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Singapore: Trends & Developments

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Trends and Developments

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Litigation in Singapore: an Introduction

Streamlining the regime for the recognition and enforcement of foreign judgments

The Reciprocal Enforcement of Commonwealth Judgments Act 1921 (RECJA) was repealed with effect from 1 March 2023. Previously, foreign judgments from Brunei, Australia, India (except the states of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka and the United Kingdom were recognised and enforced under the RECJA. With the repeal of the RECJA, the recognition and enforcement of foreign judgments from these jurisdictions will fall under the Reciprocal Enforcement of Foreign Judgments Act 1959 (REFJA).

The REFJA applies to judgments from recognised courts of foreign countries as gazetted by the Minister. Currently, the list includes Hong Kong and the countries previously included under the RECJA. The REFJA does not apply to any judgment that may be recognised or enforced in Singapore under the Choice of Court Agreements Act 2016 (CCCA), which gives effect to the Hague Convention on the Choice of Court Agreements.

The REFJA applies to interlocutory or final judgments or orders given or made by a recognised court in any civil or criminal proceedings for the payment of money, whether the judgment or order is given or made by a lower or superior court, and includes consent judgments, consent orders and judicial settlements. A judgment is taken to be final even though an appeal may be pending against it or it may still be subject to appeal.

A non-money judgment or order (including an order for interlocutory injunctive relief or a freezing order) may only be recognised and enforced if, having regard to the circumstances of the case and the nature of the relief contained in the judgment or order, the Singapore court is satisfied that enforcement of the non-money judgment or order would be "just and convenient". If the Singapore court is of the opinion that such enforcement would not be "just and convenient", it may nevertheless make an order for the registration of such amount as it considers to be the monetary equivalent of the relief.

The REFJA does not define when it would be "just and convenient" to enforce a non-money judgment or order, and there are currently no reported Singapore court decisions on this point. That being said, one of the criteria for enforcing Commonwealth judgments under the now-repealed RECJA was similarly that enforcement of the judgment must be "just and convenient", and the Singapore Court of Appeal had in that context held in Westacre Investments Inc v The State Owned Co Yugoimport SDPR (also known as Jugoimport-SDPR) [2009] 2 SLR(R) 166 that "just" connotes that the enforcement of the judgment must be "fair and equitable", while "convenient" means that enforcement of the judgment must "not only be fair in the given circumstances, but also appropriately tailored to meet the exigencies of the circumstances". This construction of "just and convenient" is likely to continue guiding the Singapore courts' approach under the REFJA.

Foreign judgments from jurisdictions not falling under the REFJA or the CCCA can still be recognised and enforced under common law. As held by the Court of Appeal decision in Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace) [2010] 1 SLR 1129, a foreign judgment in civil proceedings may be enforced by an action if the foreign judgment if it meets the following requirements:

- it has been decided on the merits of the case and has final and conclusive effect on the parties according to the law under which it was granted;
- it has been obtained from a court of law of competent jurisdiction;
- it is for a fixed or ascertainable sum of money; and
- it does not involve the enforcement of foreign penal, revenue or other public laws, unless:
  (a) the judgment is procured by fraud;
  (b) its enforcement would be contrary to public policy; or
  (c) the proceedings in which it was obtained were contrary to natural justice.

The party seeking to enforce the foreign judgment may apply for summary judgment on the basis that there is no defence to the claim for enforcement.

Developments in cryptocurrency disputes

Recognition of cryptocurrency assets as property

In CLM v CLN [2022] 5 SLR 273, the court granted a proprietary injunction and a worldwide Mareva injunction against persons unknown in respect of stolen cryptocurrency traced to digital wallets held by unknown persons.

In coming to its decision, the court had to grapple with the novel question of whether cryptocurrency was property capable of giving rise to proprietary rights that could be protected by a proprietary injunction. The court answered the question in the affirmative, holding that cryptocurrency satisfied the classic definition of a property right as set out in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 ("Ainsworth"), in that cryptocurrency was "definable, identifiable by third parties, capable in its nature of assumption by third parties, and [has] some degree or permanence or stability". In this connection, the court cited and relied on the New Zealand case of Ruscoe v Cryptopia Ltd (in liq) [2020] 2 NZLR 809, in which the High Court of New Zealand examined the nature of cryptocurrency in the context of the four requirements in Ainsworth and found as follows.

