conclude that:

> "This can not be sensible. A distinction between a protest as to the existence of jurisdiction and the exercise of jurisdiction is easy to see but difficult to justify. . . . The distinction which ought to be drawn is between contesting the existence or exercise of the jurisdiction of the foreign Court, whether by conditional appearance or otherwise, and contesting the merits of the plaintiff's claim. Whilest it is a line that may not always be easy to draw, most cases will clearly fall on one side or the other. It is better than a line which bisects jurisdictional issues."[138]

The hub of Dr. North's criticism[139] was that the Court of Appeal drew a distinction between two slender stripes of argument. Namely, between an appearance to invite the Court to exercise its discretion and the defendant's

[133] *Ibid.*, 746.

[134] Dr. Peter North, Fellow of Keble College, Oxford and a Law Commissioner for England and Wales is the editor for the tenth edition of Dr. Cheshire's Private International Law. At the time of the hearing of the appeal before the Court of Appeal, Dr. North had edited the 9th edition.

[135] Cheshire & North, *Private International Law*, 10th Edn., 1979, at pp. 638-641.

[136] *Ibid.*, at p. 640.

[137] *Ibid.*

[138] *Ibid.*

[139] *Ibid.*

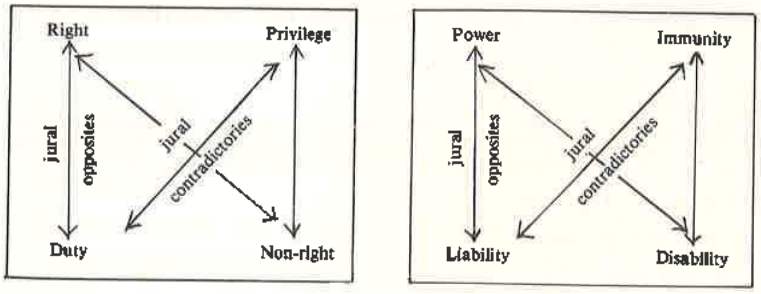
appearance to protest, that is to deny, the Court's jurisdiction. The latter, he argues will not be submission under *Henry* while the former will be. Such a distinction, Dr. North maintains is quite wrong and supports an earlier comment[140] of the decision that says that "it does not provide a rational basis for a rule of Private International Law."

The distinction drawn here is bottomed by the suggestion that the distinction is too subtle and serves no practical purpose. It is also been suggested that it provides no real basis for a rule of Private International Law. However, the distinction between 'an invitation to exercise discretion' and 'a denial of the existence of a basis for exercising that discretion' is a distinction between the Hohfeldian:[141] 'Immunity — disability' relationship and a 'privilege — non right' relationship. When the Court is invited to exercise its discretion, the applicant admits that there is a basic 'propositional — position' that binds him and what he is calling for is for the Court to free him from such binds due to reasons he may submit in support of his application. An infant who claims an immunity from action because he is both an infant and that the consideration concerns non-necessaries is making a similar claim from the Court. While there is a 'propositional-position' in contract law that binds him to the transaction, what the infant in effect is suggesting is that, due to his (her) infancy and the consideration being a non-necessary that he should be declared immune from the plaintiff's action. If the court holds that the immunity in the Hofeldian sense is established then the action against the infant is dismissed. If the Court holds against, then the Court shall claim that the Infant could be impleaded despite the Common Law position regarding infancy.

That is not so in the case of 'privilege — Non right' relationship. There the applicant denies the existece of a 'propositional position' which the law provides to bind him. There the applicant denies a right in the Court to implead him. In such an event, the Court's refusal to accept the applicant's argument merely establishes what the applicant had ventured to deny.

[140] *Ibid.*, see n. 2.

[141] Hohfeld, Fundamental Legal Conceptions (Edt. by Cook), Yale. See also Dias, (R.M.), Jurisprudence, Chap. 2. Glanville Williams reduced Hohfeld's legal analysis into the following exposition when he was the editor of Salmond, *Jurisprudence* (11th edn.), p. 278.



