

The Changing Global Landscape for Foreign Judgments

I. Introduction

1. There have been significant advances in the global landscape for the recognition and enforcement of foreign judgments in recent years. The two most significant international developments have been the coming into force in 2015 of the 2005 *Convention on Choice of Court Agreements*¹ (“Choice of Court Convention”), and the completion in 2019 of the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*² (“Judgments Convention”) from the Hague Conference on Private International Law. Singapore has responded to the global environment, in bringing the former Convention into force under Singapore law in 2016, and in making extensive amendments to the Reciprocal Enforcement of Foreign Judgments Act³ (REFJA) in 2019. It took an active part in the negotiations for the Judgments Convention. In 2018 the Commonwealth Office promulgated a *Model Law on The Recognition and Enforcement of Foreign Judgments* (“Commonwealth Model Law”).⁴ 2020 also saw the publication by the Standing International Forum of Commercial Courts of the second edition of the *Multilateral Memorandum on Enforcement of Commercial Judgments for Money*,⁵ and the *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (“Asian Principles”) by the Asian Business Law Institute.⁶ The Singapore Court of Appeal recently started a re-evaluation of the common law on foreign judgments,⁷ signalling possible fundamental changes to Singapore common law on the subject.
2. The focus of this paper is on *in personam* judgments in civil and commercial matters. Foreign judgments in the sphere of family law and the law of insolvency attract different legal and policy considerations.

II. The Conceptual Framework

3. A foreign judgment is an order granted by a court of an originating state outside the state that is requested to give effect to it. For this purpose, a “state” is simply a distinctive legal system without any political connotations. There are two kinds of effects. A foreign judgment is *recognised* when its determination of the rights and liabilities of the parties is considered to have *res judicata* effect, ie, it is as good as a declaration from a domestic court. A foreign

¹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (accessed on 30 April 2021).

² <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (accessed on 30 April 2021)

³ Cap 265, Rev Ed 2001.

⁴ Office of Civil and Criminal Justice Reform, *Model Law on the Recognition and Enforcement of Foreign Judgments* (2018), https://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_1_GPD_ROL_Model_Law_Rec_Enf_Foreign_Judgements.pdf (accessed on 30 April 2021).

⁵ <https://sifocc.org/2021/04/21/sifocc-multilateral-memorandum-on-enforcement-now-with-international-working-group-commentary/> (accessed on 30 April 2021).

⁶ Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI, 2020). See also Adeline Chong, “Moving towards harmonisation in the recognition and enforcement of foreign judgment rules in Asia” (2020) 16 JPIL 31; Mention should also be made of the ongoing project of Asian Principles of Private International Law: see Chen Weizuo and Gerald Goldstein, “The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law” (2017) 13 JPIL 411.

⁷ *Merck Sharp & Dohme Corp v Merck KGaA* [2014] SGCA 14.

judgment is *enforced* when the requested state carries out what the foreign court has ordered the defendant to do.

4. Legal systems in the world are organised on the principle of territorial sovereignty. A court judgment will naturally have full legal effect within the territory of the originating state. Territorial sovereignty dictates that this judgment has no legal effect in any other state. However, territorial sovereignty also implies that a sovereign state may on its own accord allow the recognition of foreign judgments within its own territory. That is comity at work.
5. Comity is capable of multiple meanings. At one extreme it is merely courtesy, at another it could be an international obligation, and there are many possible positions in between. That comity is an important aspect of private international law is not in doubt. The question is what is meant by it. The earliest common law cases that gave conclusive effect to foreign judgments relied on the notion of the “law of nations”,⁸ suggesting some kind of obligation in public international law, but this is clearly not the thinking today (outside the realm of conventions and treaties).⁹ The received wisdom in common law systems is that comity is something in between, as expressed by Gray J delivering the opinion of the US Supreme Court in *Hilton v Guyot*:¹⁰

‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other person who are under the protection of its laws.

6. Comity is the rationale that one sovereign, as a gesture of respect to a foreign sovereign, permits the effects within its own territory of the decree from the foreign sovereign. Indeed, comity is the only possible explanation why foreign judgments can be recognised at all outside the originating state. But the explanatory power of comity stops there. Comity does not tell us *which* foreign judgments deserve recognition.¹¹
7. All this discussion so far proceeds on the basis that the recognition of foreign judgments is a matter of international relations. In many countries, it stops there. In common law countries, it is a matter of international relations as far as international conventions and to some extent statutory regimes are concerned. The common law perspective focuses on the private law dimension, on the view that the issue is one relating to the rights and liabilities of the parties to the judgment. It is therefore concerned with the conduct of the party sought to be bound in relation to the proceedings leading to the judgment. The historical explanation for the enforcing a foreign judgment is that the judgment debtor has come under an “obligation” to obey a foreign judgment. The obligation arises when the originating court has international jurisdiction. In Singapore common law, the foreign court has international jurisdiction if the party sought to

⁸ Alexander N Sack, “Conflict of Laws in the History of the English Law” in A Reppy (ed), *Law: A Century of Progress, 1835-1935* (NYUP, 1937) 342 at 381-384.

⁹ In modern terms, there is not enough consistency or uniformity to constitute state practice for customary international law.

¹⁰ Drawing from Joseph Story, *Commentaries on the Conflict of Laws* (2nd ed, 1841). Story had drawn inspiration from Dutch scholar Huber, who has been highly influential on the common law: Kurt Lipstein, “The General Principles of Private International Law” (1972) 135 *Collected Courses of the Hague Academy of International Law* 99, at 123-124; Hessel E Yntema, “The Comity Doctrine” (1966) 65 *Mich L Rev* 9 at 31.

¹¹ Adrian Briggs, “The Principle of Comity in Private International Law” (2012) 354 *Collected Courses of the Hague Academy of International Law* 65 at 145-147.

be bound was present or resident in the jurisdiction of the originating state at the commencement of the proceedings, or has submitted or agreed to submit to the jurisdiction of the court in the relevant proceedings.

III. The Policy Framework

8. It is not controversial that it is desirable that judgments of one country should have at least some effect in other countries. If judicial process of one country has been invoked and has concluded in a final judgment, it seems wasteful that the judgment creditor needs to sue the judgment debtor all over again in another jurisdiction. This is all the more so in the modern context where assets are easily movable across borders. It is also a matter of policy that judicial resources should not be wasted in repetitive litigation. There is general consensus that the cross-border recognition and enforcement of judgments will incentivise greater international trade.¹² In addition, a nascent network of international commercial courts¹³ will thrive if there is a strong system of cross-border recognition of their judgments. This in turn will help to build up the convergence of commercial law that will facilitate and encourage even more international trade. At the same time, there are legitimate concerns about inconsistencies in the rigour of the rule of law in different countries. Finally, the political reality is that recognition and enforcement of foreign judgments can be a bargaining chip in international negotiations.

IV. The Legal Framework

A. Global

9. The sources of law on the recognition and enforcement of a foreign judgment may be found at three levels: international law (which may be global or regional), national law, and soft law. Foreign judgments may be the subject of international treaties. Some, like the Hague Conventions, are multilateral and global. Some may be regional, and some bilateral. There may also be international conventions that are not on foreign judgments but deal with foreign judgments incidentally.¹⁴ Two very important global instruments are the Choice of Court Convention, and the Judgments Convention.¹⁵
10. The Choice of Court Convention took effect in Singapore from 1 October 2016.¹⁶ Other Contracting States include Mexico, the Member States of the European Union, the United Kingdom, and Montenegro. Other states that have signed but not yet ratified include the United States, China, Macedonia, Ukraine, and Israel. Under this Convention, a judgment from the exclusively chosen court of one Contracting State within the scope of the Convention will be recognised and enforced in all other Contracting States, subject to limited defences. It aims to

¹² Ronald A. Brand, “Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law”, in J Bhandari & AO Sykes (eds), *The Economic Analysis of International Law* (1998) 592. Non-recognition of foreign judgments has been analogised to a non-tariff trade barrier: Anotonio F Perez, “The International Recognition of Judgments: The Debate Between Private and Public Law Solutions” (2001) 19 Berkeley J Intl L 44 at 50-51.

¹³ Standing International Forum on Commercial Courts, <https://sifocc.org/> (accessed on 20 April 2021).

¹⁴ Eg, International Convention on Civil Liability for Oil Pollution Damage 1992, implemented under the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act, Cap 180 Rev Ed 1999.

¹⁵ The Hague Convention on Recognition and Enforcement of Foreign Judgments (1971) is effective in Albania and Kuwait in addition to three EU countries: Cyprus, the Netherlands and Portugal. It has practically been superseded by the Judgments Convention 2019. It requires a separate bilateral agreement between Contracting States before it can be effective *inter se*. For all practical purposes it has been superseded by the Judgments Convention.

¹⁶ Choice of Court Agreements Act, Cap 39A, Rev Ed 2017.

create an international regime for litigation to emulate the success of the international arbitration regime built upon the New York Convention. The standards of review under the Choice of Court Convention are slightly stricter than under the common law.¹⁷ For example, a ruling by the foreign court that a choice of court agreement is valid cannot be questioned, and its decision on jurisdiction facts cannot be re-opened unless it is a default judgment.

