CURING NON-COMPLIANCE WITH FOREIGN LAWS IN THE CONTEXT OF SERVICE OUT OF JURISDICTION

A Review of Singapore's Position

The topic of curing defects in service of an originating process out of jurisdiction deserves much more attention than it has thus far received in Singapore. This article draws attention to how the words of one of the main governing rules conflict with the position that has been taken by the local courts, before examining the core issues of whether a court can cure, and (if so) when a court should cure, such defects. A framework that achieves the most satisfactory balance between the plain words of the relevant rules and the competing considerations of procedural justice, substantive justice and international comity will be proposed.

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I. Introduction

1 The challenge of trying to balance procedural justice with substantive justice is notorious.[1] This is encapsulated in the memorable quote by Andrew Phang Boon Leong JC (as he then was) in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd*:[2]

> … in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt … to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth. [emphasis in original]

The complexity of the task is invariably compounded when a third consideration to be balanced is thrown into the mix: international

* The author wishes to thank Professor Jeffrey Pinsler and the anonymous referee for reviewing an earlier draft of this article. All errors remain the author's own.

1 The local courts' recent efforts in tackling this challenge are extensively examined in Jeffrey Pinsler & Cavinder Bull, "Procedure's Multi-Faceted Relationship with Substantive Law – Not a 'Mistress'; nor a 'Handmaid'" in *Developments in Singapore Law between 2006 and 2010: Trends & Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Singapore: Academy Publishing, 2011) at p 106.

2 [2005] 2 SLR(R) 425 at [9].

comity. This occurs squarely in the topic of curing a defect in the service of a Singapore originating process *in a foreign jurisdiction*. A defect arises in service out when there is non-compliance with the laws of the foreign country, and this area of law is mainly governed by certain rules under O 11 of the Rules of Court ("RC").[3] The core controversial issues are: (a) whether the Singapore court has the power to cure such a defect in a plaintiff's service of originating process (most commonly a writ) out of jurisdiction; and if so, (b) when should the court exercise that power.[4]

2 An opportunity to properly consider these issues was presented in the recent High Court case of *SRS Commerce Ltd v Yuji Imabeppu* ("*Yuji*").[5] Regrettably, the High Court did not take up the chance to re-examine this area of law, despite (a) there being two previous entirely conflicting High Court decisions[6] that "illustrate the difficulties which may arise regarding compliance with the law of the foreign jurisdiction";[7] and (b) the relevant rules in the RC presenting subtle but real difficulties in resolving the issues. Instead, the court in *Yuji* simply "agree[d] entirely" with one of the earlier High Court decisions,[8] and proceeded to decide the case on that basis.

3 This paper takes up the missed opportunity and attempts to critically re-assess this area of law. Notably, the English courts have in recent years been struggling with similar issues as well. And although in 1998, the UK Rules of the Supreme Court[9] ("UK RSC") were superseded by the Civil Procedure Rules ("UK CPR"), there remain significant similarities between the relevant rules in the UK RSC and the UK CPR, the former being the model for the RC. Pertinently, in 2013, the UK Supreme Court ("UKSC") issued its judgment for *Abela v Baadarani*,[10] a decision which local courts will likely find considerable guidance on how to deal with this vexing area of law. Therefore, where appropriate, this paper in attempting to rationalise this area of law in the local context will refer to and discuss these English cases.

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3 Cap 322, R 5, 2014 Rev Ed. Order 11 bears the heading "Service process out of Singapore".

4 See generally Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.023 *ff*.

5 [2015] 1 SLR 1.

6 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 and *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150.

7 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.031.

8 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [9].

9 SI 1965 No 1776.

10 [2013] UKSC 44.

4 This paper will in Part II first provide a summary of the recent Singapore cases that have dealt with this area of law.[11] Then in Part III, it will be highlighted, as a preliminary observation, that the local courts' position on one of the key rules under O 11 of the RC is at odds with the plain words of that rule.[12] However, all considered, it will be argued that the courts' interpretation, which departs from the literal reading of the rule, is ultimately justified. Having addressed the preliminary point, in Part IV, the crucial issue of whether the courts have the power under O 2 r 1 to cure a defect arising from non-compliance in foreign laws will be examined.[13] It will be submitted that the courts do have such a power in certain cases of non-compliances. Part V moves on to explore the issue of the threshold that should be met before a court exercises that power.[14] Finally, Part VI collates everything that has been earlier discussed into a coherent proposed framework to deal with such issues in future cases.[15]

5 For ease of reference, the important rules in the RC that will be referred to extensively in this paper are set out here:

> **Service of originating process abroad through foreign governments, judicial authorities and Singapore consuls or by any method of service (O 11 r 4)**
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> **4.**—(2) Where in accordance with these Rules an originating process is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the originating process may be served –
>
> > (*a*) through the government of that country, where that government is willing to effect service;
> >
> > (*b*) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country; or
> >
> > (*c*) by a method of service authorised by the law of that country for service of any originating process issued by that country.
>
> **Service of originating process abroad: Alternative modes (O 11 r 3)**
>
> **3.**—(1) Subject to paragraphs (2) to (8), Order 10, Rule 1 and Order 62, Rule 5 shall apply in relation to the service of an originating process out of Singapore.

11 See paras 6–18 below.
12 See paras 19–36 below.
13 See paras 37–52 below.
14 See paras 53–59 below.
15 See paras 60–62 below.

(2) Nothing in this Rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

(3) An originating process which is to be served out of Singapore need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

Non-compliance with Rules (O 2 r 1)

1.—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

II. Understanding the local (conflicting) positions on service out of jurisdiction

A. SRS Commerce Ltd v Yuji Imabeppu

6 In *Yuji*, the plaintiffs sued the four defendants, who are resident in Japan, for misappropriation of money. Leave was granted for the plaintiffs to serve the writ on the defendants in Japan, by post or courier and/or by service through the Ministry of Foreign Affairs in Japan. The writ was translated in Japanese and sent by registered post to three of the defendants. It was accepted that these defendants did receive the writ.[16]

7 The defendants subsequently applied to set aside the writ on the basis that the service was improper. The assistant registrar agreed with the defendants that the service was improper, and additionally that the

16 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [1]–[2].

defendants were prejudiced by the improper service. Hence, the defect should not be cured and the writ was accordingly set aside.[17]

8 On the plaintiff's appeal to the High Court, given that there is no Civil Procedure Convention subsisting between Singapore and Japan, the High Court relied on O 11 r 4(2) of the RC. The court further noted that rr 4(2)(*a*) and 4(2)(*b*) were not relevant on the facts. Instead, r 4(2)(*c*) was applicable, and that rule "requires the plaintiffs to comply with the method of service authorised by the domestic law of the foreign jurisdiction (in this case, Japan)".[18]

9 The court then held that in *Yuji*, contrary to r 4(2)(*c*), there was little doubt that the service had not been properly effected. This was because under Japanese law, the writ must be served through Japan's Ministry of Foreign Affairs, and then through court clerks authorised by the Japanese courts. In this case, the writ was not served by such a court clerk.[19]

10 Having concluded that there was non-compliance with Japan's law on service of foreign process in Japan, the court, however, decided that the defect could and should be cured. It agreed entirely with the second decision of *ITC Global Holdings Pte Ltd v ITC Ltd*[20] ("*ITC 2011*") that:[21]

> … where a defendant … is apprised of the proceedings, it should be regarded as an important factor against an application to set aside service of process … The rule is not designed as a technical obstacle but as a rule to prevent foreign parties from orders made against them without their knowledge. They must be aware of the process instituted against them to decide whether they should resist.

Considering all the evidence, the court in *Yuji* was satisfied that:[22]

> … the defendants have not been prejudiced by the irregularity in service of process. They not only knew that process had been instituted against them in Singapore, but they were constantly advised by Singapore lawyers …

Hence, the plaintiff's appeal was allowed and the defendant's application to set aside the writ for improper service failed. Although not expressly mentioned, it is assumed that the court had invoked its power under O 2 r 1 of the RC to cure the defect.

17 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [3].
18 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [5].
19 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [6].
20 [2011] SGHC 150.
21 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [9].
22 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [14].

B. ITC Global Holdings Pte Ltd v ITC Ltd *(2007)*

11 Before going into the facts and reasoning of *ITC 2011*, it is prudent to first summarise the same in the 2007 decision of *ITC Global Holdings Pte Ltd v ITC Ltd*[23] ("*ITC 2007*"), given that the latter came first in time. Both decisions arose from the same suit, where the plaintiff was a Singapore company claiming against 15 defendants for close to $20m. The plaintiffs had to serve a writ on a number of the defendants in India.

