

CHAPTER 6 THE CONFLICT OF LAWS

- Section 1 [Introduction](#)
- Section 2 [Jurisdiction](#)
- Section 3 [Choice of Law](#)
- Section 4 [Foreign Judgments](#)

SECTION 1 INTRODUCTION

6.1.1 The subject of the conflict of laws, or private international law, deals with three interdependent questions: (1) When a case arises which involves cross-border elements, which country's court should try the case? (2) What law should be applied to determine the outcome of a substantive dispute involving cross-border elements? (3) What is the effect of a judgment given by the court of one country in the courts of another: will it be recognised or enforced?

6.1.2 When rules of the conflict of laws are examined more closely, however, these questions require refinement. This is because conflict of laws rules are ultimately rules of domestic law of a country which it applies in its court of law to resolve problems that arise because of the international elements in the case. Thus, from the perspective of Singapore law, the questions are: (1) when will a Singapore court adjudicate a case involving cross-border elements? (2) Assuming that the Singapore court does try the case, which legal system's substantive law will the court apply to specific questions that arise in the dispute? (3) When will a foreign judgment be recognised or enforced in Singapore?

6.1.3 Every country has its own conflict of laws rules. Some conflict of laws issues have been the subject of international conventions, but many remain to be resolved by individual countries' conflict of laws rules. However, principles of conflict of laws are inherently cognisant of the international dimension, and there has been a considerable consistency of approach not only within common law countries that share the English legal tradition, but also between common law and civil law countries.

6.1.4 Conflict of laws issues can arise in respect of any problem that appears before the court. This chapter gives a brief outline in respect of cases arising from the in personam jurisdiction of the court, ie, suits against the defendant in respect of breaches of contract, torts, etc, seeking to make the defendant personally liable to the plaintiff.

[Return to the top](#)

SECTION 2 JURISDICTION

Introduction

6.2.1 The foundation of the civil jurisdiction of a court in Singapore is statutory. The relevant statutes are the Supreme Court of Judicature Act, Cap 322, 1999 Ed (and corresponding provisions in the Subordinate Courts Act, Cap 321, 1999 Ed). Service of originating process on the defendant is the foundation of the jurisdiction of the court. There are two basic concepts that underlie the question of jurisdiction in cross-border disputes. First, there must be a legal connection between the case or the defendant and Singapore for jurisdiction to exist. Secondly, given the degree of connection of the case with Singapore and with other countries, the Singapore court may not exercise its jurisdiction unless it is satisfied that it is the most appropriate forum for the dispute. It should also be noted that there is a threshold test for the merits of the case that is related to but distinct from jurisdictional considerations. A weak case on jurisdictional considerations cannot be strengthened by testing the merits of the case; conversely a hopeless case on the merits cannot be strengthened by strong jurisdictional considerations ([Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd \[2000\] 1 SLR 673](#); [The Rainbow Joy \[2005\] SGCA 36](#)).

Territorial Jurisdiction

6.2.2 The Singapore court has jurisdiction over a defendant who is served with originating process when he is present in Singapore, or when he has agreed to submit to the jurisdiction of Singapore in an agreement with the plaintiff and has also agreed to a means for service within Singapore and the service is effected accordingly. For example, a traveller passing through Singapore may be served with process while he is in Singapore. A defendant who has agreed that the Singapore court has jurisdiction to try disputes arising under the contract with the plaintiff and that service may be effected on his agent in Singapore, or by posting the process to a particular address in Singapore, may be served with process within Singapore. The Singapore court also has jurisdiction if in the course of legal proceedings, the defendant takes a step that unequivocally demonstrates that he has accepted the court's jurisdiction; the defendant in this case has submitted to the jurisdiction of the court.

6.2.3 Once jurisdiction is obtained in this manner, the defendant may apply to the court to stay the proceedings on the ground that the Singapore court is not the natural forum to try the case. As in the case of any local suit, the defendant may also apply to have the suit dismissed on the basis that there is an abuse of the jurisdiction of the court because the plaintiff has no reasonable cause of action.

Extra-Territorial Jurisdiction

6.2.4 Where service of process within Singapore is not possible, then the plaintiff may ask the court for permission to serve the originating process on the defendant outside Singapore. The court may grant leave if a number of conditions are satisfied. The most important ones are: (1) there is a good arguable case that a specific connection has been established between the case and Singapore – in most cases this will involve the connection between the facts, the law, the subject matter of the dispute, or the parties, with Singapore – (see Order 11, Rules of Court, Cap 322 R5, 2004 Ed); (2) the Singapore court is the natural forum to determine the dispute; and (3) there is a serious issue to be tried on the merits. For example, the plaintiff may

try to establish the connection with Singapore by showing that the contract on which the claim is based was made in Singapore or is governed by Singapore law.