- "Definable": cryptocurrencies are computer-readable strings of characters that are recorded on networks of computers established for the purpose of recording those strings, and are sufficiently distinct to be capable of then being allocated to an account holder on that particular network.
- "Identifiable by third parties": in this regard, an important indicator is whether the owner has the power to exclude others from using or benefiting from the asset. In this vein, excludability is achieved in respect of cryptocurrencies by the computer software allocating the owner a private key, which is required to record a transfer of the cryptocurrency from one account to another.
- "Capable of assumption by third parties": this involves two aspects – that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable. The fact that these two aspects are met by cryptocurrencies is evidenced by the fact that many cryptocurrencies, certainly BTC and ETH, are the subject of active trading markets.
- "Some degree of permanence or stability": the blockchain methodology that cryptocurrency systems deploy provides stability to cryptocurrencies, and a particular cryptocurrency token stays fully recognised, in existence and stable unless and until it is spent through the use of the private key, which may never happen.

CLM v CLN is also notable in that the proprietary and worldwide Mareva injunctions were granted against persons unknown. Relying on UK and Malaysian authorities, the court found that there was nothing in the Rules of Court (2014 Rev Ed) (ROC 2014) that required a defendant to be specifically named. Furthermore, even if the commencement of proceedings against persons unknown contravened the ROC 2014, this was a mere irregularity and would not nullify proceedings. In addition, Order 81 Rule 3 of the ROC 2014 allowed for a reference to persons unknown in summary proceedings for possession of land, and in principle there was no reason why such a reference could not be used for interim orders.

In Janesh s/o Rajkumar v unknown [2023] 3 SLR 1191 ("Janesh"), the court similarly found that non-fungible tokens (NFTs) were property capable of giving rise to proprietary rights that could be protected via a proprietary injunction, as they fulfilled the definition of property as set out in Ainsworth.

In that case, the claimant entered into a cryptocurrency loan transaction with the defendant using the Bored Ape Yacht Club NFT as collateral. Following the claimant's failure to make full repayment, the defendant foreclosed on the Bored Ape NFT. The claimant then filed a suit against the defendant and took out an urgent ex parte application for a proprietary injunction over the Bored Ape Yacht Club NFT.

The court allowed the claimant's ex parte application and similarly applied the Ainsworth test and found that NFTs did satisfy the requirements in Ainsworth and were therefore property. Like CLM v CLN, Janesh is also notable in that the proprietary injunction was granted against the defendant based on his username for his Twitter and Discord accounts, although his actual identity was unknown. Leave was also granted for substituted service of court papers out of jurisdiction on the defendant on his Twitter and Discord accounts, and on the messaging function of the defendant's cryptocurrency wallet address. In allowing substituted service, the court found that Order 8 Rule 2 of the Rules of Court (2021 Rev Ed) (ROC 2021) did not prescribe a closed list of the means by which service of court papers could be effected out of jurisdiction.

More recently, in ByBit Fintech Ltd v Ho Kai Xin and others [2023] SGHC 199 ("ByBit"), the court also held that cryptocurrencies are property such that they are capable of being held on trust. In this regard, the court found as follows.

- The ROC 2021 recognises cryptocurrency as property. Order 22 of the ROC 2021 deals with the enforcement of judgments and orders, and defines "movable property" to include "cryptocurrency or other digital currency".
- Whilst crypto-assets are not physical assets, they do manifest themselves in the physical world, and can be defined, identified, traded and valued as holdings (citing Ainsworth). Although some may be sceptical of their value, value is not inherent in an object.
- The holder of a crypto-asset has, in principle, an incorporeal right of property (similar to copyrights) that is recognisable by the common law as a thing in action and so is enforceable in court.

These decisions show that the Singapore courts are willing and adept in applying established legal principles and concepts to modern technological developments to ensure that the rights of users of modern technology are protected.

That being said, it should be noted that these decisions were all rendered in the contexts of applications for interlocutory reliefs (CLM v CLN and Janesh) or summary relief (ByBit) and were made on an ex parte basis (Janesh) and/or where the defendants were absent and unrepresented (CLM v CLN, Janesh and ByBit). As observed by the court in Janesh, different conclusions may well be reached with the benefit of fuller submissions.

