Ninth Yong Pung How Professorship of Law Lecture

Common Law Developments Relating to Foreign Judgments

This lecture will review selected developments in several common law jurisdictions including Singapore relating to the recognition and enforcement of foreign judgments that signal liberalisation of the rules. References will also be made to the regime under the Hague Convention on Choice of Court Agreements 2005 and the ongoing Judgments Project at the Hague Conference on Private International Law.

I. Introduction

1. The Yong Pung How Professorship of Law Lecture series was made possible by a generous endowment from the Yong Shook Lin Trust, in honour of Mr Yong Pung How. Mr Yong had been a lawyer, a banker, and a judge before he was appointed the second Chief Justice of independent Singapore in 1990. He transformed totally the Singapore judiciary into a world-class institution, and laid the foundations for his successors to take the legal system to greater heights. After he stepped down as Chief Justice in 2006, he was heavily involved in setting up the second law school in Singapore, the SMU School of Law. He became a Distinguished Fellow of the School and was the Chairman of its first Advisory Board. With guidance from his wise counsel, the School of Law grew from strength to strength. After stepping down from the Advisory Board, he continued to serve SMU as Chancellor until 2015. Even today, he continues to support the faculty and students of the School of Law in many ways. If there were a market for enforcing debts of gratitude, the debt the School owes to Mr Yong would be a textbook example for summary judgment.

2. In his judicial capacity, Mr Yong was extremely prolific in writing judgments. His judicial contributions spanned the spectrum of civil, criminal and constitutional law, including several landmark cases in the conflict of laws, under which foreign judgments is a major topic, and the subject of my lecture today.

II. Foreign Judgments

3. In this lecture, I will focus on judgments *in personam*. Judgments *in personam* purport only to bind parties before the court. Judgments *in rem* and matrimonial decrees and orders raise different considerations of principles and policies altogether.

4. Court judgments derive their authority from the legal system from which they originate. The territorial limits of sovereign power means that the effective reach of such judgments are similarly circumscribed. The starting point for the analysis of the effect of foreign judgments in Singapore is that they do not have any legal effect except to the extent that Singapore law gives them such effect.

5. There are presently four regimes in Singapore relevant to the recognition and enforcement of foreign judgments. The oldest is the common law scheme, which applies to all foreign judgments. It is supplemented by the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA), and the Reciprocal Enforcement of Foreign Judgments Act (REFJA). These two statutes apply only to respectively specified countries. The latest addition is the Choice of Court Agreements Act 2016 (CCAA)), implementing the Hague Convention on Choice of Court Agreements 2005 (HCCCA), which will apply to foreign judgments from chosen courts in Contracting States to the Convention.

III. The Common Law Regime

6. The common law on the recognition and enforcement of foreign judgments is easy to state but can be difficult to explain. A foreign judgment may be recognised in Singapore as final and conclusive if it is a judgment from a foreign court of law having competent jurisdiction that is final and conclusive on the merits of the issue, the foreign court is regarded under the private international law of Singapore as having international jurisdiction over the party sought to be

bound, and there are no relevant defences to such recognition. Recognition puts the foreign judgment on the same basis as a local judgment: it has *res judicata* effect in respect of matters decided therein. This is useful for raising an estoppel, whether in respect of an issue or a cause of action. A foreign judgment that is so recognised may be enforced by an action on a debt if it is for a fixed or ascertainable sum of money.[1] It is the resulting Singapore judgment that will be executed. This conceptual relationship between recognition and enforcement, ie, that recognition is a step towards enforcement,[2] has been judicially recognised in England[3] as well as Singapore.[4] This relationship is especially important when considering the question of non-money foreign judgments below.

1. International Jurisdiction

7. The most important concept in the common law on the recognition of foreign judgments is the idea of international jurisdiction. It is the test which the common law uses to determine whether a foreign judgment is binding on a person before the Singapore court. It is the fundamental reason why a person who is outside the territory of a foreign country comes under an obligation to obey that judgment. That obligation is imposed under the law of Singapore, and this is why international jurisdiction is determined by Singapore law. The obligation theory has been much criticised as lacking explanatory power.[5] It tells us that the person should be bound but does not explain why. Indeed, it is difficult to find any single explanation.[6]

8. Common law jurisdictions do not speak with one voice on the contents of international jurisdiction. In England, the latest judicial pronouncements put it as presence or submission.

[1] *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 (CA).
[2] Adrian Briggs, *The Conflict of Laws* (2nd ed, 2008) at 148-150.
[3] *Clarke v Fennoscandia Ltd* [2007] UKHL 56 at [18] and [21].
[4] *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SLR 545 at [15].
[5] The historical explanation lies in the use of the writ of *indebitatus assumpsit* as a matter of procedure to enforce a foreign judgment at common law. *Indebitatus assumpsit* is premised on the theory of an implied obligation to pay money. This does not, of course explain how the obligation arose.
[6] See HL Ho, "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 ICLQ 443, examining the multiple policy forces potentially at play.

In Singapore, it is presence or residence, or submission. In Canada, it is presence or residence, or submission, or substantial connection to the parties or subject matter of the dispute.[7] In Australia, it has traditionally been presence or residence or submission, but there are authorities supporting citizenship, and in some cases a sufficient connection between the foreign court and the defendant, as additional grounds for the recognition of foreign judgments. Being judge-made law, the grounds of international jurisdiction are not necessarily exhaustive.

9. The grounds of international jurisdiction used in the major common law countries can be classified broadly into three justifications. One is the idea of allegiance: that the party sought to be bound by the foreign judgment owed allegiance to the foreign sovereign at the time the foreign proceedings started, such that we should recognise that he continued to be under an obligation to obey the judgment even outside the territorial jurisdiction of the foreign country. Another is the submission or consent of the party sought to be bound: that he had agreed (whether contractually or not) or accepted that he would be bound by the determination of the foreign court even outside its territory. A third is that there is sufficient connection between the foreign country and the subject matter of the dispute or the parties to justify imposing an obligation on the parties to obey the judgment outside the foreign territory.

10. These are potentially free-standing explanations. Thus, if a ground of international jurisdiction is justified on allegiance, it does not fail by lack of connection or consent. If a ground is based on consent, lack of allegiance or connection is irrelevant. If a ground is based on sufficiency of connections, the lack of allegiance or consent is merely a consideration.

[7] *Chevron Corp v Yaiguaje* 2015 SCC 42 at [27] (Gascon J, delivering the judgment of the court). The test was stated in a different way by the majority in the earlier case of *Beals v Saldanha* 2003 SCC 72, [2003] 3 SCR 416 at [37], where the traditional grounds of presence, residence and submission were said to be factors influencing the "overriding factor" of "real and substantial connection".

2. Presence or Residence

11. The historical development of the common law rules on international jurisdiction placed tremendous emphasis on allegiance that stems from the territorial dominion of the foreign sovereign. The problem lies in determining what allegiance requires in this context.

12. In one of the earliest cases to deal with the issue, *Schibsby v Westenholz*,[8] Blackburn J said:

> If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them

On this view, either nationality or residence is sufficient ground, though a later part of the judgment suggests that presence may also be sufficient.[9]

13. In *Carrick v Hancock*, it was reported that Lord Russell of Killowen CJ had said:[10]

> that the jurisdiction of a court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts. In his opinion that duty of allegiance was correlative to the protection given by a state to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory.

