

**Second Study Commission
Civil Law and Procedure**

2011 QUESTIONNAIRE

**“Cross-border issues in the face of increasing globalization –
as reflected in a series of individual fact scenarios”.**

A. Recognition and Enforcement of a Foreign Judgment

(A). General Questions:

- 1) What laws exist in your country regarding the recognition and enforcement of a foreign judgment?
- 2) What is the difference in the operative result in your country between the recognition of a foreign judgment and the enforcement of a foreign judgment?
- 3) What conditions are required in the court of your country in order to declare a foreign judgment as enforceable?
- 4) In order to enforce a foreign judgment, does your country require reciprocity with the country which gave the judgment?
- 5) Under what circumstances does the court in your country not enforce a foreign judgment?
- 6) Can your country impose temporary orders issued by a foreign court, such as alimony?
- 7) What are the conditions necessary for recognition of a foreign judgment in your country? Can your court recognize a foreign judgment incidentally?
- 8) Is it possible to enforce a foreign arbitration award in your country?

(B). Cases

- 1) Humpty and Dumpty are a business partners in Wonderland. Humpty violated the partnership agreement signed between them. The partnership agreement stated that the partnership will be the representative in your country, of an investment company from Wonderland, and will market its services in your

country. Humpty argued that Dumpty established a competing investment company in your country. Wonderland Court ruled that the Dumpty violated his duty of good faith and fair dealing and ruled against him to pay Humpty damages of 5.5 million dollars. A sum of one and a half million dollars as punitive damages and the rest as compensatory damages for harm caused. Humpty asks the court in your country to enforce the Wonderland court ruling, Dumpty opposed, his main claim being that part of the damages is punitive and therefore is not enforceable.

What is the law in your country?

- 2) A British businessman got into debt in the amount of 100-200 million pounds sterling and a bankruptcy order was issued against him by the High Court of Justice in London, with the appointment of estate trustees. Following this ruling, the trustee submitted to the court in your country a request to enforce the order and to appoint an official receiver for the realization of the debtor's assets located in your country.
 - a. Will the court in your country enforce the court order obtained in England?
 - b. The question was asked to address the fact that the English ruling does not include a personal operative remedy; in this case can your court enforce the ruling or rather give recognition?
 - c. Can it be a direct recognition? If not, can it be an incidental recognition?
 - d. What are the different effects of the three variations: enforcement, direct recognition and incidental recognition?
- 3) Sarah and Judy have been lifetime partners for 7 years and are citizens of your country. Their permanent residence is the State of Neverland. Sarah bore a son after she had been impregnated with a donor sperm. The son was adopted by Judy with Sarah's consent. The adoption order was issued in Neverland and Judy was registered in the birth certificate as an additional parent. Sarah and Judy would like to return to your country for the purpose of studying there for

two years. They have notified the registration official that Judy has adopted the child, relying on the birth certificate and the ruling of the State of Neverland which issued the decree of adoption. The Registration official refused to accept the registry on the grounds that the existence of two biological parents of the same gender is not possible and he is not obliged to accept the registration at its face value. Sara and Judy apply to the court in your country to recognize the adoption.

- a. What will be your ruling?
- b. Does it depend on the question of the law in your country allowing an adoption by a couple of the same sex?
- c. If so, what will be the ruling if it is not allowed?

B. Cross border issues in the conduct of trials:

Factual Scenario #1

Company “Head Co.” is the parent company of an international group of companies. It carries on business in its country of incorporation, country A. It also carries on business in country B through a subsidiary (“Subsidiary”) which is incorporated in country B.

“Director” is a director of Head Co. and Subsidiary. He is also a resident of country B.

Head Co. and Subsidiary claim that Director has breached statutory, fiduciary and contractual duties that he owed to each of them, arising out of his position as director of both Head Co. and Subsidiary. The companies allege that he misappropriated funds of Head Co. and Subsidiary. They rely on substantially the same acts and events to support their respective claims.

Head Co. and Subsidiary have commenced two sets of proceedings against Director: one in country A and the other in country B, both actions seeking relief against Director arising out of substantially the same facts.

Assume you are a Court in country A. Director has applied to your Court for an order to stay the proceedings against him in your country.

