

ENFORCEMENT OF FOREIGN JUDGMENT IN E-COMMERCE CONSUMER CONTRACTS IN MALAYSIA: ISSUES AND CHALLENGES

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ABSTRACT

Electronic commerce or e-commerce is gaining momentum in Malaysia. Consumers are finding transacting online to be a convenient method especially to buy goods and services. As online transactions involve trans-border commerce, disputes are inevitable. As such the question of conflict of laws arises, one of which involves enforcement of foreign judgement. Even though there is a law regulating enforcement of foreign judgement in Malaysia, however it does not take into consideration consumer protection. Adapting doctrinal research, this article discusses issues and challenges arising in the enforcement of foreign judgement in e-commerce consumer contracts in Malaysia.

Keywords: *Enforcement of Foreign Judgement, Reciprocal Enforcement of Foreign Judgement Act 1958, Brussels I Regulation, E-Commerce Consumer Contracts.*

INTRODUCTION

The vast usage and development of the Internet has led to the growth of sale of goods and services via the World Wide Web, known as the electronic commerce (hereinafter referred to as “e-commerce”). E-commerce contract is the transaction of buying and selling of products and services by businesses and consumers through an electronic medium, without using any paper documents.[1] There are four categories of e-commerce transactions, which consists of Business to Business transaction (hereinafter referred to as “B2B”), Business to Consumer transaction (hereinafter referred to as “B2C”), Consumer to Consumer transaction (hereinafter referred to as “C2C”) and Consumer to Business transaction (hereinafter referred to as “C2B”). The B2B transaction involves the contract of sale and purchase of goods and services from one business entity to other businesses. On the other hand, the B2C transaction involves sale and purchase of goods and services from a business entity to consumers.[2] Besides that, C2C and C2B involve direct trade relations between consumers and between consumers and businesses respectively.[3] B2C transaction has taken a sharp rise in the world. Table 1 exhibits the estimated figures of B2C e-commerce sales worldwide from the year 2012 to 2018. Needless to say, the number of e-commerce transactions is estimated to increase along the years specified. [4]

Table 1: B2C E-Commerce Sales Worldwide from 2012 to 2018

Year	Sales in US Dollars (billion)
2012	1,058
2013	1,233
2014	1,471
2015	1,700
2016	1,922
2017	2,143
2018	2,356

In addition, according to the International Data Corporation Malaysia, the sales revenue generated by e-commerce in Malaysia registered year to year growth of \$105 and \$144 billion for 2010 and 2011 respectively.[5] It has been estimated that by 2025, the annual global cross borders e-commerce revenues could swell to between \$250 billion and \$350 billion. By the same year, Asia would account for some 40 percent of cross borders e-commerce revenues, making it the center of e-commerce world.[6] As a result of the enormous growth of e-commerce transactions, the legal fraternity is racing to keep the law at pace with the development of Information and Communication Technology (hereinafter referred to as “ICT”).

E-commerce contracts are trans-border in nature.[7] Thus, trans-border disputes are inevitable. In the event where trans-border disputes arise, businesses and consumers need to know whether the judgment given in the foreign court could be enforced in other jurisdictions. Hence, one area that calls for concern is enforcement of foreign judgment. It is a hassle for e-consumers to settle the dispute that may occur through e-commerce transactions by travelling to the courts and tribunals of another country to seek for legal reliefs and remedies for their losses. For example, if a plaintiff from England sued a foreigner in a foreign country for breach of contract, and obtained a judgment in his favor, he might find that the defendant had surreptitiously removed his assets to Germany if the judgment made in the stated foreign court is unable to be enforced in Germany. In this situation, he might have to start all over again to enforce his rights in Germany. [8] The said concern arises from various authoritative examples from the past, one of which is, *LICRA v Yahoo! Inc*. The plaintiff brought an action against the defendant for allowing the Nazi memorabilia to be accessible to French citizens via links to the United States’ site. Yahoo Incorporation had made a particular effort to adhere to separate countries law by having a different website for France. However, through the French site, materials in contravention of French law were still accessible. In dealing with the issue of choice of law and jurisdiction of court, the French court held that, French law is applicable as the effects of the content of the site were felt in France, despite the site being based and hosted in the United States. However, the decision made by the French court could not be enforced in the United States as the decision was said to pose a real and immediate threat to the American constitutional rights of free speech.[9] Hence, although the French court had decided that French law and jurisdiction shall be used to resolve

the matter, however, the disagreement by the United States to enforce the judgment held by the French court defeats the purpose of discussion on choice of law and jurisdiction of court passed by the French court. What would be the consequence if such a case would arise in Malaysia?