[8] (1870-71) LR 6 QB 155 at 161.
[9] Ibid at 161, citing from *General Steam Navigation Co v Guillou* (1843) 11 M & W 877 at 894.
[10] (1895) 12 TLR 59 at 60.

In this passage, the requisite allegiance arose from the person being merely present within the foreign territory.

14. In *Sirdar Gurdyal Singh v Rajah of Faridkote*, Selborne LC said:[11]

> Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country.

This appears to require residence in addition to presence.

15. In *Emanuel v Symon*, which of more often quoted than actually applied, Buckley LJ purported to identify the cases in which the English court would enforce a foreign judgment:[12]

> (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

16. The last three grounds can be grouped together as consent-based grounds, and they are relatively uncontroversial. It is notable that *presence* is not mentioned at all.

17. The authorities were reviewed by the Court of Appeal of England and Wales in *Adams v Cape Industries plc*.[13] The judgment debtor was a corporation, for which neither presence or residence really made any sense. The Court developed and applied the test of corporate presence for trading corporations based on the carrying on of business by a corporation from a

[11] [1894] AC 670 at 683.
[12] [1908] 1 KB 302 (CA) at 309.
[13] [1990] 1 Ch 433.

fixed place of business for more than a minimal period of time. The Court also discussed the principle in relation to individuals, and reached the view that temporary presence was sufficient,[14] and queried whether residence without presence was also a sufficient basis.[15] Notably, Slade LJ, who had delivered the judgment of the Court, stated in a subsequent case that he was inclined to answer the latter query in the affirmative.[16] However, the law was subsequently stated very clearly (though in *obiter*)[17] by the Supreme Court of the UK in *Rubin v Eurofinance SA* that the international jurisdiction for the purpose of the recognition of foreign judgments is based on presence and submission; residence was not a ground of international jurisdiction at common law,[18] contrary to suggestions in a number of English texts.[19]

18. The position is Singapore is somewhat different. There are two relevant Straits Settlements cases. In 1876, Thomas CJ in *Kader Nina Merican v Kader Meydin*,[20] held that the defendant who was served while temporarily present in the State of Johore was a sufficient reason to enforce the Johore judgment in Singapore. However, in 1893, in *RMS Veerappa Chitty v MPL Mootappa Chitty*,[21] Bonser CJ refused to enforce a Johore judgment where the judgment debtor had been served while on a day trip to Johore. The earlier case was distinguished on the basis that the judgment debtor had submitted to the jurisdiction of Johore court by mounting a counter-claim in that court. Bonser CJ held that temporary presence was an insufficient ground, and the defendant had to be either a *subject* of or *resident* in the foreign territory. The only modern statement on common law international jurisdiction comes from an *obiter* statement in

[14] Ibid, at 519.
[15] Ibid, at 518.
[16] *State Bank of India v Murjani Marketing Group Ltd* (unreported, CA 27 March 1991).
[17] It was common ground that the judgment debtors were neither present nor resident in the foreign country at the relevant time: [2012] UKSC 46, [2013] 1 AC 236, at [10].
[18] [2012] UKSC 46, [2013] 1 AC 236, at [10].
[19] See eg, Cheshire, North & Fawcett, *Private International Law* (14th ed, 2008), at p 517; Hill & Chong, *International Commercial Disputes* (4th ed, 2010), at para 12.2.14; John O'Brien, *Conflict of Laws* (2nd ed, 1999), at p 266. The position endorsed is that stated in Dicey, Morris & Collins, Conflict of Laws,
[20] [1893] 1 SSLR 3 (1876).
[21] [1893] SSLR 17.

the case of *United Malayan Banking Corp Bhd v Khoo Boo Hor*,[22] stating that either presence or residence would be sufficient as a ground of international jurisdiction. It did not refer to the Straits Settlements authorities. The common law position in Singapore on what amounts to allegiance for the purpose of international jurisdiction is unsettled. Insofar as residence is an alternative ground to presence, it appears to be consistent with the Australian and Canadian position.

3. Nationality

19. Generally, modern common law authorities and texts have shunned nationality as a ground of international jurisdiction, in spite of a multitude of *obiter* support in historical case law.[23] The most explicit rejection was by the Irish court in *Rainford v Newell-Roberts*.[24] It is also implicitly rejected by the UK Supreme Court in *Rubin v Eurofinance SA*.[25] However, it was accepted as a valid ground of international jurisdiction in the New South Wales Supreme Court in *Independent Trustee Services Ltd v Morris*,[26] on the reasoning that the judgment debtor owed allegiance to the foreign country in question.[27] This case has come under severe academic criticism.[28] One criticism is that nationality is not a connecting factor known to common law conflict of laws, but this objection is based on lack of precedent rather than principle. Another criticism is that it is problematic in federal jurisdictions, but this can be addressed by looking

[22] [1995] 3 SLR(R) 839 at [9], citing *Adams v Cape Industries plc* [1991] 1 All ER 929. It was obiter because the case dealt with registration under the RECJA.
[23] See *Conflict of Laws*, Vol 6(2) *Halsbury's Laws of Singapore* (2013 Reprint) at para [75.190].
[24] [1962] IR 95.
[25] [2012] UKSC 46, [2013] 1 AC 236. Nationality as a ground of international jurisdiction was expressly doubted in *Blohn v Desser* [1962] 2 QB 116 at 123, *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 382-383, and *Vogel v R & A Kohnstamm Ltd* [1973] QB 133, 140-141.
[26] [2010] NSWSC 1218.
[27] The court also relied on its earlier decision in *Federal Finance and Mortgage Ltd v Winternitz* (unreported, 9 November 1989) (Sully J) where a judgment from Hawaii was enforced on the basis of the defendant's US nationality.
[28] Adrian Briggs, "Recognition of foreign judgments: a matter of obligation" (2013) 129 LQR 87 at 96; Sirko Harder, "Recent Judicial Aberrations in Australian Private International Law" (2012) 19 Australian International Law Journal 161 at 169 *et seq*.

for additional connections to a specific state within the jurisdiction, or by taking the position that all states within the federation have international jurisdiction.

20. If allegiance is indeed a justification for international jurisdiction, then nationality appears to be a stronger basis than presence. A sovereign can legitimately exercise power over a person who is within its jurisdiction but not when he is out of its territory. A sovereign can legitimately exercise power over its nationals even when they are outside its territory, which is the typical situation when a foreign judgment is being enforced. As in the case of allegiance justifying temporary presence as a ground of jurisdiction, it is not a cogent argument that the judgment debtor may have no other connection to the country of his nationality.

