

STATUTE AND PUBLIC POLICY IN PRIVATE INTERNATIONAL LAW: GAMBLING CONTRACTS AND FOREIGN JUDGMENTS

LIAO ENG KIAT V. BURSWOOD NOMINEES LTD

by YEO TIONG MIN*

This note argues that because there is a legal distinction between the public policy defence to the enforcement of foreign judgments under the common law and the corresponding defence in the Reciprocal Enforcement of Commonwealth Judgments Act, the prohibition against the enforcement of foreign wagering transactions under Singapore law is no longer founded on public policy.

I. INTRODUCTION: TWO FORMULATIONS OF PUBLIC POLICY

Foreign judgments may be enforced in Singapore by action under the common law or by registration under the statutory regimes of the *Reciprocal Enforcement of Commonwealth Judgments Act*¹ (RECJA) which was modelled after the *Administration of Justice Act 1920* (UK),² or the *Reciprocal Enforcement of Foreign Judgments Act*³ (REFJA) which was modelled after the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK).⁴ That there is a distinction between the foreign judgment and the original cause of action is relatively uncontroversial. The common law theory of enforcement is based on the foreign judgment, where the conditions for enforcement under the rules of private international law of the enforcing forum are satisfied,⁵ giving rise to an obligation to obey the judgment. This obligation to obey the judgment is independent of the original obligation that had been enforced by the foreign court.⁶ The enforcement of a foreign judgment is subject to defences, and the most important defence is that of the contravention of the fundamental public policy of the forum. There is also no doubt that the standard of public policy required to defeat the enforcement of a foreign judgment must be higher than the domestic public policy that would have been applied by the Singapore court if the facts of the underlying dispute had been purely domestic and the action had been tried in the Singapore forum. The question is whether the enforcing court should be focusing on the public policy objections to the original obligation that was the subject matter of the foreign judgment, *i.e.*, objection to the

* DPhil, BCL (Oxon), LLB (NUS); Advocate & Solicitor (Singapore); Associate Professor, Faculty of Law, National University of Singapore. The author had been consulted by counsel for the appellant in the noted case. The views expressed here are purely the author's personal views. The author gratefully acknowledges the helpful comments and suggestions of Adrian Briggs, Professor of Private International Law, University of Oxford, while remaining responsible for all errors and infelicities.

¹ Cap. 264, 1985 Rev. Ed. Sing. (in respect of gazetted countries).

² C 81. See the Straits Settlements Government Gazette, 30 September 1921, at 1528.

³ C 13. Cap. 265, 2001 Rev. Ed. Sing. (in respect of gazetted countries).

⁴ See the Singapore *Legislative Assembly Debates Official Report* (1959), vol. 3, no. 25, col. 2189.

⁵ At minimum, this requires a final and conclusive judgment from a foreign court of law, having international jurisdiction over the party sought to be bound, on a question of merits and for a fixed or ascertainable sum of money.

⁶ *Ralli v. Anguilla* (1917) 15 S.S.L.R. 33 (S.S. C.A.) at 76. *c.f.* *Hong Pian Tee v. Les Placements Germain Gauthier Inc* [2002] 2 S.L.R. 81 (C.A.) at paras. 14 and 30.

enforcement of the underlying *cause of action*, or public policy objections to the obligation arising from the foreign judgment itself, *i.e.*, objection to the enforcement of the foreign *judgment* itself.

The controversy over the nature of the public policy defence is encapsulated in the two ways in which the public policy objection has been expressed. Under the RECJA, a foreign judgment shall not be registered 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”.⁷ However, the REFJA draws a clear distinction between the judgment and the underlying cause of action. Under this statute, the registration of a judgment shall be set aside if “*the enforcement of the judgment* would be contrary to the public policy in the country of the registering court”.⁸ The REFJA formulation is aligned with the common law. As Dicey and Morris put the position of the common law of England: “A foreign judgment is impeachable on the ground that *its enforcement* ... would be contrary to public policy.”⁹

Waller L.J. observed of the respective corresponding U.K. statutes in *Soleimany v. Soleimany*: “The distinction between those two provisions may be important, the Act of 1933 being concerned with recognition of the *judgment*, and the Act of 1920 with the original cause of action.”¹⁰ In a similar vein, the distinction is noted in Dicey and Morris¹¹:

At common law ... the public policy exception relates to enforcement ... of the judgment itself, whereas the 1920 Act excludes from registration any judgment in respect of a cause of action which for reasons of public policy or some other similar reason could not have been entertained by the registering court.

In a comprehensive study of Commonwealth legislation, Patchett remarked on the “significantly different formulation” in the two statutes.¹² An important case in the Singapore context is the Straits Settlements Court of Appeal (the predecessor to the present Singapore Court of Appeal) decision of *Ralli v. Anguilla*,¹³ concerning the enforcement of a foreign judgment at common law, where the court, in detailed and reasoned judgments, consciously rejected the formulation based on objections to the underlying cause of action and held that the common law defence was based on objections to the enforcement of the foreign judgment.

On the other hand, in *Liao Eng Kiat v. Burswood Nominees Ltd*,¹⁴ the Singapore Court of Appeal, presented with the registration of a foreign judgment under the RECJA, took the view that the two formulations presented only “minor differences”,¹⁵ and decided the case on the basis that under the RECJA, the test was also whether the enforcement of the *judgment* would be against the fundamental public policy of Singapore,¹⁶ a standard that

⁷ s. 3(2)(f) (RECJA).

⁸ s. 5(1)(v) (REFJA) (emphasis added).

⁹ L. Collins *et al*, eds., *Dicey and Morris: The Conflict of Laws*, 13th ed. (London: Sweet & Maxwell, 2000) at 14R-141, see Rule 44 (emphasis added).

¹⁰ [1999] Q.B. 785 (C.A.) 795 (original emphasis). The distinction in Singapore law was noted in T.M. Yeo, “Role of Public Policy, Overt and Camouflaged, in International Litigation and Arbitration”, in K.S. Teo *et al*, eds., *Current Legal Issues in International Commercial Litigation* (Singapore: National University of Singapore, 1997) 375 at 403-404, and in H.L. Ho, “Problems of Jurisdiction and of Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Singapore and Malaysia”, *ibid.*, at 499, 520, note 154.

