UNITED KINGDOM RESPONSE
To
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?

The law relating to the recognition and enforcement of foreign judgments in the legal systems within the United Kingdom falls generally into three chapters. Which of these chapters applies to a given foreign judgment will depend in large measure on the country in which the judgment was issued..

(a) *European Union Judgments* :

Recognition and enforcement of judgments given in the courts of other Member States of the European Union is governed by a number of EU regulations dealing with respectively (i) civil and commercial matters (ii) matrimonial matters and parental responsibility (iii) maintenance obligations and (iv) insolvency proceedings. There are also EU regulations providing for a free circulating European enforcement order for uncontested claims and for a small claims procedure, which may be used when one of the parties is domiciled or resident in another Member State. A more detailed list, and discussion, of these regulations is to be found in the Italian response to the questionnaire, to which reference may usefully be made.

The general aim of these measures is to foster the recognition and enforcement of judgments. Thus a judgment given in a civil or commercial matter in one Member State is to be recognized in other Member States without the need for any special procedure. The grounds upon which recognition may be withheld are restricted. A judgment may be refused recognition only if (i) it is "manifestly contrary to public policy" in the Member State in which recognition is sought; or (ii) it was given in default of appearance and the defendant did not receive service of the initiating writ in time to defend; or (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or (iv) is irreconcilable with an earlier judgment given in another Member State, or a third country, between the same parties and in the same cause of action, provided that the earlier judgment would meet the conditions for recognition in the Member State in which recognition is sought. No examination of the grounds of jurisdiction assumed by the court giving the judgment is permitted. A similar approach to the refusal of recognition is adopted in the other regulations.

Enforcement follows a procedure for registration with the courts of the Member state in which enforcements is sought. There are proposals to abolish or restrict this procedure of registration or *exequatur* as part of a review of the regulation dealing with civil and commercial matters.

Recognition and enforcement of judgments in civil and commercial matters, and maintenance claims, issued by courts of the countries (other than EU Member States) of the European Economic Area are subject to a similar regime, but under the provisions of the Lugano Convention.

(b) Registration Countries

Judgments given in a number of countries (other than the EU or EEA Member States) may be made enforceable within the UK by a process of registration in the superior court of the constituent part of the UK in which enforcement is sought.

Enforcement of foreign judgments through the simplified process of registration for enforcement was introduced by the Administration of Justice

Act 1920 and was based in part upon a system of registration for enforcement in one of the legally distinct constituent countries of the United Kingdom of a judgment given in another such country which had been elaborated in the nineteenth century. The 1920 Act allows judgments given by the superior courts in certain British Commonwealth countries[1] to be registered for enforcement. Registration is a matter for the discretion of the court to which the application for registration is directed. But there are a number of grounds upon which registration must be refused. These include, *inter alia* absence of jurisdiction other than residence, or the carrying on of business, within the territory or prorogation or submission; absence of due service of the proceedings; the obtaining of the judgment by fraud; or the judgment having been given in respect of a cause of action contrary to public policy.

The procedure of enforcement of a foreign judgment by means of registration was further extended by the Foreign Judgments (Reciprocal Enforcement) Act 1933, which enabled, and gave effect to, bi-lateral conventions concluded between the UK and the foreign State. The foreign judgment must be final, or require interim payment of money; and be for the payment of money, other than a sum in respect of taxes, fines or penalties. Registration of a judgment must be set aside by the registering court if the defender can show reasons which *grosso modo* follow the obligatory grounds for refusal under the 1920 Act. A number of British Commonwealth countries transferred from the 1920 Act to more detailed bi-lateral conventions under the 1933 Act. Bilateral conventions with countries now in the EU are superseded by the EU regulations, though may yet be applicable in the unlikely case of a judgment on a matter outside the scope of the EU regulations, but nonetheless within the scope of the particular bi-lateral convention. Currently, the countries with a bi-lateral convention with the UK are as undernoted[2]

[1] New Zealand, the Falkland Islands, Jamaica, Trinidad, Ghana ,Nigeria, Kenya, Tanzania, Uganda, Zimbabwe, Zambia, Botswana, Sri Lanka, Malaysia, Singapore – the list is now closed and any new arrangements must be under the 1933 Act.

