

8. CONFLICT OF LAWS

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Introduction

8.1 In 2004, the *Singapore Law Reports* contained three reported cases which will be examined in this review. In addition, there were also five unreported judgments which are worthy of note.

8.2 As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws.

8.3 For the sake of completeness, it is appropriate to mention that two cases reported in 2004 have already been reviewed last year. These cases are *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR 457 and *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6.

Jurisdiction

8.4 In the year under review, there were two cases relating to questions of jurisdiction in the context of conflict of laws. Both these cases also brought up issues of procedure.

8.5 In *Tao Commodity Trader Inc v Fortis Bank (Nederland) NV* [2004] SGHC 30, the defendant was a Dutch bank incorporated in the Netherlands. It was registered as a “foreign company” under Part XI, Division 2, of the Companies Act (Cap 50, 1999 Rev Ed) in June 2000. In compliance with s 368(1)(e) of the Companies Act, the Deputy General Manager, Gijsbert Schot (“Schot”), was one of two employees named as agents who were authorised to accept service of process on behalf of the defendant.

8.6 In 2001, the defendant sold and transferred its business operations in Singapore to its parent company. As part of these arrangements, Schot was

employed by the parent company. The defendant closed its Singapore branch and ceased to carry on or have a place of business in Singapore from March 2002. A notice of cessation of business was lodged with the Registrar and duly acknowledged. By April 2003, the defendant's name had been removed from the register. A notice of cessation of agency, however, was not lodged.

8.7 On 31 October 2003, the plaintiff served a writ on the defendant by serving Schot at his residence. It is not clear from the judgment what the cause of action was, but service was effected in accordance with s 376(b) of the Companies Act. The defendant applied to set aside service of the writ. The assistant registrar decided the matter in the defendant's favour and set aside service.

8.8 The court began by stating that the application before it depended upon whether jurisdiction over the defendant existed based on the governing statutory regimes of s 16 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") and Part XI, Division 2, of the Companies Act.

8.9 Counsel for the defendant argued that service had not been valid because at the time of the service, the defendant was no longer registered as a foreign company and had ceased to carry on business in Singapore. Counsel for the plaintiff argued that the status of the defendant's agents to accept service was independent of whether the defendant was registered or was carrying on business.

8.10 The court considered these arguments along with academic and case authorities and concluded that the statutory regime of *in personam* jurisdiction envisioned in s 16 of the SCJA mirrored that of the common law. Since at common law a company could not be served if it had ceased to carry on business, then it had to follow that once the defendant had ceased to be registered under the Companies Act and had ceased to carry on business in Singapore, any purported service on the defendant was not valid.

8.11 Two points may be made about this decision. First, this is the first time that this question has been directly addressed in a decision. This decision makes clear that registration of a foreign company under Part XI, Division 2, of the Companies Act goes towards establishing a nexus of jurisdiction which then determines whether the relevant service provisions apply to the company in question. Conversely, de-registration of the company removes that nexus. Presumably, an unregistered foreign company carrying on business in Singapore has sufficient "presence" to still attract jurisdiction and be served in accordance with the Rules of Court.

8.12 Second, the plaintiff had relied on a number of English case authorities and academic works by Prof Walter Woon which support the proposition that a de-registered company could nonetheless still be served under s 376(b) of the Companies Act. This decision goes against this line of authorities. The court acknowledged this and maintained that while there is force to the argument that, as a matter of policy, it is better to have a wide jurisdictional net ameliorated by the doctrine of natural forum, courts cannot create jurisdiction when there is none. The writer agrees with this decision. Service itself cannot constitute a nexus of jurisdiction. At common law and in the regime under s 16 of the SCJA, nexus is supplied by presence. Presence for a company is constituted by the concept of carrying on business. This decision makes it clear that registration under the Companies Act constitutes sufficient nexus.

8.13 The second case is *Cheong Ghim Fah v Murugian s/o Rangasamy (No 2)* [2004] 3 SLR 193. Although this case does not directly raise an issue relating to conflict of laws, it has an impact upon whether a Singapore judgment may eventually be recognised and enforced. As such, it is useful to briefly mention it here.