Non-Justiciability

6.2.5 The Singapore court has no jurisdiction to entertain proceedings principally concerned with a question of title to, or right of possession of, foreign immovable property, unless the question is based on a contract or personal equity between the parties ([Eng Liat Kiang v Eng Bak Hern \[1995\] 3 SLR 97](#)), or if the question arises in the administration of a trust, or the estate of a deceased person which is within the court's jurisdiction [?]. The court will not entertain questions involving the legality or validity of acts of state by a foreign sovereign within the sovereign's own territory.

6.2.6 Generally, a foreign state is immune from the jurisdiction of Singapore unless it has submitted to the jurisdiction of Singapore ([Civil Aeronautics Administration v Singapore Airlines Ltd \[2004\] 1 SLR 570](#)). There are other exceptions, which can be found in the State Immunity Act, Cap 1985 Ed. Additionally, there exists the doctrine of judicial restraint, the scope of which is uncertain, which prescribes that the court should refrain from adjudicating questions involving disputes between states on questions of public international law ([Buttes Gasand Oil Co v Hammer \[1982\] AC 888](#)).

Natural Forum

6.2.7 The doctrine of the natural forum was developed by many common law countries as an ad hoc technique for the allocation of jurisdiction among different countries when disputes arise which could plausibly be tried in a number of competing jurisdictions. It also serves an important function of curbing forum-shopping by parties seeking procedural advantages in jurisdictions which may not have strong, or even any, connections with the underlying subject matter of the dispute. The fundamental idea is that the case should be tried in the forum which is most suited to try it in the interests of the parties and for the ends of justice. The leading authority from England, [The Spiliada \[1987\] AC 460](#), has been adopted in Singapore in a number of leading decisions (see, eg, [Brinkerhoff Maritime Drilling Corp v P T Airfast Indonesia \[1992\] 2 SLR 776](#), [PT Hutan Domas Raya v Yue Xiu Enterprise \(Holdings\) Ltd \[2001\] 2 SLR 49](#)).

6.2.8 In working out the principles of the natural forum, the court has devised two basic steps. The first step is to determine which jurisdiction has the closest and most real connection with the dispute and thus best placed to try the case at the least cost, expense and inconvenience. Examples of factors considered at this first stage are the location of the evidence and witnesses, the relative costs of transport and translation, and the ease with which the court in question could apply the relevant law to the dispute. The second step is to ask whether allowing the case to be tried in that jurisdiction would result in the denial of justice. The most extreme example is where the legal system is corrupt or seriously deficient in some way. However, it is not necessary to go so far as to show absolute injustice. It is enough to show that substantial justice would be denied if the case were to be tried in the most appropriate forum, as compared to trial in the forum instead. The fact that the plaintiff would be deprived of a legitimate advantage of trial in the forum if the court

were to send the case to the more appropriate forum is not conclusive. Regard will also be had to the interests of all the parties and the ends of justice in determining whether the deprivation of the plaintiff's comparative advantages of trial in the forum are so serious that it would amount to denial of substantial justice. The court has repeatedly emphasized that it will not compare legal systems. Procedural differences will not be taken into account, or at least will be given little weight. Thus, the fact that trial takes longer in the more appropriate foreign forum than in Singapore, or that the plaintiff can get higher damages in Singapore than in the foreign but more appropriate forum, only go to show structural differences in the legal systems, and will not in themselves amount to denial of substantial justice.

6.2.9 This is a discretionary exercise, though of course the discretion is guided by principles laid down in *The Spiliada* and subsequent cases in England and Singapore. An appeal from a decision on this basis is an appeal against discretion and can succeed only if wrong principles had been applied, or right principles had been applied wrongly, eg, if the court had taken account of irrelevant factors or failed to take account of relevant factors, or had reached a patently unreasonable conclusion. Otherwise, the exercise of discretion by a judge on the question of the appropriate forum will generally not be disturbed on appeal.