12 In *ITC 2007*, the first and 13th defendants applied to set aside the plaintiff's service of the writ on them on the basis that the plaintiff had not complied with the requirements of service of foreign summons in India. On the issue of whether there was a defect in the service, the court noted that there does not subsist a Civil Procedure Convention between Singapore and India. As such, as in *Yuji*, the court held that the applicable rule was O 11 r 4(2)(*c*).[24] It then examined the provision in the Indian Code of Civil Procedure, 1908[25] ("Indian CPC") that relates to service of foreign processes (which would include a writ from Singapore), before finally concluding that the service of the writ had not been in accordance with the relevant Indian rules, which required the service of foreign processes to be effected through the Indian judicial channels.[26]

13 On the issue of whether the court had the power under O 2 r 1 to cure the defect, the court held in the negative. In so holding, it relied predominantly on:[27]

(a) O 11 r 3(2) for the proposition that:[28]

> … when one country was seeking to effect service in a foreign jurisdiction, it was mutual courtesy to comply with the rules of the foreign jurisdiction. It was not the role or in the power of the Singapore court to decide whether one can disregard the rules of another country.

(b) O 11 r 4(2) for the proposition that service of the summons in a foreign country must comply with the method of service in that country;[29] and

(c) the view that where a defendant has not been properly served in accordance with the laws of a foreign country,

23 [2007] SGHC 127.
24 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [9]–[10].
25 Act 5 of 1908.
26 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [12]–[36].
27 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [37]–[60].
28 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [38].
29 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [48].

> international comity is at stake and the courts have always adopted a firm policy on international comity.[30]

The upshot is that the failure to obey the laws of another country in effecting service is not a defect envisaged by the Legislature to be curable under O 2 r 1.

14 For good measure, the court added that if it was wrong on this count, and that it did possess the power under O 2 r 1 to cure the defect, the plaintiff still had not shown any good reason for the court to exercise that power.[31]

C. ITC Global Holdings Pte Ltd v ITC Ltd *(2011)*

15 Four years later, the plaintiffs attempted service out of jurisdiction again on the defendants in India. This time, in *ITC 2011*, it was the first, second and third defendants who applied to set aside the service.

16 On the issue of whether the service was regular, the court, as with the court in *ITC 2007* (and in *Yuji*), held that the applicable rule was O 11 r 4(2)(*c*). It stated that according to that rule, "the method of service must comply strictly with the foreign jurisdiction's rules and laws regarding service".[32] In this case, the court too relied on the same provision in the Indian CPC relating to service of foreign processes, and found that in relation to the first defendant, the service was in fact valid, but in relation to the second and third defendants, the service was not in accordance with Indian law. Specifically, Indian law required that a defendant be served personally or by an agent properly empowered to accept service on behalf of them. This was not done in this case and therefore a defect arose.[33]

17 On the issue of whether the court had the power under O 2 r 1 to cure the defect, the High Court reversed the assistant registrar's decision below that the court did not have the power to cure the defect. In contrast to the court in *ITC 2007*, the court in *ITC 2011* concluded that it did have such a power.[34] The detailed reasoning of the court in so holding will be examined at the appropriate junctures below.[35] Suffice to mention here that the court relied on English cases which suggest that such a defect was capable of being cured under the English equivalent of

30 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [60].
31 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [61].
32 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [22].
33 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [22]–[35].
34 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [36]–[41].
35 See paras 38 and 55 below.

O 2 r 1. The court also cited an earlier Singapore Court of Appeal case for the view that the writ in the present form is no longer structured in the form of a command to a defendant, but is more of a notification to the defendant that an action has been commenced against him in a Singapore court. Consequently, the court found it difficult to accept that service of a Singapore writ abroad would interfere with or encroach upon the sovereignty of the foreign country in which the writ is served. Presumably, therefore, the concerns of the court in *ITC 2007* regarding international comity were overstated. Pertinently, O 11 r 3(2) was noted only in passing, and its implications, if any, on the court's power to cure defects in service out were not examined at all.[36] In fact, the court's decision in *ITC 2011* was curiously devoid of any mention of *ITC 2007*.

18 Having found that it did have the power to cure defects in service out, the court then concluded that it should exercise the discretion to cure the defect in this case because:[37]

> (a) the second and third defendants were in fact apprised of and took steps to contest the proceedings, and suffered no prejudice as a result of the defect in service;
>
> (b) the plaintiff had properly done all that it could to effect service; and
>
> (c) the plaintiff and the defendants have been involved in the suit for almost a decade but substantive proceedings could not take off due to multiple procedural obstacles. To refuse to cure the defect would cause undue prejudice to the plaintiff by denying its right to a hearing.

Based on the court's language, it does not seem that any of the three factors would by themselves have been determinative of the court exercising its discretion.

III. Basis for requiring service out to comply with the foreign country's laws – Taking a close and hard look at O 11 r 4(2)(*c*)

A. "Originating process issued by that country"

19 Before examining the core controversial issues, some preliminary concerns need to be first discussed. Firstly, the courts in *Yuji*, *ITC 2007* and *ITC 2011* have all relied on and read O 11 r 4(2)(*c*) as a rule that requires the service out to comply with the foreign

36 This important observation was also pointed out in Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.034.

37 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [42]–[50].

jurisdiction's laws on service of *an overseas process* (overseas *vis-à-vis* the foreign jurisdiction, such as a writ from Singapore). In *Yuji*, the court cited the rule and went on to examine the Japanese law on how a foreign process, *eg*, a Singapore writ, should be served in Japan. In *ITC 2007* and *ITC 2011*, the respective courts likewise applied the rule and relied on s 29 of the Indian CPC, which is the provision that governs the service of foreign summons in India.

20 Although such a position evidently accords with logic and common sense, this interpretation in fact flies completely against the plain words of the rule, which repay slow and careful re-reading. It will be submitted that ultimately, the courts' hitherto interpretation is justified. But what is somewhat troubling is that the local courts have adopted that interpretation without realising the glaring contradiction and at least attempting to rationalise it.

21 The critical phrase in O 11 r 4(2)(*c*) that gives rise to the conflict is "the law of that country for service of any originating process *issued by that country*" [emphasis added]. "That country" doubtlessly refers to the foreign jurisdiction in which the Singapore writ is to be served. So in *Yuji*'s case, applying O 11 r 4(2)(*c*) literally, what the plaintiff's service of the Singapore writ has to comply with is the Japanese law on service of a process issued *by a Japanese court*, *not a Singapore court*. Similarly, in *ITC 2007* and *ITC 2011*, following the rule, the courts should not be concerned at all with the Indian CPC rule on service of foreign summons, for example, s 29, but rather the rule(s) on service of originating processes issued *by an Indian court*. The *Yuji*, *ITC 2007* and *ITC 2011* courts' interpretation only holds if O 11 r 4(2)(*c*) for instance reads, "by a method of service authorised by the law of that country for service of any originating process *issued by a foreign country*" or "by a method of service authorised by the law of that country for service of *any foreign originating process*".

22 Nevertheless, it is submitted that all considered, this is a classic situation where applying the literal words of O 11 r 4(2)(*c*) will lead to absurd consequences. As such, departing from strict adherence to the literal is justified. Applying the rule as it is literally worded creates a very jarring problem. It is necessary to first mention that in the 1987 case of *Ong & Co Pte Ltd v Chow Y L Carl*[38] ("*Ong & Co*"), the word "may" in "may be served" under the then O 11 r 4(2) was held to connote permission and not discretion.[39] In that case, the plaintiff served a writ on a Malaysian defendant through the former's agent in Malaysia. Order 11 at that time only had the current rr 4(2)(*a*) and 4(2)(*b*). Since "may" connotes permission, and the plaintiff's method of service was

38 [1987] SLR(R) 281.

39 *Ong & Co Pte Ltd v Chow Y L Carl* [1987] SLR(R) 281 at [9].

not provided for under the rule, the service was defective. Shortly after *Ong & Co*, the Singapore Rules Committee, presumably to reverse the state of affairs following from that case, inserted r 4(2)(*c*) into O 11.[40] There is good reason to believe that *Ong & Co*'s interpretation of "may" remains good law even after r 4(2)(*c*) was inserted. This is because if the Rules Committee had disagreed with the court's interpretation of "may", a more obvious remedy would be to replace that word with something that makes clear that the official methods of service under rr 4(2)(*a*) and 4(2)(*b*) are merely options, and a plaintiff is free to use some other methods. However, the Rules Committee left the phrase "may be served" as it is, and instead chose to make explicit, by inserting r 4(2)(*c*), that a plaintiff can opt for *an additional* method. This quite strongly suggests that the Rules Committee had agreed with and intended to retain *Ong & Co*'s interpretation of "may" even after the insertion of r 4(2)(*c*).