8.14 It is not necessary to go into the factual background of this case. Suffice it to say, the plaintiffs had commenced an action in the High Court and the damages awarded fell well within the pecuniary limit of the District Court. The assistant registrar having ruled that costs should be taxed on the District Court scale, the plaintiffs applied to have costs taxed on the High Court scale.

8.15 The court opined that, ordinarily, where Subordinate Court proceedings were commenced in the High Court, costs awarded should be assessed on the Subordinate Courts scale. This stemmed from a desire to have proceedings heard at the correct level of forum. However, in some cases, where there was “sufficient reason” within the meaning of s 39 of the Subordinate Courts Act (Cap 321, 1999 Rev Ed) to initiate proceedings in the High Court, then costs could be taxed on the High Court scale.

8.16 In this case, the court held that there was indeed “sufficient reason” and ordered costs to be taxed on the High Court scale. There were two reasons for this decision. The first was not related to conflict of laws and had to do with counsel’s reasonable expectations that the damages recoverable would exceed the pecuniary limit of the District Courts.

8.17 It is the second reason that is relevant to this review. If a Subordinate Court judgment could not be enforced as a foreign judgment in another jurisdiction, this could constitute “sufficient reason” for commencing proceedings in the High Court. On this second reason, three observations may be made. Firstly, the court opined that where proceedings are commenced in the High Court *only* because of a desire to enforce the judgment in another jurisdiction, costs should continue to be taxed at the Subordinate Courts scale. Therefore, this means that the decision to allow costs to be taxed on the High Court scale in this case depended solely on the first reason.

8.18 Secondly, it is not in every instance of a desire to enforce a Singapore judgment in another jurisdiction that there is sufficient reason to commence proceedings in the High Court. It must be that a judgment of the Subordinate Courts would not be recognised in the jurisdiction in which the judgment is sought to be enforced, and the *sole* means of enforcing the judgment must lie in that jurisdiction. By way of contrast, V K Rajah JC (as he then was) referred to *Sunlink Engineering Pte Ltd v Koru Bena Sdn Bhd* [2003] 2 SLR 452 where Tan Lee Meng J had transferred proceedings to the Subordinate Courts and observed that the need to meet another country’s legislation on reciprocal enforcement of foreign judgments did not, without more, confer on a plaintiff the right to be heard in the High Court. In that case, the foreign defendant had a presence and assets in Singapore and there was little question of the plaintiff being able to enforce a judgment of the Subordinate Courts in Singapore.

8.19 While this seems clear, one wonders what would happen if it was reasonably foreseeable that the entire judgment could not be satisfied by the defendant’s assets in Singapore and that the plaintiff would have to seek enforcement in another jurisdiction? Would this constitute sufficient reason to commence proceedings in the High Court? Taking Rajah JC’s requirement of the foreign jurisdiction having to be the *sole* means of enforcing the judgment, it would appear that the answer is no. However, this hardly seems just and the writer suspects the court will take a fairly robust and common-sense approach to resolving this matter.

8.20 Finally, it is important to point out that this case dealt with the question of registering a Singapore judgment in Malaysia under the Malaysian Reciprocal Enforcement of Judgments Act 1958. Since it is also possible to enforce a subordinate court judgment by common law action in Malaysia, the statements in this case must be restricted to situations where a plaintiff wishes to transfer proceedings to the High Court *in order to seek*

eventual registration in another jurisdiction. Otherwise, there could never be “sufficient reason” for proceedings to be transferred to the High Court as long as a subordinate court judgment is enforceable by common law action in that jurisdiction.

Stay of proceedings: *Forum non conveniens* and *lis alibi pendens*

8.21 In the year under review there were three cases relating to stay of proceedings that are worthy of note. The first was *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409. This case arose out of the unfortunate accident involving Singapore Airlines flight SQ006 at Chiang Kai-Shek International Airport in Taiwan. The plaintiff commenced proceedings against the defendant, Singapore Airlines, which joined the Civil Aeronautics Administration (“CAA”) as a third party in the action seeking an indemnity or contribution from CAA. Singapore Airlines subsequently commenced an action in Taiwan against CAA in respect of the same accident claiming a wider scope of relief than its Singapore action. CAA applied to stay the Singapore action on two grounds. The first ground was on the basis of multiplicity of proceedings. The second was based on the principles of *forum non conveniens*. Woo Bih Li J granted CAA’s application and stayed the local proceedings.

