The Council of the Law Society of Singapore's Feedback on the Proposed Amendments to the Reciprocal Enforcement of Foreign Judgments Act

1. Following from the Ministry of Law's ("MinLaw") call for feedback on its proposed amendments to the Reciprocal Enforcement of Foreign Judgments Act ("REFJA"), the Law Society of Singapore ("Law Society") publicized its call for consolidated feedback on the matter from its members by way of the following:

   (a) 23 April 2019 – Law Society's JusNews
   (b) 29 April 2019 – eBlast to Law Society members
   (c) 30 April 2019 – Law Society's JusNews reminder
   (d) 3 May 2019 – eBlast reminder to Law Society members
   (e) 8 May 2019 – Law Society's Facebook page

2. By the close of all feedback channels which was fixed for close of business on 10 May 2019, the Law Society received no feedback from its members, save for one that was sent directly to MinLaw with the Law Society on copy (**reproduced in <u>ANNEX</u> below**).

3. Feedback from the Council of the Law Society is as follows:

   (a) Repealing the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA")

   Under the proposed section 9(2) of the REFJA, the time limit for the registration of a judgement to which the repealed RECJA applied is 12 months from the date of the judgment. Although the shorter period is transplanted from the repealed RECJA, there appears to be a disconnect between this timeline and the longer period of 6 years for the registration of foreign judgments under the current section 4(1)(a) of the REFJA. Clarification is required on this disconnect.

   (b) Widening the Range of Judgments to be Registered in Singapore

   Council notes that the proposed amendments will widen the range of judgments to include judicial settlements, non-money judgments and interlocutory orders.

   The new section 4(4A) contains a "just and convenient" test which would require the court to have regard to the "circumstances of the case" and the "nature of the relief contained in the judgment". Presumably, the foreign court would already have considered the merits of the case before granting the non-monetary judgment. To the extent that the Singapore Court has to consider these factors, parties would in effect have a second bite of the cherry to re-litigate their arguments before the Singapore Court. Perhaps the Act could clarify the standard of proof (e.g. *prima facie* or something else) that the Singapore Court requires in considering these factors.

   Moreover, even where the court finds it is not just and convenient to enforce the non-monetary aspects of a judgment, the Bill would empower the courts to convert that into the monetary equivalent of the relief. This is odd because the enforcement stage should not become an occasion in which the enforcement court is compelled to second-guess the foreign court's discretion and/or decision to grant non-monetary relief in lieu of monetary relief. This could also give rise to the re-litigation problem as per the previous paragraph.

   (c) Creating New Grounds for Refusing Registration (or Setting Aside the Registration) of a Foreign Judgments

   Under the new section 4(4B), a Singapore Court could refuse to enforce a registered judgement if, and to the extent that, the registered judgment awards damages (including exemplary or punitive damages) in excess of compensation for the actual loss or harm suffered by the party awarded the damages. Presumably, the foreign court would already have considered the merits of this issue before granting the judgment. To the extent that the Singapore Court has to consider the same issue afresh, parties would appear to have another bite of the cherry to re-litigate their arguments before the Singapore Court. Therefore, although a Singapore court may not grant, for example, punitive damages, it is debatable whether it should not enforce such a judgment

issued by a foreign court in a matter decided squarely under foreign law. Moreover, under Section 5(1)(a)(v) of the REFJA, there is an extant "public policy" ground for setting aside the enforcement of a registered judgment. That ground could be invoked in appropriate cases to excise, where objectionable, exemplary or punitive damages from the rest of the registered judgment. For completeness, we note however that this new aspect appears to be consistent with the position under the Choice of Court Agreements Act.

(d) Proposed Savings and Transitional Provisions

Council agrees that a 2-year pilot phase is suitable.

4. Council is open to engage in further discussions with MinLaw on our feedback above if considered desirable.

ANNEX

From: Glen Koh [mailto:glen.koh@fl.sg]
Sent: Friday, 3 May 2019 1:11 PM
To: Represent represent@lawsoc.org.sg
Cc: MLAW_Consultation@mlaw.gov.sg; Glen Koh kenboh330@gmail.com
Subject: Comments on the proposed amendments to REFJA

Dear Sirs,

I refer to the Ministry's and Law Society's invitation for consultative views on the proposed amendments to the REFJA.

In principle, it would be kind to hear from the MINLAW as to what the mischief or impetus is as regards the proposed expansion of the scope of REFJA is. It appears that while one hand gives (by expanding the scope of the Act), the other hand takes by bringing in discretionary exclusions on the enforcement by and of the Act. Hence, whilst some may have insuperable confidence in the Bench, as one pre-supposes in these legislative amendments, even a good law student will know that "discretionary relief" is a matter of equity (and subject to those special rules on equity) , law is strict to the letter. This not only ensures that persons are able to ascertain their rights but can order themselves and plan for the future, in accordance with the Rule of Law. Is there certainty in the proposed new legislation with the constant reference to "leave" and the Court's "powers", in this and other recent legislation?