[2] Australia, Bangladesh ,Canada(except Québec), India, Isle of Man, Israel, Jersey, Guernsey, Pakistan, Surinam and Tonga; and Austria, Belgium, France, Germany, the Netherlands, and Italy, - as respects any matter within the bi-lateral convention but not the EU regulatory system

(c) *"Common Law proceedings for enforcement of a foreign judgment;*

The registration for enforcement procedures just described are superimposed upon procedures, developed by the courts in, respectively, Scotland, England and Wales, and Northern Ireland, without any basis in a legislative text, for giving effect to a foreign judgment against a person subject to their jurisdiction. The procedures involve the bringing of an ordinary court action, in the sense that it is commenced in the ordinary way, with the defending party being entitled to lodge defences, or answers, to the initiating summons. In Scotland, the procedure is termed "an action for decree conform" to the foreign judgment. Elsewhere in the UK it is termed an " action on the judgment". The juridical basis for such actions was originally conceived as being that of international comity but in the 19th century the "theory of obligation" came to prevail, namely that the foreign judgment imposed on the defending party an obligation to obtemper the judgment and the action for decree conform/on the judgment simply enforced that obligation. In Scotland the existence of the foreign judgment was always seen as superseding and replacing the original cause of action. In England the view was taken that the plaintiff might either sue on the foreign judgment or ignore that judgment and sue on the original cause of action *de novo.* But by s 34 of the Civil Jurisdiction and Judgments Act 1982, the law in England and Wales and Northern Ireland was altered to accord with the Scottish position.

There are a number of conditions to the bringing of such an action.

First, the ground of jurisdiction upon which the foreign court proceeded must be seen as being one having general international recognition – such as residence, domicile, prorogation by contractual agreement, or voluntary submission[3]. A judgment based upon any "exorbitant" ground of jurisdiction, such as arrestment of property to found jurisdiction will not suffice.

Secondly, the judgment must be final and conclusive and not subject to appeal , and be fully exhaustive of the dispute.

Thirdly, the judgment must be for a definite sum of money, and not a decree *ad factum praestandum.*

[3] A controversy in England as to whether appearance to contest jurisdiction amounted to submission , was settled, to the effect that it did not, by s 33 of the Civil Jurisdiction and Judgments Act 1982

Fourthly, the judgment must still be enforceable in the country in which it was given (for example, not barred or extinguished by a rule of negative prescription consequent upon the passage of time).

Fifthly, it is recognized that a judgment obtained by perpetration of a fraud upon the foreign court is a valid defence. While the principle is well recognized and accepted, its application in practice is sometimes problematical. The allegation of fraud on the court is not uncommonly deployed as a defence to an action to enforce a foreign judgment by the common law procedures of action on the judgment/decree conform. In advancing that defence the contention sometimes amounts to asserting that in the foreign proceedings the material witnesses against the position of the defending party in the enforcement proceedings gave untruthful evidence. The tension between the rule of not re-litigating the merits (error of fact or law by the foreign court not being a defence) and the fraud exception is evident and may be a matter of difficulty.

Finally, a foreign judgment which was granted in breach of natural justice, will not be enforced. In this context, the deficiencies in the foreign proceedings must be substantial, recognition being given to the fact that different legal systems may have very differing judicial procedures.

The common law procedure of action on the judgment (or action for decree conform), continues to be of practical importance since no registration arrangements exist with countries of considerable importance in international trade, such as the USA, China (now including Hong Kong), Brazil and other Southern American countries, and middle eastern States, such as Bahrain.

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?

Enforcement refers to a procedure whereby the authority of the requested court, or State, is sought to compel, by the means of diligence or execution available in the requested State, due performance or implement of the obligation(s) imposed on the judgment debtor by the foreign judgment in question. Recognition is the process involved where the court takes account of, and gives effect to, what was established by the foreign judgment. Typically, recognition is the exercise which a court performs

as respects judgments *in rem* or governing personal status, such as a decree of divorce. While a declaratory action may be brought to have a foreign judgment of that sort formally recognized, the validity of the judgment may be directly recognized without the need for such a declaratory judgment[4]. Recognition is also the juridical notion involved when, in response to an action brought against him, a defending party pleads that the claim advanced by the pursuing party has already been litigated and decided in the foreign court – *i e,* the plea of *res judicata.* In upholding that plea, the court does not "enforce" the judgment of the foreign court, but it "recognises" it as having determined the issues.