8.22 On the first ground, Woo J stated the principle that when a plaintiff sues the same defendant in two or more different jurisdictions over the same subject matter, the defendant can apply to compel the plaintiff to make an election as to which set of proceedings it wishes to pursue. Once a defendant shows duplicity of proceedings in different jurisdictions, the plaintiff is required to make an election unless it can show “very unusual circumstances”. On the facts, the court found that there was indeed duplicity of actions and that Singapore Airlines had not shown that very unusual circumstances existed. Further, Woo J also opined that Singapore Airlines had affirmatively elected to proceed in Taiwan. As such, the Singapore proceedings should be stayed and dismissed.

8.23 It is useful to make two observations here. First, it is clear that an application for a stay based on a multiplicity of proceedings is an application independent of *forum non conveniens* considerations and is appropriately applied for when a plaintiff commences similar actions in different jurisdictions. Should an applicant fail in its application for a stay on this basis, or if the application succeeds and the plaintiff elects to continue the local proceedings, it is still open to the applicant to proceed with a stay application based on *forum non conveniens*.

8.24 Second, it is clear from *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 4 SLR 21 that the mere commencement of one set of proceedings does not *per se* amount to an election to proceed in that jurisdiction. In addition, the lack of diligence *per se* in prosecuting an action similarly does not amount to an election. In other words, some sort of affirmative election is required. It is therefore interesting that Woo J decided that Singapore Airlines had elected to proceed in Taiwan when it was counsel's submission that no election had been made, and that if called upon the defendant would elect to continue the proceedings in Singapore. This decision seems to have been made on the basis that Singapore Airlines' claim in Taiwan was an election to proceed there. In other words, the defendant had made an election by conduct prior to the present proceedings.

8.25 This seems contrary to the principle in *Yusen Air* that the mere commencement of proceedings does not *per se* amount to an election to proceed in that jurisdiction. Woo J considered it important that in the case before him, the action in Taiwan covered a wider scope of relief than the action in Singapore and that this was unlike the facts in *Yusen Air* where the Singapore action was commenced to claim relief not recoverable in New York.

8.26 Perhaps it might be argued that while commencing proceedings *per se* does not amount to an election, commencing proceedings elsewhere which subsumes the local action does amount to an election. The writer is not convinced of this argument. A commencement of proceedings which subsumes the local action strengthens the argument that there is duplicity of proceedings and perhaps adds to the sense that the proceedings are vexatious. It is not as clear that such a commencement of proceedings amounts to or should amount to an election on the part of the plaintiff. It is suggested that election by conduct prior to proceedings should involve more than this, perhaps some form of representation of that party's intention to definitively proceed in a particular jurisdiction. Perhaps this point can be clarified by the courts at some future opportunity.

8.27 On the second ground, the court stated the principles enunciated in *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460 and went on to consider the factors involved. The court concluded there Taiwan was a more appropriate forum and the ends of justice did not require the action in Singapore to continue nonetheless. Therefore the action could also be stayed on this ground.

8.28 While it is not necessary to look in detail at the court's examination of all the factors, three points can be made. Firstly, as one of the connecting factors, the court considered the question of the governing law. In Taiwan, the governing law would be the law of Taiwan as that was the place where the act was committed. If the action was heard in Singapore, then it would require the consideration of the double actionability rule. Woo J went to great lengths to consider the history, critiques and alternative approaches to the same question by other jurisdictions and concluded that even if the action were to be heard in Singapore, the law of Taiwan would apply as an exception to the double actionability rule. As such, this connecting factor pointed towards Taiwan.

8.29 As an aside, it is interesting to note from this discussion that Woo J was clearly in favour of reform of the law relating to international torts from the double actionability rule to the *lex loci delicti*. This option was, of course, not open to him as he was bound by precedent. However, perhaps this is something that can be considered by the Court of Appeal or even the Legislature at an appropriate time.

8.30 Secondly, Woo J similarly considered the scope of the Taiwanese action to be significant. As it was wider than the scope of the Singapore action, it was possible for the additional matters in the Taiwanese action to be litigated with inconsistent results from the Singapore action. Therefore, this factor of multiplicity of proceedings also favoured a stay.