¹¹ *Supra*, note 9, at paras. 14-163.

¹² K.W. Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London: Butterworths, 1984) at 3-57.

¹³ *Supra*, note 6.

¹⁴ [2004] 4 S.L.R. 690 (C.A.: P.H. Yong C.J., H.T. Chao J.A., and B. Ang J.) [*Burswood*].

¹⁵ *Ibid.*, at para. 43, presumably comparing s. 5(1)(a)(v) of the Malaysian *Reciprocal Enforcement of Judgments Act 1958* (*in pari materia* with s. 5(1)(a)(v) of the REFJA, which is the same as the common law formulation) with s. 3(2)(f) of the RECJA.

¹⁶ *Supra* note 14, at paras. 32 and 46.

was higher than domestic public policy.¹⁷ This judgment purports to obliterate the view that the concern at the stage of the enforcement of the foreign judgment is with the objection to the enforcement of the underlying cause of action. This is an important decision not only for Singapore, as it is possibly the first reported appellate decision in the Commonwealth to address this problem, which is prevalent in many Commonwealth countries.

It will be argued in this note that, although well-intended, the construction placed on section 3(2)(f) (RECJA), by the Singapore Court of Appeal is not supportable. However, the decision could be justified on the basis of the correct interpretation of the provision if the Court has altered its stand on a question of public policy in a previous case.

II. BACKGROUND: FROM *STAR CITY* TO *BURSWOOD*

It is necessary to understand *Burswood* against the backdrop of the Court of Appeal's recent previous decision in *Star City Pty Ltd v. Tan Hong Woon*.¹⁸ In this case, the question was whether a gaming contract entered into in a foreign country and governed by foreign law (under which it was presumed to be valid) could be enforced under the law of Singapore. The relevant statutory provision was section 5(2) of the *Civil Law Act* (CLA)¹⁹: "No action shall be brought or maintained in the court for recovering any sum of money ... alleged to be won upon any wager ..." The Court of Appeal held that the claim in question, although in respect of a dishonoured cheque obtained from the defendant in exchange for chips used in the claimant's casino, was a claim for money won upon a wager, and not a claim for the repayment of a loan,²⁰ for the purpose of applying section 5(2). The court further held that section 5(2) applied to the transaction, which had occurred abroad and was governed by foreign law, on two grounds. One reason was that the provision was a forum mandatory rule in view of the language of the provision and the public policy of Singapore that it protected.²¹ The court rejected the view that gambling was in itself against the fundamental morality or public policy of Singapore.²² The real objection lay in the misuse by casinos of judicial resources to enforce gambling debts: "Valuable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims."²³ The other reason was that the provision was procedural in the private international law sense,²⁴ because it barred the enforcement of the right without extinguishing the right of action as such.²⁵

In *Burswood*, the claim was in respect of a dishonoured cheque in a transaction similar to that in *Star City*. The transaction took place in Western Australia and was governed by the law of Western Australia where the casino was located and the gambling took place.

¹⁷ *Supra* note 14, at para. 41.

¹⁸ [2002] 2 S.L.R. 22 (C.A.) [*Star City*].

¹⁹ Cap. 43, 1999 Rev. Ed. Sing.

²⁰ The court accepted that had it been a loan occurring abroad and governed by foreign law, s. 5(2) would not apply. For further discussion in respect of the effect of such loans under the private international law of Singapore, see: T.M. Yeo, "Are Loans for International Gambling Against Public Policy?" (1997) 1 S.J.I.C.L. 593 and T.M. Yeo, "Loans for Extraterritorial Gambling and the Proper Law" (1998) S.J.L.S. 421.

²¹ *Supra*, note 18, at paras. 27-32, especially at para. 29. The determination of s. 5(2) as a forum mandatory provision was in the context of "recharacterising" the foreign "loan" transaction as a wagering transaction falling under s. 5(2), but this is the same as saying that s. 5(2) must apply to the transaction, even though it occurred in a foreign country and is governed by foreign law and however it is characterised by foreign law, so long it falls within the terms of s. 5(2) because it is a forum mandatory provision.

²² *Supra*, note 18, at para. 30.

²³ *Supra*, note 18, at para. 31. The court focused its discussion on the misuse of judicial resources by casinos to enforce gambling debts. It is unclear whether underlying public policy was intended to apply to *all* causes of action caught by s. 5(2), although the language also suggests that it is the undesirability of "wagers" generally that is the reason of the objection.

²⁴ *Supra*, note 18, at paras. 8-14.

²⁵ *Supra*, note 18, at para. 12.

The key difference from *Star City* was that the respondent had obtained judgment²⁶ against the appellant in Western Australia, and had sought to register the judgment under the RECJA in Singapore. The Singapore High Court characterised the transaction as a loan, and dismissed the appellant's application to deregister the judgment.²⁷ The Court of Appeal disagreed with this finding of the High Court, and held that the underlying claim was one to enforce a wagering contract for the purpose of section 5(2) (CLA). Nevertheless, the court dismissed the appeal. The appellant's case was that the original cause of action could not have been entertained by the Singapore courts for reasons of public policy because of section 5(2) (CLA), and the case therefore fell within the defence to registration in section 3(2)(f) (RECJA). The court rejected this contention in two steps. First, section 5(2) (CLA) and section 3(2)(f) (RECJA) encapsulate different standards of the public policy defence; the former is a statement of Singapore's domestic public policy while the latter requires a stronger threshold of public policy to be met in order to refuse the registration of a foreign judgment.²⁸ Secondly, enforcing the judgment would not offend any fundamental principle of justice or deep-rooted tradition of Singapore constituting the fundamental public policy of Singapore under section 3(2)(f) (RECJA);²⁹ the domestic public policy against the enforcement of gambling debts is not so fundamental that it would operate at the "international" level.³⁰

This note will consider this aspect of the decision in three steps. First, it will consider whether there is any significant difference in the two formulations of the public policy defence. Secondly, in concluding that there are significant differences, it will consider whether the conclusion of the court in *Burswood* that the RECJA formulation did not differ from the common law principle is supportable by the language of the provision in question. Thirdly, regardless of whether the court was right or not on the issue of statutory interpretation, this note will consider whether and how the result of the case may be reconciled with the decision in *Star City*.