11. The Judgments Convention,¹⁸ which has not yet taken effect,¹⁹ is intended to complement the Choice of Court Convention, dealing with judgments beyond those covered in the latter Convention. A judgment within the scope of the Convention from one Contracting State that is sufficiently connected with the defendant or the cause of action will be recognised and enforced in all other Contracting States subject to limited defences. Sufficiency of connection is tested by a series of bases (usually referred to as grounds of indirect jurisdiction), that can be broadly divided into five categories: (a) location of immovable property; (b) where the defendant is resident in the originating state; (c) where the defendant has agreed to the jurisdiction of the court of the originating state (except if it is an exclusive choice of court agreement falling within the scope of the Choice of Court Convention); (d) where the defendant has consented to the jurisdiction of the originating court in the proceedings; and (e) where there are sufficient connections between the case and the originating state.
12. The primary significance of the Judgments Convention for international commercial courts is that, between itself and the Choice of Court Convention, practically all types of jurisdiction agreements will enable the resulting judgment of the chosen court to circulate.²⁰ The Choice of Court Convention allows Contracting States to extend the application to non-exclusive choice of court agreements, whereupon a judgment from a non-exclusively chosen court will be recognised and enforced by another Contracting State that has made the same extension.²¹ But to date no Contracting State has taken this move.
13. While the Judgments Convention is multilateral, unlike the Choice of Court Convention, it provides for existing Contracting States to deny treaty relationships with newly joining members. This bilateralisation mechanism was intended to encourage more countries to sign up,²² in recognition of the reality that nations may hesitate because there is no consistency in the degree of the rule of law applicable in all countries. This is far less of a concern in the Choice of Court Convention because the courts are chosen by the parties.

B. Regional

14. There are many instances of regional instruments regulating the recognition and enforcement of foreign judgments, the most prominent one being the Brussels I Regulation (Recast)²³ in the European Union. This instrument regulates both jurisdiction and judgments within the Union. Essentially, some cases must be commenced exclusively in a particular jurisdiction (eg, based

¹⁷ They share the common feature of no review on the merits of the case.

¹⁸ Terence Yeo, "The Hague Judgments Convention: A View from Singapore" (2020) 32 SAclJ 1153.

¹⁹ Three states (Israel, Ukraine and Uruguay) have signed so far but none have ratified.

²⁰ Some problematic cases where there is doubt about whether the Choice of Court Convention applies, eg, asymmetric clauses, floating choice of court clauses, and jurisdiction agreements in trust instruments, will be covered under the Judgments Convention in any event.

²¹ Choice of Court Convention, Art 22.

²² However, potential embarrassment may arise in a denial.

²³ 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, OJ L 351, 20.12.2012.

on the agreement of the parties, or the location of immovable property or the place of registration of intellectual property). Outside of exclusive jurisdiction, a defendant who is domiciled in the EU must be sued only in its own home (domicile) unless particular heads of jurisdiction can be made out based on specific obligations in a contract or where the harmful event in a tort occurred. Judgments from one Member State are recognised and enforced throughout the entire Union.

15. The possibility of a regional instrument for ASEAN has been mooted from long ago.²⁴ Hard law instrument remains impossible within its present political and legal structure, though soft law may be feasible.²⁵ Singapore is not party to any bilateral treaties on foreign judgments.
16. In the absence of international arrangements, resort is had to national laws. In common law systems, this includes both statutory and common law. In some civil law countries, courts have also gone beyond the text of Codes to allow recognition and enforcement of foreign judgments.

C. Soft Law

17. In addition, there are soft law instruments. One example is the 2018 Model Law from the Commonwealth Office.²⁶ This Model Law proposes a common standard for Commonwealth countries that is closely aligned to the structure and content of the Judgments Convention 2019. It allows for the registration of foreign monetary and non-monetary final judgments.²⁷ The most significant difference is that it is intended to guide unilateral national legislation, and there is no inherent requirement for reciprocity of treatment.²⁸
18. In recent times, there has been a proliferation of non-binding memoranda of understanding and guidance between courts,²⁹ including the second edition of the Multilateral Memorandum on Enforcement of Commercial Judgments for Money issued by the Standing International Forum of Commercial Courts in late 2020 covering more than 30 jurisdictions. These documents have no legal effect. However, they serve useful purposes in: (a) providing information to potential litigants on the laws of various jurisdictions; (b) providing information of reciprocity to courts in jurisdictions where this is a requirement; and (c) in the longer term, providing incentives for convergence of principles across jurisdictions.

²⁴ Colin Ong, “Cross-Border Litigation Within ASEAN” (Kluwer, 1997); Pearlie Koh, “Foreign Judgments in ASEAN: A Proposal” (1996) 45 ICLQ 844.

²⁵ Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI 2020) is a step in this direction.

²⁶ Office of Civil and Criminal Justice Reform, *Model Law on the Recognition and Enforcement of Foreign Judgments* (2018), https://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_1_GPD_ROL_Model_Law_Rec_Enf_Foreign_Judgements.pdf (accessed on 25 April 2021).

²⁷ Like the REFJA, the enforcement of non-monetary judgments is discretionary and subject to the procedures of the requested court.

²⁸ Presumably it is up to national legislatures to decide whether to adopt the rules to apply to all foreign judgments, or only to judgments from states with which they have reciprocal arrangements, and whether to confine it to intra-Commonwealth recognition and enforcement.

²⁹ Pioneered by the DIFC courts: see <https://www.difccourts.ae/about/protocols-memoranda> (accessed on 30 April 2021). See also Michael Hwang SC, David Holloway and Lim Si Cheng, “One Belt, One Road, One Clause for Dispute Resolution?” in Dr Michael Hwang SC, *Selected Essays on Dispute Resolution* (SIAC, 2018) 585. In Singapore’s context, see <https://www.supremecourt.gov.sg/publications/enforcement-of-money-judgments> (accessed on 30 April 2021). Cf Gilles Cuniberti, “Signalling the Enforceability of the Forum’s Judgments Abroad”, University of Luxembourg Law Working Paper Series No 2020-11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571700 (accessed on 30 April 2021).

19. Yet another potentially significant soft law is the *Asian Principles for the Recognition and Enforcement of Foreign Judgments*.³⁰ This is a series of 13 general principles each of which have substantial support within the laws of the 15 countries in the study. They do not necessarily represent the laws of all of these countries, but they are useful indicators of what may be prevailing values within the region. They are intended to aid in the convergence of national laws.

D. National Laws: Singapore

20. In the absence of international treaties, national law determines whether and the extent to which foreign judgments can be recognised or enforced. In dualist countries like Singapore, international treaties are given force through national laws. This may be statutory law (or Codes in civil law countries), or common law (judge-made law has also made some significant advances in some civil law jurisdictions).
21. There are presently four legal regimes for the recognition and enforcement of foreign judgments in Singapore.
22. The Choice of Court Convention is given effect to under the Choice of Court Agreements Act (COCA).
23. The common law regime is the main regime today, but statutory law may play an increasingly larger role. Under Singapore common law, a foreign judgment may be recognised, subject to limited defences, if it is from a court of law of competent jurisdiction, it is final and conclusive on the merits of the dispute, and the foreign court had international jurisdiction over the party sought to be bound. International jurisdiction is established if the party was present or resident in the originating state at the time of commencement of the foreign proceedings, or has submitted to the jurisdiction of the foreign court in relation to those proceedings, or has agreed to the jurisdiction of the foreign court in respect of the dispute. To qualify for enforcement, a recognised foreign judgment must be for a fixed or ascertainable sum of money. Enforcement is by way of a fresh action on the obligation to pay on the foreign judgment. It is an action on a debt, and jurisdiction must be established over the judgment debtor like in any other suit. However, summary trial is usually available in many cases.
24. In addition, there are two statutory regimes, the Reciprocal Enforcement of Commonwealth Judgments Act³¹ (RECJA) and the REFJA.³² The former is earlier in time and applies to the UK and gazetted Commonwealth countries. The scheme builds upon the common law, but facilitates *enforcement* by doing away with the need for a fresh action and allows a registered judgments to be enforced on the same basis as a local judgment. The grounds of international jurisdiction are similar to but not the same as the common law. It is narrower in excluding presence, but broader in including natural persons doing business in the originating jurisdiction (the common law only admitted that ground for corporations³³). This statute has been repealed, but the effective date has yet to be announced.³⁴

³⁰ Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI, 2020).

³¹ Cap 264, Rev Ed 1985.

³² Cap 265, Rev Ed 2001.

³³ *Adams v Cape Industries Plc* [1990] Ch 433 (CA); *Bank Central Asia v Harry Rosenberg* [1994] 3 SLR(R) 981 (CA).

³⁴ Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (No 24 of 2019).