Territorial Jurisdiction

6.2.10 A defendant who has been served within the jurisdiction (see Section 6.2.2-6.2.3 above) and who does not want the Singapore court to try the case may apply to stay the proceedings by showing that there is another available and competent forum (which need not strictly be a court of law: *The Rainbow Joy* [2005] SGCA 36) which is clearly the more appropriate forum to try the case. If the defendant cannot show this, then a stay will ordinarily be denied. Even if the defendant can show that there is a more appropriate forum elsewhere, the court may nevertheless decline to stay the proceedings if it is satisfied that the plaintiff will be denied substantial justice if the case is tried in foreign forum.

Extra-Territorial Jurisdiction

6.2.11 The plaintiff who is seeking leave of the court to serve process on the defendant outside Singapore (see Section 6.2.4 above) must show that Singapore is the most appropriate forum to try the case. Even if the plaintiff cannot show that, the court may still grant leave if the plaintiff can show that he will be denied substantial justice if he is not able to sue in Singapore, but has to sue in the prima facie more appropriate forum instead. Since the leave is necessarily applied for by the plaintiff in the defendant's absence, once served, the defendant can apply to set aside the service on the basis that Singapore is not the appropriate forum. The arguments are heard afresh at this stage, with the onus remaining on the plaintiff to convince the court that the leave was properly granted in the first place.

Choice of Court Agreements

6.2.12 In the common law, a choice of court agreement is like any other contractual agreement. It must be valid according to its applicable law (see below, Section 6.3.8). The law governing the choice of court clause is usually the law that

governs the entire contract, although it is possible for the choice of court agreement to be governed separately by its own law. Whether a particular dispute falls within the choice of court clause is a substantive question of construction, governed by the applicable law of the choice of court agreement ([The Jian He \[2000\] 1 SLR 8](#)). On the other hand, the effect of the contract on the court's jurisdiction is a question of procedure, governed exclusively by the law of the forum. (On the distinction between substance and procedure, see below, [Section 6.3.4](#)).

6.2.13 A choice of court agreement can serve two distinct functions. It can have the function of providing a basis for the Singapore court to assume jurisdiction (prorogation function). In a choice of court agreement, the defendant submits, or agrees to submit, to the jurisdiction of the Singapore court. This provides the basis for service within jurisdiction if such a mode of service is specified in the agreement, or if not, then the contractual submission provides a legal connection for service out of jurisdiction. In its basic form, the choice of court agreement does not prevent action from being commenced in a jurisdiction other than the chosen jurisdiction. This is commonly referred to as a non-exclusive jurisdiction agreement.

6.2.14 A choice of court agreement can serve the additional function of excluding jurisdiction (derogation function). The exclusive choice of court agreement exemplifies this. This is an agreement that imports an obligation on one or both parties to the contract not to commence proceedings in any court other than in the chosen court. In such a case, it would be a breach of a contractual obligation to commence or continue proceedings in a court other than the court of the chosen country. Where a plaintiff commences proceedings in Singapore in breach of a choice of court agreement, the Singapore court will not apply the natural forum test. Although the factors considered are similar, in such a case, the question is whether there are exceptional circumstances amounting to strong cause why the plaintiff should be allowed to carry on his action in Singapore in breach of contract ([Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd \[1975-1977\] SLR 258](#)). Conversely, where the plaintiff has commenced action in Singapore pursuant to an exclusive choice of Singapore court clause, the defendant has to show strong cause why he should be allowed to breach his contract and force the plaintiff to take his proceedings to a country other than Singapore.

6.2.15 An obligation binding a party to a choice of court agreement may be unilateral or mutual. The agreement is mutual if both are equally bound by their choice of a forum (whether exclusive or not). The agreement is unilateral if only one party is bound. For example, in a contract between A and B, B may agree that A can sue B in X, Y or Z country, and that B agrees to whichever forum A chooses as the exclusive forum for that dispute. In this case, the agreement is an exclusive choice of court clause as far as B is concerned but not an exclusive one where A is concerned. Only B is bound by the forum selected by A.

6.2.16 What amounts to strong cause depends on the facts of the case ([The Eastern Trust \[1994\] 2 SLR 526](#)). If the agreement is the product of actual close negotiations between the parties, the court will be very slow to release the parties from their bargain. If the agreement is a standard clause, especially in complex transactions involving multiple parties where it may be difficult for the defendant to ascertain which country the choice of court clause may point to or where the

defendant may not even be aware that there is a choice of court clause, the court may require less to be shown by way of strong cause. In any event, all factors will be taken into consideration by the court, including factors which were foreseeable by the parties at the time they had agreed to the exclusive choice of court clause. However, such factors are likely to bear less weight than factors which had not been foreseeable. Moreover, if the Singapore court is of the view that there is no defence to the plaintiff's claim, it is likely to find that the defendant is not genuinely desiring to seek trial in the contractually chosen jurisdiction, and this is an exceptional circumstance that is likely to amount to strong cause justifying the plaintiff suing in Singapore in breach of an exclusive choice of foreign court agreement ([The Hyundai Fortune \[2004\] 4 SLR 548](#)).