8.31 Finally, considering stage 2 of the test from *The Spiliada*, it appeared that counsel expressed Singapore Airlines' concern that it would not get justice in Taiwan. This was because CAA was linked to the Taiwanese Government and it was essentially a claim against the Government. From the judgment, it does not seem that an actual submission was made, only an innuendo. This was dismissed, and correctly so, by the court. While not having access to justice is a valid consideration in stage 2 of the test, it is important to maintain respect for the judicial systems of other jurisdictions and not to fall into the chauvinistic trap of assuming that "one can only get justice at home".

8.32 The second case relating to stay of proceedings was *Herbst Ehud v Sampoerna Putera* [2005] 1 SLR 82. The plaintiff, an Israeli, was a consultant engaged by the Sampoerna group of companies of which the first defendant had a controlling interest. The second defendant was held out to be the agent of the first defendant. Pursuant to a business plan, the plaintiff, first defendant and a third party were to participate in a joint venture. To this end,

two Indonesian companies held by Mauritian offshore companies were established and the shares held in trust by the second defendant for the parties' respective nominee companies. Although a joint venture agreement was still being negotiated and had not been signed, the plaintiff made a capital contribution of US\$250,000 on the repeated requests of the second defendant. This remittance was made on the condition that the whole amount would be refunded on demand if the joint venture agreement was not concluded, and there was an implied warranty that the second defendant had been authorised to enter into the refund agreement. When the plaintiff's employment was terminated a year later, he demanded his refund and was asked to withhold his demand for various reasons. In consideration, the second defendant undertook that if the first defendant refused to refund the amount to the plaintiff, he would do so himself. Subsequently, the plaintiff was informed by the second defendant that he was not entitled to a refund. The second defendant also sold the shares in the Indonesian companies without the plaintiff's knowledge or consent.

8.33 The plaintiff commenced proceedings against the first defendant for the refund of the remittance pursuant to the refund agreement made by the second defendant as agent on behalf of the first defendant. The plaintiff also claimed in the alternative against the second defendant for the sum of the remittance as damages for breach of warranty of authority, or pursuant to the undertaking made by the second defendant to refund the remittance upon the first defendant's refusal to do so in exchange for the plaintiff's agreement to withhold an initial demand for the refund of the remittance. The plaintiff also claimed an account of the sale of the shares and payment of any sum payable to him upon such sale, and/or damages for breach of trust. The defendants applied for a stay of proceedings on the grounds that Indonesia was the more appropriate forum. The application first came before the assistant registrar, who ordered a stay. This was reversed on appeal to the High Court by Tay Yong Kwang J, who refused a stay.

8.34 In coming to his decision, Tay J considered the factors put forward by the defendants and concluded that they did not tilt the balance in favour of them. Two brief points can be made here. First, the defendants had relied on the proposition from *Praptono Honggopati Tjitrohupojo v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2002] 4 SLR 667 that if in the balancing process the balance were to remain at the mid-point and tilts to neither side, the action must generally follow the defendant. Tay J disagreed with this and opined that if the balance did not tilt to the forum preferred by the defendant, then the defendant's burden had not been discharged and the action should "follow the plaintiff". Put another way, the

proceedings will not be stayed. This must surely be correct, and in this case the defendant's burden had not been discharged.

8.35 Secondly, while the application was resolved at stage 1 of the test from *The Spiliada*, the court went on to consider the plaintiff's further argument that even if Indonesia was shown to be the more appropriate forum, a stay of proceedings should nevertheless not be granted because of the risk to his personal safety there. For this, the plaintiff relied on a travel advisory issued by Israel's Counter Terrorism Bureau recommending "that all Israeli citizens avoid any visit/stay in Indonesia" because of "a concrete terror threat" posed to such citizens. On this point, Tay J briefly commented that it would not have been unreasonable for a citizen of any country to decide to abide by a travel advisory issued by the government of his country regarding any place in the world.