23 If so, under the current O 11 r 4(2), a Singapore plaintiff *must* choose to serve a writ overseas through either one of the three methods prescribed in the rule. So where there is no Civil Procedure Convention subsisting between Singapore and the foreign country the defendant is in, and the plaintiff does not wish to serve through official channels in the foreign country, O 11 r 4(2)(*c*) mandates that the process be served by or through a party authorised by the foreign country's laws for service of an originating process *issued by that foreign country*. But would it not make a lot more sense if the rule requires that the process be served by a method authorised by the foreign laws for *service of a foreign process*? Many jurisdictions are likely to have enacted special rules precisely to govern the service procedure of processes from outside that jurisdiction.[41] It seems ludicrous that the Singapore Rules Committee would introduce a rule that directs a plaintiff, in serving a writ overseas, to disregard those special rules designed for this very purpose and instead serve according to the rules on how processes issued by the foreign country itself are to be served. And the Rules Committee certainly could not have assumed that those two sets of rules will be identical in every jurisdiction. Furthermore, does the Rules Committee even have the power to promulgate rules that permit a Singapore plaintiff to ignore certain provisions in the foreign jurisdiction's laws? There does not appear to be any logical or sensible explanation to these questions, save that there was an oversight by the Rules Committee in drafting r 4(2)(*c*).

24 No assistance can be found in the UK's jurisprudence. Prior to the replacement of the UK RSC with the UK CPR, the English courts

40 See generally Jeffrey Pinsler, *Developments in the Course of the 20th Century: Civil Justice in Singapore* (Singapore: Butterworths Asia, 2000) at pp 193–194.

41 For example, in Singapore, these rules are found in O 65 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

did not have to face the above problem of interpretation because the equivalent of O 11 r 4(2)(*c*) of the RC was never introduced to the UK RSC. In contradistinction to the position taken in *Ong & Co*, it appears that under O 11 r 6(3) of the UK RSC (the equivalent of O 11 r 4(2) of the RC before r 4(2)(*c*) was inserted), the word "may" in the phrase "may be served" was taken to connote discretion and not permission.[42] English plaintiffs were *prima facie* free to serve out of jurisdiction through non-official channels and there was hence no impetus to introduce an equivalent of r 4(2)(*c*) of the RC. Currently under the UK CPR, the equivalent of O 11 r 4(2)(*c*) is r 6.40(3)(c), which states that a writ from the UK may be served, *inter alia*, "by any other method permitted by the law of the country in which it is to be served". This rule is broadly phrased and also avoids the interpretation difficulty that besets our O 11 r 4(2)(*c*).

25 One possible solution is to depart from *Ong & Co* and assume that the word "may" under O 11 r 4(2) should be accorded its natural meaning to connote mere discretion. There are certainly persuasive arguments for doing so.[43] It would mean that a plaintiff can choose to serve the writ:

> (a) through one of the official channels as provided in rr 4(2)(*a*) and 4(2)(*b*);
>
> (b) by a method of service authorised by the law of the foreign country for service of a process issued by that country as provided in r 4(2)(*c*); as well as
>
> (c) the *unstated option* of a method of service authorised by the law of the foreign country for service of a foreign process.

To be sure, there is a viable basis for option (c) even though it is not provided for within the RC, and that is the trite common law principle that the service of a writ within or outside the jurisdiction is the

42 See *Ferrarini SpA v Magnol Shipping Co (The "Sky One")* [1988] 1 Lloyd's Rep 238 at 240, where in relation to O 11 r 6(3) of the UK Rules of the Supreme Court (SI 1965 No 1776), Staughton J stated that:

> It is common ground that *the methods of service provided in* [*O 11 r 6(3)*] *are not exclusive*. Service may be effected by private means rather than through the Master's Secretary's Department, and Foreign and Commonwealth Office and diplomatic channels provided always that nothing is done in the country where service is to be effected which is contrary to the law of that country. [emphasis added]

See also *The Supreme Court Practice* (Jack Jacob & Richard Scott eds) (London: Sweet & Maxwell, 1999) at para 11/6/4.

43 See generally Sundaresh Menon, "Effecting Service of Process Out of The Jurisdiction – *Ong & Co Pte Ltd v Carl Y L Chow*" (1990) 2 SAcLJ 111.

foundation of jurisdiction in actions *in personam*.[44] Applying this principle, unless a foreign defendant is *validly* served with process, barring voluntary submission, a Singapore court does not have jurisdiction over that defendant. Specifically in Singapore, this principle is arguably encapsulated in s 16(1)(*a*)(ii) of the Supreme Court of Judicature Act:[45]

> **Civil jurisdiction – general**
>
> **16.**—(1) The High Court shall have jurisdiction to hear and try any action in personam where –
>
> (*a*) the defendant is served with a writ of summons or any other originating process
>
> …
>
> (i) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court or Family Justice Rules.

In a situation where the defendant is applying to set aside a writ before any judgment has been rendered by a Singapore court,[46] the defendant is contending that by virtue of the service's non-compliance with the foreign country's laws on service of foreign processes, the defendant has not been validly served. Therefore the Singapore court does not have jurisdiction in the action. The obligation for the defendant to enter an appearance has not arisen. In a situation where the defendant is applying to set aside a default judgment on the ground of such non-compliance as regards service of writ,[47] the same reasoning applies, such that the defendant has not failed to enter an appearance because no such obligation ever arose. Hence, there is an implied need for a plaintiff to serve by a method authorised by the foreign country's law on *service of foreign processes*.

26 However, the consequent state of affairs remains a very problematic one. Firstly, there is still the nagging unanswered question of why the Rules Committee would prefer to expressly state option (b) rather than option (c), the latter as mentioned being a much more logical choice. Secondly, given that the controversial issue of whether a court has the power to cure a non-compliance will likely be affected by the *basis* for requiring compliance in the first place, that there will be

44 *Dicey, Morris & Collins: on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (London: Sweet & Maxwell, 15th Ed, 2012) at para 11.003. See also *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [60] that "the basic principle of law that service is the legal basis of jurisdiction" and *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 WLR 457 at 461; [1985] 1 All ER 395 at 398.

45 Cap 322, 2007 Rev Ed.

46 Pursuant to O 12 r 7(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

47 Pursuant to O 13 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

different bases, hailing from different sources, for the different kinds of non-compliance, is bound to lead to the devising of a very unwieldy framework.[48] Finally, there will potentially be awkward situations when the rules governing service of local and foreign processes in the foreign country directly conflict, such as where a plaintiff serves through his agent, and service by a plaintiff's agent is a method permitted for serving processes issued by the foreign country, but that foreign country has enacted rules that provide that for foreign processes, the process can only be served through the judicial authorities. Then, is there in fact non-compliance in such situations? Put simply, interpreting "may" to connote mere discretion may solve one problem, but the mess it creates will be so tough to untangle that adopting this interpretation should not be an option either.

27 It is submitted that the most preferable approach is to depart from the plain wording of O 11 r 4(2)(*c*), and read the rule to mean that the method of service is to be one authorised by the foreign country's laws for service of any originating process *issued by a foreign country*. Admittedly, this interpretation goes against the clear words of the rule. Nonetheless, the Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[49] has approved the principle of statutory interpretation that "an absurd interpretation or one that leads to unworkable consequences that are patently contrary to Parliament's intent should be avoided".[50] The House of Lords have likewise commented that:[51]

> The courts will presume that Parliament did not intend a statute to have consequences which are objectable or undesirable; *or absurd; or unworkable or impracticable*; or merely inconvenient; *or anomalous or illogical*; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it … [emphasis added]

Given the preceding discussion, it is argued that on balance of all the considerations, reading O 11 r 4(2)(*c*) literally will lead to such an unreasonable result that departing from the strict literal words of the rule is justified. That there is no additional evidence that either the Singapore or English Parliament or the Rules Committee intended the rule to have its literal meaning also renders the departure more palatable.

48 See n 76 below.

49 [2014] 2 SLR 815.