3) *What conditions are required in the court of your country in order to declare a foreign judgment as enforceable?*

The various conditions have been set out in the answer to Question 1.

(4) In order to enforce a foreign judgment, does your country require reciprocity with the country which gave the judgment?

Enforcement under the registration procedures described in the answer to Question 1 involves, of course, reciprocal arrangements. The availability of the common law procedures of action on the judgment/ action for decree conform do not depend upon the existence within the foreign country concerned of an equivalent possibility of enforcing a judgment from the courts of the relevant constituent part of the UK.

5) *Under what circumstances does the court in your country not enforce a foreign judgment?*

[4] Cf Administrator of Austrian Property v Von Lorang 1927 SC (HL) 80

This is covered by the answer to the first question

6) *Can your country impose temporary orders issued by a foreign court, such as alimony?*

At the outset, it may be said that in the UK systems – and no doubt many others - an interim award of alimony, or maintenance for a spouse or a child pending final conclusion of the divorce action, or other family law litigation, would usually not be seen as a temporary award, subject to retroactive revision. To the extent that it orders the making of periodical payments of aliment *ad interim* the order for those payments (if not appealed) would be treated as final and any arrears which have accrued would similarly be regarded as a final judgment debt. In the EU context, a decree ordering the making of alimentary payments *ad interim* would generally be enforceable under the relevant EU regulation on maintenance payments.

On the other hand, in so far as a court may order an interim payment in respect of a disputed obligation as a provisional measure (which it may thus reverse on determining the merits of the dispute) different considerations apply.

In the context of the EU regulations, the general approach is that of enabling a party to a litigation in one Member State to apply to the courts of another Member State for such provisional or protective measures as might be available, for an equivalent claim, under the law of that other Member State. Thus, to give an example, the court in which the principal action is proceeding –"country A"- may be empowered to grant a provisional measure in the form of a order for provisional payment of a part of the disputed sum. The law of country B does not enable its courts to make such a provisional measure; but it does provide for the making of a protective order in the shape of arrestment on the dependence of an action of property, such as incorporeal movable property of the alleged debtor, in the hands of a third party. In such circumstances the courts of country B will not make an the order for provisional payment but may authorize arrestment of the debtor's incorporeal property in the hands of a third party in the territorial jurisdiction of B.

Other than in that EU context, provisional and protective measures ordered by the foreign court may not be enforced, whether directly or by the grant of an equivalent, domestic provisional or protective measure.

7) *What conditions are necessary for recognition of a foreign judgment in your country? Can your court recognize a foreign judgment incidentally?*

These matters have already been discussed, principally in the answers to Questions 1 and 2.

8) *Is it possible to enforce a foreign arbitration award in your country?*

In principle, a final arbitral decree or award pronounced in a foreign arbitration may be enforced at common law by the bringing of an action for decree conform to the arbitral award or decree – in the same way as that in which a party to an arbiter's decree may yet have to have resort to the court for its enforcement. The grounds of objection which may be advanced by the resisting party may of course be different from those which might be deployed where that party has been subjected to litigation in a foreign court.

Arbitration awards are excluded from the scope of the EU Regulation 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters; so registration for enforcement under those procedures is not available. However an arbitration award made in a country the judgments of which are enforceable under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933 is enforceable in the UK in the same way as a judicial decree.

The United Kingdom is also party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and accordingly arbitration awards to which that convention applies may be enforced by the scheme of registration for enforcement set out in the convention.

(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?

The fact that in this case study the judgment identifies as a discrete head of damages the sum of $1,500,000 as punitive or exemplary damages, avoids the difficulty encountered in some of the reported English cases on this topic of its not being possible to identify from the foreign damages award the element which can be said to have been punitive.

It has been held that an award of punitive damages in a civil litigation, while capable of being described as a "penalty", does not come within the exclusion of judgments for state revenue taxes or penalties[5]. If enforcement of the punitive element is to be refused it must therefore be by resort to the notion of such an award being contrary to public policy. The view that damages in a civil suit are strictly compensatory is perhaps less well settled in English legal thinking than in Scots legal thinking and, so far as the compiler of this response is aware, the English courts have not enunciated a principle that an award of punitive damages by a foreign court will be unenforceable as being contrary to English public policy. The point has not arisen for consideration in Scotland.