6.2.17 This does not mean that the Spiliada test would apply in all cases of non-exclusive choice of court agreements. Sometimes, the court may find that the defendant had impliedly agreed not to raise any natural forum objections to the plaintiff's right to sue the defendant in the chosen (Singapore) court. Thus, if the defendant argues that the plaintiff should not sue him in Singapore because another forum is more appropriate, that is a breach of contract that needs to be justified. At other times, the court may find (by an express term or by inference) that the defendant has agreed not to object to the chosen (Singapore) court exercising its jurisdiction; it would be a breach of contract to argue that the Singapore court should not exercise its jurisdiction, and at least something like strong cause would need to be shown to justify the breach of contract. In every case it is a question of interpretation what the parties have agreed to. Quite apart from the question of breach of contract, the very existence of a non-exclusive jurisdiction bears weight in the Spiliada test. What weight it bears depends on the circumstances. For example, the choice would obviously bear more weight as a conscious choice by the parties of a neutral court than it would had it been just one of several jurisdictions listed as possible places where legal action could be taken.

Anti-suit Injunctions

6.2.18 An anti-suit injunction is an order by the Singapore court to prevent a party from commencing or continuing legal proceedings in a foreign country. It is an order that is made personally against the person subject to the injunction. The court has no power, and does not purport, to give the foreign court any direct orders. Nevertheless, the anti-suit injunction is recognised as a rather extreme measure amounting to an indirect interference with foreign legal proceedings, and the court will apply great caution in exercising its discretion to grant such an injunction ([Djoni Widjaya v Bank of America \[1994\] 2 SLR 816](#)).

Comity

6.2.19 As a matter of comity, generally the court would only consider granting an anti-suit injunction if it is the natural forum to try the case ([Airbus Industrie GIE v Patel \[1999\] 1 AC 119](#); [The Ever Glory \[2004\] 2 SLR 457](#)); this justifies the exercise of power which could indirectly interfere with foreign proceedings. On the other hand, the court will not grant an anti-suit injunction simply because it is the natural forum to try the case. It must also be shown that the party to be enjoined (the

respondent) has, in pursuing the foreign legal proceedings, behaved in a vexatious, oppressive or unconscionable manner against the applicant.

Breach of Contract

6.2.20 However, comity bears comparatively less weight when the court is enforcing an agreement between the parties ([WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka \[2002\] 3 SLR 603](#); [Donohue v Armco Inc \[2002\] 1 Lloyd's Rep 425](#)). Thus, the breach of an exclusive choice of forum court agreement in the pursuit of foreign proceedings is a sufficient reason for an anti-suit injunction, without further inquiry as to the vexatiousness or oppressiveness of the foreign conduct, unless exceptional circumstances amounting to strong cause are shown to justify the breach of contract. The test here is the mirror of that above in the enforcement of exclusive choice of court agreements within the forum. This is not surprising since in both cases, the court is enforcing an agreement. Nevertheless, considerations of comity are necessarily weightier when considering whether to grant an anti-suit injunction than when the court is considering the exercise of its own jurisdiction. The Singapore court has refused to enforce an exclusive choice of court agreement where it was not the contractually chosen court ([People's Insurance Co Ltd v Akai Pty Ltd \[1998\] 1 SLR 206](#)).

[Return to the top](#)

SECTION 3 CHOICE OF LAW

Introduction and Methodology

6.3.1 Choice of law problems can arise when a dispute involves parties from, or facts occurring over, different countries. The underlying basis of choice of law is the recognition of the pluralism of legal values, and its corollary that the application of the forum law may not do justice to the parties in all cases involving foreign elements. Another important objective of choice of law analysis is, as far as possible, to promote the uniformity of outcome whichever country happens to try the case. Singapore follows the common law choice of law methodology. Generally, the court analyses the situation in these steps.