50 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [50].

51 *R v Central Valuation Officer* [2003] UKHL 20 at [116]–[117]. See also *Gumbs v AG of Anguilla* [2009] UKPC 27 at [44]. See generally Oliver Jones, *Bennion on Statutory Interpretation: A Code* (London: LexisNexis, 6th Ed, 2013) at Part XXI.

28 Ultimately, the courts in *Yuji*, *ITC 2007* and *ITC 2011* have adopted the better interpretation of O 11 r 4(2)(*c*). But that they did so without realising and addressing the clear incongruity of that approach with the plain words of the rule is arguably unsatisfactory. Needless to say, it will be optimal if the Singapore Rules Committee reviews this rule as soon as possible and makes the necessary changes.

B. "Method of service"

29 There is yet another phrase in O 11 r 4(2)(*c*) which the local courts have arguably misunderstood, and that is "method of service". Nevertheless, again it is submitted that on balance, the local courts' interpretation of the phrase is the more desirable one. Why this is so, unfortunately, has likewise also been overlooked by the courts, and merits closer analysis.

30 "Method of service" is an ambiguous phrase that can potentially cover any and every aspect, stage and detail of the service process. It can refer to the party or body responsible for serving the process on the defendant in the foreign country (*eg*, the foreign government, Singapore's consular authority in the foreign country, the foreign judicial authority, the plaintiff, the plaintiff's agent), the underlying mechanism of service (*eg*, the need for the process to be signed by a certain body, that a copy of the process has to be forwarded to the foreign judicial authority), the party or body able to receive the service of the process (*eg*, the defendant, the defendant's agent), *etc*. Nonetheless, the local courts and commentators[52] have steered away from unpacking what exactly "method of service" under O 11 r 4(2)(*c*) refers to. The positions taken in *Yuji*, *ITC 2007* and *ITC 2011* suggest that the courts have probably assumed "method of service" to include *each and every aspect* of the service procedure.

31 Yet, there are indications that intimate that "method of service" under the rule was intended to have a narrower meaning, such that the phrase concerns *only the party or body who is responsible for serving the process in the foreign country*. In other words, the sole purpose of O 11 r 4(2)(*c*) is to provide a plaintiff the option of serving a writ in another country for example, either by the plaintiff himself or herself, or by the plaintiff's agent, *etc*, provided the laws of the foreign country allows foreign processes to be served by those parties. The rule does not govern the other details of the service out procedure.

52 See Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.025 *ff*.

32 There are three reasons that support this narrow interpretation. The first arises from a comparison of r 4(2)(*c*) with rr 4(2)(*a*) and 4(2)(*b*). The latter two limbs prescribe that the originating process may be served either through the foreign government where that government is willing to effect service, or through a Singapore consular authority in the foreign country, except where service through such an authority is contrary to the law of that country. The wording in the initial and *proviso* parts of both limbs suggests that the two limbs are concerned only with the appropriate party or body that is responsible for serving the process in the foreign country. Neither limb makes mention of or purports to be concerned with any other specifics of the service procedure. Applying the canon of statutory construction *noscitur a sociis*,[53] a presumption arises that r 4(2)(*c*) shares a similar purpose.

33 Secondly, what appears to be the historical basis for the introduction of r 4(2)(*c*) supports this interpretation. As mentioned, r 4(2)(*c*) was likely added in response to *Ong & Co*, where the High Court held that under the then equivalent of O 11 r 4(2), a Singapore plaintiff was not permitted to serve the writ on a defendant in Malaysia through a private arrangement with a Malaysian law firm, that is, the plaintiff's agent.[54] If indeed the introduction of r 4(2)(*c*) in 1991 by the Rules Committee was targeted at reversing the implications of *Ong & Co*,[55] and considering there was only one issue at stake in that case – who can serve an originating process in a foreign country – it stands to suspect that the only purpose of the introduction was to now make clear that service in another jurisdiction by a plaintiff or a plaintiff's agent, *etc*, is permissible, so long as that method is one authorised by the foreign country's laws. Rule 4(2)(*c*) was arguably not intended by the Rules Committee to have the broad purpose of governing other aspects of the service procedure.

34 Moreover, O 11 r 6(2)(b)(ii) of the Malaysian Rules of Court[56] ("Mly RC"), the rule equivalent of our O 11 r 4(2)(*c*), states simply that the notice of a writ may be served in a foreign country "by the plaintiff or his agent", unless that method is prohibited by the foreign country's laws. It says nothing about the other aspects of the service procedure. Rule 6(2)(b)(ii) was recently added to the Mly RC.[57] Before that, O 11 r 6(2) of the Mly RC was *in pari materia* with O 11 r 4(2) of the RC

53 A word or phrase in a statutory provision should be construed in light of the surrounding text. See Oliver Jones, *Bennion on Statutory Interpretation: A Code* (London: LexisNexis, 6th Ed, 2013) at pp 1100–1105.

54 See para 22 above.

55 See generally Jeffrey Pinsler, *Developments in the Course of the 20th Century: Civil Justice in Singapore* (Singapore: Butterworths Asia, 2000) at pp 193–194.

56 PU(A) 205/2012.

57 See generally *Malaysian Civil Procedure 2013* (Petaling Jaya, Selangor: Sweet & Maxwell Asia (Malaysia), 2013) at para 11/6.

prior to the 1991 amendments to the latter. It is possible that as with the RC, r 6(2)(b)(ii) was introduced to the Mly RC to reverse the implications of *Ong & Co*. Arguably then, the purpose of the amendments to both Rules of Courts is similar: to extend to plaintiffs an additional option of *whom the writ can be served by*, and not anything beyond that.

35 However, it can be persuasively countered that if the Singapore Rules Committee had this narrow purpose in mind, it would have drafted O 11 r 4(2)(*c*) of the RC in the same way that its Malaysian counterpart had *vis-à-vis* O 11 r 6(2)(b)(ii) of the Mly RC, or more explicitly and following the tenor of rr 4(2)(*a*) and 4(2)(*b*), such that it reads "*by or through a person or body* authorised by the law of that country". Additionally, if "method of service" is read restrictively, then in respect of all other aspects of the service procedure, the courts will need to find another basis for requiring a plaintiff to comply with the foreign country's laws – probably the aforementioned common law principle that a court only has jurisdiction over an *in personam* claim if the process has been validly served on a defendant.[58] If so, the courts will likely have to contend with a very unwieldy framework as underscored in [26] above. As mentioned, this will be highly unattractive.

36 Therefore, in the final analysis, the local courts are probably right in reading "method of service" under O 11 r 4(2)(*c*) widely to cover every aspect of the service procedure.[59]

IV. Whether the court has the power to cure non-compliance with the foreign country's laws

37 Based on the above analysis, it can be concluded that in serving a process in a foreign jurisdiction, the basis for requiring compliance with that jurisdiction's laws is O 11 r 4(2)(*c*), and more generally, O 11 r 4(2). On top of that, where the non-compliance arises from the inappropriateness of *whom the writ is to be served on in the foreign country*, an additional basis for compliance with the foreign country's laws may be O 11 r 3(3). Having cleared the air on the proper basis and scope for requiring compliance with a foreign country's laws, one is now better positioned to examine the main controversial issue of whether the Singapore court even has the power to cure a non-compliance. The rule in the RC that provides a court a general discretion to cure procedural defects is O 2 r 1. What may negate or at least limit this general

58 See para 25 above.

59 For consistency's sake, rr 4(2)(*a*) and 4(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) should also be read broadly to govern all aspects of service out either through the foreign country's government, or the Singapore consular authority in that country.

discretion to cure are O 11 rr 3(2) and 4(2) (and O 11 r 3(3)). The scope of these rules will be analysed *in seriatim*.