21. Allegiance is a slippery justification for international jurisdiction. It does not explain why the judgment debtor should *continue* to obey the foreign judgment after he has left the foreign territory in the case of presence,[29] and it does not explain the general resistance to nationality where there is a stronger argument for a continuing duty to obey. It cannot explain whether presence or residence or either or both will suffice for international jurisdiction. As far as this justification goes, the law appears to be dictated more by precedent than by principle, and there is no principled way of clear demarcations. It has further been described as a "fanciful" concept at least in the context of corporations.[30]

22. Professor Briggs has suggested that the better explanation for presence as a ground of international jurisdiction is based on an analogy of the *lex situs* rule, where we recognise as a general rule all things done (including its adjudications) within the territory of a foreign state in accordance with its own laws.[31] One possible consequence of this view is that involuntary presence will be a ground for international jurisdiction, though the reasons for involuntariness

[29] The common law has never demanded that he should obey all the laws existing in a foreign country at the time that he was once present there.
[30] Adams v Cape Industries plc [1990] 1 Ch 433 at 553.
[31] Adrian Briggs, "Recognition of foreign judgments: a matter of obligation" (2013) 129 LQR 87 at 91-92.

can be a defence. In order to expunge residence as a ground of international jurisdiction, it is not enough to accept this justification of presence. It is also necessary to eliminate all other justifications (allegiance and connection) for international jurisdiction apart from submission. This requires discarding a great deal of historical baggage on one hand, and ignoring modern arguments based on based on substantial connections in private international law on the other. The merit of this view is that it confines the common law to a clearly defined ambit of operation, and leaves the rest to legislation and conventions. Common law works best with doctrines and principles, not with policies and international relations.

4. Submission

23. The common law is on firmer ground on submission, which is based on consent. When a person has consented to the exercise of jurisdiction by the foreign court, it is fair and just that he should be held bound by the foreign judgment. Submission can occur by agreement or in the course of proceedings.

A. Submission by Agreement

24. The simplest and clearest case of submission by agreement is the choice of court clause in contracts. There is submission to the chosen court whether the choice of court agreement is exclusive or non-exclusive. Something that has dogged the common law for a long time is the supposed proposition found in many cases[32] that an agreement to submit must be express and cannot be implied. This has always been a puzzling proposition, especially to contract lawyers, because if an express choice of court clause in a contract is effective to create international jurisdiction, it is difficult to see why it does not equally work if it exists as a matter of

[32] See the cases discussed in *Conflict of Laws*, Vol 6(2) *Halsbury's Laws of Singapore* (2013 Reprint) at para [75.188].

construction, or implied term.[33] The Privy Council confronted this question recently in *Vizcaya Partners Ltd v Picard*.[34] This case arose out of the aftermath of the collapse of the Madoff Ponzi scheme. Trustees in the liquidation of Madoff's company commenced proceedings in New York, relying on anti-avoidance provisions of the US Bankruptcy Code in an attempt to recover funds paid out to certain investors before the fraud was uncovered. They obtained a default judgment against the defendant, a BVI company. In enforcement proceedings in Gibraltar, the question was whether the New York court had international jurisdiction over the defendant on the basis of contracts which contained choice of New York law clauses, which was argued to give rise to implied submission to the New York court. The parties settled before the Board handed down its decision, but the Board decided to give reasons because of the international significance of the common law point involved.

25. The key points in the decision may be summarized:

    1. An agreement to submit to the jurisdiction of the foreign court does not necessarily have to be contractual. The real question is whether the judgment debtor had consented in advance to the jurisdiction of the foreign court.
    2. It is commonplace that contractual agreement or a consent may be implied or inferred.
    3. The same applies to contractual agreement or consent to a foreign court's jurisdiction.
    4. The authorities denying the possibility of an implied submission by agreement really meant that that had to be an <u>actual</u> agreement or consent.[35]
    5. Whether the judgment debtor had submitted to the foreign court is determined by the law of the forum.[36]

[33] In *International Allied Alltex Corp v Lawler Creations [*1965] Ir Rep 264, a New York judgment was enforced in Ireland on the basis that the defendant, in agreeing to arbitration in New York, had necessarily submitted to the jurisdiction of the New York court confirming the arbitration award.
[34] [2016] UKPC 5 (Gibraltar).
[35] Ibid, at [56].
[36] Ibid, at [59].

6. Where the question is whether there is submission by agreement, the law of the forum looks to the law governing the agreement to determine as a matter of construction or implied terms whether there was actually contractual submission.[37]

26. The Board held that submission by an implied term in the contract (determined in accordance with New York law governing the contract) was arguable as a matter of law, but there was no factual basis for the argument on the evidence presented. The expert evidence on New York law did not show any term implied in fact or in law.[38] Moreover, it was questionable whether the *scope* of any implied jurisdiction agreement would encompass submission to anti-avoidance claims in bankruptcy proceedings.[39]

27. This case only dealt with consent purportedly arising from a contract. The Board's formulation of the concept of consent is broader, accepting the proposition that all that is required is that the judgment debtor "expressed willingness or consented to or acknowledged that he would accept the jurisdiction of the foreign court. It does not require that the judgment debtor must have bound himself contractually or in formal terms so to do."[40] Thus, it would follow that a non-contractual consent to submit in a trust instrument which binds a beneficiary[41] would be equally effective as a ground of international jurisdiction.

B. Submission in the Course of Proceedings

28. While submission by agreement is about the dealings between private parties in relation to the having their dispute settled by a particular foreign court, submission in the course of proceedings is concerned with the action of the judgment debtor in relation to the court which

[37] Ibid, at [60]-[61]. These statements are consistent with the position proposed in *Conflict of Laws*, Vol 6(2) *Halsbury's Laws of Singapore* (2013 reprint), para [75.188].
[38] Ibid, at [66]-[72].
[39] Ibid, at [73]-[74].
[40] Ibid, at [56], quoting from Goff LJ in *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279 at 303.
[41] Cf *Crociani v Crociani* [2014] UKPC 40 (Jersey) (determining the question for the purpose of exercising forum jurisdiction).

signifies unequivocal acceptance of the jurisdiction of the foreign court to try the matter in question. One key difference is that a non-contractual promise made to another litigant to submit to the jurisdiction of the foreign court is not necessarily legally binding and may be withdrawn unless some doctrine like estoppel is invoked.[42] Submission in the course of proceedings is irreversible.

29. The UK Supreme Court decision in *Rubin v Eurofinance SA* is usually classified as highly conservative. It would not go beyond presence and submission as grounds of international jurisdiction. It rejected the "real and substantial connection" test. It declined to adopt a more liberal approach to international jurisdiction in order to pursue universality in insolvency. However, the Supreme Court also took an important step to broaden the scope of international jurisdiction, in holding that one set of parties had, by submitting proof of debt and participating in creditors' meetings in a foreign liquidation, submitted to the jurisdiction of the foreign court in bankruptcy proceedings arising out of that liquidation. This aspect of the decision has attracted much academic criticism to the effect that the court had pushed the scope of consent too far.[43] One justification provided by the court was that proof of debt amount to submission in domestic law.[44] This is not conclusive as the majority judgment itself pointed out that there is no necessary correlation between submission for the purpose of domestic law and for the context of international submission.[45] The second reason appears to be policy-based: the judgment debtor "should not be allowed to benefit from the insolvency proceeding without the burden of complying with orders made in that proceeding".[46]

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[42] *Adams v Cape Industries plc* [1990] 1 Ch 433 at 463 (Scott J).
[43] A Briggs, "New Developments in Private International Law: A Busy Twelve Months for the Supreme Court of the United Kingdom" (Continuing Legal Education Programme, Supreme Court of Singapore, 21 Nov 2013); Adeline Chong, "Recognition of foreign judgments and cross-border insolvencies" [2014] LMCLQ 241. See also *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [121]-[122].
[44] At [165].
[45] At [161].
[46] At [167].