III. ANALYSIS

A. *The Two Faces of Public Policy*

In spite of the court's dismissal of the difference in the formulation of the two perspectives on the public policy defence as only "minor", it is respectfully submitted that there is a vast difference,³¹ although the two can also be closely related.

In many cases, the objection to the enforcement of the original cause of action would translate into an objection against the enforcement of the foreign judgment itself, as the same effect on the public policy of the forum would be felt. Suppose the original cause of action was to enforce a contract entered into with the object of committing an illegal act in a friendly foreign state. Such a cause of action would fail in the court of forum, whatever law should govern the contract, for contravening the fundamental public policy of the forum of protecting friendly foreign relations.³² Suppose that a foreign court, after finding such facts, nevertheless enforced such a contract. The enforcement of this foreign judgment in

²⁶ This was obtained in the District Court of Western Australia, and subsequently entered as a judgment of the Supreme Court of Western Australia under the *Supreme Court Act 1935*, s. 146, and deemed under that provision to be a judgment of the Supreme Court for the purpose of overseas enforcement in a country to which the *Foreign Judgments Act 1963* applied.

²⁷ [2004] 2 S.L.R. 436.

²⁸ *Supra*, note 14, at paras. 24-41.

²⁹ *Supra*, note 14, at para. 45.

³⁰ *Supra*, note 14, at paras. 42-46.

³¹ See also text to *supra*, note 10 *et seq.*

³² *Foster v. Driscoll* [1929] 1 K.B. 470 (C.A.); *Bhagwandas v. Brooks Exim Pte. Ltd.* [1994] 2 S.L.R. 431, 438; *Royal Boskalis Westminster N.V. v. Mountain* [1999] Q.B. 974 (C.A.) 692.

the forum would contravene the same fundamental public policy of the forum.³³ In such a case, the same public policy that would have opposed the enforcement of the original cause of action would also apply to the enforcement of the foreign judgment, and the two formulations would lead to the same result.

On the other hand, there are many cases where the objection to the enforcement of the foreign judgment has nothing to do with the enforceability of the original cause of action in the forum. The defences of breach of natural justice³⁴ and fraud,³⁵ both of which are founded on the fundamental public policy of the forum, are clear examples. The basis of the objection lies in how the judgment had been obtained, not whether the forum would have enforced the original cause of action. In this type of case, there will be a critical difference to the outcome whether one is concerned with the objection to the original cause of action, or to the enforcement of the foreign judgment.

It is also possible that the court of the forum may have public policy objections of a fundamental nature (so that it does not matter what law governs the claim) to hearing the original cause of action, but the court may not have any such objection to the enforcement of a foreign judgment based on the cause of action. For example, the original cause of action may be one where the court of the forum would have dismissed the claimant's case on the basis that the claim is tainted by a connected illegal transaction.³⁶ The foreign court hearing the case may find that the connection is too remote, and enforce the claim. In such a case, on the assumption that the tainting doctrine of the forum reflects a fundamental public policy, the foreign judgment may still be enforced because the respect for the final judgment of a foreign court of law on the question of the remoteness of the connection may outweigh the application of the forum's fundamental public policy that would have resulted in the refusal to enforce the original claim, unless the seriousness of the illegality is such that the court of the forum would take the view that it must ultimately decide on the question.³⁷ In this type of case, there could be critical differences of outcome depending on whether one is concerned with the objection to the original cause of action, or to the enforcement of the foreign judgment.

Thus, there is a clear distinction between objecting to the enforcement of the original cause of action and objecting to the enforcement of the foreign judgment. In the light of modern understanding of principles of private international law and modern views of international comity, at the stage of enforcement of the foreign judgment, the enforcing forum should be concerned with the public policy objections to the enforcement of the foreign judgment itself, taking into consideration the possibility of the transmission from the public policy objections to the enforcement of the original cause of action to the public policy against the enforcement of the foreign judgment.

The early common law did not take such a sophisticated approach to the application of public policy in private international law. There was a conflation between the original cause of action and the foreign judgment. This is hardly surprising for it was only in the middle of the nineteenth century or so that the foreign judgment began to be seen as capable of generating independent rights.³⁸ Thus, there had been a suggestion that if a cause of action was unknown in the forum (so that no action on it could ever succeed in the forum), then a foreign judgment based on such a cause of action is not enforceable.³⁹ This has been

³³ *Soleimany v. Soleimany*, *supra*, note 10, at 796-797.

³⁴ *Adams v. Cape Industries Plc* [1996] Ch. 433, 496 (Scott J.).

³⁵ *Jacobs v. Beaver Silver Cobalt Mining Co.* (1908) 17 O.L.R. 496, 505, approved of in *Hong Pian Tee v. Les Placements Germain Gauthier Inc.* [2002] 2 S.L.R. 81 (C.A.) at para. 20.

³⁶ See, e.g., *Euro-Diam Ltd. v. Bathurst* [1990] 1 Q.B. 1 (C.A.).

³⁷ *C.f. Westacre Investments Inc. v. Jugoinport-SPDR Holding Co. Ltd.* [2000] 1 Q.B. 188 (C.A.) at 316-317 (Waller L.J.).

³⁸ *Williams v. Jones* (1845) 13 M. & W. 628, 633, 153 E.R. 262, 264-265.

³⁹ *Re Macartney* [1921] 1 Ch. 522.

debunked in modern times.⁴⁰ Significantly, the 1908 edition of Dicey states a “possible exception” to the enforcement of a foreign judgment at common law⁴¹:

An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England.

This statement was considered in *Ralli v. Anguilla*.⁴² The claimant had sought to enforce a judgment from India alleged by the defendant to be based on an action on a wagering contract. The objection was taken in enforcement proceedings in the Straits Settlements on the basis that the underlying contract could not have been enforced in the forum because of section 7 of the Civil Law Ordinance 1900 (predecessor to section 5 (CLA)). The court decided that the judgment stood on a different footing from the original cause of action. It also decided that, on the assumption that the original cause of action could not have proceeded under the law of the forum because of the statutory provision, the foreign judgment was conclusive of the issue whether the contract was enforceable because the defendant ought to have raised this defence in India but had not done so. On the basis that the underlying cause of action was based on the enforcement of a wagering contract, Edmonds J. and Woodward J., in detailed and reasoned judgments, both expressly rejected the quotation by Dicey above as not being reflective of the common law principle, and held that the judgment was enforceable even if the cause of action could not have been proceeded upon in the forum.