A. Scope of O 2 r 1 in granting a power to cure defects arising from non-compliance with foreign procedural laws

38 The courts in *ITC 2007* and *ITC 2011* have assumed that O 2 r 1 empowers a court to cure *all forms* of irregularity, including one that arises from non-compliance with foreign procedural laws. The court in *Yuji* can be assumed to have taken the same position. However, as pointed out by Jeffrey Pinsler:[60]

> … if Order 2 is concerned with procedures governed by the Rules of Court (Order 2 rule 1(1) refers to 'a failure to comply with the requirements of *these* Rules' …), the point might be made that the discretion which it provides should not apply to rules of procedure in a foreign jurisdiction … [emphasis in original]

Admittedly, this is an attractive argument. On a plain reading of O 2 r 1, the rule purports to grant a discretion to cure failures to comply with *the rules within the RC*. Non-compliance with rules in the foreign country's law should therefore be beyond the reach of the discretion provided for in O 2 r 1. The force of this position is buttressed by one's intuitive sense that a Singapore court simply has no business in remedying a non-compliance with foreign laws.[61] It should be up to the relevant foreign courts to remedy a non-compliance with their own laws. This interpretation is also consistent with the principle of international comity. Moreover, when O 2 r 1 was introduced to the UK RSC, service out of jurisdiction was already an accepted practice[62] and if the UK Rules Committee had intended the discretion to cure non-compliances with foreign laws, it could easily have drafted the rule to make such an intention clear. The fact that it did not may imply that

60 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.036. The full view was that the discretion should not apply to rules of procedure in a foreign jurisdiction "unless the circumstances are so very exceptional that justice demands a departure from the norm". With respect, it is submitted that following the earlier part of Pinsler's argument, there is either a discretion, or there is not. It is not clear how O 2 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) can reasonably be read such that the rule should not apply where the non-compliance is of foreign laws, but in certain exceptional circumstances, justice can still demand that it applies.

61 The court in *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 shared a similar view: see *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [38].

62 In the UK, service of process out of jurisdiction was introduced in the second half of the 19th century through the English Common Law Procedure Act 1852 (c 76). Order 2 r 1 was introduced to the UK Rules of the Supreme Court (SI 1965 No 1776) in 1964. See Jeffrey Pinsler, *Developments in the Course of the 20th Century: Civil Justice in Singapore* (Singapore: Butterworths Asia, 2000) at pp 14 *ff* and 452 *ff*.

the discretion was only meant to apply to failures to comply with the local rules.

39 Nevertheless, there are also several good arguments in favour of reading O 2 r 1 expansively such that the power to cure does extend to non-compliances with foreign procedural laws. For one, the historical purpose of enacting O 2 r 1 supports, to some extent, applying the discretion as widely as possible. The rule was enacted in UK as a result of the decision in *Re Pritchard*.[63] In that case, a majority of the English Court of Appeal held that the defect in commencing the summons in the wrong court was so fundamental that it should qualify as a nullity that the court simply had no power to cure, rather than a mere irregularity that the court could cure.[64] Order 2 r 1 was then introduced to negative the result of *Re Pritchard*. In *Harkness v Bell's Abestos & Engineering Ltd*[65] ("*Harkness*"), a case decided shortly after the reform, Lord Denning explained that:[66]

> This new rule does away with the old distinction between nullities and irregularities. *Every omission or mistake in practice or procedure* is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. [emphasis added]

This quote by Lord Denning has been cited with approval multiple times by the local courts, including the Court of Appeal.[67] Given how widely Lord Denning understood the scope of O 2 r 1, it is arguable that non-compliances with a foreign country's laws should not be precluded. To be sure, this is not the most convincing argument because neither *Re Pritchard*, *Harkness*, nor for that matter any of the local cases that approved Lord Denning's above quote concerned service out of jurisdiction and non-compliances with foreign laws. Indeed, the court in *ITC 2007* took the view that "an improper service which does not obey the laws of another country can and shall not be envisaged by the legislature as an irregularity which is curable".[68]

40 Another reason is that not reading O 2 r 1 expansively may lead to serious injustice in certain cases. One example is where: (a) a plaintiff has sought the view of the foreign court that although there is in fact a non-compliance with the foreign country's law, the foreign court invites

63 [1963] Ch 502.

64 See generally Jeffrey Pinsler, *Developments in the Course of the 20th Century: Civil Justice in Singapore* (Singapore: Butterworths Asia, 2000) at pp 454–457.

65 [1967] QB 729.

66 *Harkness v Bell's Abestos & Engineering Ltd* [1967] QB 729 at 736.

67 See, for example, *Sheagar s/o TM Veloo v Belfield Int (HK) Ltd* [2014] 3 SLR 524 at [100]; *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [69]; and *The Melati* [2004] 4 SLR(R) 7 at [25].

68 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [57].

the Singapore court to cure that fact as the non-compliance was minor; (b) the evidence shows the defendant has not in any way been prejudiced by the non-compliance; and (c) the plaintiff was not at any fault for the non-compliance. To read O 2 r 1 literally, that is, restrictively, would mean that even in such a situation, the court will not have the power to cure the defect. The difficulty is magnified when one considers that reading O 2 r 1 literally will result in the following: in cases where there is a major non-compliance with a rule in the Sg RC, the court potentially can cure it, but in other cases where there is but a minor technical non-compliance with a foreign country's rule, the Singapore court will be left completely powerless.

41 Importantly, it is reasonably possible to read O 2 r 1 as supporting the position that a court has the power to cure non-compliance with foreign laws, although a slightly strained reasoning is involved. This reasoning draws inspiration from the English case of *Boocock v Hilton International Co*.[69] In that case, the English Court of Appeal held that service in that case was governed exclusively by s 695 of the UK Companies Act 1985.[70] That section required the writ to be served on an overseas company in a particular manner. Nonetheless, the court held that although the writ was not served according to s 395,[71] the defect could be cured under O 2 r 1, and proceeded to so cure the defect.[72] On its face, the court's position is untenable if one accepts Pinsler's argument. The non-compliance was directly in relation to a provision in the UK Companies Act 1985, and not a rule in the UK RSC. Thus, the court should not have the power to cure such a defect.

42 Mann LJ's brief reasoning hints at how Pinsler's concern may be allayed. He stated that "[t]he service was not in accord with section 695(1) of the Companies Act 1985 and there being no other relevant enactment, *it follows that RSC Ord 10, r 1(1) was not satisfied. This was an irregularity*" [emphasis added].[73] UK RSC O 10 r 1(1), which prescribes that a writ must be served personally on each defendant by the plaintiff or his agent, was described by Neill LJ as a basic rule as to the service of originating process.[74] Thus, that rule apparently *indirectly* requires that s 695 of the UK Companies Act 1985 be complied with. As such, there was non-compliance with O 10 r 1(1), which is a rule under the UK RSC, *through the non-compliance of s 695*. The non-compliance,

69 [1993] 1 WLR 1065.
70 c 6. *Boocock v Hilton International Co* [1993] 1 WLR 1065 at 1073.
71 *Boocock v Hilton International Co* [1993] 1 WLR 1065 at 1073.
72 *Boocock v Hilton International Co* [1993] 1 WLR 1065 at 1073–1076.
73 *Boocock v Hilton International Co* [1993] 1 WLR 1065 at 1076.
74 *Boocock v Hilton International Co* [1993] 1 WLR 1065 at 1072.

viewed in this manner, falls under the scope of O 2 r 1 and can hence be cured.

43 A similar line of reasoning may be adopted in the present context. As discussed above,[75] O 11 r 4(2) (and possibly O 11 r 3(3)) of the RC requires that the foreign country's laws on service of foreign processes must be complied with. When a Singapore plaintiff fails to comply with a foreign country's laws on service, he or she indirectly, but ultimately, also fails to comply with O 11 r 4(2), which is a non-compliance with a rule of the RC.[76] This non-compliance therefore comes within the scope of O 2 r 1, and accordingly can be cured by a court. This solution is not ideal, but in adopting it, one may find comfort in Lord Woolf MR's quip in his Final Report to the UK CPR that in interpreting the procedural rules:[77]

> … [e]very word in the rules should have a purpose, but every word cannot sensibly be given a minutely exact meaning. Civil procedure involves more judgment and knowledge than the rules can directly express. In this respect, rules of court are not like an instruction manual for operating a piece of machinery. Ultimately their purpose is to guide the court and the litigants towards the just resolution of the case.

It is interesting to note that under the UK CPR, the reincarnated version of O 2 r 1 of the UK RSC is r 3.10, which prescribes that "where there has been an error of procedure *such as* a failure to comply with a rule or practice direction" [emphasis added], the court has the power to cure that error. Notably, r 3.10 has been given a broader phrasing and it avoids the above problem that plagues our O 2 r 1.