International Mandatory Rules

6.3.2 If there is a rule of the forum that is mandatory in the international sense, ie, it peremptorily directs itself to apply to the facts irrespective of the foreign elements in the case, then such a rule must be applied irrespective of any choice of law rule. Generally it is a question of construction whether a statutory provision bears this character. Some provisions are express. Otherwise, the forum engages in an exercise of construction, often by asking whether the rule is intended to protect some fundamental value or interest of the forum, or if the statutory objective was not intended to be circumvented by the existence of foreign elements in the dispute.

Characterisation

6.3.3 If the issue is one to which choice of law analysis is relevant, the first step is to characterise the issue before the court. The objective is to identify the nature of the problem in the private international law sense. At this stage, while domestic classifications are helpful, they are not determinative. Thus, in domestic Singapore law, the doctrine of consideration is an essential ingredient of a contract not made under deed. Nevertheless, an agreement not supported by consideration can be characterised as a 'contract' for choice of law purposes, in recognition that other legal systems do not use consideration to resolve the problems that the common law uses that doctrine to resolve (*Re Bonacina* [1912] 2 Ch 394). Issues are characterised into categories which are delineated for choice of law purposes. Every category has its own connecting factor which will indicate the applicable law (see below, [Section 6.3.5](#)).

Substance and Procedure

6.3.4 The most basic level of characterisation is that between substance and procedure. Matters of procedure are always governed by the law of the forum. Issues of substance are amenable to further characterisation for choice of law purposes. The distinction is not necessarily drawn in the same manner as in domestic law. The traditional common law approach (*Huber v Steiner* 2 Bing NC 202, 132 ER 80), which appears to be the applicable approach in Singapore, is that the distinction depends on whether the matter goes to the existence and content of the right, or to its enforceability: the former is substantive, the latter is procedural (*Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22). However, the trend in other major common law countries, which has yet to be tested in Singapore, takes a functional approach, that is, the inquiry is whether the application of foreign law in the case would cause undue inconvenience to the administration and machinery of justice in the court of the forum (*Tolofson v Jensen* [1994] 3 SCR 1022; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Harding v Wealands* [2005] 1 WLR 1539).

6.3.5 If the issue is substantive, the next step is to determine which substantive category of choice of law it belongs to. The common law has developed a large number of categories and sub-categories, and they are being continuously redefined and reshaped. Examples are contracts (with sub-categories of formal validity, essential validity, formation, etc), torts, restitution, property inter vivos, succession, family, etc. Associated with each category, or sub-category, are connecting factors pointing to the applicable law. The question of what law to apply is usually quite straightforward, but complications can arise if a reference is made to the foreign legal system's choice of law rules. This can create difficulties when the reference is returned (*renvoi*), but this problem generally does not affect most commercial transactions in contract, and nothing more will be said about it.

Exclusion of Foreign Law

6.3.6 The application of foreign law is always subject to the fundamental public policy of the forum. Contravention of domestic public policy is not enough; there must be contravention of some essential moral, social or economic value of the forum. Moreover, the forum will not enforce, directly or indirectly, any foreign penal, revenue, or other public laws.

Choice of Law for Contracts

6.3.7 The common law choice of law rules apply in Singapore, but the rules are very similar to those in many civil law jurisdictions, as well as the rules embodied in the Rome Convention applicable in the European Union, especially in the respect for party autonomy. The choice of law rules were considered by the Law Reform Committee of the Singapore Academy of Law (Reform of the Law Concerning Choice of Law in Contract), which recommended the retention of the common law. Most issues arising in contract (in the private international law sense) are governed by the proper law of the contract.

6.3.8 The proper law of the contract is determined in three stages. (1) If the parties to the contract have expressly selected a law to govern the contract, that will be the proper law (the subjective proper law), unless the choice was not made in good faith ([Peh Teck Quee v Bayerische Landesbank Girozentrale \[2000\] 1 SLR 148](#)). The exception is narrowly construed. The choice of an unconnected law is not in itself objectionable. (2) If the parties have not made any express selection, the court may infer a choice from the contract and the surrounding circumstances at the time of the making of the contract. (3) If the court cannot find any choice by the parties, then the proper law is the law of the country or system of law with the closest and most real connection with the transaction and the parties (the objective proper law). Although the second and third stages are conceptually different – as the second is still a search for the subjective proper law while third is purely an examination of objective connections – the same factors are scrutinised. Practically, the Singapore court may skip stage 2 in the absence of an express choice and go straight to stage 3, in cases where the factual circumstances are such that any inference of the parties' intentions as to choice of law to be drawn from the fact is likely to be speculative ([Overseas Union Insurance Ltd v Turegum Insurance Co \[2001\] 3 SLR 330](#)).