Malaysian legislature has enacted the Consumer Protection Act 1999 and Consumer Protection Electronic Trade Transactions Regulations 2012 in order to provide protection to e-consumers who conduct online purchases. These regulations however, do not include provisions on enforcement of foreign judgments. The registration enforcement of foreign judgments in Malaysia and its procedures are governed by the Reciprocal Enforcement of Judgment Act 1958 (hereinafter referred to as “REJA”) and the Rules of Court 2012 (hereinafter referred to “the ROC”). REJA and ROC, however, are merely the procedural laws stating the process of enforcement of foreign judgments which consequently makes it non comprehensive to deal with e-consumer protection. As similar with Malaysia, in the United Kingdom, (hereinafter referred to as “UK”) whilst there are enactments of consumer protection laws, the law and procedure on enforcement of foreign judgement is provided in Civil Jurisdiction and Judgment Act 1982, which incorporated the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (hereinafter referred to as “Brussels I Regulation”). The Brussels I Regulation has been enacted to provide solutions to the issues on private international law, which includes the enforcement of foreign judgment that harmonises its practice with all European Unions (hereinafter referred to as “EU”) member states in order to enhance consumer protection. This article, adapting doctrinal analysis, therefore examines the comprehensiveness of the law i.e. REJA in governing enforcement of foreign judgments in the purview of e-consumer protection through a comparative analysis with Brussels I Regulation for lessons to be learnt.

REJA V BRUSSELS I REGULATION

In comparing REJA and Brussels I Regulation, the following are the research findings:

Type of Judgment

Section 2 of the REJA, exhibits that REJA recognises any form of judgments or order for the payment of a sum of money and arbitration award to compensate the injured party in a civil or criminal proceeding.[10] Section 3(3) of REJA states that, the money judgment does not include a sum payable for taxes or fines, or other penalties. In *SA Consortium General Textiles v Sun and Sand Agencies Ltd*[11] Lord Denning MR in deciding on foreign judgments (Reciprocal Enforcement) Act 1933 section 1 (2) (b), which is similar with section 3(3) of REJA stated that, penalty is a sum payable to the state due to punishment and not a sum to be paid to an individual.

On the other hand, Article 2 of the Brussels I Regulation, states that, “judgment” refers to judgment of a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as decision on the determination of costs or expenses by an officer of the court. The judgment in Brussels I Regulation does not only include money judgment, but also court orders such as injunction and specific performance.[12] The court in *De Cavel v De Cavel (No. 1)*, highlighted that the word judgment in the Brussels I Regulation also includes provisional or protective orders.[13] However, as emphasised by the court in *Denilauler v Chouchet Freres*, the said order is only recognised and could be made enforceable only in the circumstance where the defendant had been notified of the said order.[14]

It is apparent that, unlike Brussels I Regulation, REJA only permits the registration and enforcement of foreign money judgments, and does not include the judgments of equitable remedies. This raises doubt on whether e-consumers’ interest could effectively be protected if such judgments are not taken into consideration. Consequently, the main aim of enforcement of foreign judgment to protect the parties to the dispute from re litigation’s hassle and costs may not be fully achieved in the absence of the recognition of equitable remedies as a form of judgment.

Parameters of Judgment

Secondly, in REJA, besides the payment of a sum of money to compensate the injured party in any civil or criminal proceedings, the registration and enforcement of foreign judgment in Malaysia also includes arbitration award. The Brussels I Regulation permits the recognition and enforcement of judgment on any civil and commercial matters. It shall be noted that, the substance of Brussels I Regulations exhibits its obvious application to consumer contracts,[15] which leads to its wide application in litigation concerning e-consumer contracts.[16]

However, the Brussels I Regulation is not applicable to matters pertaining to revenue, customs, or administrative matters, legal capacity and status of natural persons, property rights arise from matrimonial relationship, bankruptcy, winding up proceedings, social security, arbitration, maintenance obligations arise from family, marriage and parentage relationship, wills, succession and maintenance obligation due to death.[17] Needless to say, Brussels I Regulation does not apply to these matters as its objective is to govern the recognition and enforcement of foreign judgment of civil and commercial matters only. Hence, its areas are more focused and compartmentalized. REJA contains broad scope of judgment, as compared to Brussels I Regulation which may lead to ambiguities and uncertainties. Consumers may be deterred to transact online if they are not confident of the protection accorded by the law.