8.36 This comment is interesting because it is a clear pronouncement that concern for one's personal safety, presumably based on reasonable grounds, is sufficient to satisfy the requirements of justice in stage 2 of the test in *The Spiliada*. This answers the question from *Askin v ABSA Bank Limited* [1999] IL Pr 471; *The Times*, 23 February 1999. In that case, the plaintiff argued that Africa was not an available forum because, *inter alia*, he feared assassination. The court there dismissed this argument on the basis that, on the evidence, there was no strong indication that the plaintiff's concerns about assassination were founded. With Tay J's comment in *Herbst Ehud v Sampoerna Putera*, it would appear that a plaintiff's concern for his safety is well founded if based on a governmental travel advisory. However, one wonders if every instance of a security advisory is sufficient. Are there differing levels of seriousness? Should it be limited to only acts of terror, or can it be extended to other instances of danger to personal safety? Further, just as one should not be parochial and assume that a foreign court is not able to dispense justice, surely one should not assume that a foreign government is unable to adequately protect visitors to their shores.

8.37 The final case relating to stay of proceedings was *Kaki Bukit Industrial Park Pte Ltd v Ng Man Heng* [2004] SGHC 60 ("*Kaki Bukit*"). The plaintiff was a Singapore company in compulsory liquidation. For a period, it was under judicial management until a winding-up order was made in January 2002. In reviewing the accounts, the liquidator discovered that, prior to the order for liquidation, payments were made out of the plaintiff's bank account by the first defendant to various third parties between the period December 1997 and July 1999. The liquidator considered these payments to be in breach of trust and fiduciary duties and the plaintiff commenced

proceedings for breach of fiduciary duty, conspiracy and knowing receipt. The defendants applied for a stay on the basis that Malaysia was the more appropriate forum. The application first came before the assistant registrar, who refused a stay. On appeal to the High Court, this was affirmed by MPH Rubin J who concluded that the defendants had not discharged their burden.

8.38 In coming to its decision, the court reviewed the principles in governing the application for a stay of proceedings and cited from *Dicey & Morris on the Conflict of Laws – Third Cumulative Supplement to the Eleventh Edition* (Sweet & Maxwell, 1990) at paras 393–395. According to the principle stated in this work, a defendant has to show *both* that Singapore is not the natural or appropriate forum, *and also* that there is another available forum which is clearly and distinctly more appropriate than Singapore.

8.39 This is noteworthy as it can be taken as a departure from the usual approach that courts take towards such applications, where a stay will normally be granted if the defendant can show to the court that there is another available forum which is clearly more appropriate for the trial of the action. The court now seems to require a cumulative two-limb approach to stage 1 of the test from *The Spiliada*.

8.40 While it can be taken that the judge in *Kaki Bukit* simply meant to state the usual position with regards to such an application, it is interesting to note that he found that the defendants *had not discharged their burden that Singapore was not the appropriate forum*. This seems to suggest that he was focusing on the requirement that the defendants had to show that Singapore was not the appropriate forum. Of course, one could argue on the facts that even if one had applied the traditional approach, the defendants would still not have discharged their burden in showing that there was a more appropriate forum elsewhere. However, this begs the question of what happens if a case arises where a defendant is able to show that there is a more appropriate forum elsewhere but cannot sufficiently show that Singapore is not the appropriate forum.

8.41 The court's new approach, if that is what it is, raises the defendant's burden at stage 1 of the test from *The Spiliada* significantly. This means greater difficulties in getting stays on the grounds of *forum non conveniens*, thereby adding to the load on the courts. It could also mean that cases which have a greater connection with other jurisdictions may nonetheless not be heard there, not because of reasons of justice but simply because defendants

are unable to show that Singapore is not the appropriate forum. The writer hopes that, at some opportune point, the courts will clarify this.

Jurisdiction clauses

8.42 In the year under review there was one case relating to jurisdiction clauses. In *The Hyundai Fortune* [2004] 4 SLR 548, the plaintiffs shipped from China to Singapore a consignment of melons on board the *Hyundai Fortune*. On arrival in Singapore, the consignment was found to be badly damaged. Surveyors were appointed by the parties and after reports had been made, the plaintiff wrote to the defendants, owners of the *Hyundai Fortune*, making a claim. There was no response from the defendants for almost a year despite several reminders. The plaintiff commenced an action in Singapore suing the defendants for the damaged goods. The contract of carriage contained an exclusive jurisdiction clause in favour of Korea where the action was time-barred. The defendants applied for a stay and at first instance, the application was granted. The plaintiffs appealed to the High Court, the judgment of which is reported in [2004] 2 SLR 213.