6.3.9 The subjective proper law is found by the usual ascertainment of objective facts in the common law approach to the determination of the objective intention of the contracting parties. It is not a reference to the subjective thinking of the parties.

Depeçage

6.3.10 Different parts of a contract may be governed by different laws, although generally the court would be slow to arrive at such a conclusion.

6.3.11 The proper law of the contract governs issues of essential validity, interpretation, whether consideration or causa (in some civil law contracts) is required, content of the obligation, mode of performance, and the discharge of the obligation or of the contract.

Formal Validity

6.3.12 A contract is formally valid if it is valid either by the proper law of the contract or the law of the place of execution of the contract ([PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd \[1996\] SGHC 285](#)).

Formation

6.3.13 Formation of contract raises one of the most complex problems in private international law, because it is an issue that precedes the existence of the contract. There are no Singapore authorities on point, but authorities from other common law jurisdictions suggest that the debate is likely to be between the proper law of the putative contract (ie, what the proper law would be assuming the contract to exist), and the law of the forum.

6.3.14 Capacity. The common law has no clear rule on the choice of law for capacity of natural persons for contracting. Various authorities in the past have suggested either the law of the domicile, residence, place of contract, or the proper law of the contract. Many writers argue against using the law selected by the parties as it would amount to the parties pulling themselves up by the bootstrap. Domicil and residence are seen by some writers as inconvenient connecting factors in commercial transactions. Some writers have suggested that capacity should be validated by the objective proper law of the contract or, alternatively, the law of the residence . A corporation has capacity to enter into a contract if it has capacity both by the law of its incorporation and the proper law of the contract.

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Illegality

6.3.16 A contract that is illegal by its proper law will take its consequences from that law; it will generally not be enforceable in Singapore. A contract that is illegal by the law of the place where it is made will nevertheless be enforceable in Singapore. A contract, whatever its governing law, will not be enforceable in Singapore if its enforcement will contravene the fundamental public policy of Singapore. A contract that is illegal by the law of the contractual place of performance may not be enforceable in Singapore. Whether this is the consequence of the application of the proper law of the contract or the public policy of the law of the forum has not been resolved.

Choice of Law for Torts

6.3.17 Singapore applies the double actionability rule for wrongs committed abroad ([Parno v SC Marine Pte Ltd \[1999\] 4 SLR 579](#)). Thus, the plaintiff can sue in Singapore for a wrong committed overseas if (1) the wrong is actionable as a tort by

the law of the forum if the tort had been committed in the forum; and (2) the wrong gives rise to civil liability by the law of the place where the tort is committed. However, in an exceptional case, the court may apply the law of the forum to the exclusion of the law of the place of the wrong, or it may apply the law of the place of the wrong to the exclusion of the law of the forum, in respect of specific issues or the entire cause of action. Where the tort is committed is not always easy to determine, but the court would look back at the series of events constituting the tort and ask itself where in substance the tort had occurred. In several major common law countries (eg, England: Private International Law (Miscellaneous Provisions) Act 1995; Canada: *Tolofsen v Jensen* [1994] 3 SCR 1022; and Australia: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491) the requirement of the law of the forum has been dropped as being a relic of the past which is inconsistent with modern choice of law approaches towards civil obligations generally and which also encourages forum shopping. The protection of the interest of the forum is today generally seen as something which can be dealt with by its fundamental public policy and international mandatory rules. Arguments in favour of this reform have yet to be tested in the Singapore court, but there have been indications that the court may be receptive to such arguments ([Ang Ming Chuang v Singapore Airlines Ltd \[2005\] 1 SLR 409](#)). See also the recommendations of the Law Reform Committee of the Singapore Academy of Law (Reform of the Choice of Law Rule Relating to Torts.)

Foreign Currency Obligations

6.3.18 The Singapore courts can and do regularly enter judgments in foreign currency where that is the currency in which the relevant loss or gain is felt, and such a judgment is converted to local currency at the date of execution of the judgment ([Indo Commercial Society \(Pte\) Ltd v Ebrahim \[1992\] 2 SLR 1041](#)).

[Return to the top](#)

SECTION 4 FOREIGN JUDGMENTS

Introduction

6.4.1 A foreign judgment may be recognised in Singapore, or enforced by action at common law in Singapore. A foreign judgment that is recognised may be used to raise an estoppel on a specific issue, or on a cause of action. The common law allows foreign judgments to be recognised or enforced if the following conditions are met.