25. The REFJA was originally structured similarly to the RECJA. It was intended to cover non-Commonwealth countries. On the international jurisdiction requirements, it rejects presence but adds the defendant's place of business.³⁵ As it turned out, the only gazetted country is Hong Kong SAR, and only because it could not be housed within the RECJA after 1997. The REFJA was amended extensively in 2019 together the repeal of the RECJA, with the intention that the RECJA countries will eventually be gazetted under the REFJA, and more countries will be added to the statutory scheme with further negotiations with other countries. The three key amendments in the REFJA are: (1) extending enforcement beyond judgments of superior courts; and (2) extending enforcement to interlocutory judgments; and (3) extending enforcement to non-monetary judgments. So far only Hong Kong SAR is on this statute, and only for final money judgments of superior courts. In other words, there is so far no change to the status quo.

E. National Laws: The Global Landscape

26. What about the national laws of other countries? I conducted a cursory review of some 108 states.³⁶ It may safely be assumed that all countries (and not only those reviewed) will abide by international law and will give effect to treaties to which they are parties. Less than 8% (8 out of 108) of the surveyed jurisdictions will not recognise or enforce foreign judgments under national law without a treaty.³⁷ Of the 100 states that do recognise foreign judgments without treaties, a not insignificant number (34 or 31.5%) require some manner of reciprocity, ie, recognition will be denied unless its own equivalent judgment will be recognised in the originating state.

27. The numbers are ultimately misleading for several reasons. From the macro perspective, some of the surveyed jurisdictions will be economically and strategically more important than others; which are more important in this sense will depend on the political affiliations and economic networks of the country asking the question. For example, from Singapore's perspective, 4 of the 8 jurisdictions that will recognise and enforce foreign judgments only if treaties are in existence are found within ASEAN. From the micro perspective, ultimately what matters to a judgment creditor is the location of the assets of the judgment debtor in question.

28. Moreover, where states do recognise foreign judgments, vastly different conditions apply. Some are fairly straightforward, but some may be onerous. For example, some may require that its own court could not have jurisdiction over the original cause of action. Others may require that the originating court applied a substantive law to the merits that is consistent with its own domestic law, and yet others may require that the originating state had applied the same

³⁵ REFJA, s 5(2)(a)(iv) and (v). For a defendant who is a natural person, the dispute must also be in respect of a transaction effected through or at that place.

³⁶ This was made possible largely by a few significant recent publications: Jurgen Basedow et al (ed), *International Encyclopedia of Private International Law* (Kluwer, 2017) (80 national reports); Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI (Asian Business Law Institute), 2017) (15 country reports); Michael Hwang SC, David Holloway and Lim Si Cheng, "One Belt, One Road, One Clause for Dispute Resolution?" in Dr Michael Hwang SC, *Selected Essays on Dispute Resolution* (SIAC, 2018) 585 (14 civil law countries); Anselmo Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters (Studies in Private International Law- Asia)*, Hart, 2019) (15 country reports). Standing International Forum of Commercial Courts, *Multilateral Memorandum on Enforcement of Commercial Judgments for Money* (2nd ed, 2020), available at: https://s3-eu-west-2.amazonaws.com/sifocc-prod-storage-7f6qtyoj7wir/uploads/2021/04/6.7387_JO_Memorandum_on_Enforcement_2nd_Edition_April2021_WEB.pdf (access on 25 April 2021) (33 jurisdictions). The countries overlap to a large extent.

³⁷ Where the national law of a state will only give effect to a foreign judgment if there is reciprocity from treaty, then effectively there is no national law on foreign judgments apart from treaty, and it is counted as a state not giving effect to foreign judgments under national law.

choice of law rule as the requested state. Moreover, for states that require reciprocity as a precondition to recognition, there are about as many meanings of reciprocity as there are such states. Conversely, where states do not formally recognise foreign judgments, some may give such heavy evidential effect to them that effect is practically as good as legal recognition. Others may give discretionary weight to such judgments, in which case it can be difficult to predict the outcome.

29. Generalisations of recognition, enforceability and reciprocity are not very useful, and in every case, the detailed rules of the relevant country in which recognition or enforcement is sought needs close study. Nevertheless, given the relatively small number of countries that do not recognise foreign judgments, the larger problem at the global level is not non-recognition or non-enforceability, but the lack of uniformity in the principles of recognition and enforcement. Multilateral conventions provide the ideal way forward to address this problem.
30. Practitioners, however, have learnt to cope with lack of uniformity of laws. At the very least, some risk mitigation can be done if the rules, even if not uniform, are at least certain. Certainty probably played a very important role in the development of English common law on this subject, where international jurisdiction is confined to presence, submission and agreement (no residence).³⁸ There is concern that the rules of recognition should make it easy for a potential defendant with English assets to decide how to respond to a summons to attend court in a foreign jurisdiction.
31. On a global level, the general trend in national laws is moving towards greater recognition and enforcement of foreign judgments. Outside common law systems, it has been observed that countries have been relaxing limitations on the influx of foreign judgments,³⁹ in particular, reciprocity as a condition for recognition has been on the decline.⁴⁰ In common law countries, the expansion has occurred in varying degrees. In Australia international jurisdiction has been expanded incrementally to include the nationality of the defendant.⁴¹ English common law has extended the concept of submission to include implied consent.⁴² Canada has taken the boldest steps, going beyond the traditional grounds of international jurisdiction to recognise foreign judgments where the originating state has a real and substantial connection with the dispute,⁴³ and allowing the enforcement of non-monetary judgments.⁴⁴

³⁸ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [7]-[8]. D Kenny, “*Re Flightlease: The ‘real and substantial connection’ test for recognition and enforcement of foreign judgments fails to take flight in Ireland*” (2014) 63 ICLQ 197.

³⁹ Bélich Elbalti, “Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments” (2014) 16 Japanese Yearbook of Private International Law 264; Bélich Elbalti, “Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite” (2017) 13 JPIL 184.

⁴⁰ Bélich Elbalti, “Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite” (2017) 13 JPIL 184; Ruth Bader Ginsburg, “Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States” (1970) 4 International Lawyer 720 at 723-725.

⁴¹ *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218.

⁴² *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, [2016] 3 All ER 181 (implied submission possible so long as actual); *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (proof of debt in insolvency proceedings as submission to jurisdiction in respect of subsequent proceedings by liquidators); see also “Common Law Developments Relating to Foreign Judgments”, Yong Pung How Professorship of Law Lecture 2016, available at https://law.smu.edu.sg/sites/law.smu.edu.sg/files/law/Paper2016_YPH.pdf (accessed on 30 April 2021).

⁴³ *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416.

⁴⁴ *Pro Swing Inc v Elta Golf Inc* 2006 SCC 52 (SC, Canada).

V. The Future of Singapore Law

32. Singapore takes a multipronged approach to the issue of foreign judgments. The Choice of Court Convention is already part of the law, and the Judgments Convention is under consideration. Bilateral understandings will be reached with other countries in the implementation of the expanded REFJA. In terms of soft law, Singapore led the initiative on the *Asian Principles for the Recognition and Enforcement of Foreign Judgments*, and there is evidence of many memoranda of guidance and understanding with foreign courts. Where will the common law go from here?

A. The Common Law Obligation Approach

33. The rationale for recognition of foreign judgments in the common law has been the subject of much debate and confusion. It bears re-iteration that while the doctrine of comity provides the key to unlock the door to the reception of foreign judgments, other explanations are required for deciding *when* the key should be turned.⁴⁵ For this, the common law courts resorted to the doctrine of obligations for *in personam* judgments.⁴⁶ *Schibsby v Westenholz* is the leading authority. Blackburn J said:⁴⁷

... the true principle on which the judgments of foreign tribunals are enforced in England ... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

34. Quite apart the authoritativeness of *Schibsby v Westenholz*,⁴⁸ all the passage tells us is that when a foreign court has competent jurisdiction (according to the *lex fori*) over the defendant, this will give rise to an obligation to pay that will be enforced as a debt in the forum. The obligation to pay is the conclusion. The question of when the foreign court has competent jurisdiction – “international jurisdiction” in modern terminology – is the premise and the real question.

35. The language of “obligation” is historically linked to the procedural form of action in quasi-contract of *indebitatus assumpsit*, where the claim is based on an implied promise by the defendant to pay a sum of money to the plaintiff.⁴⁹ But there are also substantive reasons for this approach. It makes it clear that it is the law of the forum that ultimately determines whether the foreign judgment has legal effect, and more importantly, that it is a matter of law and not discretion, and a matter of private law, not international law.⁵⁰ By focussing on the legal relationship between the parties, the doctrine came to be developed by analysis of the strength

⁴⁵ Hessel E Yntema, “The Enforcement of foreign Judgments in Anglo-American Law” (1935) 33 Michigan L Rev 1129 at 1147, footnote 25.

⁴⁶ Obligation is not the purported rationale in the common law for the recognition of judgments on personal status or title to property. The criticism that the theory does not explain such judgments (*Merck* [2021] SGCA 14 at [30]) is somewhat misdirected.

⁴⁷ (1870-71) LR 6 QB 155 (QBD) at 159 (Blackburn J delivering the judgment of the Court).

⁴⁸ It has been questioned in Andrew Dickinson, “*Schibsby v Westenholz* and the recognition and enforcement of judgments in England” (2018) 134 LQR 426.

⁴⁹ The claim based on a foreign judgment was regarded as a “pseudo-quasi-contract” in PH Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell, 1952) at 28-29.