8.43 It is appropriate to make three points about the High Court judgment. Firstly, the court observed that the defendants were technically not entitled to the benefit of the jurisdiction clause as they were the owners of the *Hyundai Fortune* and not the contracting carriers. As such, they were not parties to the bill of lading. However, as this point was not brought up by counsel, the court proceeded as if they were parties to the contract.

8.44 Secondly, the court set out the approach where an exclusive jurisdiction clause exists: the court will ordinarily grant a stay of the action unless the plaintiff is able to establish that an exceptional circumstance amounting to strong cause exists to warrant a refusal to stay the proceedings. In determining whether strong cause exists, the court can examine whether there is a real question of liability to refer to the agreed forum, and this includes the consideration of whether a valid defence exists. Further, how exceptional the circumstances must be in each particular case is always a question of fact and degree. The court will take a cumulative approach and give each circumstance due weight. On this point, the court found that there was no real question of liability to be tried in the contractually-agreed forum.

8.45 Finally, the court considered the effect of the time bar in Korea. The defendants argued that the plaintiffs had failed to protect time and that this should not deprive the defendants of their defence. The court considered this argument and held that even though the plaintiffs had failed to provide a

satisfactory explanation for failing to protect time, they could rely on other factors to show strong cause.

8.46 The court therefore concluded that the plaintiffs had shown strong cause and the plaintiffs' appeal was allowed. The defendants appealed to the Court of Appeal, arguing that the learned High Court judge had failed to properly evaluate the facts and thus incorrectly applied the law to the facts.

8.47 There are a number of noteworthy points about the Court of Appeal's judgment. Firstly, there was no mention of the issue of lack of privity in relation to the exclusive jurisdiction clause and the defendants. This is not surprising, although it would have been nice to have the brief thoughts of the Court of Appeal in relation to this matter.

8.48 Secondly, the Court of Appeal stated clearly and correctly that as the judge was exercising a discretion in refusing a stay of proceedings, the Court of Appeal should not interfere in the exercise of that discretion unless it could be shown that the judge had wrongly applied the law, or had wrongly appreciated the facts, or that the decision was plainly wrong. So even if the court disagreed with the High Court's weighting of the factors in exercising its discretion, as long as the High Court had not erred on matters of law or its determination was not plainly wrong, the Court of Appeal would have no basis to intervene.

8.49 Thirdly, the court made it clear that while considering whether strong cause existed, the weight to be given to each of the relevant factors is not something that can be precisely defined. Factors must be weighed cumulatively to see if they amounted to strong cause. Further, factors that were foreseeable at the time of entering into the contract should not be accorded the same weight as the unforeseeable factors.

8.50 In weighing the factors, the court considered it significant that the defendants were unable in their affidavits to identify their defences and that they had ignored the plaintiffs' claim for over a year. The court considered that had the defendants thought that they had a defence, it was reasonable to infer that they would have responded. This was also taken as an indication that they were waiting for the limitation period to lapse in order to seek a procedural advantage. In other words, the court inferred the defendants did not seriously want a trial in the contractual forum.

8.51 Finally, the Court of Appeal considered the question of whether the plaintiffs had acted reasonably in not instituting a protective writ in Korea

before the limitation period had passed. The High Court had found that the plaintiffs had not provided a satisfactory explanation for failing to protect time. It is curious that the Court of Appeal considered otherwise. The court's reasoning was that because the defendants had not acknowledged or responded to the plaintiffs' claim, it was not unreasonable for the plaintiffs to have assumed that the defendants had adopted the stonewalling approach because they really had no answer to the claim. The court went on to say in support that because the defendants were not willing to waive the time-bar defence and have the security furnished in Singapore transferred to Korea, this lent further weight to the point that the defendants did not desire a trial in Korea.

8.52 To the writer's mind, there are two difficulties with this. First, the Court of Appeal seems to be saying that a plaintiff can make an assessment that the potential defendant does not have a real answer to the claim, and as long as that assessment is reasonable, the plaintiff can be taken to have acted reasonably in not taking out a protective writ. Perhaps, on the evidence, the assessment in this case was obvious. However, there are likely to be many cases where this assessment is not so clear. Further, this assessment may sometimes be made before counsel is appointed. Will failure to issue a protective writ based on an assessment, albeit reasonable to a lay person but not a legally-trained one, be sufficient?