6.4.2 A judgment from a court of law of a foreign country on a matter of substance, which is final and conclusive by the law of that country, where the court had international jurisdiction (as defined by Singapore law) over the party sought to be bound in the local proceedings, binds that party to obey that judgment. In addition, a foreign judgment must be for a fixed or ascertainable sum of money to be enforceable. In enforcement proceedings, the judgment is sued upon as a liquidated sum owed. Foreign default judgments can be recognised and enforced, although in the case of recognition, the court will very carefully examine precisely what had been decided by the foreign court.

International Jurisdiction

6.4.3 A foreign court of law has international jurisdiction over the party sought to be bound to the judgment if that party was present, or resident, in the territory of the foreign country at the time of commencement of the foreign proceedings, or if that party had submitted or had agreed to submit to the jurisdiction of that foreign court. There are no other grounds of international jurisdiction recognised under Singapore law.

Conclusiveness

6.4.4 A foreign judgment that has satisfied the above conditions is regarded as being final and conclusive on the merits of the case under Singapore law, unless it is challenged under one of the defences below.

Non-Merger

6.4.5 In domestic litigation, the substantive obligation sued upon merges into the judgment debt. This rule is based on the public policy of finality, to prevent the plaintiff from suing on the obligation all over again. At common law, merger does not apply to foreign judgments ([Malaysia Credit Finance Bhd v Chen Huat Lai \[1992\] 2 SLR 859](#)). Thus, the plaintiff has the option of suing on the foreign judgment, or suing on the original obligation which has not merged with the judgment, subject to a limited defence of abuse of process.

Defences

6.4.6 A number of defences may be raised against the recognition or enforcement of foreign judgments. These are defences to the recognition or enforcement of the foreign judgment in Singapore only. They do not affect the question of the legal effect of such judgments in foreign countries. However, the court has the power to issue an anti-enforcement injunction against the reliance on the foreign judgment outside Singapore, although it will require highly exceptional circumstances for such power to be exercised.

Breach of Natural Justice

6.4.7 If a foreign judgment had been obtained in breach of natural justice, it will not be recognised or enforced in Singapore. Whether there has been such a breach is determined by the law of the forum. Generally natural justice encompasses the rule against bias as well as the rule that the parties bound by a judgment must have had a reasonable opportunity to be heard. However, the defence goes beyond these two tenets: the question in every case is whether there has been a breach of substantial justice, as opposed to mere procedural irregularities. If there had been an opportunity to correct the defect in the procedure in the foreign country, the complaining party is generally expected to avail himself of that opportunity. But failure to do so is not fatal: in every case it is a question of whether it was reasonable in the circumstances to have used that opportunity to correct the defect.

Estoppel

6.4.8 A foreign judgment will not be recognised or enforced if it would be inconsistent with a prior local judgment to give effect to the foreign judgment. If the foreign judgment is given before the local proceedings on the same matter have reached a conclusion, the foreign judgment is capable of raising an estoppel and thus pre-empting any local decision on the matter. Authorities from other common law countries suggest that this is so even if the local proceedings had started before the foreign proceedings that had led to the judgment. If there are two valid and binding foreign judgments which are inconsistent with one another, it appears to be the general rule that the first in time prevails. Thus, the earlier judgment creates an estoppel against the recognition of the later. However, nothing prevents a possible cross-estoppel, ie, in appropriate circumstances, it may be that the later judgment creates an estoppel against the recognition of the earlier. In the interest of finality of litigation, even if a point is not strictly caught by a prior estoppel in a foreign judgment between the same parties or their privies, it may be an abuse of process in the local proceedings to raise points which should have been raised in the prior foreign proceedings.

Public Policy

6.4.9 A foreign judgment will not be recognised or enforced if its recognition or enforcement will contravene a fundamental public policy of the forum. This fundamental public policy has to be more deep-rooted than domestic public policy ([Liao Eng Kiat v Burswood Nominees Ltd \[2004\] 2 SLR 436](#)).

Foreign Penal, Revenue or Public Laws

6.4.10 A foreign judgment will not be enforced if it will amount to the direct or indirect enforcement of a foreign penal, revenue or other public law. The award of exemplary damages by a foreign court to the successful plaintiff is not by itself penal. Generally, only sums forfeited to the state are considered penal.