Cryptocurrency is not a money debt for the purposes of statutory demand

In Algorand Foundation Ltd v Three Arrows Capital Pte Ltd (HC/CWU 246/2022) (unreported), the court considered the novel question of whether a debt denominated in cryptocurrency could be regarded as a money debt for the purposes of a statutory demand which, if unsatisfied, would give rise to a statutory presumption of insolvency. The court answered this in the negative and found that the presumption of insolvency only arises where there has been a failure to pay a debt or statutory demand expressed in fiat currency.

This decision should be read as being limited to its specific context. It remains to be seen whether the court will find in other contexts (for example, a common law action for a debt) whether a cryptocurrency debt amounts to a money debt. This decision also does not prevent a creditor of a cryptocurrency debt from bringing civil proceedings to recover the debt (for example, by way of an action for breach of contract or an action for specific performance).

Developments in arbitration

CBX and another v CBZ and others [2022] 1 SLR 0047 ("CBX")

In CBX, the Singapore Court of Appeal set aside portions of two awards on the ground of excess of jurisdiction under Article 34(2)(a)(iii) of the Model Law.

The dispute in CBX arose from two share sale and purchase agreements (SPAs), which provided that disputes should be resolved by International Chamber of Commerce (ICC) arbitration seated in Singapore. In two partial awards, the tribunal ordered the buyers to pay the sellers certain amounts, described as the "Remaining Amounts", and interest thereon in accordance with contractually deferred dates stipulated in the SPAs, rather than on an accelerated basis (which was the basis on which the buyers had originally mounted their claim for the Remaining Amounts, by reason of the buyers' defaults or conduct).

The Court of Appeal held that the tribunal had no jurisdiction to order payment of the Remaining Amounts on a non-acceleration basis. While the sellers' reply did include a new claim for payment on a non-acceleration basis, the buyers never accepted that the new claim came within the tribunal's jurisdiction, and repeatedly objected to the tribunal's consideration of this new claim. There was thus an unresolved jurisdictional issue that the tribunal never identified nor ruled on.

Significantly, the terms of reference (TOR) in the arbitration did not include the new claim, and Article 23(4) of the ICC Rules of Arbitration ("ICC Rules") contemplates that, in the event of a party wishing to make a new claim, the tribunal should expressly consider and determine whether the new claim should be permitted. Where there was a challenge to the new claim, the tribunal should issue a clear jurisdictional ruling. However, the tribunal in the present case did not make any such ruling to admit the new claim, which meant that neither party had any opportunity to address the tribunal's eventual ruling on the new claim.

The requirement for there to be a TOR setting out the claims, defences, reliefs sought and issues to be determined is unique to the ICC Rules. There is no similar requirement under the rules of other major arbitral institutions, such as the LCIA, SIAC or HKIAC. This decision highlights the importance of having a TOR; even if there is no requirement for there to be a TOR, parties to an arbitration should consider having one to clearly delineate the issues submitted to the tribunal for its determination and to avoid jurisdictional challenges at the enforcement stage. That being said, the absence of a TOR does not mean that a party can or should be permitted to introduce a new claim at any time without arbitral input or control. Where a party wishes to introduce a new claim, the tribunal should carefully consider the same and, where appropriate, issue a clear ruling as to whether the new claim should be admitted.

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 4

In this case, the Republic of India applied for various confidentiality and sealing orders, including:

- for India's appeal to reverse and set aside an order for leave to enforce the final award issued in an arbitration between India and Deutsche Telekom AG (DT) ("Appeal") and any other applications that may be filed in connection with the Appeal to be heard in private;
- for the parties in the Appeal to not be identified in any hearing lists; and
- for any published judgment or decision that may be issued in these proceedings to be redacted.

In dismissing India's application, the Court of Appeal clarified the scope of confidentiality over arbitration-related court proceedings. The default position of privacy and confidentiality of proceedings under the International Arbitration Act (IAA) is statutorily provided for in Section 22 of the IAA, which provides that unless the court – on its own motion or upon the application of any person – orders that the proceedings under the IAA are heard in open court, "proceedings under [the IAA] in any court are to be held in private". The Court of Appeal held that the confidentiality of arbitration-related court proceedings was derived from the need to protect the confidentiality of the underlying arbitral proceedings. Therefore, unlike most other court proceedings where the making of privacy orders is a departure from the hallowed principle of open justice and should be an exception rather than the norm, court proceedings relating to arbitration matters are presumptively private as a starting point, and this is so without the need for any application by a party.