The applicant at that point acquires a choice for the first time to submit or not, to the jurisdiction of the Court. Here the applicant does not begin from a position where he must conceed jurisdiction like when he invites the Court to exercise its discretion.

The distinction between the two, is that in the 'Immunity — disability' relationship one begins by conceeding the existence of a 'propositional position' and request the Court to exercise its discretion to free the applicant from the binds of that position. If the Court were to refuse that request then the applicant is bound by the propositional-position which the applicant had conceeded to, from the moment he makes his application to have the discretion exercised in his favour. The propositional-position concerned here is one of jurisdiction. In contrast in the 'privilege-non right' relationship one begins by denying such a 'propositional-position'. By disallowing the application, what the Court does is to declare its existence. From that point onwards, the applicant has the option to conceed jurisdiction and submit or withdraw from any further proceedings. In the former, the applicant has no such option for he conceeds to the availability of jurisdiction from the moment he invites the Court to exercise its discretion.

Despite what Dr. North says, the case law[142] suggests that an invitation to exercise the Court's discretion to free the applicant of the Court's jurisdiction and a mere denial of that jurisdiction is as different as night and day. The analysis of these two 'propositional-positions' within the Hohfeldian scheme of legal analysis should provide a graphic exposition of this difference.

(ii) *Common Law* vs *Statute Law*

One of the difficult questions that arise out of the Act is its inter-relations with the Common Law. The most recent exposition of this inter-relationship was Roskill L.J.'s judgment in *Henry* v. *Geoprosco* where he said:

> "Accepting for present purposes that this Act reflects the common law position, it does not declare what the relevant common law was before the Act. That must be ascertained from the relevant decided cases and not from the Act itself. One cannot ascertain what the Common Law is by arguing backwards from the provisions of the Act."[143]

The Common Law bases for jurisdiction were those that were laid down by Bukley L.J. in *Emanuel* v. *Symon*[144] to which reference has already been made.[145] In a compendium those bases may be described as resting

[142]Dias, *ibid.*, Chap. 2. See also: *Nash* v. *Inman* [1909] 2 K.B. 1, Buckley L.J. supports an 'Immunity-Disability' relationship for an Infant's liability (*ibid.*, at p. 12) while Fletcher-Moulton L.J. supports a 'privilege-non right' relationship to explain an Infant's Contractual liability (*ibid.*, at p. 8).

[143][1975] 2 All E.R. at p. 722.

[144][1908] 1 K.B. at p. 309.

[145]See n. 12 above.

on submission and residence. The Act provides submission, residence and in addition having an office or place of business within the jurisdiction. One of the key questions that may be raised is whether the increased conspectus for jurisdiction which the Act provides should influence the Common Law to broaden its own grounds for recognition. Cheshire[146] suggests that the broader parameters prescribed for jurisdiction by the Act should influence the Common Law. But authority is against him.

The Act, however, is clear in its conclusiveness that the grounds for jurisdiction stated thereunder (S. 5(2)) is exclusive for the purposes of the Act. The Act has a narrow ambit of application, for it applies only to judgments obtained in jurisdictions mentioned in the First Schedule of the Act. Judgments obtained in jurisdictions not included under that schedule must necessarily fall to be recognised and enforced under the common law. To that extent the clarification and the re-statement of the common law provided by the Court of Appeal in *Henry* v. *Geoprosco* should apply to those foreign judgments that do not qualify to be registered and enforced under the Act.

(iv) *The Malaysian Position*

The enforcement of foreign judgments is governed by the Reciprocal Enforcement of Judgment Act[147] of Malaysia. As it was mentioned in the previous section, those jurisdictions that have not been included in the First Schedule of the Act must rely on the Common Law to have their judgments enforced in Malaysia. The jurisdictional basis of a foreign Court that would justify the enforcement of such judgments must be founded basically on Buckley L.J.'s *dicta* in *Emanuel* v. *Symon.*[148] That provides submission and residence. Submission was explained by the same Buckley L.J. in *Harris* v. *Taylor*[149] which has now been re-stated and re-affirmed by Roskill L.J. in *Henry* v. *Geoprosco.*[150] The temporary departure from the common law by Denning M.R. in *In re Dulles*[151] has been terminated and the ancient common law position has now been re-established.