⁵⁰ Hessel E Yntema, “The Enforcement of foreign Judgments in Anglo-American Law” (1935) 33 Michigan L Rev 1129 at 1147.

of connection between the defendant and the proceedings in originating state.⁵¹ Further, by implying and enforcing an obligation within private law, the common law court bypassed the rule against the direct or indirect non-enforcement of foreign public laws.⁵²

36. The early common law focussed on the way the foreign court took jurisdiction. Assertions of sovereignty within its own territorial jurisdiction – the presence of the defendant – was regarded as a valid reason to give effect to the foreign judgment. Thus, in *Power v Whitmore*, Lord Ellenborough said:⁵³

By the comity which is paid by us to the judgments of other Courts abroad of competent jurisdiction, we give full and binding effect to such judgments so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate.

37. Because the common law considered the enforcement of foreign judgments to be a matter of common law right, it accepted that there were other ways where the defendant may have conducted itself such that it was fair and reasonable to impose an obligation to obey the foreign judgment. If the defendant had agreed, or voluntarily and unequivocally accepted, that the foreign court had jurisdiction to determine the dispute, then it had consented to the proceedings, and that provides a powerful reason to hold the defendant to the judgment. Thus, agreement and submission⁵⁴ came to be uncontroversial grounds in the common law. Presence has sometimes been explained on the basis of tacit consent to the jurisdiction of the foreign court.⁵⁵ However, the Privy Council has recently clarified that the consent in submission and agreement must be actual.⁵⁶ Indeed, if tacit consent is the true rationale, then international jurisdiction should be much broader, and indeed it would be difficult to draw the line when tacit consent may not be inferred.⁵⁷ For example, doing business in, or with, or even directing website activities at a particular jurisdiction, may well be evidence of tacit consent. Thus, far as presence, submission and agreement are grounds of international jurisdiction, international jurisdiction has no unitary rationale.

⁵¹ A Briggs, “Which Foreign Judgments Should We Recognise Today?” (1987) 36 ICLQ 240 at 242.

⁵² *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 (CA) at [41]. There is no problem with the *recognition* of the duty to obey the judgment which gave rise to the obligation to pay, as long as the duty is one that can be said to arise within the territory of the foreign sovereign. This might be argued to be based on the vested-right theory (that foreign judgments are given enforceable in the forum because the right to enforce vested in the foreign territory) that is often criticised for circularity. However, the recognition of rights vested within the territorial competence of foreign sovereigns is part of the foreign act of state doctrine. The circularity arises in choice of law analysis because there is a question of which law to apply in the first place. The only question in foreign judgments is whether a particular foreign judgment has legal consequences in the forum.

⁵³ (1815) 4 M & S 150. See also, Adrian Briggs, “The Principle of Comity in Private International Law” (2012) 354 *Collected Courses of the Hague Academy of International Law* 65 at 149-150.

⁵⁴ What amounts to submission may, however, sometimes be controversial. See *Henry v Geoprosco International Ltd* [1976] QB 726; REFJA, s 5(2)(a)(i)(C); Civil Jurisdiction and Judgements Act 1982 (UK), s 33(1)(b).

⁵⁵ *Adams v Cape Industries Plc* [1990] Ch 433 (CA) at 555.

⁵⁶ *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, [2016] 3 All ER 181 at [56]-[58]. This is not inconsistent with the operation of estoppel principles that could prevent a party from denying the consent. Nor does it mean that the consent must be express, but it should be unequivocal. The scope of the submission raises a different question that may not subject to a strict test of actual consent: *Murthy v Sivajothy* [1999] 1 WLR 467 (CA); *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236; *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2011] 2 SLR 545 at [44]-[49].

⁵⁷ Andrew Dickinson, “*Schibsby v Westenholz* and the recognition and enforcement of judgments in England” (2018) 134 LQR 426 at 436-437.

38. In addition, residence of the defendant at the time of the commencement of the foreign proceedings was accepted as a ground in many common law countries including Singapore. It is also a ground in international instruments including the Judgments Convention and the Commonwealth Model Law, regional instruments like the Brussels I Regulation (Recast), as well as the REFJA. Intuitively, it seems fair and reasonable that a person should obey the judgment from the court of the territory that is his home. It was, however, recently ejected from English common law by the UK Supreme Court.⁵⁸ Residence does not fall within the territorial sovereignty rationale. Nor does it fall into the consent rationale to the extent that consent needs to be actual or at least unequivocal. This could explain its recent excision from English common law. Another reason may be that residence may not provide the same level of certainty and predictability as presence, submission and agreement.
39. Residence represents a different type of international jurisdiction from territoriality, consent and agreement, that of a sufficient connection between the defendant and the originating state. There may be other kinds of connections. Moreover, the concept of international jurisdiction is no longer strictly required if the obligations theory is jettisoned in favour of a broader rationale of transnational comity and reciprocal judicial respect. It may however, still provide a useful control gateway.

B. End of the “obligations” era for Singapore?

40. It is in the context of this global environment that the Singapore Court of Appeal dealt with the issue of foreign judgments in *Merck Sharp & Dohme Corp v Merck KGaA*⁵⁹ (“*Merck*”). On the facts as found it was a straightforward case of issue estoppel from a foreign judgment. It is a very important decision because it is the first time that the Singapore Court of Appeal has given so much consideration to the question of the scope, effect, and limits of issue estoppel arising from foreign judgments, and it merits close study for what it decided and also for what it did not. For the purpose of this paper, however, I will focus on the observations of the courts on the more fundamental question of the recognition of a foreign judgment, which is a prerequisite for issue estoppel to arise in the first place. This was not in issue in the case because it was clear the defendant had submitted to the jurisdiction of the foreign court.
41. The Court examined the possible rationales for the recognition of foreign judgments albeit without reaching a concluded view. Nevertheless, it is clear that the Court found the “obligations” theory to be dubious, pointing out that it does not explain when the obligation arises,⁶⁰ and was not convinced that the rationale that foreign judgments are final determinations of the rights of parties was a sufficient basis.⁶¹ It was content to base the recognition of foreign judgments on “transnational comity and reciprocal respect among courts of independent jurisdictions”.⁶²
42. As seen above, “comity” can only explain the phenomenon of recognition, but the common law resorted to obligations to explain *which* judgments could be recognised. In embracing

⁵⁸ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [7]-[8].

⁵⁹ [2021] SGCA 14.

⁶⁰ *Merck* [2021] SGCA 14 at [30]. Previous Court of Appeal authorities had also been non-committal about the theoretical basis, but had accepted that the court is enforcing an obligation owed by the judgment debtor to the judgment creditor: *Ralli v Angullia* (1917) 15 SSLR 33 (CA, Straits Settlements) at 75-76, 90-91, 94, 98; *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 (CA) at [14], [30]-[31]; *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 (CA) at [41], [121].

⁶¹ *Merck* [2021] SGCA 14 at [32].

⁶² *Merck* [2021] SGCA 14 at [33].

comity and casting doubt on the obligations theory, the Court is effectively inviting counsel to re-argue the doctrinal basis for the recognition of foreign judgments.

C. Reciprocity as a Precondition in the Common Law?

43. In particular, the Court of Appeal in *Merck* left open “the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law”.⁶³ Since reciprocity has never been a condition of enforcement in Singapore common law or any other Commonwealth country,⁶⁴ to “leave open” this as a question is clearly an indication that the Court is seriously consider changing the law in this direction, and this amounts to an invitation to press the arguments in future cases.
44. At first blush, it seems counter-intuitive to narrow the field of recognition of foreign judgments when the worldwide trend is going in the opposite direction. One reason offered for suggesting reciprocity as a necessary condition for recognition is that it would be consonant with the position under the CCAA, the REFJA, and the Maintenance Order (Reciprocal Enforcement) Act.⁶⁵ The other, and more significant justification is the suggestion that since “considerations of transnational comity and *reciprocal* respect among courts of independent jurisdictions have come to undergird the recognition of foreign judgments at common law”,⁶⁶ a reciprocity requirement would be consistent with comity.⁶⁷ This suggests that comity, not obligations, is to be used as the gateway to control the influx of foreign judgments. Insofar as the common law rationale for the recognition of foreign judgments is based on the protection of private interests, it is a serious matter to deny that interest in order to achieve a state objective.⁶⁸ The common law is “not organised to in order to prevent unwelcome behaviour by foreign courts”.⁶⁹ If, however, transnational comity and reciprocal judicial respect provides the *test* for the recognition of foreign judgments, then it would be justifiable to deny recognition of a foreign judgment if the foreign court is seen to be unco-operative.
45. The idea of reciprocity needs unpacking. An important implication of sovereignty is equality. Therefore, when one sovereign is dealing with another sovereign, reciprocity is expected. This is the baseline for any negotiations between equals. Reciprocity in this sense is used to undergird the process of reaching a fair agreement between equals. A state should be ready to do for another state what it expects that other state to do for it. Reciprocity is therefore inherent in the content of the treaties and political arrangements for the recognition and enforcement of foreign judgments. But the reciprocity is spent once the rules of engagement are laid down unless the rules themselves direct recourse to it. Two cases are illustrative.
46. In *Societe Cooperative Sidmetal v Titan International Ltd*,⁷⁰ the plaintiff sought register a Belgian judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) (the equivalent of the REFJA), even though international jurisdiction was not satisfied on the terms

⁶³ *Merck* [2021] SGCA 14 at [39].