Specific to the proposed amendments, I reproduce below an excerpt of the proposals as set out on MINLAW's website, with my humble views on the amendments as set out therein:-

6. Clause 10 of the Bill repeals the RECJA so that the REFJA will be the only statutory regime that governs the reciprocal enforcement of foreign judgments. Clauses 6 and 11 preserve the registrability of final money judgments from Commonwealth countries and Hong Kong. There may have been a good legal reason for the difference in the RECJA and REFJA being placed into two different Acts. It may be worth ascribing a reason as to why this has now been superseded?

7. Clause 2 of the Bill updates the definition of "judgment" in the REFJA: - As regards the definition of "judgment", and the proposed expansion of the definition of "judgment", it seems to my humble view that a principled approach needs to be adopted towards the inclusion of new orders, judgments or coercive pronunciations of foreign bodies. The principled approach must include the exclusion of "judgments" which would by Singapore law have had not been able to be enforced had the foreign action been commenced or instituted in Singapore. Hence for example, I would submit that only judgments which are common between Singapore and the UK by virtue of the Application of English Law Act, such as under the Sale of Goods Act should be enforceable in both countries. Likewise, a judgment in Singapore under the International Convention of the Sale of Goods (Vienna Convention) would not be enforceable in the UK. I believe this is in accordance with international private law as well as international public law. "Reciprocal" must have an inbuilt principle that requires uniformity of the cause of action, and not just uniformity in the "type of coercive decision" which is made by the bodies.

a. to include judicial settlements, non-money judgments, and interlocutory orders; and (see above. It appears meaningless when a person in a foreign jurisdiction cannot be served within Singapore jurisdiction to be compelled to comply with an interlocutory order especially when proceedings could not or are not brought against that person in Singapore. If proceedings could be served and are instituted against the person in Singapore, there is no reason why our Rules of Court and law need to be supplemented in terms of compliance with interlocutory orders made in Singapore. As regards non-money judgments, there are a wide range of non-money judgments in different jurisdictions, which may be pronounced for different reasons, and hence, reciprocity both in terms of the substance of the judgment and the substance giving rise to the judgment needs to be accommodated for, if such non-money judgments are to be enforceable by registration.

b. excludes foreign judgments that are founded on a judgment of a court in another foreign country, and judgments given by a recognised court on appeal from a court that is not a recognised court, in order to prevent the reciprocity requirement from being circumvented.

8. Clause 3 of the Bill amends section 3 to facilitate the reciprocal enforcement of a wide range of foreign judgments, including: non-money judgments, interlocutory judgments, and judgments from foreign "inferior" courts. The exact class of judgments from a foreign country entitled to enforcement in the Singapore courts will be specified by Ministerial order. (Again, this leads to ministerial discretion, which could not likely be challenged by judicial review. A democratic or legal bane or boon?) In the case of non-money foreign judgments, clause 4 creates a new section 4A providing that the High Court may only enforce a registered non-money judgment if it is satisfied that such enforcement would be just and convenient (I don't think this test is sufficiently clear, and it is a tag on from the "forum non conveniens" test, which is quite remote in relevance). If the High Court is of the opinion that the enforcement of a registered non-money judgment would not be just and convenient, it may grant the plaintiff a monetary equivalent of the relief sought.

9. Clauses 4 and 5 of the Bill create new grounds for refusing registration (or setting aside the registration) of a foreign judgment, and/or limiting enforcement of a registered foreign judgment, as follows:

a. the new section 3(aa) provides that the High Court may refuse to register a foreign judgment if it has been discharged (e.g. in the event of bankruptcy);

b. the new sections 4B and 4C provide that the High Court may refuse to enforce a registered judgment, if, and to the extent that the registered foreign judgment awards damages in excess of compensation for actual loss or harm (will this necessitate a new re-assessment of the damages and thus an attack on the res judicata Principe, at the least);

c. the new section 5(c) provides that the registration of a foreign judgment may be set aside if the notice of registration (should and it appears to be in uniform principle with the rest of the Rules of Court that notice of registration should only be allowed if service could be made under Order 11 or by other means of service of Singapore orders under the Rules of Court) was not served on the judgment debtor, or if the registration was defective. However, the setting aside of the registration of a foreign judgment does not prevent that foreign judgment from being subsequently re-registered once the defects with service have been rectified; and

d. section 2(a)(i), which sets out the situations when a defendant is deemed to have voluntarily submitted to the jurisdiction of a foreign court, is amended to exclude cases where a defendant had entered an appearance for the sole purpose of inviting the court in its discretion not to exercise its jurisdiction in the proceedings.

These are my personal views and not that of the firm's. I would humbly exhort the draftsman to place reliance on principles of Rule of Law, such as certainty, non-retrospectivity, clarity etc.

Kind regards,

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