Under section 3(1) of the Civil Law Act[152] of Malaysia, the Common Law of England as of a prescribed date[153] has been adopted for application by Malaysian courts. The aforementioned departure from the Com-

[146]Cheshire & North, *Private International Law*, 10th Edn., 1979.

[147]Act No. 99, Revised in 1972.

[148]See n. 12 above.

[149][1915] 2 K.B. 580.

[150]See n. 143.

[151][1951] Ch. 842.

[152]Civil Law Act, of 1956, *Laws of Malaysia Act No. 67* (Revised in 1972).

[153]The dates of reception of the English Law: West Malaysia (7/4/1956) — *ibid.*, S. 3(1)(a); Sabah (1/12/1951) — *ibid.*, S. 3(1)(b); Sarawak (12/12/1940) — *ibid.*, S. 3(1)(c).

mon Law position by Denning M.R. in *In re Dulles* will not have any effect on the Malaysian Law. For the Common Law is discovered by the Courts.[154] What Roskill L.J. did was to correct Denning M.R. and to restate the Common Law, as it had appeared to the Court, over a period of 150 years.[156]

Conclusion

Cheshire is correct in pointing out that Roskill L.J. did draw a distinction between 'an appearance to invite the Courts to exercise its discretion not to exercise jurisdiction' and 'an appearance to protest jurisdiction'. Having drawn that distinction the Court of Appeal did then go an to say that it was not deciding on the latter position but limiting their judgment to the former.[157] However, Roskill L.J. did indicate what kind of protest of jurisdiction would amount to a voluntary submission in this way:

> We therefore say no more than that we are not deciding that an appearance solely to protest against the jurisdiction is, without more, a voluntary submission. But we do think that the authorities compel this Court to say that if such a protest (for example) takes the form of, or is coupled with, what in England would be a conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign Court.[158]

This passage in the Malaysian context applies to the interpretation of S. 5(2)(a)(i) of the Act,[159] which deals with an appearance for the purposes of "contesting the jurisdiction of that Court."

As mentioned earlier, it is, however, incorrect to suggest that there is no difference between an 'invitation to exercise discretion' and an appearance 'to protest jurisdiction'. There indeed is a distinction which is both rational and justifiable. In the Malaysian context the law relating to an 'invitation to exercise discretion' is relevant to foreign judgments where their enforcement is sought before the Malaysian Courts under the Common Law rules because they do not fall under the Malaysian Act. The law relating to 'a protest of jurisdiction' however is relevant to all foreign

[154] *Heydon's case* (1584) 3 Co. Rep. 7 b. Lloyd, (D), *An Introduction* to Jurisprudence, 4th Edn., Chap. 11.

[155] *Magor and St. Mellons R.D.C.* v. *Newport Corporation* [1952] A.C. 589, and Lloyd, *loc. cit.*, and Dias, (R.W.M.), Jurisprudence, 4th Edn., Chaps. 6 and 7.

[156] See n. 143, at p. 711 where Roskill L.J. traces the history from *Buchanan* v. *Rucker* (1808) 9 East 192.

[157] [1975] 2 All E.R., at pp. 719-720.

[158] *Ibid.*

[159] See n. 31.

judgments whether they are enforceable under the Act or under the Common Law. For both, the Statute Law and the Common Law of Malaysia recognise 'protest of jurisdiction' as an element in the equation for enforcement of a foreign judgment. Needless to say that these observations apply to all Commonwealth jurisdictions, that follow the English Common Law and The Foreign Judgments (Reciprocal Enforcement) Act, 1933 of the U.K.

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