In the context of this case study it may be of help to mention the Protection of Trading Interests Act 1980. Among other things, in section 5(2)(a), it prohibits any court in the United Kingdom from enforcing an overseas judgment for "multiple damages". The provision was designed to prevent the extra-territorial operation of section 4 of the US Clayton Act, which provided for treble-damage awards in "anti-trust" cases. The 1980 Act seemingly does not strike at punitive

[5] SA Consortium General Textiles v Sun and Sand Agencies [1978] Q B 279

awards not calculated by simple arithmetical multiplication of the compensatory damages. The provisions of the 1980 Act may thus be deployed on both sides of the argument whether punitive damages are contrary to public policy.

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?*

Since this case study is based upon an English bankruptcy order, it supersedes the need for any UK response!

Within the United Kingdom there are various provisions seeking to secure mutual assistance within its different legal systems and jurisdictions. The EU arrangements are described by in the Italian Response, which description is gratefully adopted *brevitatis causa*.

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?*

Following the enactment, in England and Wales, of the Adoption and Children Act 2002 and, in Scotland, the Adoption and Children (Scotland) Act 2007, adoption by an unmarried heterosexual couple or a same–sex couple is permitted (assuming, of course, the other requirements for adoption, including particularly the welfare of the child, are satisfied). A person who is living together with the parent may also adopt the child, even if the relationship of that person with the parent is an homosexual one. Prior to the passing of those statutes, the courts had interpreted the then prevailing legislation as not excluding adoption by a single person in a homosexual relationship[6].

Accordingly, the same-sex nature of the relationship between Sarah and Judy would not be a reason for denying recognition of the Neverland adoption.

B. Cross border issues in the conduct of trials:

[6] *T,Petitioner* 1997 SLT 724;*Re W (a minor)(adoption; homosexual adopter)* [1998] Fam 58

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?*

It is not entirely clear from the terms of the case whether Head Co and Sub Co have each taken proceedings in both country A and country B for their respective losses. This response assumes that to be so, and that the claim advanced by each company does not differ between country A and country B. It is also assumed, since it seems necessarily to be the case, that each company has suffered a separate loss. And that it largely follows from their having suffered discrete, and not joint, losses that while there may be an overlap of fact to some extent deriving from the common factor that Director was a director and employee and was allegedly delinquent as respects his duties to each company, there must be differences in the facts of the particular alleged delinquencies involved.

Assuming further that the United Kingdom is country A, the next matter for clarification, or further assumption, is whether country B is another EU Member State. If so, the rules on *litispendence* and on related actions contained in Regulation 44/2001 would govern. Put shortly, since the proceedings *ex hypothesi* involve the same parties and the same cause of action, article 27 of the Regulation gives priority to the court first seised. The case study assumes jurisdiction as respects both companies' claims in both country A and country B. So whether the application in country A to stay proceedings would succeed, is dependent upon whether the proceedings in country B had been commenced earlier than those in country A. If so, a stay is obligatory. If not, country A would have no proper reason for declining jurisdiction in favour of the court second seised.

Assuming that country B is not an EU Member State, and also assuming that jurisdiction exist against Director in both countries, a basis for objecting to the proceedings in country A might be found in the plea of *forum non conveniens.* Put shortly, this is a plea, accepted into English law from Scotland by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*[7], which, in essence, involves the contention, by a defending party, that there is another court, having competent jurisdiction, which may more appropriately and properly determine the issues. The issue is not simply a matter of mere practical convenience for the attendance of witnesses and parties; the strength or weakness of the links or connecting factors to the respective courts are important considerations.

The companies would probably find themselves in some embarrassment in face of such a plea, since having asserted jurisdiction in both countries, they face the stark issue of the more appropriate jurisdiction. A possible answer is that since Sub Co was incorporated in and traded in country B, and hence, presumably the relevant delinquencies (which would require to be tested by the responsibilities which the law of country B placed on directors) and losses occurred there, the plea of *forum non conveniens* would be upheld as respects Sub Co's action in country A.