8.53 The second difficulty is that the court used the defendants' subsequent behaviour in not waiving the time bar or transferring security to justify the plaintiffs' failure to issue a protective writ. This was with the benefit of hindsight. Since the plaintiffs received no response from the defendants for almost a year (during which they could have issued a protective writ), they could not have known how the defendants would respond with respect to the time bar or transferring security. Put another way, a defendant's subsequent behaviour cannot be validly used to determine whether the plaintiff's failure to protect time was reasonable. The plaintiff's actions must be looked at from the circumstances available to it at the time.

8.54 Having said that, the Court of Appeal's finding only strengthened the plaintiffs' position and did not change the court's position that strong cause had been established. The defendants' appeal was therefore dismissed.

Foreign judgments and orders

8.55 There were two cases relating to the treatment of foreign judgments and orders in the year under review. The first was *AB v AC* [2004] SGDC 6.

This review does not normally consider cases from the District Court but in this case an exception has been made. The applicant mother, a Singaporean, and the respondent father, a Norwegian, were married in Singapore in 1998. Shortly after the birth of their son in 1999, the couple left for Norway. Difficulties were encountered in the marriage and a consent order on the custody of the child was obtained in January 2002 giving joint legal custody and fixing the child's abode with the mother. The father had rights of access. This was followed by a divorce in November 2002. In February 2003, the applicant brought the child to Singapore in contravention of the consent order and has since refused to return the child to Norway. The mother applied for the custody and maintenance of the child in Singapore. The father applied for various declarations and orders but also applied to stay the applicant mother's proceedings on the grounds of *forum non conveniens* and *res judicata*. After hearing submissions, District Judge Daphne Hong stayed the mother's application for custody and maintenance and allowed the father's applications.

8.56 Although this decision dealt with *forum non conveniens*, it was not selected for review because of this reason. It is sufficient to say that on this point, the court applied the standard principles governing such an application. In this case, there was a preponderance of connecting factors pointing to Norway and it is submitted that the learned judge was quite correct in staying proceedings on this ground. This should have been sufficient to dispose of the matter. Of more interest is the court's treatment of the order of the Norwegian courts.

8.57 The father had argued that the Norwegian custody order was *res judicata*. The learned judge considered this and concluded that it was unclear if a custody order could be said to be final and conclusive for the purposes of recognition and enforcement. However, the court went on, *in effect*, to recognise that order on the basis that it was made by the court of the child's habitual residence. As such, the court granted the father custody to return the child to the jurisdiction of the Norwegian court.

8.58 A number of comments can be made about this aspect of the decision. First, it is submitted that the court correctly decided that a custody order may not be final and conclusive for the purposes of recognition. Of more interest, and this is the second point, is what would have happened if the father had argued issue estoppel instead of *res judicata*. Would the court have accepted an argument that because this issue had been resolved as between the parties, the mother was estopped from reopening the matter? It is submitted that even with an issue estoppel argument, the paramount

consideration of the interests of the child would trump and the court would therefore be free to reconsider the matter. Thirdly, by giving *de facto* effect to the Norwegian custody order, the court was strongly influenced by the Hague Convention on Civil Aspects of International Child Abduction. From the perspective of international law, this is unusual as Singapore is not yet a signatory to that Convention. This is not to say that the learned judge did not have good reasons for doing so. For an analysis of this case from a family law perspective with its attendant policy considerations, see Debbie Ong & Valerie Thean, “Family Law” (2004) 5 SAL Ann Rev 281 at paras 13.1–13.5.

8.59 At the end of the day, it is submitted that the decision of the court was correct. It is easier to rationalise this decision on the basis of *forum non conveniens* than on the basis of “recognition” of the foreign court order. On this latter point, it is challenging to find a justification in international law, public or private, for such recognition. Perhaps at some point this matter may be resolved by a clarification by the courts or legislative intervention.

8.60 The second case in this area was *Burswood Nominees Ltd v Liao Eng Kiat* [2004] 2 SLR 436 and the decision on appeal, *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690.