B. *Statutory Interpretation*

The predecessor to the RECJA was introduced to the Straits Settlements in 1921,⁴³ shortly after the enactment of the U.K. statute upon which it was based.⁴⁴ The words of 3(2)(f) (RECJA), which have remained unchanged throughout the history of the statute, are important enough to merit repetition in full:

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 for public policy or for some other similar reason could not have been entertained by the registering court.

It is notable that the Court of Appeal in *Burswood* made no attempt to analyse the words of this section after reciting it, except for an obscure reference to “minor differences” already mentioned above.⁴⁵ It is somewhat surprising that, in a case essentially turning on the interpretation of a statutory provision, very little attention was in fact paid to the wording of the provision.⁴⁶

The literal meaning of the provision is very clear: if the original cause of action could not be enforced in the Singapore court because of public policy or other similar reason, then the judgment cannot be registered. The literal words require that the relevant public policy to be tested in this provision is the public policy that opposes the enforcement of the original cause of action. So, it follows that so long as there is a public policy or similar ground that would have caused the enforcement of the underlying claim to fail had it been

⁴⁰ *Cablevision Systems Development Co. v. Shoupe* [1986] 39 W.I.R. 1; Anderson, “Enforcement of foreign judgments founded upon a cause of action unknown in the forum” (1993) 42 I.C.L.Q. 697.

⁴¹ Dicey, *The Conflict of Laws*, 2nd ed. (London: Stevens and Sons, 1908), see Rule 102.

⁴² *Supra*, note 6.

⁴³ Reciprocal Enforcement of Judgments Ordinance 1921, Ord. 34 of 1921.

⁴⁴ *Supra*, note 2.

⁴⁵ *Supra*, note 15.

⁴⁶ For a critique of the general tendency of traditional techniques in private international law to pay inadequate attention to statutory provisions of the forum, see A. Briggs, “A Note on the Application of the Statute Law of Singapore within its Private International Law” (2005) S.J.L.S. (forthcoming).

brought in Singapore, the judgment cannot be registered. On the facts, if the original claim had been brought in Singapore, the Singapore court could not have entertained it because of section 5(2) (CLA). *Star City* instructs us that this provision is based on the public policy of protecting judicial resources from being wasted by the enforcement of gambling debts.⁴⁷ So the claim could not have been entertained for a reason of public policy. *Ergo*, the judgment shall not be enforced.

In demanding a different standard of public policy to apply to section 3(2)(f) (RECJA) from the standard in section 5(2) (CLA), the *Burswood* court therefore rejected the literal interpretation. But how is it possible to get around such clear words of the statute? There was no identification of any word or phrase which was capable of a range of meanings in its linguistic “register”,⁴⁸ and no indication of any relevant ambiguity in the words of the provision that needed to be resolved.

One argument against the literal approach is that the court should apply the purposive approach. Section 9A(1) of the *Interpretation Act*⁴⁹ states:

In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

The application of this section presupposes two conditions. First, there must be at least two plausible interpretations. The purposive approach presupposes that the “words are sufficiently flexible to admit of some other construction by which [the statutory] intention will be better effectuated.”⁵⁰ Secondly, one of the interpretations would promote the purpose or object of the written law, and the other would not. Assume for the present that it is plausible to understand section 3(2)(f) as a reference to the public policy objection to the enforcement of the foreign judgment instead of a reference to the objection to the enforcement of the original cause of action. The next step is to determine which interpretation will promote the underlying object of the written law. This begs the question: what is the object of section 3(2)(f)? Is it to create a defence to registration based on objections to the original cause of action or to the judgment? The answer seems clear enough. The object is stated clearly in section 3(2)(f) itself. It is to prevent registration when the Singapore court could not entertain the original cause of action for policy reasons.

Suppose that we ignore for the time being what is stated expressly in section 3(2)(f), for the true object may not be expressly stated.⁵¹ What, then, is this true object? *Owens Bank Ltd v. Bracco*⁵² instructs us that the UK legislation upon which the RECJA was based, was intended to capture the common law as understood at the time of its enactment. The truth is that the common law position at that time in respect of this point was murky. This is illustrated most clearly in *Ralli v. Anguilla*, where the Straits Settlements Court of Appeal considered this very problem in the common law. The UK Parliament, in adopting the language it did for this defence in the *Administration of Justice Act 1920*, is likely to have considered the statement in Dicey, being highly regarded as an authoritative text on English conflict of laws, and very likely adopted it as its object. The Straits Settlements Legislature, in adopting this piece of legislation wholesale in 1921, could be said to have adopted the

⁴⁷ Although there is some doubt as to whether the *Star City* public policy applies to *all* claims caught by s. 5(2) (see *supra*, note 23), there is no doubt that it would have applied to *this* claim.

⁴⁸ *Maunsell v. Olins* [1975] A.C. 373, 291.

⁴⁹ Cap. 1, 1999 Rev. Ed. Sing. This section does not require the wording of the provision requiring interpretation to be ambiguous: *Planmarine AG v. Maritime and Port Authority of Singapore* [1999] 2 S.L.R. 1 (C.A.) at para. 22).

⁵⁰ *Caledonian Railway v. North British Railway* (1881) 6 App. Cas. 351, 358 (Lord Selborne).

⁵¹ See text to *supra*, note 49.

⁵² [1992] 2 A.C. 443.

same object. If the Legislature is to be presumed to be aware⁵³ of *Ralli v. Anguilla* at that time,⁵⁴ the adoption of the language in the predecessor to section 3(2)(f) in the light of the reasoned discussions in that case would have led to an inference that the legislative intention was *not* to follow the common law on this point.

In other words, on any of the views considered above, the most probable conclusion is that the object of section 3(2)(f) is, in accordance with intuition, stated in section 3(2)(f).