30. *Vizcaya* has emphasized in the context of submission by agreement that there must be actual consent to the jurisdiction of the foreign court.[47] As a matter of principle, the consent must be equally real in the context of submission in the course of proceedings. Some doubt had arguably been thrown on this principle in the English case of *Murthy v Sivjothi*,[48] which was recently applied by the Singapore High Court.[49] According to this case, a party who has submitted to a foreign court in respect of a dispute before the court, may also have submitted to the foreign court in respect of but also in respect of future disputes in subsequent and separate proceedings in respect of the same parties provided the subsequent claim was related to and was part of or arose from the same subject matter.[50] However, this goes to the interpretation of the scope of submission where there has been actual submission. It does not deem submission when there has been no actual submission.

31. In this sense, *Rubin* pushes the "voluntary" in the concept voluntary submission quite far. It may well be that this is a small concession to the lobby for universalism in international insolvency. The insolvency context is quite specific and it is not clear how far this reasoning will extend beyond it. *Rubin* is a case on "submission in the course of proceedings".[51] Prospects for extending the benefit and burden reasoning to cases outside this context are slim. It will be hard to press the argument, based on *Rubin*, that merely carrying on economic activity in a foreign territory, a person or entity has thereby submitted to the jurisdiction of the foreign court because he must take the burdens with the benefits.

[47] See text to note 35 above.
[48] [1999] 1 WLR 467 (CA), at 477.
[49] *Giant Light Metal Technology (Kunshan) Co Ltd* [2014] 2 SLR 545.
[50] *Whyte v Whyte* [2005] EWCA Civ 858.
[51] Vizcaya, at [59]. The language of "imputed" consent was used in

5. Connection

32. Canadian courts have taken a bold judicial step in reforming the grounds of international jurisdiction. There is some uncertainty over the formulation of its international jurisdiction. In *Beals v Saldanha*,[52] the first leading Canadian Supreme Court decision on the international (as opposed to interprovincial) enforcement of a foreign judgment to adopt the new approach, Major J, delivering the majority opinion, said:[53]

> There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court … must determine whether the foreign court had a real and substantial connection to the action or the parties ... *A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties.*

33. This has been understood to mean that the traditional grounds of presence, residence or submission have been subsumed within the broad test of real and substantial connection. It implies that temporary presence without sufficient connection is no longer a valid ground of international jurisdiction. Not surprisingly, this has caused some consternation. Even the most secure and uncontroversial ground of international jurisdiction, submission, is no longer conclusive but merely one factor to be considered. Contracting parties suddenly found that there was no assurance that judgments from courts chosen in their contract would be enforced in Canada. Canadian judges tried to mitigate the uncertainty with statements to the effect that submission by contract provided sufficient connection.[54] However, the inquiry is highly factual

[52] [2003] SCR 416.
[53] Ibid, at [37].
[54] See, eg, *PT ATPK Resources TBK (Indonesia) v Diversified Energy and Resource Corporation* 2013 ONSC 5913 at [14].

and context-specific, and it is not clear that submission to a court of a country that has nothing to with the dispute except for the choice of court clause (the Singapore International Commercial Court (SICC) comes to mind) would meet the standard.

34. However, in *Chevron Corp v Yaiguaje*,[55] Gascon J, delivering the judgment of the Supreme Court of Canada, sought to bring greater certainty to the law. The Court stated:[56]

> To recognize and enforce … a [foreign] judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, *or that the traditional bases of jurisdiction were satisfied*…
>
> …
>
> order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. *If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada*.

This makes it clear that the real and substantial connection test is an *alternative* to the traditional grounds, and does not replace or subsume them.

35. Canada stands alone in this approach. In *Adams v Cape Industries plc*, Slade LJ said: "While residence or presence will *ex hypothesi* give rise to a connection [between the judgment debtor and the foreign country], it is the residence or presence, not the connection as such, which gives rise to the jurisdiction of the court."[57] The modern Canadian test was unanimously rejected by the Irish Supreme Court in *In re Flightlease (Ireland) Ltd*.[58] The UK Supreme Court in *Rubin*

[55] 2015 SCC 42.
[56] Ibid, at [27] and [54].
[57] At 519.
[58] [2012] IESC 12; noted David Kenny, "*Re Flightlease*: the 'real and substantial connection' test for recognition and enforcement of foreign judgments fails to take flight I Ireland' (2014) 63 ICLQ 197.

v Eurofinance SA was not persuaded by counsel's arguments to follow the Canadian approach. A similar argument before the Singapore High Court in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*[59] did not receive the consideration of the court because the court had found that international jurisdiction had been established under the traditional ground of voluntary submission. The real and substantial connection test is used in the common law for matrimonial decrees,[60] but it is a reflection of different policy considerations in the different context of personal status. There are powerful policy arguments to prevent limping marriages.[61]

36. *Flightlease* provides by far the most extended judicial consideration of the Canadian innovation outside of Canada. While the judges acknowledged that the common law rules may well be outdated, they declined to follow the Canadian judicial renovation. In summary, the reasons given by the majority in the Supreme Court were:

    1. There was no evidence to show that any other common law country had followed the Canadian approach. This was an area of law where international consensus was an important factor.
    2. Adopting the Canadian approach would upset the expectations of many who have relied on the traditional common law.
    3. Defences to enforcement would need to be reconsidered if changes are made to the existing grounds of international jurisdiction.
    4. A change of this type is best left to legislation, and in accordance with international conventions.

[59] [2014] 2 SLR 545.
[60] *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 2 SLR 316; *Indyka v Indyka* [1969] 1 AC 33.
[61] *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236, at [110].

37. O'Donnell J in his concurring judgment added that while there were good reasons to reform the common law to expand the ground for the recognition of foreign judgments to meet the challenges of globalization, the benefits offered by the Canadian approach were outweighed by the uncertainty and unpredictability the test generates. The discretionary nature of the Canadian test rendered it impossible for lawyers to advise clients whether to defend foreign proceedings (in which case they have submitted to the jurisdiction) or to ignore them.[62]

38. Some of the uncertainty can be mitigated by the use of presumptive connections, as the Canadian Supreme Court has attempted to do. [63] However, there is a large policy dimension in this case law exercise. Further, expansion of common law grounds does not beget any reciprocity of treatment of our own judgments overseas.

39. A limited version of a connection-based approach has surfaced in Australia. In *Independent Trustee Services Ltd v Morris*,[64] the New South Wales Supreme Court held that the court in its equitable jurisdiction would recognize an order from the court of equity of a foreign country on the basis of a sufficient connection between the foreign country and the defendant. It drew from the line of cases which recognized the appointment of a receiver by a foreign court, which is not controversial, and it seems quite a leap to generalize this to all equitable orders. The Singapore Court of Appeal has decided that we should not have different choice of law rules depending on whether the equitable jurisdiction of the court has been invoked.[65] The same may be argued in respect of the private international law in relation to foreign judgments. One can learn much from the much-neglected history of the equitable jurisdiction on the enforcement

[62] See also Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1 at 13-14.
[63] Some non-exhaustive presumptive connections were listed in in the context of jurisdiction in *Club Resorts Ltd v Van Breda* 2012 SCC 14, [2012] 1 SCR 572 at [90]: (a) domicile/residence; (b) carrying on business; (c) place of commission of tort; and (d) place where a contract connected with the dispute was made. This was expressly subject to case law incremental development.
[64] [2010] NSWSC 1218.
[65] *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA).

of foreign judgments.[66] But the most important lesson is not the necessity of having separate rules of recognition for common law and equity judgments, but that the frequent focus on monetary judgments in the common law has somewhat obscured the law's ability to deal with non-monetary judgments.