⁶⁴ It was introduced into the federal law of the United States with a narrow majority in the controversial decision of *Hilton v Guyot* (1895) 159 US 113, but the practical effect of this decision was minimal as it became clear that recognition and enforcement of foreign judgments was a matter of state law.

⁶⁵ Cap 169, 1985 Rev Ed.

⁶⁶ *Merck* [2021] SGCA 14 at [33] (emphasis added).

⁶⁷ *Merck* [2021] SGCA 14 at [39].

⁶⁸ *Johnston v Compagnie Generale Transatlantique* 152 NE 121 (NY 1926) at 123 (Pound J).

⁶⁹ Adrian Briggs, “The Principle of Comity in Private International Law” (2012) 354 *Collected Courses of the Hague Academy of International Law* 65 at 90-91.

⁷⁰ [1966] QBD 828.

of the statute or even under common law. The plaintiff argued that the judgment should be registered because the Belgian court would have recognised a judgment given by the English court in a converse situation. This argument was rejected by the Court on the basis that the Act had not introduced reciprocity as the underlying basis for the recognition of foreign judgments.⁷¹

47. In *Kok v Resorts World at Sentosa Pte Ltd*,⁷² the plaintiff, a licensed Singapore casino had obtained a judgment against a client from the Singapore Court and sought to register it in Western Australia under the Foreign Judgments Act 1991 (Cth) (the equivalent of the REFJA). The defendant challenged the registration on the basis that there was no reciprocity because in the converse situation, a judgment from Western Australia would not be enforceable in Singapore.⁷³ The matter went up to the Court of Appeal which rejected the argument on the basis (amongst others) that the reciprocity inherent in the legislation was a political matter and was not a relevant consideration in applying the rules.⁷⁴
48. Reciprocity may also be used by a court in an *ad hoc* sense to deny recognition and enforcement of foreign judgments if an equivalent judgment its own will not be recognised in the originating state in a converse situation. This is not about bargaining to enter an arrangement, but a response to foreign conduct. It is commonly characterised by writers as retaliation against the lack of co-operation from the foreign state.⁷⁵ The approach is problematic in several ways. It punishes private litigants for a perceived offence by a foreign state;⁷⁶ a state objective is sought to be achieved at the expense of private rights. A foreign judgment will not be recognised even if it is from the exclusively chosen contractual forum of the parties, if the originating state is an “unco-operative” state that will not recognise a Singapore judgment in the converse situation. The parties to suffer non-recognition are not necessarily nationals or residents of the foreign

⁷¹ [1966] QBD 828 at 845-847.

⁷² [2017] WASCA 150.

⁷³ *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR 71 (CA) at [114] casting doubt on *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690 (CA).

⁷⁴ *Merck* [2021] SGCA 14 at [41].

⁷⁵ Anselmo Reyes, “Introduction”, in Anselmo Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart, 2019) 1 at 27; Michael Hwang SC, David Holloway and Lim Si Cheng, “One Belt, One Road, One Clause for Dispute Resolution?” in Dr Michael Hwang SC, *Selected Essays on Dispute Resolution* (SIAC, 2018) 585 at 603, footnote 62; Bélich Elbalti, “Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite” (2017) 13 JPIL 184 at 186-187; Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Laws in the People’s Republic of China* (Elgar, 2016) at [6.13] and [6.59]; Ho Hock Lai, “Policies Underlying the Enforcement of Foreign Commercial Judgments” (1997) 46 ICLQ 443 at 454; John Kuhn Bleimaier, “The Doctrine of Comity in Private International Law” (1979) 24 Catholic Lawyer 327 at 330; Arthur Lenhoff, “Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis” (1956) 16 Louisiana L Rev 465 at 473. See also the dissenting opinion in *Hilton v Guyot* (1895) 159 US 113 at 234, but cf the majority judgment at 228.

⁷⁶ Arthur Taylor von Mehren, “Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements” (1980) 167 Collected Courses of the Hague Academy of International Law 9 at 50; Friedrich Juenger, “The Recognition of Money Judgments in Civil and Commercial Matters” (1988) 36 Am J Comp L 1 at 32-33; Ralf Michaels, “Recognition and Enforcement of Foreign Judgments” in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (2009) (https://scholarship.law.duke.edu/faculty_scholarship/2076/, accessed on 30 April 2021) at [7]; Yujun Guo, “Principle 5. Reciprocity” in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLL, 2020) 57 at 59; John F. Coyle, “Rethinking Judgments Reciprocity” (2014) 92 NC L Rev 1109 at 1123-1125; Louisa B Childs, “Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law” (2005) 38 NYU J Int’l L & Pol 221 at 229-230; Richard W Hulbert, “Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration” (2008) 29 U of Pa Intl L 641..

state in question.⁷⁷ There are additional costs⁷⁸ involved in the application of the law if the content of foreign law and approaches of foreign courts require scrutiny in every case when recognition of a foreign judgment is sought in Singapore. Further it is necessary to determine what is being tested on the reciprocity issue. Countries applying reciprocity employ a variety of approaches. Some courts require reciprocity in the form of treaty obligations, some may infer reciprocity from mutual co-operative agreements, and some require a formal list from the government of the day. Where the test is on a case by case basis, it may be based on *de facto* (ie, actual past cases⁷⁹), or *de jure* reciprocity. There are further questions of how differences in the grounds of international jurisdiction, defences, and threshold for review will affect the reciprocity question.

49. The usual rationale for imposing reciprocity as a precondition for recognition of foreign judgments is that it will encourage the uncooperative foreign state to liberalise its own laws on the recognition of foreign judgments.⁸⁰ It is certainly not a case of leading by example. On rare occasions it has worked,⁸¹ but it has been argued by one writer that its success depends on the private interest of lobby groups that are sufficiently powerful to persuade the government of the day to change the law.⁸² This was in the context of a country where private lobby groups are agents of legislative change. This appears to suggest that this may not even be enough to change anything in other countries where this is not the culture.⁸³ In particular, if the reason for the non-recognition of foreign judgments for a country is deeply rooted in its belief in the strict doctrine of territorial sovereignty, the non-recognition of its own judgments in other countries will be accepted as a logical corollary.
50. Many academics have been critical of the requirement of reciprocity.⁸⁴ As the Court of Appeal noted, the doctrine is in decline and has generally been liberalised.⁸⁵ A commentator in the *Asian Principles for the Recognition and Enforcement of Foreign Judgments* has suggested as

⁷⁷ A cursory review of foreign judgments cases in Singapore reveals no particular pattern on the nationality/residence of the party seeking to rely on the foreign judgment. This is expected of a hub for international commercial litigation.

⁷⁸ John F. Coyle, "Rethinking Judgments Reciprocity" (2014) 92 NCL Rev 1109. Some costs are already incurred in examining whether the foreign judgment is final and conclusive and the foreign court had competence in accordance with the law of the originating state.

⁷⁹ This raises another problem between two states applying the same test because without precedent, each country will be waiting infinitely for the other to act.

⁸⁰ Arthur Taylor von Mehren, "Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements" (1980) 167 Collected Courses of the Hague Academy of International Law at 49; Ralf Michaels, "Recognition and Enforcement of Foreign Judgments" in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (2009) (https://scholarship.law.duke.edu/faculty_scholarship/2076/, accessed on 30 April 2021) at [7]; Louisa B Childs, "Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law" (2005) 38 NYU J Int'l L & Pol 221 at 229.

⁸¹ Arthur Taylor von Mehren, "Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements" (1980) 167 Collected Courses of the Hague Academy of International Law 9 at 49, suggesting that French law may have liberalised in the 1960's partly in response to the refusal of German courts to recognise their judgments, but noting however that "the normal tendency of a reciprocity requirement is probably to generalize lower, than inculcate higher, standards of practice".

⁸² John F. Coyle, "Rethinking Judgments Reciprocity" (2014) 92 NCL Rev 1109 at 1132-, documenting how an insurance policyholders interest group successfully lobbied for change in the law of California law in 1907 after Californian judgments against German insurers were refused enforcement in Germany for lack of reciprocity (but the revised law unfortunately still did not satisfy the German courts at that time).

⁸³ On possible motivations, see Aaron D Simowitz, "Convergence and the Circulation of Money Judgments" (2019) 92 Southern Cal L Rev 1031 at 1045-1052.

⁸⁴ For a sampling, see the materials cited in footnotes 75 and 76.