B. Scope of O 11 rr 3(2), 4(2) and 3(3) in constraining the power to cure defects arising from non-compliance with foreign procedural laws

44 Having concluded that O 2 r 1 should be read as granting a court the power to cure non-compliances with foreign procedural laws,

75 See paras 19–36 above.

76 Note that if contrary to that suggested in paras 19–36 above, "originating process issued by that country" and "method of service" under O 11 r 4(2)(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) are read literally and restrictively, it would mean that for certain non-compliances with the foreign country's laws, the basis for compliance will not be O 11 r 4(2) but rather, the common law principle that the foundation of a court's jurisdiction is valid service of a writ on a defendant. If so, the line of reasoning proposed in this paragraph cannot apply. This will be a major source of the "very unwieldy framework" as pointed out in paras 26 and 35 above.

77 Lord Woolf MR, *Access to Justice: Final Report* (London: HSMO, 1996) at [10]–[11].

the next major hurdle is O 11 r 3(2). That rule states that nothing in the rule or in any order or direction of the court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to that country's laws. On the face of the rule, it completely negates the power to cure non-compliances with foreign laws as granted by O 2 r 1. If the court directs that such a non-compliance be cured under O 2 r 1, it will in effect arguably be authorising the doing of something in the foreign country which is contrary to the law of that country. This was one of the main reasons why the court in *ITC 2007* held that it did not have the power to cure the non-compliances.[78]

45 A riposte could be that O 11 r 3(3) should be read literally, such that this sub-rule only applies to O *11 r 3 itself* or a court order *made by virtue of O 11 r 3*. When a court cures a non-compliance, it does so under O 2 r 1 and not under O 11 r 3. Hence, O 11 r 3(3) does not act to negate O 2 r 1. However, this argument does not seem to take us very far. The source rule permitting service of originating process abroad is O 11 r 3(1), which is part of O 11 r 3. When a court cures a non-compliance in service of an overseas process, although the power to cure *per se* stems from O 2 r 1, its overall effect is to allow service overseas in a particular manner, which means the order is still inextricably linked to O 11 r 3(1).

46 It is submitted that the better solution to this difficulty lies in the words "contrary to the law of that country". Those words should be read narrowly to mean O 11 r 3(2) only precludes curing non-compliances when the method of service the plaintiff used is expressly prohibited by the foreign country, as opposed to merely not in accordance with the foreign country's laws. The latter, which is the position taken in *ITC 2007*,[79] occurs simply when a plaintiff serves a process through method X, but *the foreign country's law provides that foreign processes should or can (only) be served through method Y*. The former, which is the interpretation advocated here, occurs when *there is some explicit indication from the foreign country that the plaintiff's method of service is not permitted, or worse, is unlawful in that foreign country*. The distinction, though subtle, is absolutely critical to recognise.

78 This was the view of the court in *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127: see *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [60].

79 See also Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.025, where Pinsler took a similar position when he stated that pursuant to O 11 r 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), "[a] key principle is that the Singapore court will not permit a mode of service in another jurisdiction which offends (*or is not recognized by*) its system of law" [emphasis added].

47 The narrow approach is very much supported by the *different choice of words in the different rules under O 11*. Under O 11 r 4(2)(*c*), the method of service must be "authorised by" the foreign country's laws, and under O 11 r 3(3), the method of service must be "in accordance with" the foreign country's laws. These words connote that there should be a provision under the foreign country's laws that expressly permits the method of service. In contrast, under O 11 r 3(2), the operative words are "contrary to" the foreign country's laws. These words suggest that r 3(2) should only apply when the plaintiff's method of service is not merely one inconsistent with the foreign country's laws, but rather, one expressly prohibited by or is unlawful in the foreign country.[80]

48 The English courts have themselves recently struggled with the precise scope of the words "contrary to the law of that country", before finally the UKSC favoured, at least impliedly, the narrow construction of the phrase. Under the UK CPR, the nearest equivalent of O 11 r 3(2) is r 6.40(4). That rule states that "nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served", and for present purposes may be taken to be *in pari materia* with O 11 r 3(2).[81] In the UK High Court ("UKHC") case of *Basil Shiblaq v Kahraman Sadikoglu*[82] ("*Shiblaq*"), the plaintiff served an English writ on a defendant in Turkey through a notary public in Turkey. The court found that Turkey had expressly registered an objection to Art 10 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[83] which, *inter alia*, provides for the freedom to send processes directly to persons abroad through private means.[84] Turkey's objection raised a very strong inference that the method of service used by the plaintiff in that case was impermissible in Turkey, and the plaintiff failed to rebut that inference. The court held that its power to cure non-compliances under r 3.10 of the UK CPR does not extend to such cases.[85]

49 The decision in *Shiblaq* was distinguished in a later UKHC case of *Habib Bank Ltd v Central Bank of Sudan*[86] ("*Habib*"). In that case, the plaintiff served an English writ on a defendant in Sudan, firstly through

80 For a very similar view, see Sundaresh Menon, "Effecting Service of Process Out of The Jurisdiction – *Ong & Co Pte Ltd v Carl Y L Chow*" (1990) 2 SAcLJ 111 at 118.

81 Note however that r 6.40(3) of the UK Civil Procedure Rules is in fact phrased broadly, such that unlike O 11 r 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), it applies to *any* court order, and not only a court order made under a particular rule. *Cf* para 45 above.

82 [2004] EWHC 1890 (Comm).

83 15 November 1965; entry into force 10 February 1969.

84 *Basil Shiblaq v Kahraman Sadikoglu* [2004] EWHC 1890 (Comm) at [13].

85 *Basil Shiblaq v Kahraman Sadikoglu* [2004] EWHC 1890 (Comm) at [14]–[43].

86 [2006] EWHC 1767 (Comm).

the British consular authority in Sudan and the Sudanese Ministry of Foreign Affairs, and subsequently again by leaving a copy of the writ at the defendant's offices in Sudan.[87] The evidence was that these methods were not expressly permitted by Sudanese laws because these laws required service of process to be effected by the Sudanese court and a Sudanese court would not recognise a request to serve process issued out of an English court on a Sudanese defendant. However, the evidence also revealed that the methods used were not contrary to the Sudanese laws.[88] Crucially, the court held that:[89]

> … it is implicit in [r 6.40(4)] that the court may permit any alternative method of service abroad under CPR r 6.8 so long as it does not contravene the law of the country where service is to be effected.

There was no need for the method of service to be expressly permitted by the foreign laws in order for the service to be valid. *Shiblaq* was therefore distinguished on the basis that in that case, the method used there was explicitly objected to by Turkey. This was not so in *Habib*.[90]

50 Several years later, the UKHC in *Abela v Baadarani*[91] adopted a position similar to that in *Habib*, by holding that:[92]

> [Rule 6.40(4)] need not be read as requiring any method of service '*directed*' under CPR 6.37(5) to be a method of service prescribed by the relevant foreign country's rules. The method of service directed must not constitute an illegal act under the law of the host state [emphasis in original].

In that case, the plaintiff served an English writ on a defendant in Lebanon. The writ was served on the defendant's solicitor in Lebanon, and it was found that the solicitor did not in fact have sufficient authority to accept service on behalf of the defendant. The method did not constitute good service under Lebanese law.[93] There was, however, no evidence that such a method of service was contrary to Lebanese law.[94] On appeal, the English Court of Appeal wholly disagreed with the UKHC's position, and instead held that:[95]

> The fact that CPR 6.40(4) expressly states that nothing in any court order can authorise or require any person to do anything contrary to the law of the country in which the document is to be served *does not*

87 *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm) at [26].
88 *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm) at [27].
89 *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm) at [30].
90 *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm) at [30].
91 [2011] EWHC 116.
92 *Abela v Baadarani* [2011] EWHC 116 at [65].
93 *Abela v Baadarani* [2011] EWCA Civ 1571 at [20], [23] and [29].
94 *Abela v Baadarani* [2013] UKSC 44 at [24].
95 *Abela v Baadarani* [2011] EWCA Civ 1571 at [22].