Another possible argument against the literal interpretation is that it causes a serious mischief because it would leave a large lacuna in respect of cases where there is a public policy objection against the enforcement of the judgment, but which does not impinge upon the original cause of action (*e.g.*, breach of natural justice). However, this argument is not persuasive because the gaps can be plugged by a judicious use of section 3(1).⁵⁵ So, it would not be just or convenient to enforce a foreign judgment where there had been serious unfairness in the proceedings of the foreign court.

Yet another argument that could be mounted is that if the literal interpretation is taken, then the judgment cannot be registered, but the judgment creditor would then sue on the judgment under common law where the more enlightened public policy defence formula would apply. This would waste the time of the court and that of the judgment creditor. However, this inconvenience is not sufficient to overcome the plain words of the statute. What it means is that, properly advised on the law, the judgment creditor perhaps ought to have simply proceeded on the common law. Moreover, there is no assurance of a different result, in view of the possibility that the same public policy being contravened whether by the enforcement of the action or of a judgment upon the action.

Thus, it is submitted that section 3(2)(f) means exactly what it says, and says exactly what it means. We may not agree with it; it is probably inconsistent with contemporary understanding of private international law, and should be modified. But so long as it remains in the statute books, it is law and must be applied.⁵⁶ It is respectfully submitted that the *Burswood* court had been mistaken on this point. This does not, however, necessarily mean that the result in *Burswood* was wrong.

The remainder of this note will consider, on the basis that the *Burswood* interpretation is correct, what that means for the public policy in *Star City*, and then, on the basis that it was wrong on the statutory interpretation point, whether the *Burswood* decision could be supported on any alternative basis without reconsidering the public policy in *Star City*, and finally, on the assumption that no such alternative can be found, what modifications must be understood to have been made to the public policy position stated in *Star City*.

C. Implications of *Burswood*

1. Public Policy against the Foreign Judgment

Having decided that the public policy objection had to be one directed at the enforcement of the foreign judgment, the *Burswood* court considered that the public policy in *Star City*

⁵³ *Farrell v. Alexander* [1977] A.C. 59 at 84; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 649.

⁵⁴ It was quite possible, given the state of law reporting at that time, that the Legislature had no knowledge of the case. Although the case was decided in 1917, the law report containing the case was published only in 1931.

⁵⁵ See also Patchett, *supra*, note 12, at [3-57]. This provision is discussed further at *infra*, Section C.2.

⁵⁶ Statutory law does not lapse by desuetude in the common law: *The King v. Governor of Wormwood Scrubs Prison* [1920] 2 K.B. 305. Such a doctrine is inconsistent with the constitutional division of powers in Singapore anyway: see the Malaysian case of *Johnson Tan Han Seng v. P.P.* [1977] 1 M.L.J. 66. In any event, the doctrine of desuetude does not go so far as to allow the court to *change* the meaning of the written law. The most that can be said is that such laws should as far as possible within the language of the provision be applied restrictively: see *e.g.*, *Lin v. P.P.* [1986] S.L.R. 436, 440; [1987] 1 M.L.J. 106, 109.

was only of domestic effect and there was no fundamental public policy of the forum that would be contravened by the enforcement of the foreign judgment.⁵⁷ Assuming that the *Burswood* court was correct on the point of statutory interpretation, it may appear that a straightforward application of *Ralli v. Anguilla*⁵⁸ would get to the result reached by the court. However, one key difference between this case and *Ralli v. Anguilla* is that *Ralli v. Anguilla* did not consider the predecessor to section 5(2) (CLA) to be a forum mandatory provision or to be based on any fundamental public policy, whereas *Star City* mandated that consideration in *Burswood*.⁵⁹ On this basis, there is some difficulty reconciling the statements on public policy in the *Burswood* and *Star City* cases.

At the more general level, the statements probably reflect different attitudes to the enforcement of gambling transactions. This is perfectly acceptable, on the basis that public policies do change with time, even if the Singapore timeline is a rather rapid one.

For example, the *Star City* court was concerned about the Singapore courts being used by casinos to enforce foreign gambling transactions.⁶⁰ The *Burswood* court was more concerned that Singaporeans who ran up gambling debts in foreign countries should answer to them, even in Singapore.⁶¹ It is not clear that the interposition of a judgment makes such a significant difference from the policy perspective. If the court is concerned about having its resources wasted by casinos using it as a debt collection agency, it seems facile that the court should close an eye when it is done through a foreign judgment. This is the classic situation where the policy objection against the enforcement of the underlying cause of action could reach the enforcement of the foreign judgment. The decision in *Burswood* was, of course, implicitly, that this specific public policy did not do so in this case. But although much was said about public policy, it is still not clear why casinos which enforced gaming contracts through courts in other countries which were willing to act as debt collectors were not wasting the judicial resources of the Singapore court. Conversely, if a Singaporean who runs up foreign gambling debts should answer to them in a Singapore court, it is difficult to see why that same Singaporean should be protected if the foreign casino is suing directly on the original cause of action which is based on a foreign transaction and governed by a foreign law under which it is perfectly valid.

The *Star City* court noted that the gaming contract remained valid, and the casino could bring it to another country to enforce.⁶² On the other hand, the *Burswood* court was concerned about giving effect to the foreign judgment in Singapore.⁶³ One could easily have said that the casino could bring the foreign judgment to another country to enforce. The Singapore court would disregard a foreign *sovereign* (presumably the ultimate source of foreign laws otherwise applicable to the transaction by Singapore's choice of law rules) to protect its own judicial resources from being used to enforce a gaming transaction, but would gladly offer its resources to enforce the pronouncement of a foreign *judiciary* that had enforced the same gaming transaction. The combined effect of *Star City* and *Burswood* is to turn the casino away when it wants to use the court system to enforce a debt, but then to assist it once it has obtained a judgment from a foreign court which does not turn it away. This *modus operandi* vaguely resembles the proverbial bureaucratic red-tape. Of course, one has to be mindful that the court thought that the interposition of a judgment made all the difference. But, as a matter of policy, the distinction is not convincing.

⁵⁷ *Supra*, note 14, at para. 24, as elaborated in paras. 25-46.

⁵⁸ *Supra*, note 6, discussed at text to and following *supra*, note 42.