Fraud

6.4.11 A foreign judgment obtained by fraud may be impeached in local proceedings. There must be some dishonesty or deception involved. Fraud may be intrinsic or extrinsic. Fraud is intrinsic when it occurs within court proceedings, eg, the giving or procuring of perjured or forged evidence. Fraud is extrinsic when it occurs outside court proceedings, eg, in the bribing or kidnapping of witnesses, or in fraudulently inducing the default of the defendant. The distinction is critical under Singapore law because the rule for a foreign judgment obtained by intrinsic fraud is the same as that for pleading fraud to unravel a local judgment: there must be newly discovered evidence of the fraud, which evidence could not have reasonably been produced at the original trial, and which is so material that its production would probably have affected the outcome. However, if the fraud is extrinsic, then the foreign judgment can be impeached even if no freshly discovered evidence is produced. The rationale is that if the foreign court had been in a position to decide for itself whether to believe the evidence (in intrinsic fraud cases), the local court should not question the foreign court's judgment. This position ([Hong Pian Tee v Les Placements Germain Gauthier Inc \[2002\] 2 SLR 81](#)) is different from English common

law where the rule for extrinsic fraud also applies to cases of intrinsic fraud for foreign judgments.

6.4.12 The party challenging the foreign judgment for fraud must produce credible evidence in the first instance; otherwise the application to challenge it is likely to be struck out at the threshold as an abuse of process. Moreover, if the question of fraud had been raised on appeal in the foreign court, although technically it could not raise an estoppel against the issue of fraud (because whether it is capable of raising such an estoppel is in issue), it may amount to an abuse of process to keep raising the same challenge, especially if the evidence is thin. Furthermore, the issue of whether a foreign judgment had been obtained by fraud can be the subject of an estoppel. Thus if the party sought to be bound by the foreign judgment had challenged that judgment for fraud in another foreign country and that challenge failed, the second foreign judgment (if not itself challenged) could raise an estoppel on the point that the first judgment had not been obtained by fraud.

Unknown Cause of Action

6.4.13 Although some older English cases have suggested that a foreign judgment on a cause of action not known to the law of the forum is unenforceable, the modern view is that it is irrelevant whether the underlying cause of action is known to the law of the forum or not. The enforcing court is only concerned with the obligation to obey the judgment as such. Any objection to the underlying cause of action today would have to be formulated in terms of the contravention of fundamental public policy of the forum.

Severability

6.4.14 Provided that a foreign judgment is regarded as severable, objectionable parts may be ignored while the unobjectionable parts may be recognised or enforced ([Yong Tet Miaw v MBf Finance Bhd \[1992\] 2 SLR 761](#)). For example, if part of the sum awarded by the foreign court is regarded as penal, and it is possible to distinguish between the penal and non-penal sums, then the judgment remains enforceable in respect of the non-penal sum.

Registration

6.4.15 Foreign judgments from superior courts of law of gazetted countries may be registered in Singapore to be enforced. There are two statutory registration regimes. Jurisdictions gazetted under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Ed) (RECJA) include the federal jurisdiction of Australia, the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territories, Norfolk Island, and Northern Territory, New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea, and India (except Jammu and Kashmir). So far, only Hong Kong SAR has been gazetted under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Ed) (REFJA)

6.4.16 The registration processes are intended to make the enforcement process more efficient and effective, and do not change the fundamental principles for the

enforcement of foreign judgments. There are, however, some differences of detail. For example, there is a defence to registration under the REFJA where the foreign proceedings had been brought in breach of an agreement between the parties, which does not appear in the RECJA and has not been articulated in the common law.

6.4.17 The main difference between registration and the common law method of enforcement is that the judgment creditor need not sue the defendant in an action. Once registered, the foreign judgment may be executed in Singapore as if it were a local judgment. Thus, there is no need for the plaintiff to commence proceedings afresh which could require service of originating process out of the jurisdiction. A second difference is that the burden is thrown on the judgment debtor to apply to set aside the registration of the judgment. To discourage recourse to the common law when statutory registration is available, although a judgment creditor may choose to sue at common law on a foreign judgment that is registrable under the RECJA, he cannot recover costs if he does that. A judgment creditor cannot sue at common law at all on a foreign judgment that is registrable under the REFJA. Neither statutory regime is affected by the non-merger principle. Thus, in any case, the judgment creditor can choose to sue afresh on the underlying obligation, subject to any defence of abuse of process.

[Return to the top](#)

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