40. A connection-based justification has no explanatory force from the territorial power of the sovereign or the consent of the judgment debtor. It really lies in the policy of promoting cross-border mobility of judgments, although it has constitutional origins in Canada.[67] The development of this type of ground is probably better suited for international agreements and legislative action rather than judicial innovation. *Re Flightlease* deserves to be studied as carefully as *Beals v Saldanha* by our courts before it decides which is the better course of action.

6. Non-money Judgments

41. The subject of foreign judgments at common law is traditionally divided into money and non-money judgments. Money judgments can be enforced by an action on a debt. Non-money judgments can be recognised. The relationship between recognition and enforcement[68] as accepted by the Singapore High Court,[69] that recognition is a necessary step towards enforcement, throws important light on the matter. The action on a debt is the obvious way to enforce a money liability which is the subject of estoppel in the foreign judgment.[70] This does not mean that non-monetary liabilities cannot be enforced. It just means that they cannot be enforced by debt action. A foreign judgment does not merge the underlying cause of action. The judgment creditor can sue in the forum and use the foreign judgment to raise either cause

[66] See also RW White, "Enforcement of Foreign Judgments in Equity" (1982) 9 Syd LR 630.
[67] *Club Resorts Ltd v Van Breda* 2012 SCC 14, [2012] 1 SCR 572 at [22].
[68] Adrian Briggs, "Recognition of foreign judgments: a matter of obligation" (2013) 129 LQR 87 at 89-90.
[69] *Giant Light Metal Technology (Kunshan) Co Ltd* [2014] 2 SLR 545.
[70] The common law "enforcement" process goes beyond giving effect to the underlying substantive liability that is recognised by way of estoppel, because consequential costs orders are also given effect to. This does not detract from the analysis because the same treatment can be given to non-monetary judgments.

of action or issue estoppel. Of course it must still be determined whether the judgment was on the merits (and not on a point of procedure) and the remedy must be fashioned according to what is available under the law of the forum.

42. The dismissal of the claim to enforce a US judgment on the basis that it was not a money judgment by the Singapore Court of Appeal in *Poh Soon Kiat v Desert Palace (trading as Caesars Palace)*[71] is not inconsistent with this approach. The Court found that the judgment in question, a 2001 judgment from the California court, that had ordered the setting of a conveyance by the defendant of his property in Californnia together with consequential orders and declared that the defendant remained liable for any unpaid amounts under a 1999 California judgment. The plaintiff was not suing on the 1999 judgment (which would have been time-barred), so any estoppel in relation to the defendant's liability under that judgment was not in issue before the Court. The plaintiff was also not seeking any relief from the Singapore court in respect of the California property. There was no relevant non-monetary obligation to be recognised or enforced in that case.

43. There is no necessary inconsistency with the proposition that an enforceable foreign judgment gives rise to an obligation that is independent of the original cause of action. The juristic nature of this obligation had not always been clear.[72] There can be an obligation to obey the judgment (in the sense of being bound by *res judicata* estoppel) whether it is a monetary judgment or otherwise.[73]

44. These are some implications. First, the Canadian innovation in *Pro Swing Inc v Elta Golf Inc*[74] holding that it was possible at common law to enforce foreign non-monetary judgments was

[71] [2010] 1 SLR 1129 (CA).
[72] *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 2 SLR 81 (CA) at [14], [30]-[31].
[73] The analysis of the obligation theory could also have bearing on the question whether the limitation period for the "enforcement" of a non-monetary foreign judgment should also follow the law established the enforcement of non-monetary judgment (ie, date of foreign judgment), or date of accrual of the underlying cause of action.
[74] 2006 SCC 52.

not such a quantum leap as it has often been supposed to be. Secondly, Singapore's commitment to enforce foreign non-monetary judgments under the HCCCA is not a case of taking a big step away from the common law. Thirdly, it is possible to develop a rational system for giving effect to foreign non-monetary obligations in foreign judgments that is neutral to the distinction between common law and equity, contrary to the position in some Australian courts.[75]

7. Enforcement

45. Before turning to the statutory regimes, I would like to highlight one issue that has a bearing on the facilitation or obstruction of the common law enforcement of foreign judgments in Singapore: the doctrine of *forum non conveniens*. The issue is whether *forum non convienens* (or *forum conveniens* if the defendant is served outside the jurisdiction) can be raised in a common law action to enforce a debt based on a foreign judgment. In *Alberto Justo Rodriguez Licea v Curacao Drydock Co, Inc*,[76] the learned Judge in the Singapore High Court said: "I agreed with the AR's determination that the issue of *forum non conveniens* was irrelevant to the enforceability of foreign judgments and therefore, did not constitute a triable issue." The question is whether this is a statement of law, so that *forum non conveniens* can never be raised when the plaintiff is seeking to enforce a foreign judgment, or whether this is really a statement that no triable issue relating to *forum non conveniens* arose on the facts.

46. *Forum non conveniens* is a common law doctrine designed for *ad hoc* allocation of jurisdiction based on the theory that, in the absence of an exclusive choice of court agreement, a dispute should be tried in the most appropriate forum in the interests of the parties and for the ends of justice. In the international context and before the merits have been determined, the plaintiff's choice of forum should not be conclusive. However, once judgment has been given, the merits

[75] Though the jurisprudence in equity will no doubt be relevant and instructive as precedents.
[76] [2015] SGHC 136, at [20].

have been determined, and the only thing left to be done is to enforce the judgment. In the case of the common law, the debt action is really just the means to give effect to the foreign judgment. The questions whether the judgment can be enforced in Singapore and what defences are applicable are of course best determined by the Singapore court.