⁵⁹ This point also distinguishes *The Aspinall Curzon Ltd. v. Khoo Teng Hock* [1991] 2 M.L.J. 484 (considered in *Burswood*, *supra*, note 14, at para. 43, even on the court's assumption that the differences in statutory language were insignificant).

⁶⁰ *Supra*, note 23.

⁶¹ *Supra*, note 14, at para. 46.

⁶² *Supra*, note 18, at para. 32.

⁶³ *Supra*, note 14, at para. 46.

At a more specific level, there is a potential conflict of a more serious kind. As noted above, *Star City* was at least partly based on the mandatory nature of section 5(2) (CLA) and the public policy of not wasting the court's judicial resources on waging claims which are in their nature unmeritorious of judicial attention.⁶⁴ It is impossible to see this as a "domestic" public policy⁶⁵ only, seeing that the *Star City* court was adamant that the "peremptory" language of section 5(2) (CLA) and its basis in public policy required its application to transactions occurring in foreign lands and governed by foreign law.⁶⁶ In view of the *Burswood* court's approach to section 3(2)(f) (RECJA), the court probably used "domestic" public policy to mean that the public policy encapsulated in section 5(2) (CLA) applied only to *domestic* litigation (whether the facts involve foreign elements or not) as opposed to *foreign* litigation resulting in a foreign judgment. As the public policy identified in *Star City* is the prevention of wastage of judicial resources being used to enforce gambling transactions, this same public policy may be contravened by the enforcement of a foreign judgment which enforced foreign gambling transactions, or to use a stronger case, a foreign judgment enforcing a *local* gambling transaction (where not illegal).⁶⁷ Although section 5(2) (CLA) does not technically apply to the registration of a foreign judgment, statutes can be the source of fundamental public policy of general application.⁶⁸ Since the policy underlying the provision has been identified as an extra-territorial public policy that applies to foreign transactions, it could certainly affect the enforcement of foreign judgments in respect of such transactions.

One possible reconciliation is that the forum should always give greater respect to the enforcement of foreign judgments than to the enforcement of foreign laws where they both contravene the same fundamental public policy of the forum. However, that this is not necessarily so is clearly demonstrated in the cases that have refused the direct or indirect enforcement of foreign penal⁶⁹ or revenue⁷⁰ laws. There are legitimate concerns of international comity where the public policy argument being made in the enforcing forum is premised on facts contrary to the findings of the foreign court.⁷¹ But absent this consideration, the public policy of the forum would be too vulnerable if the shield of foreign adjudication is used too liberally. Moreover, it is uncertain when this "shield" would apply. If foreign adjudication creates a shield against a public policy that was held in a previous case to apply to transactions wherever occurring and whatever the governing law, it is difficult to tell what kind of public policy will pierce this shield. Suppose that a foreign court allows a claim for a lump sum maintenance to be paid by one party to another under foreign rules governing mutual rights in a civil partnership (*i.e.*, a legally recognised homosexual relationship). Even if all the relevant facts and the governing law of the claim⁷² are foreign, such a claim probably cannot be entertained⁷³ in a Singapore court for a reason of public policy.⁷⁴

⁶⁴ *Supra*, note 21.

⁶⁵ *Supra*, note 14, at paras. 24 and 42.

⁶⁶ *Supra*, note 21.

⁶⁷ The *Burswood* reasoning could allow the enforcement of such a foreign judgment: see the emphasis on licensed casinos at *supra*, note 14, at para. 46.

⁶⁸ *Bossevain v. Weil* [1949] 1 K.B. 482 (C.A.) at 490-491; O. Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 *Grotius* 39 at 59-69; Y.L. Tan, "A Case of Foreign Illegality?" (1988) 30 *Mal. L.Rev.* 420 at 422-423; *Ngui Mui Khin v. Gillespie Bros. & Co. Ltd.* [1980] 2 M.L.J. 9.

⁶⁹ *U.S.A. v. Inkley* [1989] Q.B. 255 (C.A.).

⁷⁰ *Government of India v. Taylor* [1955] A.C. 491, 506.

⁷¹ See text to and following *supra* note 36.

⁷² Ignoring for the present purposes the difficulties of characterising such a claim. For discussion of some of these difficulties, see T.M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) at 3.28, 6.52-6.55.

⁷³ Assuming there is no procedural objection based on the inability to award an appropriate remedy to give effect to the foreign right: *Phrantzes v. Argenti* [1960] 2 Q.B. 19.

⁷⁴ Although the recognition of such rights may not be deleterious to the *local* marriage institution, the content of such law is probably still regarded as repugnant to prevailing fundamental moral notions. *Contra* B. Crown,

Assuming this public policy to exist, would this be a “domestic” or “international” public policy, as understood in *Burswood*? The only distinction appears to be the adjudication shield, but the existence of this shield is the very question we are trying to answer.

A more secure foundation for reconciliation is to confine the content of the *Star City* public policy to the wastage of *adjudicatory* resources only. On this reasoning the use of the court’s execution machinery for the enforcement of a foreign judgment can be distinguished and thus not affected by the *Star City* public policy. One possible justification for the distinction is that adjudicatory costs are higher than enforcement costs. Another is that adjudication may involve the court going into unmeritorious questions of the content of the wager, a task which the court may find unsavoury,⁷⁵ while execution generally does not involve such questions. However, *Star City* itself did not distinguish between adjudicatory and enforcement resources. Modification of the *Star City* public policy would leave that court’s reasoning on the forum mandatory nature of section 5(2) (CLA) intact, though now resting on a more restrictive content of public policy. On the interpretation of section 3(2)(f) (RECJA) taken by the *Burswood* court, this view does the least damage to *Star City*.

Another way is the removal of the public policy basis of *Star City* altogether (*i.e.* the enforcement of gaming contracts is not really a waste of the court’s time, or at least not such a serious waste as to amount to contravention of public policy applying irrespective of the foreign elements of the case), leaving *Star City* to stand solely on the reasoning that section 5(2) (CLA) is procedural in the conflict of laws sense. The implication of this view is discussed below.⁷⁶

2. *Alternative Explanations?*

If, on the other hand, as submitted in this note, the decision in *Burswood* is wrong on the statutory interpretation of section 3(2)(f) (RECJA), is there an alternative explanation of the case that would be consistent with the *Star City* public policy-based bar to the enforcement of the original cause of action?