⁸⁵ *Merck* [2021] SGCA 14 at [39].

the way forward that a “cogent case could be made for the abolition of reciprocity as a precondition to the recognition and enforcement of foreign judgments”.⁸⁶ The Court of Appeal further pointed out that in practice, absence of reciprocity would rarely be an obstacle against recognition of foreign judgments in Singapore, because there are very few countries that do not enforce foreign judgments.⁸⁷ This suggests that the Court is likely to take a liberal view of the reciprocity condition if it decides that it should be a precondition. Indonesia and Thailand were cited as examples where the reciprocity requirement may not be satisfied because they have a general bar against the recognition of foreign judgments. However, Lao and Cambodia probably do not recognise foreign judgments without reciprocity under treaty.⁸⁸ It is not clear how the Court would have assessed these two jurisdictions on a reciprocity test since there are no relevant treaties with Singapore. If the reciprocity can be satisfied by potential treaty reciprocity, then it becomes a meaningless requirement.

D. Changes to Grounds of International Jurisdiction?

51. The grounds of international jurisdiction at common law are judge-made, and they cannot be immutable. However, common law courts have generally taken a conservative approach.⁸⁹ A common criticism is that the common law is too conservative.⁹⁰ How the grounds may be reworked will depend on the theory of recognition. If it is based on the private rights of the parties, then the focus will naturally be on the defendant’s conduct in relation to the foreign proceedings, and that could include the connection of the cause of action to the originating jurisdiction as it is allegedly the responsibility of the defendant. If the gateway is replaced by transnational comity, then a fortiori the grounds of international jurisdiction need re-examination, and any justification that can be broadly related to the idea of comity could suffice. Insofar as the grounds of international recognition are to be reworked, it is important to bear in mind that defences may need to be adjusted, especially if the grounds are to be widened considerably.⁹¹
52. Domicile has the support of older case law but no modern support in case law, and it is not a ground under the REFJA, the Commonwealth Model Law, or the Hague Judgments Convention. At least so long as we adhere to the old technical common law rules,⁹² it is probably too unpredictable and it may turn out to have little connection to the case or even the defendant.

⁸⁶ Yujun Guo, “Principle 5. Reciprocity” in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI, 2020) 57 at 76.

⁸⁷ *Merck* [2021] SGCA 14 at [39].

⁸⁸ Procedures exist to enforce foreign judgments, but on condition (probably) of reciprocal treaty obligation: Youdy Bun, “Cambodia”, in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI, 2017) 37 at 41-42; Xaynari Chanthala and Kongphanh Santivong, “Lao”, in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI, 2017) 117 at 119; Adeline Chong, “General Principle”, in Adeline Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (ABLI, 2020) 1 at 9.

⁸⁹ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [129].

⁹⁰ See, eg, Andrew Dickinson, “*Schibsby v Westenholz* and the recognition and enforcement of judgments in England” (2018) 134 LQR 426; Ardavan Arzandeh, “Reformulating the common law rules on the recognition and enforcement of foreign judgments” (2019) *Legal Studies* 39.

⁹¹ Adrian Briggs, “Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments” (2004) SYBIL 1 at 2; Tan Yock Lin “Recognition and Enforcement of Foreign Judgments” in Teo Keang Sood & ors (eds) *Current Legal Issues in International Commercial Litigation* (NUS, 1997) 326.

⁹² See *Conflict of Laws, Halsbury’s Laws of Singapore* Vol 6(2) (LexisNexis, 2020 Reissue) at [75.036].

53. Nationality is yet another type of connection between the defendant and the foreign state, and there is historical support for it.⁹³ As a person may not have any physical connections with the country of nationality, the connection is one of allegiance. This has fallen into disfavour in English common law⁹⁴ and was rejected in Irish law,⁹⁵ and there has been no sighting of this in modern Singapore common law,⁹⁶ and it is not a recognised ground under the REFJA, the Commonwealth Model Law or the Hague Judgments Convention. It was revived recently in Australian law,⁹⁷ although it is not clear that allegiance through nationality by itself is a sufficient reason, since the court was also quick to qualify that the citizenship was in the case an “active” one and not merely the ‘relic of an early stage’ of the defendant’s life.⁹⁸
54. There are a couple of grounds in the REFJA that are not found in the common law. International jurisdiction may be established by a corporate defendant having a place of business in the originating state at commencement of the foreign proceedings,⁹⁹ or a defendant having an office or place of business at the commencement of the foreign proceedings where the proceedings were in respect of a transaction effected through or at the office or place.¹⁰⁰ The question arise whether this statute would influence the expansion of common law grounds of international jurisdiction.¹⁰¹ The Court of Appeal in *Merck* appeared to be generally receptive to the argument that the common law should be aligned with the REFJA.¹⁰² However, if the argument is to take the cue from Parliament, then perhaps grounds should go no further than those in the REFJA. Further, the question should also be asked whether presence should continue to be a valid ground of international jurisdiction under the common law.¹⁰³
55. In addition, there are other possible grounds found in the Hague Judgments Convention and the Commonwealth Model Law, that could arguably establish sufficient connections between the originating state and the defendant, the cause of action or the subject matter of the suit.

E. Broad Reforms?

56. Suggestions have also been made about other ways of expanding the concept of international jurisdiction in a broad rather than piecemeal way.
- a) Finality as Rationale: Abolish International Jurisdiction?
57. At one extreme, the suggestion is that there is no need for international jurisdiction, and it is enough that the dispute has been resolved with the requisite level of finality by a foreign court

⁹³ *Schibsby v Westenholz* (1870) LR 6 QB 155 at 161; *Rousillon v Rousillon* (1880) 14 Ch D 351 at 371; *Emanuel v Symon* [1908] 1 KB 302 (CA) at 309; *Harris v Taylor* [1915] 2 KB 582 at 591; *RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12 at 13-14; *Murugappa Chettiar v Krishnappa Chettiar* [1940] SSLR 35 at 44-45; *MNMEM Chettiar v Miles* [1915-1937] 1 JLR 119.

⁹⁴ Allegiance was rejected as a basis of international jurisdiction in *Adams v Cape Industries Plc* [1990] Ch 433 (CA) at 553. See also *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [7]-[8].

⁹⁵ *Rainford v Newell Roberts* [1962] IR 95.

⁹⁶ Allegiance was not even mentioned as a possible basis in *Merck* [2021] SGCA 14.

⁹⁷ *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218.

⁹⁸ *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218 at [21].

⁹⁹ REFJA, s 5(2)(a)(iv). This may not amount to carrying on business under the common law test in *Adams v Cape Industries Plc* [1990] Ch 433 (CA) and *Bank Central Asia v Harry Rosenberg* [1994] 3 SLR(R) 981 (CA).

¹⁰⁰ REFJA, s 5(2)(a)(v).

¹⁰¹ Paul Torremans (gen ed), *Cheshire, North and Fawcett: Private International Law* (OUP, 15th ed, 2017) at ???.

¹⁰² *Merck* [2021] SGCA 14 at [20], [37], [39].

¹⁰³ See LaBel J’s dissenting judgment in *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416 at [209]; *RMS Veerappa Chitty v MPL Mootappa Chitty* [1894] II SSLR 12.

with competence according to its own law. It has scant historical support in the common law,¹⁰⁴ but finds expression in the *Restatement (Second) on the Conflict of Laws*, where the public interest to put an end to litigation is regarded as the rationale for recognising foreign nation judgments.¹⁰⁵ Strong support comes from a paper by Professor Tan Yock Lin, arguing that there is no need for an international jurisdiction filter as long as the foreign court is internally competent, but the foreign judgment should however be subject to stronger scrutiny to ensure that there is no miscarriage of justice.¹⁰⁶ However, the Court of Appeal in *Merck* expressed scepticism of the finality rationale, noting that it is only in the broadest sense of enhancing comity between nations that an end to litigation is in the interest of the forum, since the forum would not have been involved in the production of the foreign judgment.¹⁰⁷ However, the parties also have an interest in the finality of dispute resolution.¹⁰⁸ If the reason for the recognition of foreign judgments is transnational comity and mutual judicial respect, then arguably there is no better starting point than to recognise all foreign judgments. Finality could be a sufficient reason for recognition and enforcement, subject to defences. Nevertheless, the concern of the Court that the rule of law is not always understood and applied consistently across jurisdictions¹⁰⁹ may weigh against the adoption of this route. Stronger scrutiny at the defence stage can address some of these concerns, but the Court may be put in a difficult position to conclude that a foreign legal system is unreliable. Further, a condition of reciprocity will be too blunt a tool to address this issue.

b) Natural Forum as a Ground of International Jurisdiction?

58. One academic suggestion is for the court of the forum to recognise, in addition to the traditional grounds of international jurisdiction, judgments from the court that is the appropriate or natural forum for the dispute.¹¹⁰ The justification for this approach is not because the foreign judgment may result from the forum turning away disputes based on the doctrine of natural forum, because in such cases the defendant wishing to convince the court that the more appropriate forum is elsewhere will usually need to assure the court that the foreign will be able to take jurisdiction, and if the defendant has assets in the forum, that the putative foreign judgment may be enforceable against those assets, usually by undertaking to submit to the jurisdiction of the foreign court.
59. The rationale is based on the principle that if the forum abides by the theory at its jurisdictional stage that there is a centre of gravity for every dispute (the natural forum) such that the assumption of jurisdiction by a court of the forum should be the appropriate result, then there is a compelling case that a judgment from what the forum regards as the appropriate forum should be recognised as having international jurisdiction in the case. This moves the international jurisdiction rationale a step away from the private law domain, as the focus is on

¹⁰⁴ Cf *Maubourquet v Wyse* (1867) 1 Ir Rep CL 471 at 481, cited in Andrew Dickinson, “*Schibsby v Westenholz* and the recognition and enforcement of judgments in England” (2018) 134 LQR 426 at 447. See also the dissenting judgment of four justices in *Hilton v Guyot* (1895) 159 US 113 at 229.