47. It is certainly the case that the modern trend is to make the enforcement process as obstacle-free as possible. In *Fonu v Demiral*,[77] the claimant sought to enforce a Turkish judgment in the English court, and successfully applied for service of writ on the defendant out of the jurisdiction. Collins J (as he then was) accepted "the existence or non-existence of the defendant's assets within the jurisdiction to be a relevant *forum conveniens* factor, for example if there were issues being fought, or to be fought, in another jurisdiction."[78] Affirming the decision on appeal,[79] the Court of Appeal countered the defendant's argument that he had no assets in England with the observation that even if that were true, it was a reasonable possibility that he would have assets in England in the future. The Court observed: "if there is a real prospect of the claimant being able to benefit from the action in England to enforce a Turkish judgment in England, it is difficult to see why it would be right not to hold that England is the proper place to bring the claim ..."[80]

48. Canada has applied the "real and substantial connection" test, developed in the context of international jurisdiction, as a limit to the jurisdictional competence of its own courts. This means, eg, that the Canadian court cannot assert jurisdiction over a defendant who is temporarily present in Canada if there is no real and substantial connection between the subject matter of the dispute and Canada. However, the Supreme Court in *Chevron Corp v Yaiguaje*[81] (discussed above in the context of international jurisdiction) held that it would not be

[77] [2006] EWHC 3354, [2007] 1 Lloyd's Rep 223.
[78] Ibid, at [54].
[79] [2007] EWCA Civ 799, [2007] 1 WLR 2508, at [38]-[40].
[80] Ibid, at [45].
[81] 2015 SCC 42.

appropriate to apply this test where the plaintiff is seeking to enforce a foreign judgment in Canada; mere presence in this case was sufficient. The main consideration was to facilitate the enforcement of foreign judgments. Nevertheless, it is notable that the Supreme Court said that it was up to the defendant to raise any argument based on *forum non conveniens*.[82]

49. *Forum non conveniens* was denied as a defence to the enforcement of and English judgment in a New York court on the basis that inconvenience was not a ground of non-recognition under the Uniform Foreign Country Money-Judgments Recognition Act. [83] However, this classification of the doctrine as substantive is not universally accepted. US courts have recognised *forum non conveniens* as applicable to the enforcement of foreign arbitration award on the basis that it was a matter of procedure, though this has also been subject to considerable academic criticism as undermining the New York Convention.[84] To the extent that *forum non conveniens* is applicable, the better approach may be found in a New York court decision[85] holding that plaintiff's choice of enforcement forum was "entitled to a presumption of validity".

50. There could be at least two situations where *forum non conveniens* may be a relevant consideration. First, there may be collateral questions relating to the identity of the defendant or the ownership of assets which could be the subject of foreign litigation or foreign law. However, it may well be that this should only justify a temporary stay pending the outcome of foreign determination. Secondly, it should not be assumed that forum shopping is never a problem at the enforcement stage. If the evidence shows that there is no intention of enforcing the judgment in Singapore, the sole purpose being to take the Singapore judgment to a third

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[82] Ibid, at [77]. See also at [46] where it observed that enforcement of a foreign judgment is an essentially local action.

[83] Enacted as Art 53 of the New York Civil Practice Law and Rules. *Abu Dhabi Commercial Bank PJSC, Respondent, v Saad Trading, Contracting and Financial Services Company* 117 A.D.3d 609 (2014).

[84] See the authorities discussed in Ronald A Brand, "The Continuing Evolution of US Judgments Recognition Law", at 52-55, Working Paper No 2015-37, *Legal Studies Research Paper Series*, University of Pittsburgh School of Law, available at: http://ssrn.com/abstract=2670866 (accessed on 15 May 2016).

[85] *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*, No. 10 Civ. 5256 (KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (2013).

country to enforce, because the third country would not enforce the original foreign judgment but would enforce a Singapore judgment, this is a kind of forum-shopping. It may be argued that this is good and vindicatory of the reputation of Singapore judgments, but we need to be mindful that the merits had not been examined by the Singapore court.

51. *Forum non conveniens* arguments can be raised in enforcement proceedings in England and Canada, but some doubt has been thrown on its relevance in Singapore law. In my view, the better approach is that the doctrine of natural forum should be theoretically applicable to claims to enforce foreign judgments. In most cases, it will be difficult to see why Singapore would not be an appropriate forum to enforce a foreign judgment in Singapore. However, it is difficult to predict the complexities that can come with cross-border litigation, and we should not rule out its application altogether.

IV. RECJA/REFJA

52. These two statutes represent only incremental changes from the common law. The RECJA was intended to promote closer co-operation between Commonwealth countries. It applies to the UK and other Commonwealth countries gazetted by the Minister upon satisfaction of reciprocal treatment from those countries. Not surprisingly, the principles in the legislation are modelled on the common law, in terms of international jurisdiction and defences, though there are some differences. The major change brought about by the statute was that it was no longer necessary to sue on the common law action of debt for foreign judgments to which the RECJA applies. Registration automatically renders the foreign judgment capable of execution as if it were a judgment of the Singapore court.

53. It is notable, however, that the RECJA defines international jurisdiction principally in terms of residence and submission. Presence and nationality are notably absent. This indicative but not conclusive of how the allegiance principle was understood under the common law at the time

the legislation was enacted. Parliament is not bound to act according to common law principles, however,. International co-operation in the smooth movement of cross-border judgments is the key policy driver, and Parliament is free to select any connections.

54. REFJA was intended to extend the international co-operation to non-Commonwealth countries. It was anticipated that it would supersede and obsolete the RECJA but this objective is far from the present reality. However, the structure of the legislation is basically similar to the RECJA, which means that basic premises of the common law remain in the statute. The only country gazetted is Hong Kong SAR (which fell out of the scope of RECJA in 1997).

55. The Law Reform Committee of the Singapore Academy of Law had suggested an omnibus legislation to replace both RECJA and REFJA.[86] This is a good suggestion, but it may have been overtaken by developments. Singapore became party to the Hague Conference on Private International Law, signed[87] the Hague Convention on Choice of Court Agreements 2005, and is actively participating in the new Judgments Project at the Hague Conference.

V. Choice of Court Agreements Act 2016

56. The CCAA will come into force at a date to be determined by the Minister. This Act implements the HCCCA. It deals with jurisdiction as well as judgments in civil and commercial matters involving an exclusive choice of court agreement. Its objective is to facilitate international trade by providing certainty and predictability to parties' agreement on choice of court. It is a closed Convention in the sense that it applies only as between Contracting States that have brought the Convention into force. Consumer and employment contracts, and a

[86] Report of the Law Reform Committee on Enforcement of Foreign Judgements (July 2005), http://www.sal.org.sg/Lists/Law%20Reform%20Committee%20Reports/Attachments/23/Enforcement_of_Foreign_Judgments_Print_version_July_2005.pdf (accessed on 15 May 2016).

[87] See https://www.mlaw.gov.sg/content/minlaw/en/news/announcements/sg-signs-cocagreement.html (accessed n 15 may 2016). It was reported that Singapore ratified on 14 April 2016: "Singapore ratifies the Hague Convention on Choice of Court Agreements", < http://www.singaporelawwatch.sg/slw/attachments/81194/1604-01%20Hague%20Convention.pdf> (accessed on 15 May 2016).

number of other types of contracts are excluded from its scope.[88] The CCAA will apply only to exclusive choice of court agreements concluded after its entry into force in the State of the chosen court. The Convention has entered into force in Mexico and the EU (except for Denmark). It has not yet entered into force in the other signatory countries of Singapore, the US, and Ukraine.

57. Under the HCCCA, a chosen court in a Contracting State has to assume jurisdiction unless the choice of court agreement is null and void. Non-chosen courts in Contracting States are not allowed to assume jurisdiction except in narrowly circumscribed situations. A judgment from a chosen court in a Contracting State can be recognised and enforced in other Contracting States, subject to narrowly defined defences.