One possibility that can be dismissed shortly is that of resting the decision on section 3(1) (RECJA). The *Burswood* court referred to this provision at the conclusion of its judgment, as a point relevant to the resolution of the dispute:

Whilst s 3(2) of the RECJA lays down various restrictions on the court’s power to order the registration of foreign judgments, s 3(1) of the RECJA gives the court the general discretion to order the registration of a foreign judgment if “in all the circumstances of the case [the court] thinks it is *just and convenient* that the judgment should be enforced in Singapore” [emphasis added]. In our assessment, Liao had failed signally in his attempt to show that it was not just and convenient for us to register the Australian judgment.⁷⁷

While this could be read as resting the decision independently on section 3(1), it is more likely that the court had simply meant that there was an alternative defence that did not apply to the facts. The broader reading would contradict section 3(2) which begins with the heading of “Restrictions on registration” and states that “No judgment shall be ordered to be registered under this section if ...”, followed by the various recognised defences to

“Civil Partnerships in the UK—Some International Problems” (2003-2004) 48 N. Y. L. Sch. L. Rev. 697 at 707. The refusal to recognise foreign status of marriage between persons of the same sex is sometimes said to be based on the essential definition of marriage (and thus a matter of characterisation) but it is submitted that quintessentially the issue is one of public policy: *C.f.* Y.L. Tan, *Conflicts Issues in Family and Succession Law* (Singapore: Butterworths Asia, 1993) at 221-223.

⁷⁵ See *Hill v. William Hill (Park Lane) Ltd.* [1949] A.C. 530, 579.

⁷⁶ See *infra*, text to and following note 86.

⁷⁷ *Supra*, note 14, at para. 47 (emphasis added by the court).

registration in the sub-sections, including the public policy defence considered in this note. A foreign judgment which contravenes any of the sub-sections in section 3(2) cannot be registered under section 3 (“this section”).⁷⁸ On the other hand, the discretion conferred on the court⁷⁹ in section 3(1) is “subject to this section” (section 3). This can only mean that the court has no power to exercise its discretion to register a judgment under section 3(1), however just and convenient it may think the registration would be, if the registration is prohibited under section 3(2). Thus, the “just and convenient” provision provides another check on the registration of foreign judgments;⁸⁰ it is not to permit an appeal to the discretion of the court to override any applicable restrictions and defences.

Another possibility, which is more promising in theory but requires a number of assumptions to be made, is based on one of the grounds of the decision in *Ralli v. Anguilla*⁸¹: that on the assumption that Singapore law was similar to the law of Western Australia on the point, the question whether the original cause of action was enforceable or not could and should have been raised in the Australian proceedings, and thus it is too late to raise the point now. There is some support for this, in a different context, from the recent Singapore decision of *Wu Shun Foods Co. Ltd. v. Ken Ken Food Manufacturing Pte. Ltd.*⁸² In this case, after finding no evidence of illegality, the High Court went on to observe that in any event, where an alleged illegality could have been but was not raised in the foreign proceedings leading to the judgment being sought to be enforced in the forum, the judgment debtor would be estopped by the foreign judgment from raising the issue.⁸³ Such a bold statement may need to be qualified somewhat. There may be some public policies of the forum that are so stringent and fundamental that the court of the forum would go behind this estoppel.⁸⁴ If the assumptions stated at the beginning of this paragraph hold, and assuming that the public policy involved here is one that is not of such fundamental interest to Singapore that it would override the estoppel *per rem judicatem*, then the result in *Burswood* could simply be arrived by means of estoppel. If the judgment debtor is estopped⁸⁵ from pleading section 5(2) (CLA) in the enforcement proceedings, then there is no way of invoking section 3(2)(f) (RECJA) defence in the same proceedings. However, this ground is too speculative to provide a secure foundation for the *Burswood* decision.

3. *Star City Revisited*

If the position taken in this note is right, and the *Burswood* interpretation of section 3(2)(f) (RECJA) is wrong, then it is submitted that on the interpretation of section 5(2) (CLA) in *Star City*, the result in *Burswood* is indefensible. Therefore, if the *Burswood* decision is to be justified, it must be on the basis of some modification to *Star City*.

⁷⁸ It cannot be argued that “section” is intended to mean only the “subsection” in which the language appears, because the only provision for registration is found in s. 3(1) itself, *i.e.*, nothing can be registered under s. 3(2) anyway. See further the technical distinction drawn between “section” and “subsection” in the *Interpretation Act* (*supra* note 49), ss. 9(1) and (2).

⁷⁹ Of course, “just and convenient” does not mean an open-ended discretion: *Yong Tet Miaw v. MBf Finance Bhd* [1992] 2 S.L.R. 761 (C.A.) at 768.

⁸⁰ For example, it may not be just or convenient to register a judgment which otherwise satisfied all the requirements of the statute but the foreign court had lacked internal jurisdiction in the matter (assuming s. 3(2)(a) is construed to refer only international jurisdiction).

⁸¹ *Supra*, note 6.

⁸² [2002] 4 S.L.R. 877.

⁸³ *Ibid.*, at paras. 45-46.

⁸⁴ *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto (No. 2)* [1991] 1 Lloyd’s Rep. 429 (C.A.) at 435-436.

⁸⁵ There is no circularity involved as a foreign judgment that satisfies the common law conditions for recognition is capable of creating an estoppel without registration.

It would not even be enough to confine the scope of public policy in *Star City* (and therefore the scope of application of section 5(2) (CLA)) to the protection of *adjudicatory* resources. By linking the defence to the enforcement of the foreign judgment to the defence to the original cause of action, section 3(2)(f) (RECJA) would still make this narrower public policy in section 5(2) (CLA) relevant, thereby preventing the registration of the foreign judgment.

