

Malaysia

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1. What are the basic criteria for the courts of your jurisdiction to allow enforcement of a foreign judgment?

The basic criteria for enforcing a foreign judgment depends on the jurisdiction from which the judgment is issued.

If the jurisdiction has a reciprocal arrangement with Malaysia, the provisions of the Malaysian Reciprocal Enforcement of Judgments Act 1958 (REJA 1958) apply. If the jurisdiction does not have a reciprocal arrangement, common law principles are applied in determining whether a judgment issued from such a jurisdiction is enforceable in Malaysia.

Enforcement of foreign judgments under the REJA 1958

Judgments of foreign courts listed in the First Schedule of REJA 1958 may be directly registered and enforced in Malaysia. The applicable countries include United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India (certain states are excluded), and Brunei (Reciprocating Countries). The following requirements must be met:

- the foreign judgment must be final and conclusive judgment as between the parties (s 3(3)(a) of the REJA 1958);
- the foreign judgment must be a monetary judgment and the sum payable is not in respect of taxes or other similar charges or in respect of a fine or penalty (s 3(3)(b) of the REJA 1958); and
- the judgment is registered in Malaysia in accordance with the procedure set out in section 4 of the REJA 1958.

A party who wishes to enforce a foreign judgment under REJA 1958 must first apply to the High Court to register the judgment. This application must be filed within six years of the date of the foreign judgment, or within six years of the date of the last judgment where there have been proceedings by way of appeal against the judgment.

Typically, the registration of a foreign judgment under REJA 1958 involves the filing of an originating summons supported by an affidavit. The application must exhibit a duly verified/certified/authenticated copy of the foreign judgment together with a certified translation if the foreign judgment is not in the English language. The translation must be certified by a notary public or authenticated by an affidavit.

The merits of a foreign judgment will not be considered in the application for registration.

A judgment, once registered, has the same effect as if it were a judgment originally granted by the High Court, namely that:

- enforcement/execution proceedings may be taken on a registered judgment;
- the sum of the registered judgment shall carry interest;
- the registering court shall have the powers to levy execution on a registered judgment.

The party against whom a foreign judgment has been registered may apply to set aside the registered judgment, under section 5 of the REJA 1958, within a limited time period, on the following limited grounds:

- the judgment is not applicable under REJA 1958 or was registered in contravention of the requirements under REJA 1958;
- the original court had no jurisdiction in the circumstances of the case;
- the defendant in the original proceedings did not receive notice of the said proceedings in sufficient time to enable them to defend the proceedings and therefore, did not appear;
- the foreign judgment was obtained by fraud;
- the enforcement of the foreign judgment would be contrary to public policy in Malaysia; or
- the rights under the foreign judgment are not vested in the person by whom the application for registration was made.

Enforcement of foreign judgments under the common law rule

Where the judgment originates from a non-Reciprocating Country, recognition and enforcement of the foreign judgment is effected through the initiation of a fresh suit in court to enforce such judgment.

An action on the judgment must be commenced by way of a writ action or an originating summons (together with an affidavit in support). Thereafter, the plaintiff may apply for a summary judgment, in reliance on the foreign judgment, or seek an order in terms of its application at the hearing of the originating summons.

Considerations to be taken by the Malaysian Court to recognise and enforce a foreign judgment under the common law are whether:

- the foreign judgment is a final and conclusive judgment;
- the foreign judgment is for payment of a specific sum;
- the foreign court has jurisdiction which is in accord with the private international law of Malaysia; and
- there is any defence to its recognition.