58. I will focus on the judgments aspect. The rules are not very different from the common law. A judgment from a chosen court will be recognised at common law anyway on the basis of an agreement to submit. In fact, the common law is broader because it is not confined to *exclusive* choice of court agreements, and there are no formal requirements for choice of court clauses unlike the CCAA. The defences are similar to the common law. As in the case of RECJA/REFJA, there is no need to commence fresh proceedings. Once the statutory requirements are satisfied, a foreign judgment will be recognised and enforced in the same way as a Singapore judgment.[89] There is no limitation period, the only requirement being that the foreign judgment has effect in the State of origin.[90] In the Contracting State of England, judgments are "enforceable without limit of time".[91]

59. One significant difference between the CCAA on the one hand, and the common law and RECJA/REFJA on the other, is the approach to international jurisdiction. Under the common

[88] CCAA, s 9.
[89] CCAA, s 13(1).
[90] CCCA, s 13(2)(a).
[91] *A v Hoare* [2008] UKHL 6, [2008] 2 WLR 311 at [88].

law (and this is followed in RECJA/REFJA), international jurisdiction is determined solely by the recognising court. Any findings by the foreign court cannot be binding at this stage, because until international jurisdiction is determined to exist, the foreign judgment is not binding. Under the CCAA however, foreign findings of jurisdictional facts are binding unless the judgment was given by default,[92] and a determination of the validity of the choice of court agreement is binding whether the judgment is default or not.[93] Under the common law, the Singapore court is not bound by a finding in the foreign judgment sought to be recognised that the parties had agreed to a choice of court clause. Under the CCAA a finding by the chosen court that the parties had agreed to a choice of court clause cannot be reopened, unless the judgment was obtained by default. The common law starts from the point that the recognising court must be sure that the judgment debtor had really consented to the jurisdiction of the foreign court. The CCAA starts from the position of trusting the foreign court to make correct decision on its jurisdictional basis. The CCAA is the product of an international convention, and signing it is an act of faith.

60. There may be some difficulty with the idea of a default judgment in this context. Judgments can be in default of appearance or in default of defence. The CCAA (and the HCCCA) does not appear to distinguish between the two. In principle, if the defendant had appeared and had argued, or at least had the opportunity to argue, the jurisdictional facts, then there is a strong argument that it should be binding[94] even if the judgment on the merits had gone by default of defence. It may be that we need to unpack a default judgment and treat the judgment on the jurisdictional facts as discrete from the judgment on the merits, at least for the purpose of this provision.

[92] CCAA, s 13(3)(b).
[93] CCAA, s 15(1)(a).
[94] Given that we are asked to trust the foreign court on this matter.

VI. Relationship between the Four Regimes

61. The four regimes will overlap to some extent. An RECJA judgment may be enforced under the RECJA or at common law, but common law actions are discouraged by the general denial of costs.[95] An REFJA judgment may be enforced under the REFJA only; common law action is disallowed.[96] Foreign judgments from countries to which the RECJA and REFJA apply may be recognised at common law. The REFJA further provides for the recognition of foreign judgments which are not registrable merely because they are not money judgments.[97] This could expand the scope of common law recognition to the extent that the REFJA has wider grounds for recognition than the common law.[98]

62. For the avoidance of doubt, foreign judgments falling outside the scope of the CCAA will continue to be recognised or enforced under Singapore law.[99] Amendments[100] to the RECJA and REFJA make it clear that they will not apply to any foreign judgment which "may be recognised or enforced" under the CCAA. This includes a judgment within the scope of the CCAA in respect of which the Court exercises a discretion under the Act not to recognise. If a judgment comes from a CCAA country which is also a RECJA/REFJA country, the judgment creditor stands or fall by the CCAA.

63. The CCAA does not exclude the operation of common law for judgments which may be recognised or enforced under the CCAA. This means that a claimant with a CCAA foreign judgment may choose to proceed under the CCAA or the common law. The obvious advantages to using the CCAA are that (a) there is no need to sue afresh on a cause of action which may require service out of jurisdiction; (b) the Singapore court cannot re-open the jurisdictional

[95] RECJA, s 3(5).
[96] REFJA, s 7(1).
[97] REFJA, s 11.
[98] Eg, where a corporate defendant has its principal place of business in that country: REFJA, s 5(2)(a)(iv).
[99] CCAA, s 21(b).
[100] CCAA, s 25 and 26.

facts determined by the foreign court unless it was a default judgment and cannot question the foreign court's determination on the validity of the choice of court agreement; and (c) non-monetary obligations can be enforced without engaging the common law arguments. It will be a rare case where the plaintiff prefers to sue under the common law. One example may be where the foreign court has awarded exemplary damages, and the plaintiff may prefer to make a case for possible recovery under the common law[101] rather than to face probable failure under the CCAA.[102] It also means that a judgment creditor who fails to enforce a judgment under the CCAA may try his luck again by suing under the common law. The judgment debtor may, however, invoke abuse of process if substantially the same issues are being relitigated.

64. It is not clear how the common law relates to the workings of the Act. Take the example of a plaintiff who brings to Singapore a default judgment purportedly from a chosen court of a Contracting State. The judgment debtor was both resident and present in the foreign territory at the time the foreign proceedings commenced, so that international jurisdiction is satisfied as a matter of common law independently of the choice of court agreement. The foreign court had made no determination on the validity of the choice of court clause. The judgment debtor argues in Singapore – as he is entitled to – that choice of court agreement was null and void under the law of the State of the chosen court.[103] If he succeeds on the argument, the court "may refuse" to recognise or enforce the judgment under section 15 of the CCAA. It remains to be seen what factors the court will apply in exercising its discretion to enforce the judgment nevertheless. Will the common law be relevant at this point? One approach is to refuse enforcement on the basis that there are no HCCCA-related reasons to justify enforcement, since it has been shown that in substance the HCCCA should not have been invoked in the first place. The plaintiff is

[101] *Beals v Saldanha* [2003] 3 SCR 416; *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544, [2005] SASC 194 (SC, South Australia) at [71]-[72].
[102] CCAA, s 16(1).
[103] Section 15(1)(a).

then left to his common law remedies. Another approach to say that since the judgment is going to be enforceable at common law anyway, the court should allow enforcement under the Act, thus allowing the plaintiff to bypass the cumbersome process of suing all over at common law. The second approach sounds more efficient, but it means that that common law has been modified, which Parliament is of course entitled to do. But did it?

65. In this context, the outright exclusion of the RECJA/REFJA can cause hardship. Varying the hypothetical situation above, suppose that the foreign country is an RECJA country in addition to being a Contracting State,[104] and the judgment debtor was an individual who was neither physically present nor resident, but was carrying on business, in the foreign country at the time of the commencement of the foreign proceedings. The carrying on of business by an individual is a statutory ground of international jurisdiction under RECJA[105] but not under the common law.[106] Because such a judgment "may be recognised or enforced" under the CCAA, the RECJA will not apply. Allowing enforcement on the basis that the RECJA would hypothetically have applied if not for the exclusion lets in through the back door what is statutory excluded at the front. Yet, refusing recognition will leave the claimant with no recourse on the foreign judgment when he would have had one on the law pre-dating the CCAA. On the other hand, one could say that that as far as these countries are concerned, the terms of engagement have changed with the entry into force of the HCCCA.