Reciprocating Countries

REJA provides the list of reciprocating countries in the first schedule[18] which hold equal status with our local High Court.[19] This includes the judgment from United Kingdom, Hong Kong, Republic of China, Singapore, New Zealand, Brunei Darussalam, India (except Jammu Kashmir, Manipur, tribal areas of state of Assam, scheduled areas of state of Madras and Andhra).[20] However, the Brussels I Regulation provides the recognition and enforcement of judgment given in one member state to be enforced throughout EU.[21]

Julian Ding expressed his disagreement with the limited number of reciprocating countries stipulated under the REJA, by indicating that Malaysia may be isolated in respect of e-commerce areas in the event where Malaysia fails to seek reciprocity from other countries. The author suggested that for the expansion of the scope of recognition and reciprocity of foreign judgment in REJA to include all the ASEAN member countries.[22] Apart from other ASEAN countries, Malaysia should also extend reciprocity to other countries especially EU countries.[23] The limited number of reciprocating countries listed in REJA indicates that consumers' rights on enforcement of foreign judgement are restricted to certain countries. In the event where consumers enter into contracts in countries other than the ones specified in the first schedule, their right on enforcement of foreign judgment could not be exercised. Comparatively, EU member states collectively recognise and are able to enforce judgments amongst them. This shows that, consumers are far more protected in UK as compared to in Malaysia.

CONCLUSION

The trans-border nature of e-commerce has triggered the necessity of a uniform agreement on enforcement of foreign judgment to safeguard the interest of e-consumers. This realisation has reached UK and other EU members states who collectively agreed to enhance consumer protection laws and practice in their continent through the enforcement of the Brussels I Regulation. On the other hand, from the analysis above it could be concluded that Malaysia is far from such consciousness. REJA is evident of that. The discussions above display the incomprehensiveness of the provisions in REJA which may affect the confidence of the consumers to transact online.

Primarily, REJA only recognises the registration of monetary judgment as compared with Brussels I Regulation, which allows the recognition and enforcement of judgments in monetary and non-monetary form i.e. equitable remedies. This leads to the question on the extent of protection provided to consumers who engage in cross borders e-commerce transactions in Malaysia, as the sole recognition of monetary judgment is inadequate to protect the rights of e-consumers. This is because, there are circumstances where the need of equitable remedies supersedes monetary judgments, and may constitute the only protection for consumers. Consumers' rights

in Malaysia are open to abuse where the said judgment is not entitled to recognition and enforcement in REJA.

Furthermore, although the sentence of section 2 of REJA may appear straight forward in specifying “any civil or criminal proceedings”, however, the parameters of REJA is not easy to comprehend as this sentence covers a broad area on civil and criminal proceedings. A broad and general sentence in REJA may cause ambiguities as to the scope of the list of actions that may fall within both proceedings specified above. At present, references to reported case laws on REJA do not indicate its application to consumer contracts. This triggers the question on whether cases pertaining to consumer disputes fall within the scope of REJA. If, however, REJA does not intend to provide enforcement of foreign judgment on consumer disputes, this will diminish protection of e-consumers to enforce foreign judgments in Malaysia. The ambiguity of the provision and the non-presence of case laws on this issue lead to assumption that consumers are not fairly protected under REJA.

In addition, as discussed, the first schedule in REJA has stipulated the list of countries where its money judgments could be registered in Malaysia. However, amongst the ASEAN countries, only Singapore and Brunei’s judgments could be registered and enforced in Malaysia. The trans-border infrastructure of internet necessitates the scope of reciprocating countries to be as wide as possible in enhancing the protection of e-consumers. Since Malaysia is an ASEAN member state, the initial step that Malaysia could take is to commence with the insertion of other ASEAN member states in the list of first schedule of REJA instead of only Singapore and Brunei by harmonising the laws on enforcement of foreign judgments in the context of consumer protection.

Therefore, it is pertinent that Malaysia reform the areas discussed above to ensure protection is provided to e-consumers. Protection in this context is pertinent as it will affect consumers’ trust and confidence in purchasing goods and services online. Though it is not fair to compare Malaysia with the progression that has taken place in the EU as far as ICT development is concerned, there is no excuse not to keep up with the predicaments in the law especially the law to protect consumers, such as the area discussed in this article, enforcement of foreign judgments in e-commerce consumer transactions.

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