> *mean that it can be appropriate to validate a form of service which, while not itself contrary to the local law in the sense of being illegal, is nevertheless not valid by that law.* [emphasis added]

On further appeal, the UKSC in *Abela v Baadarani* ("*Abela UKSC*")[96] unanimously, albeit implicitly, preferred the position adopted by the High Court (and in *Habib*), that is, reading "contrary to the law" narrowly to mean r 6.40(4) only bars curing a non-compliance when the non-compliance is actually expressly prohibited by the foreign country's laws.[97]

51 All considered, the UKSC's approach accords with the overall choice of words under O 11 of the RC, and has the added advantage of limiting the scope of O 11 r 3(2) and consequently leaving the local courts a broader discretion under O 2 r 1 to cure non-compliances with foreign laws. Such an approach has also very recently been adopted in Canada in *Xela Enterprises Ltd v Castillo*.[98] It is submitted that the local courts should thus adopt the narrower reading of O 11 r 3(2). It may be criticised that adopting this approach will "render the strength and foundation of O 11 [specifically rr 4(2) and 3(3)] a paper tiger",[99] as plaintiffs will in effect be free to not serve processes by a method in accordance with or authorised by the foreign country's laws. This concern, however, is misconceived. Order 2 r 1 permits curing of the non-compliance of any rule under the RC.[100] It does not mean that all these rules are thus rendered paper tigers, because ultimately, a plaintiff still has to comply with these rules. If the plaintiff does not, he or she runs the very real risk of the court deciding not to cure the defect.[101]

52 On a separate note, the upshot to this approach, which may not be welcomed by all other countries, appears to be that if a country wishes not to permit a particular method of service of foreign process, the burden will be on that country to make explicit this intention somewhere; merely providing in its laws that only certain methods are allowed will not be sufficient.[102]

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96 [2013] UKSC 44.

97 *Abela v Baadarani* [2013] UKSC 44 at [24] and [32]. See also *Civil Procedure: The White Book Service* vol 1 (London: Sweet & Maxwell, 2014) at p 324.

98 (2014) Carswell Ont 687.

99 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [61].

100 See generally *Singapore Court Practice 2014* (Jeffrey Pinsler gen ed) (Singapore: LexisNexis, 2014) at p 41 *ff*.

101 In the context of non-compliance in service out of jurisdiction, see paras 53–59 below.

102 This distinction is drawn based on a comparison of the facts in *Basil Shiblaq v Kahraman Sadikoglu* [2004] EWHC 1890 (Comm) ("*Shiblaq*"), which falls into the former camp, and *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm) ("*Habib*") and *Abela v Baadarani* [2011] EWCA Civ 1571 (and *Xela Enterprises Ltd v Castillo* (2014) Carswell Ont 687), which fall into the latter camp.

(*cont'd on the next page*)

V. When should the court exercise the power to cure a non-compliance?

53 To recap, it has been argued that the court does have a power under O 2 r 1 to cure non-compliances with foreign laws in serving a writ out of jurisdiction.[103] Order 11 r 3(2) only negates that power in so far as the method of service is one expressly prohibited by, or is unlawful in, the foreign jurisdiction. All other forms of defects can potentially be cured.

54 The next crucial question then arises: when should a court cure these other types of defect? Very generally speaking, the courts determine whether to cure a defect based on whether the defendant has suffered any prejudice due to the defect, and whether the defendant may be adequately compensated through costs.[104] However, where the defect occurs in the context of service out of jurisdiction, invariably the international comity consideration will have to enter the picture.[105] And controversy emerges because it is not clear how much weight should be accorded to international comity in deciding whether to exercise the discretion to cure. If maximum weight is to be given, then arguably the threshold to cure should be an extremely high one; regardless of whether the defendant has been prejudiced, the court should only cure in very exceptional circumstances such as when the relevant authorities or the courts in the foreign jurisdiction indicate that despite the method used not being in accordance with the foreign law, that does not constitute an encroachment on its sovereignty and the Singapore court is invited to cure the defect.[106] If less weight is to be conferred on

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In particular, in *Habib*, even though the law of Sudan *requires* service of process to be effected by a particular manner and that method was not used by the plaintiff, this was not enough for the court to conclude that the method used was expressly prohibited under Sudanese laws. Another illustrative case that falls into the *Shiblaq* camp is *Ferrarini SpA v Magnol Shipping Co (The "Sky One")* [1988] 1 Lloyd's Rep 238, where the method of service used to serve on the defendant in Switzerland was found to in fact amount to a criminal offence under the Swiss Penal Code (311.0). This is a clear example where the method used is unlawful under the foreign country's laws.

103 See paras 37–52 above.

104 *Singapore Court Practice 2014* (Jeffrey Pinsler gen ed) (Singapore: LexisNexis, 2014) at pp 44–47.

105 See generally *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [37] *ff* and *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [36] *ff*. See also *Afro Continental Nigeria Ltd v Meridian Shipping Co (The "Vrontados")* [1982] 2 Lloyd's Rep 241 at 245; *Leal v Dunlop Bio-Process Int* [1984] 1 WLR 874 at 882 and *Camera Care Ltd v Victor Hasselblad* [1986] 1 FTLR 348 at 354.

106 This may occur when the court on its own motion, or alternatively by the plaintiff through an application for a stay, refers the question to the relevant foreign court. Such an approach of referring a question of foreign law to a foreign court was recently adopted by the local Court of Appeal in the context of enforceability of judgment (*Westacre Investments v Yugoimport* [2009] 2 SLR(R) 166). The recently

(*cont'd on the next page*)

international comity, then the threshold to cure need not be anywhere as high.

55 There are, to this author's mind, persuasive arguments in favour of both approaches. The court in *ITC 2011* preferred the view that international comity should no longer play a major role in whether a court can and should cure defects in service out. It relied on the earlier Court of Appeal case of *Fortune HK Trading v Cosco*[107] ("*Fortune HK*"), which suggested that given the local writ is no longer structured in the form of a command, it has lost its meaning of a judicial order, and is merely a notification. There is hence little concern that in serving out in a manner not in accordance with foreign laws, the sovereign right of the foreign country will be encroached.[108] The court in *ITC 2011* also relied on the English cases of *Golden Ocean Assurance Ltd v Christopher Julian*[109] ("*Goldean Mariner*"), as well as *Phillips v Symes*[110] ("*Phillips*"), to justify prioritising the general considerations of justice over considerations of international comity.

56 The *ITC 2011* court's reliance on *Fortune HK* may be criticised on the basis that in the first place, it is not the prerogative of a local court to decide *for another state* whether a foreign judicial document encroaches on that foreign state's sovereignty. There is a chance that a foreign state may disagree with the Singapore courts on whether a writ is now merely a notification.[111] Moreover, the views expressed in *Fortune HK* were purely *obiter* as the issue there was simply whether Singapore treats a service of writ from England as an encroachment of its sovereignty. Ironically, the court in *Fortune HK* in an earlier part of its judgment itself cautioned that "ultimately, it would depend on whether the country whether the service process is to be effected, treats the service of process by a private agent as an encroachment upon its sovereign rights".[112] The *ITC 2011* court's reliance on *Goldean Mariner* and *Phillips* has elsewhere also been criticised, basically on the ground that those two cases did not involve a consideration of whether service

introduced O 101 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) may perhaps be used for this purpose (see the proposals in Teo Guan Siew & Wong Huiwen, "Referring Questions of Foreign Law to the Court of the Governing Law" (2011) 23 SAcLJ 227).

107 [2000] 1 SLR(R) 962.

108 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [41].

109 [1990] 2 Lloyd's Rep 215.

110 [2008] 1 WLR 180.

111 For an excellent illustration of this point in the context of anti-suit injunctions, another controversial area of law where international comity features heavily, see the German case of *Re the Enforcement of an English Anti-suit Injunction* [1997] IL Pr 320.

112 *Fortune HK Trading v Cosco* [2000] 1 SLR(R) 962 at [26].

was in accordance with foreign laws,[113] and thus the issue of sovereignty does not even arise.

57 In contrast to the court in *ITC 2011*, the court in *ITC 2007* noted that "our courts have always adopted a firm policy on international comity",[114] and cited the earlier case of *Burswood Nominees Ltd v Liao Eng Kiat*[115] for the view that "the doctrine of comity of nations is not something courts in Singapore should take lightly".[116] This is entirely consistent with the caution of Andrew Phang Boon Leong JC (as he then was) in *Q & M Enterprises Sdn Bhd v Poh Kiat*[117] that:[118]

> 18 … comity is to be observed in deed, and not merely in word.
>
> …
>
> 25 The importance of international comity cannot be underestimated. The domestic courts of each country must constantly remind themselves of this point …
>
> …
>
> 66 … where there is a direct clash between international comity on the one hand and mere convenience to one of the parties on the other, the former must surely prevail …

The views expressed in these statements, if to be given full effect, will mean the threshold to exercise the power to cure should be a very high one.