¹⁰⁵ American Law Institute, *Restatement (Second) on the Conflict of Laws* (ALI, 1971), §98 Recognition of Foreign Nation Judgments, Comment b. Constitutional considerations govern the recognition of interstate judgments. See also the dissenting judgment in *Hilton v Guyot* (1895) 159 US 113 at 229.

¹⁰⁶ Tan Yock Lin “Recognition and Enforcement of Foreign Judgments” in Teo Keang Sood & ors (eds), *Current Legal Issues in International Commercial Litigation* (NUS, 1997) 326.

¹⁰⁷ *Merck* [2021] SGCA 14 at [32], relying on P Rogerson, “Issue Estoppel and abuse of process in foreign judgments” (1998) 17 CJQ 91 at 92.

¹⁰⁸ This was acknowledged in *Merck* [2021] SGCA 14 at [1] and [25].

¹⁰⁹ *Merck* [2021] SGCA 14 at [33].

¹¹⁰ Adrian Briggs, “Which Foreign Judgments Should We Recognise Today?” (1987) 36 ICLQ 240.

the jurisdiction of the foreign court rather than the conduct of the defendant in relation to the foreign proceedings. If the court is willing to move in this direction, this argument is persuasive in principle.

60. However, there are serious difficulties. First, although the doctrine of natural forum is shared by common law countries, there is no uniformity and there are different versions. This is not a practical problem if the forum's version is to prevail, but the lack of international uniformity challenges the justification for using the forum's version of the doctrine in the first place. Secondly, on the forum's version, it is not clear whether the test should be based on the Stage One of the natural forum test or both stages. Stage One requires the identification of the forum that is best suited to try the case in the interests of all parties and the ends of justice. All circumstances are considered, though factors of convenience and expense generally tend to be more prominent at this stage. In Stage Two, the question is whether the case should be tried in that forum would lead to substantial injustice. The terminology of "appropriate forum" is not stable, sometimes referring to the conclusion of Stage One, and sometime to the ultimate conclusion after applying both stages.¹¹¹ On either view, in many cases it will be difficult to predict the result of the application of the rule as there is a large element of judicial discretion involved in the process, especially if Stage Two is also part of the test.

c) International Jurisdiction Presumed Unless Anti-Suit Injunction Hypothetically Available?

61. Another suggested approach is to regard international jurisdiction as being satisfied in all cases where the foreign judgment meets all other requirements for recognition (ie, the finality rationale), unless it can be shown that the forum court would have granted an anti-suit injunction to put a stop to the foreign proceedings.¹¹² This is a very strong pro-recognition stance, with the court refusing recognition only when there had been reasons for the court to act to prevent the foreign proceedings¹¹³ in the first place. This approach suffers the same downsides as the finality rationale, as it is effectively a qualified version of it. It can also be difficult to assess whether an injunction would have been granted.

d) Real and Substantial Connection?

62. Canadian law will recognise a foreign judgment where, if the traditional international jurisdiction grounds are absent, there is a real and substantial connection between the originating state the underlying dispute.¹¹⁴ This approach is consistent with the Canadian approach to its own jurisdiction, where the courts are allowed to take jurisdiction in cross-border disputes only if the forum has a real and substantial connection with the dispute.¹¹⁵

¹¹¹ The terminology issue is discussed in *Deripaska v Cherney* [2009] EWCA Civ 849.

¹¹² Jonathan Harris, "Recognition of Foreign Judgments at Common Law – The Anti-Suit Injunction Link" (1997) 17 OJLS 477.

¹¹³ The injunction, being *in personam*, is of course directed at the plaintiff in the foreign proceedings and not the foreign court.

¹¹⁴ *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416.

¹¹⁵ From the Canadian perspective, it is an application of the "mirror image" jurisdiction approach discussed below: *Beals v Saldanha* [2003] 3 SCR 416, (2003) 234 DLR (4th) 1 at [29].

63. Its main theoretical support comes from a conception of transnational comity¹¹⁶ that is perhaps beginning to find favour in Singapore.¹¹⁷ It has not found favour in the UK¹¹⁸ or Ireland.¹¹⁹ For countries like Singapore, the main attraction of this approach is that it is directed to the underlying rationale of finding appropriate connections with the originating state without being tied to specific grounds that could prove to be obsolete in the future. The main counterpoint is that it creates uncertainty,¹²⁰ making it practically impossible to advise clients whether and how to respond to a summons from a foreign court.¹²¹ The Canadian courts have worked to mitigate the uncertainty with lists of presumptive connections,¹²² but it is not clear how successful this has been.

e) “Mirror Image”, or “Reciprocity”, Jurisdiction?

64. It has occasionally been suggested that the forum should recognise a foreign judgment if the forum would have grounds for taking jurisdiction in a converse situation, where the facts are mirrored. The argument is that if the forum could have taken jurisdiction then it should recognise that the foreign court has a legitimate basis for hearing the case, and thereby recognise the foreign judgment as a matter of comity;¹²³ there should be no discrimination against the foreign court.¹²⁴ This approach has been rejected in English case law for *in personam* judgments,¹²⁵ but has strong academic support.¹²⁶ This is frequently referred to as “reciprocity” (of jurisdiction), and it should not be confused with reciprocity as a condition for the recognition of foreign judgments.

65. This is not an independent way forward under Singapore law. If we understand this to mean that the Singapore court would have a basis for taking jurisdiction (because of presence or one of the grounds for service out of jurisdiction under Order 11), it is not a true mirror image because *forum conveniens* is often the decisive factor whether or not to grant leave. Putting that issue aside, on this basis this approach is no different from dispensing with international jurisdiction (ie, giving effect to the finality rationale) altogether because there is no practical

¹¹⁶ *Beals v Saldanha* [2003] 3 SCR 416, (2003) 234 DLR (4th) 1 at [28].

¹¹⁷ *Merck* [2021] SGCA 14 at [31] and [33].

¹¹⁸ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

¹¹⁹ *In re Flightlease (Ireland) Ltd* [2012] IESC 12.

¹²⁰ Ardavan Arzandeh, “Reformulating the common law rules on the recognition and enforcement of foreign judgments” (2019) *Legal Studies* 39 at 64; Andrew Dickinson, “*Schibsby v Westenholz* and the recognition and enforcement of judgments in England” (2018) 134 *LQR* 426 at 449; Stephen GA Pitel and Nicholas S Rafferty, *Conflict of Laws* (2nd ed, Irwin Law, 2016) at 177-178; Adrian Briggs, “Recognition of Foreign Judgments: a Matter of Obligation” (2013) 129 *LQR* 87 at 94–96; J-G Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52 *McGill LJ* 555.

¹²¹ The counter-argument from the perspective of international comity, and in particular mutual judicial respect, is that ALL such summonses should be answered with diligence.

¹²² At least in the jurisdictional context, but these are likely to be persuasive for the judgments context.

¹²³ *Schibsby v Westenholz* (1870-71) LR 6 QB 155 (QBD) at 159; *Re Dulles Settlement (No 2)* [1953] P 246.

¹²⁴ Ronald A Brand, “Understanding Judgments Recognition” (2015) *NC Int J L Comm Reg* 877 at 904-907.

¹²⁵ *Re Trepcia Mines Ltd* [1960] 1 WLR 1273 (CA) at 1281-2 (common law); *Societe Cooperative Sidmetal v Titan International Ltd* [1966] QBD 828 at 845-847 (in the context of the Reciprocal Enforcement of Foreign Judgments Act 1933).