Were there to be a prorogation of exclusive jurisdiction in favour of the courts of country B in the terms of Director's arrangements with Head Co, that would prevail and the courts of A – ie the UK – would decline jurisdiction. That would apply also if country B were an EU Member State and the court in the UK was first seised.

***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

[7] [1987] AC 460

whether to stay the proceedings?

9) *How would your Court determine whether the relevant claim formed any part of the laws of country*

Since Head Co is incorporated and trades in country A, the duties of its directors would presumably be determined by the law of A. While it would be possible for the courts of B to apply the foreign law (country A), the need to do so would be a factor in assessing appropriateness of forum in terms of any plea of *forum non conveniens.* In so far as remedies, such as the measure of damages, are seen as being for the *lex fori* and not the *lex causae,* such procedural disadvantages as Head Co might suffer in country B would be ignored[8]. What is disadvantageous to Head Co is of course advantageous to Director.

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?*

[8] cf *De La Vega v Vianna*(1830) 1 B & Ad 284

The advancing of a claim for breach of a contract of employment in addition to a claim for breach of duty as director further complicates an already complicated example.

As is pointed out in the Italian report, Regulation 44/2001 has compulsory rules of jurisdiction in employment cases. These prevail against any purported exclusive jurisdiction clause. The employment law of many countries, including the United Kingdom, is – for understandable reasons- hostile to the inclusion within a contract of employment of a clause of exclusive jurisdiction.

That said, if the clause in the contract of employment prorogating the exclusive jurisdiction of the courts of B were valid and thus required the claims based on breach of employee's duties to be litigated in B, that could well render the court in A *forum non conveniens* as respects the claims based on breach of the duties inherent in the office of director.

***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?*

There is no structured mechanism whereby a judge in the United Kingdom would communicate directly with a judge in another country about a given litigation. Generally one would rely on information provided by the parties as to the state of proceedings in the foreign litigation.

***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.*

The courts in the United Kingdom proceed upon the basis that the law applicable to the case is that of the relevant part of the United Kingdom in which the court sits unless one or both of the parties pleads the foreign law. In that event the foreign law must be proved as a matter of fact, that being done by evidence from expert witnesses. (The same rule applies within the UK. Thus if English law is pled as the applicable law in a litigation in Scotland, the terms of the relevant English law require to be proved by evidence unless parties are agreed as to those terms. The UK Supreme Court is however held to know the law of all the UK legal systems.)

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.*

No.

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?

Essentially one would look to the reason for the application, particularly why it is said that the witness cannot attend in the normal way. One reason may be that the witness is unwilling to attend voluntarily and it is therefore necessary to request the court in B to use its powers to summon witnesses. Ill-health or infirmity may prevent the witness from travelling. Or it may be impractical to set up a video link.

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?

Within the EU provision is made under Regulation (EC) 1206/2001 for obtaining evidence expeditiously by letters of request and for facilitating a court's being able to take evidence directly in the other Member State.

The United Kingdom is also a party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, effect being given to that Convention by the Evidence (Proceedings in other Jurisdictions) Act 1975.

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?

Outwith the context of the measures enacted by the EU legislature to advance the creation of the Single European Market by creating mechanisms for the free movement of judgments within the EU Member States, it is not possible to give a useful answer to this question.

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*

As already mentioned, Regulation 44/2001 enables a court in one Member State to grant provisional or protective measures in support of substantive proceedings pending in another Member State. The measures are those available under the law of the court to which application is made.

English law has developed the *Mareva* injunction, being an order prohibiting the defendant from disposing of any of his property pending conclusion of the substantive proceedings. Such an injunction is thus of the nature of a protective measure. There may however be a question whether it can have effect if the defendant has no assets within England and Wales, since the Regulation enables the granting of such measures only if there is a real and substantial connexion to the territory of the court in question. – see Case 391/95 *Van Uden Maritime BV* [1998] ECR I – 7091.

Under Scots law, the provisional or protective measures which are available do not include a general order *in personam* upon the defendant prohibiting him from disposing of his property. They could include an inhibition, registered in the appropriate registers of title to immoveable property, which would invalidate any subsequent disposition of that property; and they could include arrestment of moveable property owned by him, such as incorporeal property

in the form of a bank balance, provided the property is held by a third party.