	<p>The defences that are available to a defendant opposing the recognition of a foreign judgment under common law are as follows:</p> <ul style="list-style-type: none"> • that the foreign court had no jurisdiction; • that the judgment was obtained by fraud; • that the judgment would be contrary to public policy; or • that the proceedings in which the judgment was obtained were opposed to natural justice.
2.	<p>What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, (eg, notice provisions)?</p>
	<p>The considerations as detailed in the response to Question 1 above would apply in recognising a foreign judgment against a state. There are no other specific considerations set out in legislation or under case law.</p> <p>In relation to service requirements, for the purpose of any civil proceedings against the Government of Malaysia, the GPA 1956 provides that all documents required to be served on the government may be served on:</p> <ul style="list-style-type: none"> • the Attorney General, in the case of proceedings against the federal government; • the State Secretary, in the case of proceedings against the government of a state; or • the State Attorney General of such state, in the case of the states of Sabah and Sarawak. <p>However, it is important to note here that ordinary execution proceedings are not available against both the federal and state governments of Malaysia. Please see the response to Question 5(e), below.</p> <p>As for service requirements on a foreign state, the applicable rules will depend on which of the two modes set out in the response to Question 1 applies. The rules for service of processes are set out in the Rules of Court 2012 (ROC).</p> <p>For Reciprocating Countries, once the judgment is registered, the notice of registration of the judgment must be served personally on the foreign entity, unless the Court orders otherwise and such service can be effected without leave of Court (Order 67 r 7(1) and (2) ROC).</p> <p>For Non-Reciprocating Countries, because a writ will have to be filed to sue based on the foreign judgment, leave of Court to serve notice of the writ is required (Order 11 Rule 1 (M) ROC). Once obtained, the notice of the writ must be served.</p>

	<p>Service of notice of a writ abroad is effected either through an agent of the plaintiff (normally a lawyer in that jurisdiction) or through the use of consular offices (Order 11 r 6(2) ROC). A notice of a writ which is to be served out of jurisdiction must be served in accordance with the law of the country in which service is effected (Order 11 r 5 (3) ROC).</p> <p>There are no specific rules which apply when considering service on a foreign defendant that is a foreign state and therefore the general rules above should apply.</p> <p>It must be noted that Malaysia is a state party to the Vienna Convention on Diplomatic Relations 1961 (VCDR), which has the force of law in Malaysia by virtue of the Malaysian Diplomatic Privileges (Vienna Convention) Act 1966. The VCDR disallows service of process on a state through its embassy. This position was endorsed by the Malaysian High Court in <i>Village Holdings Sdn Bhd v Her Majesty The Queen in right of Canada</i> [1988] 2 MLJ 656 where it was held that service of a Writ on the Her Majesty the Queen in Right of Canada by way of leaving the same with a staff of the Canadian High Commission does not constitute proper service.</p> <p>The VCDR provides that the receiving state shall exempt diplomatic agents in the country from personal and public service of any kind.</p>
3.	<p>What special considerations apply where the defendant/debtor in enforcement proceedings is a state, (eg, doctrine of sovereign immunity)?</p>
	<p>Malaysia does not have legislation that deals specifically with foreign state immunity. However, the doctrine of restrictive sovereign immunity is applied by the Malaysian Court.</p> <p>The restrictive sovereign immunity doctrine is a rule of customary international law where a state is only entitled to immunity in respect of the acts carried out in the exercise of sovereign authority. In considering whether immunity should be granted, the Malaysian Court will examine the whole context in which the claim against the foreign state is made, with a view to decide whether the act(s) or claims against the defendant are: (1) governmental in nature and character or state-like activities of a sovereign (<i>acta jure imperii</i>); or (2) commercial and trading in nature and character (<i>acta jure gestionis</i>).</p> <p>Acts that fall within the category of governmental authority would attract sovereign immunity, whereas those of a commercial or private action would not.</p> <p>It is also recognised that states might not only grant and claim such immunity with regard to other sovereign states, but also that they might choose to waive such immunity, submitting themselves to the jurisdiction of the courts of a forum state. Accordingly, sovereign immunity, even when available, is subject to the exception of waiver or submission to the forum state's jurisdiction.</p>