On the plain meaning of section 3(2)(f) (RECJA), the result in *Burswood* is defensible only if the public policy basis of *Star City* is removed altogether. *Star City* would be confined to its procedural reasoning.⁸⁶ The formal reasoning of the *Star City* court in this respect stands on precarious ground, because it is based on the distinction in statutory language between the extinction of a right and the barring of a remedy.⁸⁷ This goes against the modern trend in major Commonwealth countries that eschews the forms in which rules of law are expressed and focuses instead on the question whether the application of foreign laws would cause undue inconvenience to the administration of justice in the forum.⁸⁸ However, it is nevertheless possible to justify the procedural classification made by the *Star City* court on the basis that the adjudication of such cases would be such a serious waste of court's resources such that the administration of justice would be unduly inconvenienced. This resembles a revival of the same argument that was discussed earlier as a manifestation of public policy, but it is capable of standing independently as a basis of classification. If the *Star City* court had taken this approach in the first place,⁸⁹ *Burswood* would have been an easy case to resolve. Procedural considerations are different from considerations of fundamental public policy. If section 5(2) (CLA) only bars the enforcement of the original cause of action for a procedural reason, then it is not for a reason of public policy or a reason similar to it, and the defence to registration would have failed at that stage. Despite the *Burswood* court's references to "public policy" in *Star City*, the result is only consistent with the depletion of the public policy content from section 5(2) (CLA).

It has been noted above that the solution to the specific private international law problem in *Burswood* is clear: Parliament should modify section 3(2)(f) (RECJA) to reflect the common law position. In view of the discussion in the preceding paragraphs, further clarification will be required on the question where such a modification will leave the content of public policy in *Star City*.

A larger question that can be raised is whether section 5(2) (CLA), should even be regarded as procedural in the conflict of laws sense. As long ago as 1917, Woodward J. had doubted whether its predecessor ought to apply to a foreign transaction governed by foreign law.⁹⁰ If the perceived problem is that the same problem of wastage of adjudicatory (and/or enforcement) resources inconveniencing the administration of justice in the Singapore court arises whether the wagering transaction being enforced occurred in Singapore or a foreign country, and irrespective of the governing law of the transaction, the solution may be better found within domestic law. Perhaps a review of the entire question of the enforceability of wagering contracts is timely. It may be that the problem of wastage of court resources can be addressed by more sophisticated techniques than a blanket bar on the enforcement of such agreements. It is clear that not all wagering agreements are caught by the provision; there are many exceptions.⁹¹ Either more categories of exceptions need to be created, or

⁸⁶ The "recharacterisation" of the foreign transaction undertaken by the *Star City* court does not depend on the application of s. 5(2) (CLA) as a forum mandatory provision.

⁸⁷ *Supra*, note 18, at para. 2.

⁸⁸ *Harding v. Wealands* [2005] 1 W.L.R. 1539; *John Pfeiffer Pty. Ltd. v. Rogerson* (2003) 203 C.L.R. 503; *Tolofson v. Jensen* [1994] 3 S.C.R. 1022.

⁸⁹ As the High Court in *Star City* did: [2001] 3 S.L.R. 206.

⁹⁰ *Ralli v. Anguilla*, *supra* note 6.

⁹¹ See ss. 5(3), (4) and (5) (CLA).

perhaps the blanket bar⁹² should be removed⁹³ to be replaced by specific exceptions, and perhaps with tools given to the court to deal with residual cases which trifle with the court's resources, *e.g.*, costs orders. These issues are beyond the scope of this note. But it is pertinent to observe that it may well be that, apart from the general problem of the formulation of section 3(2)(f) (RECJA), the specific problems of public policy (and procedure) in private international law addressed in this note will disappear in due course if and when the bar to enforcement is removed.

IV. CONCLUSION

In summary, this note has argued for following propositions:

- (1) In principle, in determining whether to enforce a foreign judgment from the perspective of the fundamental public policy of the forum (which is a higher standard than domestic public policy), the court should consider the objections to the enforcement of the *foreign judgment itself* in the forum, rather than the objections to the hypothetical enforcement of the *underlying cause of action* had the claim been brought before the forum. There are significant differences in the two approaches.
- (2) Nevertheless, there is a close connection between the two versions of public policy objections. The question in every case should be whether any fundamental public policy objection against the underlying cause of action is transmitted to the enforcement stage in the sense that the same public policy will still be contravened even at the enforcement of judgment stage.
- (3) Unsatisfactory as it may seem, the plain language of section 3(2)(f) (RECJA), cannot be dismissed as bearing only "minor differences" from the common law understanding as captured in the REFJA, in view of the substantive differences between the two approaches, the legislative history, and the Court of Appeal decision of *Ralli v. Anguilla*.
- (4) Section 3(2)(f) (RECJA) encapsulates one version of an old common law understanding of the public policy defence, which no longer represents the common law in Singapore. The provision should be changed to reflect the modern understanding of the public policy defence to the enforcement of foreign judgments. But as long as it remains on the statute book, its clear meaning must be applied.
- (5) If *Burswood* is correct on its interpretation of section 3(2)(f) (RECJA), the public policy of wastage of judicial resources stated in *Star City* may still be contravened by the enforcement of a foreign judgment. Reconciliation of the two cases requires a restriction of the content of public policy in *Star City* to the prevention of wastage of *adjudication* resources.
- (6) On the basis that the plain meaning of section 3(2)(f) (RECJA) is to be applied, as argued for in this note, the result of *Burswood* may be supported if *Star City* is confined to a ruling on section 5(2) (CLA) being a rule of procedure (in the conflict of laws sense) only. On this view, the juridical basis of the *Star City* decision must necessarily have been accordingly restricted: only its decision on procedure still stands.
- (7) Thus, any modification to section 3(2)(f) (RECJA) should also clarify the extent to which (if any) the public policy in *Star City* continues to apply in Singapore.

Looking further, whether there should be further amendments to section 5 (CLA), in view of plans to host casinos in Singapore resorts and within the larger context of shifting societal values and attitudes, is no doubt a very important question, but it is beyond the scope of this note.

⁹² This would need to address both the validity and enforceability of such contracts, of course.

⁹³ See S. Wellik, "Enforcing Wagering Contracts" [1999] V.U.W. L. Rev. 22. Under the *Gambling Act 2005*, c. 19 (UK), with a comprehensive scheme for the regulation of gambling activities, gaming contracts are no longer generally void and unenforceable under English law (ss. 334 and 335).