Questions:

- 1) What test would your Court apply or what factors would your Court take into account when determining Director's application?
- 2) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention on jurisdiction?
- 3) If your country is a signatory to such a convention how would this influence the decision making process?
- 4) Would it make any difference if there was a choice of jurisdiction provision in the contractual arrangements between the companies and Director providing that the parties submitted to the exclusive jurisdiction of country B?
- 5) Would your Court take into account considerations of international comity? In other words, grant a stay to give recognition to the jurisdiction of country B to determine the dispute?
- 6) Would it make any difference if country B was not a signatory to the convention?
- 7) If your country is a signatory to such a convention, what is your Court's experience of the convention in resolving issues of jurisdiction and does the convention assist to reduce disputes on jurisdiction?

Additional facts:

Assume that Head Co. argues that your Court should not stay the proceedings in country A because the laws of country B do not recognise all of the claims that have been made under the laws of country A.

- 8) Would this be a relevant consideration to take into account in determining whether to stay the proceedings?
- 9) How would your Court determine whether the relevant claim formed any part of the laws of country B?

Additional facts:

Assume that Director's employment contract with Head Co. and Subsidiary contained a choice of law clause, nominating the law of country B as the applicable law in the event of a dispute.

- 10) How would the choice of law clause influence your decision in the above scenario?
- 11) In what circumstances would your Court decline to stay proceedings, despite the clause?
- 12) Is your country a signatory to a convention for the recognition of exclusive choice of court agreements? If so, how does this influence the decision-making process? Is it your Court's experience that such a convention reduces disputes about the law to be applied?
- 13) Does your Court recognise any limit of jurisdiction based on principles of international comity – that is, that a court should decline jurisdiction in recognition of the foreign court's jurisdiction?

Additional facts:

Assume that both courts are the appropriate forum for the dispute. Assume also that Director makes an urgent application for a stay of both proceedings in both country A and country B. You are the Court in country A and would find it helpful to speak with the judge in country B to ascertain what stage the proceeding has reached in country B and its likely hearing date. You consider that this may be helpful in deciding whether to stay the proceedings.

- 14) Is there any structured way in your system that enables judges of different courts to communicate? If so, what is the structure and how effective is it?

Additional facts:

Assume your Court does not grant a stay and the matter proceeds in country A, applying the laws of country B.

- 15) How would your Court receive evidence in relation to foreign law? For example in most common law countries, the content of foreign law is a question of fact which is proven by expert evidence.
- 16) Is your country a signatory to any convention for determining foreign law? For instance, the New South Wales Supreme Court in Australia and the Singapore Supreme Court have entered into a Memorandum of Understanding (MOU) to work closely on issues of foreign law. Under the MOU, when an issue of foreign law arises in a case before either of the courts, they will be able to direct parties to take steps to have any contested issue of foreign law determined by the court of the governing law.
- 17) If your country has similar arrangements with foreign courts, what is your Court's experience? Has it reduced the complexities and difficulties in ascertaining the content of the foreign law?

Additional facts:

Assume that Director applies to have evidence taken in country B?

- 18) What factors would your Court take into account when determining the Director's application?
- 19) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention for the collection of evidence? If so, how successful is the co-operation in taking evidence in a foreign state and how efficiently and expeditiously can evidence be taken?

Additional question:

If your country is a signatory to conventions in civil proceedings, is it your Court's experience that civil procedure for commercial cases as between signatory countries have become more harmonised?

Factual Scenario #2

The plaintiff company commenced civil proceedings in country “X” against the defendant, who was resident and living in England. The plaintiff alleged the defendant had been involved in the misappropriation of \$US21m by one of its employees, and applied to the Court for a worldwide injunction “freezing” the defendant’s assets, in aid of the proceedings in country “X”, together with an ancillary disclosure order relating to the defendant’s assets worldwide.

Questions:

- 1) Would the court in your country have jurisdiction to hear this matter? If so, on what basis? For instance, in some common law countries exceptional circumstances would permit the making of an order on a particular issue, even where the court otherwise did not have jurisdiction to hear the matter. One such exceptional circumstance might be where the court hearing the substantive dispute could not make the freezing order of a person’s assets, so the making of the freezing order by another court would assist the main proceedings.
- 2) What provisions (statutory, procedural or otherwise) exist to enable a court to make a worldwide order freezing an individual’s assets? What about disclosure orders?
- 3) How would an order for disclosure and/or an order for the freezing of assets be enforced? Would enforceability of the order influence the decision as to whether or not to make the order in the first place? (If it was likely that the order could not be enforced, do you think the court would still make the order?)
- 4) Are there any provisions the defendant can rely on, to resist the disclosure order? (for instance, the privilege against self-incrimination)