66. A related question is whether a foreign judgment which recognition *must* be refused under the CCAA, is still a judgment which "may be recognised or enforced" under the CCAA, so that there is no possibly of a fall-back recourse to the RECJA or REFJA. On a literal reading, if recognition must be refused, then it cannot be said that it "may be recognised". However, it is

[104] Eg, England.
[105] RECJA, s 3(1)(c).
[106] *Vogel v R and A Kohnstamm Ltd* [1973] QB 133.

not always clear from the outset that the judgment must be refused recognition and enforcement, so that on the face of it at least, all judgments to which the CCAA applies "may be recognised or enforced" until a defence has been established. But if this were so, it might have been clearer simply to say "a judgment to which the Act applies". It would be ironic not to exclude the cases in which recognition must be refused[107] from the RECJA/REFJA as they do not make for meritorious argument in favour of alternative recourse to the RECJA/REFJA.[108] In any event, as in the case above, one could say that the rules of engagement have changed.

67. These are some of the issues that the Singapore courts may face in applying the Act. Clarification on some aspects of the relationship between the CCAA and the existing regimes would be welcome.

68. So far I have focussed on the effect of foreign judgments under Singapore law. One important aspect of adopting the HCCCA was, of course, to increase the scope of enforceability of Singapore judgments outside Singapore, especially the judgments of the SICC. For this purpose, Singapore legislation has introduced several ways to increase the prospects of such enforcement: Unless the contrary is shown, (1) a choice of Singapore High Court agreement will presumed to be exclusive;[109] (2) an exclusive choice of the Singapore High Court will be presumed to include the SICC;[110] and (3) an agreement to the SICC will be presumed to include an agreement to carry out the orders of the SICC and not to oppose enforcement of the orders to the extent permitted by foreign law.[111] There is nothing to prevent these presumptions from applying cumulatively. Thus, a clause like this: "The parties agree that the Singapore High

[107] CCAA, s 14.
[108] The other situation where recognition must be refused is in respect of preliminary rulings on whether the subject matter was within the scope of the HCCCA: CCAA, s 17(1).
[109] CCAA, s 3(2).
[110] CCAA, s 2(2). This takes precedence over Rules of Court, O 110, r 1(2)(c).
[111] Supreme Court of Judicature Act, Cap 322, 2007 Rev Ed, s 18F.

Court has jurisdiction to hear disputes arising in connection with this contract" will effectively have these effects:

(1) The parties agree that the Singapore High Court has **exclusive** jurisdiction to hear disputes arising in connection with this contract. (CCAA, s 3(2))

(2) The parties agree that the Singapore High Court **(including the SICC)** has exclusive jurisdiction to hear disputes arising in connection with this contract. (CCAA, s 2(2))

(3) The parties agree that the Singapore High Court (including the SICC) has exclusive jurisdiction to hear disputes arising in connection with this contract. **The parties further agree to carry out any judgment or order of the SICC, and to waive any recourse outside Singapore against the enforcement of such judgment or order to the extent permissible under the foreign law.**" (SCJA, s 18F)

The presumptions will have maximum effect if the choice of court agreement is governed by Singapore law.

VII. The Judgments Project

69. This is an ambitious project by the Hague Conference on Private International Law to create a new Convention on the cross-border enforcement of civil and commercial judgments. It is still in very preliminary stages, but because Singapore is actively involved in the project, it is a space that we should watch closely.

70. The HCCCA arose from the ashes of the failed Jurisdiction and Judgments project, by carving out the core idea of party autonomy that is more likely to receive wider global acceptance. The Jurisdiction and Judgments project was highly ambitious, requiring signatory states to change the way they assume jurisdiction in cross-border litigation. In comparison, the Judgments Project is a more modest project in dropping the jurisdiction question. It aims to complement

the HCCCA, by expanding the grounds for the recognition and enforcement of foreign judgments beyond the exclusive choice of court agreement.

71. One persistent problem in private international law is the different levels of countries' adherence to the rule of law. While we are urged by considerations of international comity to respect all legal systems, practical justice requires the recognition of the reality of exposing parties to sometimes dubious legal systems. The judgment debtor is not always the bad guy. This much is reflected in a recent opinion of the Privy Council, in the context of *forum non conveniens*, that international comity does not prevent a common law court from deciding on cogent evidence whether there will be a real risk of denial of substantial justice if the court were to tell that the claimant that it should sue in a country with a corrupt judiciary.[112] The Court of Appeal of England and Wales recently emphasized that the right to examine foreign legal systems to determine whether a foreign judgment had been obtained in contravention of its fundamental public policy could not be excluded by contrary findings of another foreign court,[113] and it has not been averse to finding breaches of human rights by foreign courts.[114] Across the Atlantic, a New York court released a 500-page judgment detailing how, *inter alia*, a foreign judgment had been ghost-written by the plaintiff's lawyers.[115] While there are available defences, they tend to be narrowly defined, and procuring evidence of fraud and corruption can sometimes be a very expensive exercise which only large corporations can afford. Widening grounds for the recognition of foreign judgments will increase the potential of our courts having to enter into similar inquiries.

[112] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 (PC, Isle of Man).
[113] *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458.
[114] See eg, *Merchant International Co Ltd v Natsionalna Aksonerna Kompaniia Naftogaz Ukrainy* [2012] EWCA Civ 196, [2012] 1 WLR 3036.
[115] *Chevron Corp v Donziger* 37 F Fupp 3d 653, 25 April 2014.

72. A party should have little cause for complaint if he had agreed to the choice of the court, or voluntarily submitted to the court's jurisdiction, and perhaps also if the court is from the country which he regards as his home. Despite many criticisms, the strength of the narrow grounds of international jurisdiction in the traditional common law lies in the focus on the voluntary conduct of the defendant in relation to the foreign proceedings as a justification for holding him bound. Certainty, predictability and fairness should be obvious criteria for any further expansion, and together with considerations of international comity, reciprocity, and the furtherance of international commerce and social mobility, they are more appropriate to be debated and resolved in Parliament and by international conventions.

VIII. Conclusions

73. In summary:

(1) Extension to nationality by the Australian courts should give pause for thought to consider whether the allegiance justification should continue to be a ground of international jurisdiction.

(2) The boldest common law innovation led by the Canadian courts in accepting real and substantial connection as a ground of international jurisdiction should be viewed with caution.

(3) The common law continues to refine the core ground of consent (or submission), and the trend has been one of cautious expansion.

(4) The modern trend is to remove barriers to the enforcement of foreign judgments. However, while *forum non conveniens* should have very limited application, we should be careful not to throw the baby out with the bathwater.

(5) The enforcement of non-monetary judgments is within the grasp of incremental common law development, and can be developed with aid of equity jurisprudence without being shackled by it.

(6) Beyond the core ground of consent, it is very difficult to mark the boundaries of international jurisdiction without going into policy considerations of international comity, reciprocity,

promotion of social mobility and furtherance of international commerce. The overall approach of the UK Supreme Court in *Rubin v Eurofinance SA* might be seen as restrictive, but it reflects a considered position on the balance of what should be done at common law, and what could be better achieved by legislation and international conventions.

(7) The CCAA marks an important step in international co-operation in the implementation of the HCCCA. Its core ideas are similar to the common law but there will be issues to be worked out in its implementation.

(8) The Judgments Project is more ambitious project in going beyond the core of party autonomy. Going forward, multilateral conventions or bilateral agreements are more feasible options than unilateral national developments to promote international co-operation.

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