58 It is submitted that there is a factor that tips, if only so slightly, the balance in favour of not setting the threshold so high. It is found in the brief judgment of Lord Sumption in *Abela UKSC*, which the other

113 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 5.036. In *Golden Ocean Assurance Ltd v Christopher Julian* [1990] 2 Lloyd's Rep 215, the defects in service arose because (a) for the bulk of the defendants, each of these defendants received a writ which correctly named them as defendants but which copy was intended for a different defendant; and (b) one of the defendants only received a form of acknowledge of service of a writ. Otherwise, the writs were all impeccable in form and all other respects. There was no evidence that there was non-compliance with the foreign jurisdiction's (US) procedural laws. In *Phillips v Symes* [2008] 1 WLR 180, the defect in service arose because the English writ was inadvertently removed from the package of documents served on the defendants. This was a breach of a rule under the UK Civil Procedure Rules. There was neither allegation nor analysis that such a defect arose from non-compliance with the foreign jurisdiction's (Switzerland) laws.

114 *ITC Global Holdings Pte Ltd v ITC Ltd* [2007] SGHC 127 at [60].

115 [2004] 2 SLR(R) 436 at [30].

116 *Burswood Nominees Ltd v Liao Eng Kiat* [2004] 2 SLR(R) 436 at [30].

117 [2005] 4 SLR(R) 494.

118 *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [18], [25] and [66].

four Law Lords concurred with. Lord Sumption's opinion is worth quoting *in extenso*:[119]

> In his judgment in the Court of Appeal, Longmore LJ described the service of the English Court's process out of jurisdiction as an 'exorbitant' jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the Defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of *forum non conveniens* and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that *in the overwhelming majority of cases where service is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country* … It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum. [emphasis added]

In other words, the need to give utmost effect to international comity will already be fulfilled at the stage of granting a plaintiff leave to serve out. At that stage, the plaintiff not only has to show a good arguable case that the court has jurisdiction under O 11 r 1, that there is a serious issue to be tried, *but also*, that applying the doctrine of *forum non conveniens*, Singapore is the *most appropriate forum* to adjudicate the dispute.[120] If international comity will already be heavily observed at these stages, it is difficult to justify it rearing its head again *so much* as to place more almost insurmountable obstacles in a plaintiff's path when there is a defect in service out.[121]

59 On these premises, it is submitted that balance is optimally achieved by taking a middle-ground approach – *a threshold that is higher than the usual of merely assessing whether a defendant has suffered prejudiced from the non-compliance, but lower than one where the discretion to cure will not be exercised unless the court is convinced the*

119 *Abela v Baadarani* [2013] UKSC 44 at [53].

120 See generally the Court of Appeal case of *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [2] and [19].

121 For a similar view and one which supports the UK Supreme Court's position in *Abela v Baadarani* [2013] UKSC 44, see Adrian Briggs, "Service Out in a Shrinking World" [2013] LMCLQ 415 at 416–417. Note, however, that Lord Sumption's view has not received universal support from commentators. See Andrew Dickinson, "Service Abroad – An Inconvenient Obstacle" (2014) 130 LQR 197. *Contra* Lawrence Collins, "Sovereignty and Exorbitant Jurisdiction" (2014) 130 LQR 555.

foreign jurisdiction will not be offended by the non-compliance of their laws. This middle-ground approach was applied in *Abela UKSC*, where it held that "the mere fact that the defendant learned of the existence and content of the [writ] cannot, without more, constitute a good reason to make an order [permitting alternative service]".[122] In that case, the UKSC approved the alternative service out which was not in accordance with Lebanese laws not only because the defendant was clearly not prejudiced by the non-compliance in service, but also because (a) service through a method authorised under Lebanese laws had proved impractical, and any attempt to pursue it further would lead to unacceptable delay and expense; and (b) the defendant had been unwilling to co-operate with service of the proceedings by disclosing his address in Lebanon.[123] In like vein, the court in *ITC 2011* exercised its discretion to cure the non-compliance in light of the following considerations: (a) the defendant did not suffer any prejudice because of the non-compliance; (b) the plaintiff had properly done all that he could to effect proper service; and, assuming these two factors were not determinative, (c) the parties have been involved in the suit for almost a decade but substantive proceedings have not started due to multiple procedural obstacles.[124] Hence, a court should only cure a non-compliance with foreign laws *if the plaintiff is able to show that quite apart from the defendant not having suffered any prejudice from the non-compliance, there is some other convincing factor(s) that justifies exercising the discretion*. Otherwise, the court should not cure the defect and instead invite the plaintiff to re-serve the writ. In the author's view, such a test best balances the considerations of procedural justice, substantive justice, and international comity.

VI. Concluding comments

60 The above discussion may be summarised in the following proposed framework. The court should first assess whether there is in fact a breach of O 11 r 4(2) of the RC, that is, whether the method of service complies with the foreign country's laws.

(a) **Category A: Where the non-compliance is in fact not with the foreign country's laws, but rather, solely with the originating country's own laws on method of service.** Examples of such cases are *Goldean Mariner* and *Phillips*.[125] In such cases, the consideration of international comity does not feature, and a court should, under O 2 r 1, proceed to cure the defect as in

122 *Abela v Baadarani* [2013] UKSC 44 at [36].

123 *Abela v Baadarani* [2013] UKSC 44 at [37]–[38].

124 *ITC Global Holdings Pte Ltd v ITC Ltd* [2011] SGHC 150 at [48]–[50]. See also *Astro Nusantara Int BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [54]–[63].

125 See n 113 above.

usual non-compliance cases, such as by considering whether the defendant has suffered prejudice, and whether he or she can be compensated through costs.

(b) **Category B: Where the non-compliance is with the foreign country's laws, and the method of service used is expressly prohibited by or unlawful in the foreign jurisdiction.** Examples of such cases are *Shiblaq* and *Ferrarini SpA v Magnol Shipping Co (The "Sky One")*.[126] In such cases, O 11 r 3(2) negates the court's power to cure under O 2 r 1, and the court simply has no power to cure the non-compliance.

(c) **Category C: Where the non-compliance is with the foreign country's laws, and the method of service used was not in accordance with the foreign jurisdiction's laws.** Examples of such cases are *Habib* and *Abela UKSC*.[127] In such cases, O 11 r 3(2) does not constrain the court's power to cure under O 2 r 1, and the court can proceed to cure the non-compliance *provided* the plaintiff is able to show that not only was the defendant not prejudiced by the non-compliance, there is at least some other factor(s) that justifies curing the defect.

61 Finally, we return to where we started – the recent High Court case of *Yuji* – to illustrate how the proposed framework may be applied in practice. In *Yuji*, the court, relying on O 11 r 4(2)(*c*),[128] concluded that service was defective because under Japanese law, the writ must be served through Japan's Ministry of Foreign Affairs and then through court clerks of the Japanese courts. The latter was not done. Nonetheless, it appears that the plaintiff's method of service was not expressly prohibited by or unlawful in Japan. The case falls under Category C of the proposed framework and the court was therefore right to take the position that it had the power to cure the defect. The court then agreed with the court in *ITC 2011* on the point that where a defendant is not prejudiced by the non-compliance, that should be regarded as an important factor to exercise the discretion to cure the non-compliance.[129] However, after having only found that the defendants were indeed not prejudiced by the defect in service, the court concluded that the defendants' application to set aside the writ had to be dismissed.[130] It was not realised that in *ITC 2011*, the court considered

126 See para 48 and n 102 above.

127 See paras 49–50 and n 102 above.

128 In the first place, it is not clear why the court did not consider the service through Japan's Ministry of Foreign Affairs service as through the government of Japan, under r 4(2)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). But given the paucity of details provided in the judgment, it is difficult to comment further on this point.

129 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [9].

130 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 at [14]–[16].

more than just the fact that the defendants there were not prejudiced.[131] If the *Yuji* court were to apply the proposed framework above, it should have gone on to consider whether the plaintiffs were at any fault for the non-compliance and whether the plaintiffs can re-serve the writ without unreasonable delay and expense, *etc*.

62 In conclusion, this paper has attempted to address as much as possible the uncertainties and difficulties in this area of law, to arrive at the framework proposed above.[132] The underlying analysis is admittedly ungainly at parts, but in the author's humble view, at least until the appropriate amendments are made to the relevant rules in the RC, the proposed line of reasoning achieves the most satisfactory balance between the plain words of the various rules, and the competing considerations of procedural justice, substantive justice, and international comity. Even if the suggestions in this paper are ultimately not embraced by the courts, it at least flagged out a number of the difficult issues which hopefully at the next opportunity will be given due attention by the courts, or for that matter, the Rules Committee.

131 See para 59 above.

132 See para 60 above.