However, the Court of Appeal found in that case that the confidentiality of the underlying arbitration had clearly been lost, as the interim and final awards issued in the underlying arbitration were already available on third-party sites. The Swiss Federal Supreme Court's decision not to set aside an interim award was also publicly available and identified India as a party to the arbitration. India's own lawyers published a LinkedIn post that identified India as a party to the enforcement proceedings in Singapore. India's own quasi-judicial bodies as well as the Indian Supreme Court had published various decisions that disclosed the identities of India and DT as well as the outcome of the underlying arbitration. As a consequence, the confidentiality of the underlying arbitration had substantially been lost and there was no basis for maintaining the confidentiality of the enforcement proceedings in Singapore. The competing interest of

open justice therefore overrode the interest of confidentiality.

In reaching its decision, the Court of Appeal exercised cogent reasoning in considering the basis, rationale and practicalities behind ensuring the confidentiality of arbitration-related court proceedings. Indeed, if information pertaining to the arbitration and the related proceedings is already in the public domain, there would have been no real purpose behind maintaining the confidentiality of the related court proceedings. As observed by the Court of Appeal, "[t]he court should not be made to go through an empty exercise to protect confidentiality when there is nothing left to protect". Likewise, the Court found that there was no necessity for the court to exercise its inherent powers to grant the confidentiality orders. In this regard, the private interest of a party not to be seen in an adverse light also does not warrant a grant of privacy orders in a departure from the principle of open justice.

India v DT makes it clear that although arbitration-related court proceedings are presumptively protected by confidentiality, parties should be mindful that this default position is ultimately based on the principle of protecting the confidentiality of the underlying arbitration. Hence, where information relating to the arbitration are found in the public domain, parties should take prompt and active steps to remove them from the public domain, or risk having the cloak of privacy lifted.

CZT v CZU [2023] SGHC(I) 11 ("CZT")

In CZT, the Singapore International Commercial Court (SICC) ruled that records of arbitrators' deliberations are confidential and should be protected against production orders, except in the very rarest of cases where there is a compelling case that the interests of justice outweigh well-recognised policy reasons for such records' confidentiality. This would require allegations that are very serious in nature (for example, allegations of corruption) and it must be shown that they have real prospects of succeeding. This is the first time that the Singapore courts have decided on this issue.

In CZT, the plaintiff applied to the Singapore High Court to set aside a final award issued in an ICC arbitration seated in Singapore. The final award was issued by the majority of the tribunal and the third member of the tribunal issued a dissenting award, accusing the majority, inter alia, of having "engaged in serious procedural misconduct", attempting "to conceal the true ratio decidendi from the parties" and lacking impartiality. To support aspects of its case in the setting aside application, the plaintiff filed three further applications seeking production of the records of the deliberations from all three members of the tribunal. The proceedings were subsequently transferred to the SICC.

In its discovery applications, the plaintiff argued that:

- the majority decided a key liability issue on grounds or for true reasons not contained in the final award and/or as a result of a breach of the fair hearing rule;
- the majority attempted to conceal the true reasons behind the final award by making material changes to an earlier draft award despite it having been approved by the ICC; and
- the majority lacked impartiality.

In dismissing the plaintiff's discovery applications, the SICC recognised the general principle that records of the arbitrators' deliberations are

confidential. While there is no statutory provision expressly to this effect, such confidentiality exists as an implied obligation of law, founded on well-recognised policy reasons. These include that:

- confidentiality is necessary for frank discussion;
- freedom from outside scrutiny enables arbitrators to reflect on the evidence without restriction and, where so inclined, to change these conclusions on further reflection without fear of criticism or need for explanation; and
- unmeritorious satellite litigation to set aside or challenge enforcement of the award based on issues raised during the deliberations should be minimised.

The SICC also found that, based on Article 34 of the ICC Rules, confidentiality would also apply to draft awards before they are finalised.

The SICC also observed that the confidentiality of deliberations does not apply where the challenge is to the "essential process" (such as where there is a complaint that a co-arbitrator has been excluded) rather than the substance of the deliberations. This is not an exception to the confidentiality of deliberations; rather, the protection of confidentiality does not apply to process issues that do not involve an arbitrator's thought processes or reasons for their decision.

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