4.	What exceptions may apply where the claim results from improper actions of the defendant state, (eg, wars of aggression)?
	<p>There is no legislation which specifically provides exceptions to sovereign immunity on the grounds of improper actions of the state. The question has also not yet been tested in the Malaysian courts.</p>
5.	What due process standards and exceptions may apply in proceedings for enforcement of judgment against a state?
	<p>There are no known cases where the applicability of a different/higher standard has been discussed in the case where the defendant is a state.</p> <p>The Malaysian Court, when addressing challenges to due process in an enforcement application generally, has in a number of cases held that challenges to the compliance of such due processes should be raised in the original proceedings by way of an appeal or setting aside of the judgment in the original Court, rather than being raised before the Malaysian Court in the enforcement proceedings.</p> <p>That said, the Malaysian Court has, in cases where the defendant did not submit to the jurisdiction of the original court, set aside registration of the foreign judgment obtained in default, on the basis that there was an obvious irregularity in the original jurisdiction when obtaining the judgment in default.</p> <p>Therefore, the assessment on standards of due process is fact sensitive but at all times the principal underlying consideration is whether the requirements of due process have been met so that natural justice has been served.</p> <p>In respect of the party bearing the burden of proving that due process requirements have been met, the defendant bears the burden on a <i>prima facie</i> basis to show that the requirements have not been met.</p>
5a.	What standard will the court apply in the enforcement proceedings when assessing whether the service requirements have been met in the original proceedings against a state?
	<p>There are no specific or different standards applicable to a state when assessing whether service requirements have been met in the original proceedings. In general the rule is that the defendant did have sufficient notice and time to defend the proceedings.</p> <p>Section 5(1)(a)(iii) of the REJA 1958 provides that a registered foreign judgment may, on application, be set aside if the registering court (ie the Malaysian Court) is satisfied:</p> <p style="padding-left: 40px;">‘that the judgment debtor, being the 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’.</p>

5b.	What exceptions may apply where conventional forms of service against a state are impossible, (eg, due to absence of diplomatic relations)?
	There are no known exceptions which would apply to this scenario.
5c.	What standard will the court apply in the enforcement proceedings when assessing whether the right to representation requirements have been met in the original proceedings against a state?
	This specific issue has not been discussed by the Malaysian Court and there is no legislation and/or procedural rules specific to this issue. However, the right to representation is a fundamental tenet recognised by the Malaysian Court and it is reasonable to expect due scrutiny by the Malaysian Court of the facts and the applicable rules of the original court, in the event that a foreign state asserts that its right to representation was compromised in challenging the enforcement of the judgment.
5d.	What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?
	There are no legislated/determined exceptions.
6.	What assets may be subject of enforcement if the claim is against a state and what are the requirements, (eg, enforcement against assets of state owned entities)?
	<p>Malaysian government assets</p> <p>Section 29(1) of the Malaysian Government Proceedings Act 1956 (GPA 1956) provides that the Malaysian Court shall not make an order for the recovery of the land or the delivery of the property in any proceedings against the government for the recovery of land or other property. However, the Court may in lieu thereof make an order declaring that the enforcing party is entitled as against the government to the land or property or to the possession of the same.</p> <p>Therefore, once a foreign judgment against the Malaysian Government has been registered in the Malaysian Court, if the judgment sum is not paid by the government within 21 days of the date of judgment, the enforcing party may file an application pursuant to section 33 of the GPA 1956 for the Court to issue a certificate for payment of the judgment sum by the government. This is applicable to both actions against the federal and state governments of Malaysia. Once a certificate has been issued by the Court and is duly served on the government, the government is then under a statutory duty to make the necessary payment. The obligation to pay the specified amount stated, together with interest is absolute, unless there is a direction by the Court that payment is suspended.</p> <p>Assets of foreign states in Malaysia</p> <p>There is no legislation prohibiting the execution of a judgment against the assets of a foreign state in Malaysia. However, the state has the right to claim restricted sovereign immunity in the execution proceedings. Although there is no decided case on this issue, it is likely that the Malaysian Court will, in keeping with jurisprudence in this regard, recognise immunity over assets which are used primarily for the purposes of the foreign state's function.</p>

Further, Article 22(3) of the Vienna Convention on Diplomatic Relations 1961, provides that the premises of the mission (irrespective of ownership), along with their furnishings and other property situated in the same, and the mission's means of transport, are immune from search, requisition, attachment, or execution. Therefore, these assets are excluded from enforcement by virtue of the Malaysian Diplomatic Privileges (Vienna Convention) Act 1966.

Enforcement against state-owned entities

In Malaysia, a state-owned entity which is incorporated as a separate legal entity is considered as a separate legal personality from the state. Therefore, execution against assets belonging to state-owned entities using a judgment against the state will not be permitted. The 'lifting of the corporate veil' should be done in the original proceedings and if judgment is obtained against both the state and the state-owned entities, then execution against the state-owned entities would follow.

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