¹²⁶ GD Kennedy, “‘Reciprocity’ in the recognition of foreign judgments” (1954) 32 *Can Bar Rev* 359; Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law* (Jerusalem: Magnes Press, 1960) at 30-32; *Cheshire, Private International Law*, 5th ed at p 620; Martin Davies, Andrew S Bell and PLG Brereton, *Nygh’s Conflict of Laws in Australia* (8th ed, 2010) at [40.21]-[40.22]; Ardavan Arzandeh, “Reformulating the common law rules on the recognition and enforcement of foreign judgments” (2019) *Legal Studies* 56; Ronald A Brand, “The Circulation of Judgments Under the Draft Hague Judgments Convention”, Working Paper No. 2019-02, University of Pittsburgh School of Law, <http://ssrn.com/abstract=3334647> (accessed on 25 April 2021). Cf PRH Webb, “Comity and Reciprocity” (1966) 15 *ICLQ* 269 at 276.

situation where service out of jurisdiction is not possible in a civil case as long as the plaintiff is seeking some common law, equitable or statutory remedy from the Singapore court.¹²⁷ If it is understood to mean that a Singapore court would have granted leave for service out of jurisdiction (or in the case of presence, would not have stayed the proceedings), then it is effectively the *forum conveniens* approach.¹²⁸

F. Breaking Out of Procedural Constraints?

66. With the notable exceptions in Canada,¹²⁹ Cayman Islands,¹³⁰ and Jersey,¹³¹ common law courts generally only allow enforcement of money judgments.¹³² This is clearly the case in Singapore.¹³³ The common law limitation is tied to the historical accident of the selection of the writ of debt (and *indebitatus assumpsit*) as the relevant form of action to enforce a foreign judgment debt. The forms of actions have long been abolished from the law of procedure, but the proposition that only foreign money judgments can be enforced remains in the common law.
67. The proposition that the common law court only enforces money judgments can be misleading. The difference in treatment between foreign monetary and non-monetary judgments is actually not so vast in the common law. Foreign judgments are never enforced directly in the common law, whether monetary or non-monetary. Fresh proceedings are needed. A money judgment gives rise to an obligation to pay on the judgment debt, which is then enforced in the forum as a debt. There is no precedent in English or Singapore law that the order of a foreign court to perform a non-monetary obligation to perform what the foreign court had ordered, and it is generally assumed that it is not possible. But a non-monetary judgment can be recognised in the forum to raise an issue estoppel on the underlying substantive obligation, and that obligation can be enforced accordingly in the forum in a fresh action.¹³⁴
68. The common law method of enforcing obligations – whether monetary or non-monetary – that have been the subject of foreign judicial determination is cumbersome. The requirement of a fresh action is mitigated to some extent by the availability of summary procedure, but there is still a need to establish *in personam* jurisdiction over the judgment debtor, though service out

¹²⁷ Order 11 r 1(n); *Li Shengwu v Attorney-General* [2019] 1 SLR 1091 (CA) (subject, of course, to *forum conveniens*).

¹²⁸ If and when Order 11 is reformed according to the Civil Justice Commission Report (Supreme Court, 29 December 2017) at 16 and Annex, Ch 6, <https://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system>, then the two possibilities would merge into the latter, since test for service out of jurisdiction would be that Singapore has jurisdiction or is the *appropriate forum*.

¹²⁹ *Pro Swing Inc v Elta Golf Inc* 2006 SCC 52 (SC, Canada).

¹³⁰ *Miller v Gianne* [2007] CILR 18 (Cayman Islands). This case could equally have proceeded on the basis of the *recognition* of an obligation to transfer property under the applicable law of the community property regime between the parties, and enforcement of the obligation under the law, including the private international law, of the requested court.

¹³¹ *Brunei Investment Agency v Fidelis Nominees Ltd* [2008] JRC 152, [2008] JLR 337. This case could equally have proceeded on the basis of the *recognition* of an obligation to transfer property under a settlement agreement, and enforcement according to the law, including private international law, of the requested court.

¹³² For Australian law, see RW White, “Enforcement of Foreign Judgments in Equity” (1980-82) 9 Syd L Rev 630; *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218 at [33].

¹³³ *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 (CA).

¹³⁴ This does not amount to the enforcement of an obligation to perform the foreign non-monetary court order, unlike the obligation to pay a judgment debt (which can include costs orders and interest).

of jurisdiction will invariably be available.¹³⁵ This is the reason for the wave of legislation across the Commonwealth in the early part of the 20th century, resulting in our own RECJA and REFJA. The RECJA and the REFJA before the 2019 amendments facilitated only the enforcement of money judgments, by allowing registered judgments to be directly enforced without need to start fresh proceedings. Post-2019, the REFJA allows for the enforcement of registered non-monetary judgments from foreign courts so gazetted. In substance, it is not really an extension of the common law; it is actually a highly belated tracking of the common law.

69. In deploying the law of obligations to deal with foreign *in personam* judgments, the common law is committed to the requirement for a fresh action, for that is the only way to enforce an obligation in private law.¹³⁶ If the rationale is no longer founded on private law and is based on transnational comity and mutual judicial respect, then there is no reason to adhere to the procedure mandated by the doctrine of obligations any further, and foreign monetary and non-monetary judgments should in principle be directly enforceable. Some new procedure probably needs to be created, analogous to the exequatur in civil law jurisdictions where foreign judgments need to be formally declared to have legal effect within the forum.¹³⁷

G. Interlocutory Judgments?

70. Interlocutory judgments¹³⁸ raise rather additional considerations. They are not final judgments and as a general rule are not the subject of common law rules for enforcement.¹³⁹ They are excluded from the Choice of Court Convention, the Judgments Convention because there was little prospect of international consensus, but they may be registered under the post-2019 REFJA subject to gazetting. The focus on obligations between private parties naturally required a final judgment on the merits. Anything else is a procedural matter. However, if the rationale shifts to transnational comity and mutual judicial respect, then there is no reason in principle to exclude them¹⁴⁰ from common law enforcement.

¹³⁵ Rules of Court, O 11 r 1(m). If there are assets, or prospects of such assets, in Singapore, Singapore will be an appropriate forum: *Fonu v Demiral* [2007] EWCA Civ 799, [2007] 1 WLR 2508, at [38]-[40]. It has been suggested that *forum conveniens* may not even be a relevant consideration for the exercise of jurisdiction in an enforcement action: *Alberto Justo Rodriguez Licea v Curacao Drydock Co, Inc* [2015] SGHC 136 at [20].

¹³⁶ *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 (CA) at [42]-[43].

¹³⁷ *Cf JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 (CA) at [113].

¹³⁸ One of the most important type of interlocutory injunction today is the asset-freezing injunction. This is closely related to the question whether the forum is able and willing to grant an asset-freezing injunction when the substantive litigation is abroad. The position in Singapore depends primarily on whether service of process on the defendant is effected within or outside jurisdiction: *Bi Xiaoqiong v China Medical Technologies, Inc (in liquidation)* [2019] 2 SLR 595 (CA); *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279. See also Law Reform Committee, Singapore Academy of Law, *Report on Civil Remedies* (SAL, 2020), https://www.sal.org.sg/sites/default/files/SAL-LawReform-Pdf/2020-12/2020_Report_on_Civil_Remedies.pdf (accessed no 30 April 2021) at 60-64. There is a hint of possible enforcement of a foreign asset-freezing order in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 (CA) at [113].

¹³⁹ There are exceptional situations where a finding by the foreign court may raise an issue estoppel between the parties: *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847; *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 (CA) at [100]-[101].

¹⁴⁰ Foreign *ex parte* orders raise additional considerations. There is no room for such orders on the common law philosophy of private rights, but there is room for such orders within a framework based on transnational comity and mutual judicial respect, but as a matter of policy sufficient safeguards will need to be assured.

VI. Conclusions: The Ways Forward?

71. There is a clear trend in the global landscape where multilateral conventions are being formed and national laws are becoming more receptive to foreign judgments. There has also been increasing availability of information on national laws, as well as soft laws on possible general principles. Nevertheless, rules on the recognition and enforcement of foreign judgments vary considerably across jurisdictions. The only route to uniform rules lies in multilateral conventions, but a multi-pronged approach is probably the practical way forward. The Choice of Court of Convention provides an important pathway forward. There are good reasons to sign the Judgments Convention, but perhaps there is no rush as it has not been brought into force yet.
72. At the level of national law in Singapore, some statutory rationalisation has taken place in the revised REFJA, and the *Merck* decision signals possible fundamental changes to the Singapore common law landscape on the recognition of foreign judgments. The suggestion of introducing reciprocity as a condition for recognition appears to buck the international trend, but is to be understood as an attempt to create an incentive for foreign courts that do not recognise foreign to liberalise their law. It is questionable whether it will have that effect. The Court suggested that such a change will have little practical impact because few countries in the world do not recognise foreign judgments. Whether this will be actually be so will depend on the specific test of reciprocity to be adopted. At a more fundamental level, the case signals a possible shift of rationale from obligations to broader considerations of transnational comity and reciprocal curial respect in order to explain the grounds for the recognition of foreign judgments. This has potentially deeper impact across many issues, including the grounds of international jurisdiction, the direct enforceability of foreign judgments whether monetary or non-monetary, and the enforceability of interlocutory judgments. Radical as they may be, these changes are within the scope of judicial law-making.¹⁴¹
73. It is also important to consider the law holistically so that common law and statute law (which in the Singapore context includes international instruments) develop in step with one another in a way that advances in a harmonious way both private and state interests.¹⁴² They involve ensuring a degree of certainty and predictability, the balance of private and state interests, the amount of trust of foreign legal systems, as well as policy questions on the exposure of local businesses to foreign legal risks.¹⁴³

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6 May 2021

¹⁴¹ *Cf Rubin v Eurofinance* [2013] 1 AC 236 at [129].

¹⁴² *Cf* Law Reform Committee, Singapore Academy of Law, *Report on Civil Remedies* (SAL, 2020), https://www.sal.org.sg/sites/default/files/SAL-LawReform-Pdf/2020-12/2020_Report_on_Civil_Remедies.pdf (accessed no 30 April 2021) at 64.

¹⁴³ *Cf Rubin v Eurofinance* [2013] 1 AC 236 at [130].