8.61 The plaintiff/respondent, Burswood Nominees Ltd, owned a casino that was frequented by the defendant/appellant, Liao. Liao utilised Burswood’s cheque cashing facility to buy a chip purchase voucher. This facility allowed Liao to issue a personal cheque to the casino in exchange for a voucher of equivalent value which was then exchanged for gambling chips. Needless to say, Liao lost at the gambling tables. Upon subsequent presentation, the cheque was dishonoured. After a period of waiting for payment, Burswood sued upon the dishonoured cheque in the District Court of Western Australia, and in December 2001 obtained a default judgment which was deemed by s 142 of the Supreme Court Act 1935 (Western Australia) to be a judgment of the Supreme Court of Western Australia. In August 2003, Burswood successfully applied for registration of the Australian judgment in the Singapore High Court under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) (“RECJA”). Liao took out an application before an assistant registrar to set aside the registration which was dismissed. He appealed to the High Court and argued that a contract by way of gaming was null and void under s 5(1) of the Civil Law Act (Cap 43, 1999 Rev Ed), and that the judgment could not be enforced in Singapore for public policy reasons. Lai Siu Chiu J characterised the transaction in question as a loan which, in her opinion, fell outside the

prohibition of the Civil Law Act. Further, the registration of the foreign judgment did not offend public policy. She therefore dismissed the appeal.

8.62 Liao then appealed to the Court of Appeal. This appeal was also dismissed but the judgment of the court followed a different line of reasoning. The court first reviewed the principles in *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 where the facts involved a similar credit facility arrangement as the one in the present case. Having noted that the facts of the case before them differed from *Star City* in that the plaintiff/respondent Burswood had already obtained judgment in the Australian courts and was only seeking registration of that judgment in Singapore, the Court of Appeal went on to look at the nature of the claim.

8.63 The Court of Appeal disagreed with the High Court's classification of the transaction as a loan. It looked at the essence of the transaction and concluded that the transaction was Burswood's claim for money won upon a wager. It is submitted that this is correct. It is hard to see the difference between the transaction in *Star City* (which was classified as money won upon a wager) and the transaction in this case. The facility functioned in substantially similar ways and therefore should be classified as money won upon a wager.

8.64 The court then went on to consider the effects of s 5(2) of the Civil Law Act. The court observed that had Burswood's claim been brought in a Singapore court in the first instance (as was the case in *Star City*), s 5(2) would have precluded recovery. The issue, however, was whether public policy precluded registration of Burswood's foreign judgment. Liao had argued that the nature of the transaction and its prohibition under s 5(2) constituted sufficient reasons of public policy for the Australian judgment not to be registered within the wording of s 3(2)(f) of the RECJA.

8.65 The Court of Appeal disagreed. It drew a distinction between the operation of public policy in domestic law and in the conflict of laws. In the latter, the court opined that public policy operates with less vigour. It concluded that the domestic public policy concerns regarding the enforcement of gambling debts did not extend to the public policy concerns of the international community. As such, registration of the Australian judgment did not offend any international public policy considerations. Registration was therefore allowed and the appeal dismissed.

8.66 While the writer agrees in principle with the distinction drawn by the court between the operation of public policy in domestic law and in the

conflict of laws, the reasoning of the court is hard to reconcile with the words of s 3(2)(f) of the RECJA. This provides that:

No judgment shall be ordered to be registered under this section if ... the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

8.67 It is clear that had the cause of action been brought in a Singapore court in the first instance, recovery would have been precluded by reason of domestic public policy. The “public policy” referred to in s 3(2)(f) must refer to the same public policy, *ie*, domestic public policy, that will preclude the cause of action from being entertained at all by the registering court. Therefore, it is difficult to see how the distinction drawn by the court between domestic and international public policy assists here.

8.68 Of course, had Liao sought to argue that registration of the foreign judgment would not have been “just and convenient” for reasons of public policy under s 3(1) of the RECJA, then the court’s reasoning would fully apply here.

8.69 This is a difficult decision as the writer agrees with the outcome of this case from a policy perspective, *ie*, that the judgment of a foreign court relating to a wagering claim should be registrable. With the changes in social expectations in Singapore relating to gambling, perhaps it is time for the Legislature to reconsider the relevant provisions surrounding this subject.