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The Effective Reach of in personam Reasoning in Private International Law

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The Effective Reach of *in personam* Reasoning in Private International Law

Within the equitable jurisdiction, the phrase *in personam* has been used to describe the means of enforcement of the equitable decree, the justification for equitable jurisdiction generally, and the mechanism by which chancery rulings effectively override the common law. In the context of curial proceedings, the phrase is also used to describe the nature of jurisdiction assumed over a person, as well as the effect of a decree against a person, as opposed to a thing. In the discourse on rights, it is used to distinguish personal from property rights. *In personam* reasoning in the equitable sense has been used historically to justify the assumption of jurisdiction in disputes relating to foreign immovable property, and the application of the principles of equity of the forum without reference to choice of law. In more modern times, similar reasoning has been used to justify cross-border anti-suit injunctions and asset-freezing orders. In this lecture, the uses of *in personam* reasoning in private international law in these contexts will be evaluated, and further implications for the context of recognition and enforcement of foreign judgments will be considered, with particular reference to the law in Singapore.

Introduction

'In Personam'*: Multiple Personalities*

[1] "*In personam*" is one of the most potent phrases in the law. The maxim "equity acts *in personam*" is intended to strike fear in those who seek to hide behind the rules of the common law.[1] What does it really mean? Its original meaning was tied to the early nature of the chancery jurisdiction. Unlike the common law courts, the chancery court had no machinery to execute its decrees against the property of the defendant. All it could do was to compel the defendant to perform on pain of imprisonment. The decree of the court only acted against the *person* of the defendant; hence it operated "*in personam*". This is no longer true as a matter of procedure.[2]

[2] The phrase "equity acts *in personam*" is also often used synonymously as "equity acts on the conscience". The chancery court could only summon within its jurisdiction people whose conscience has been affected in some way. This is the historical as well as modern justification for the existence of the equitable jurisdiction.[3]

[3] The most significant aspect of the maxim that "equity acts *in personam*", as far as this paper is concerned, is that it is a technique of reasoning based on outflanking through recharacterisation. Before judicial independence became entrenched, the harmonious co-existence of the common law courts and the chancery court depended on a balance of political power and sheer diplomacy. The chancery court avoided direct conflict with the common law courts by this technique of acting *in personam*.[4] The trustee holds all the powers of a legal

[1] Early chancery intervention frequently took the form of the common injunction to restrain the defendant from relying on common law rights.

[2] It had not been so from about the sixteenth century.

[3] Hence, the bona fide purchaser of legal interest for value without notice stood outside its jurisdiction. His conscience is clear, and he does not need to invoke the equitable jurisdiction of the court for his legal title.

[4] The conflict, though very real, was generally kept under control. However, it did come to a confrontation in the *Earl of Oxford's case* (1615) 1 Ch Rep 1, 21 ER 485, which the King of England had to resolve, and he did in favour of the chancery court. The king's decision survives to today in the maxim "where common law and equity conflict, equity prevails". It is also enshrined in statute: Civil Law Act (Cap 43, 1999 Rev Ed), s 4(13).

owner, but equity acts *in personam* to restrain or compel him as necessary to give effect to equitable principles relating to the trust institution. Strangers to the trust taking legal title were legal owners, no doubt, but again equity acts in personam to ensure that the equitable institution of the trust is adequately protected. The result today is not a system of legal title with equitable restraints, but a system of property with legal and equitable interests[5] which attract different rules. '[E]quity has proved that from the materials of obligation you can counterfeit the phenomena of property'.[6] This is an important point, for it illustrates that acting *in personam* does not necessarily mean the enforcement of *obligations* only.

[4] This bypass technique is of tremendous significance both historically and in the modern context. Where the system of holding legal property led to injustice, equitable interests were created. Where rules of contract law led to injustice, personal equities were created. The classic example is the promissory estoppel, but other examples included the equity to rescind for non-fraudulent misrepresentation, undue influence and unconscionability. It is important to note that the technique is driven by important substantive considerations of justice and fairness. Historically, the technique went so far as to overcome statutory formalities, principally the Statute of Frauds. Even in modern times, the English Parliament found it hard to restrain such intervention.[7]

[5] There are, of course, substantive limits. In the domestic context, landmark Court of Appeal case in Singapore, *United Overseas Bank Ltd v Bebe bte Mohammad*,[8] held the "*in personam*" reasoning in check in the context of registered land titles. In private international law context, in *Relfo Ltd v Bhimji Velji Jadva Varsani*,[9] the *in personam* reasoning inherent in a claim for knowing receipt of assets received in breach of trust could not overcome the public policy objection that a claim which directly or indirectly enforces a foreign revenue law was not justiciable in the Singapore court.

[6] The wider significance of this technique, which goes beyond the strict equitable jurisdiction, lies in the focus of the law on the personal dealings between the parties as a source of rights and obligations. This is in contrast to early thinking in private international law which focussed on connections of people, things or actions with territories.[10] The personal equities could be in the form of contract,[11] or other dealings not amounting to a contract. This will form the broader theme of this lecture.

[7] "*In personam*" is also often used in opposition to "*in rem*", to refer to personal rights and obligations, in contrast to rights in property exigible against third parties. This is very much a

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[5] *Tinsley v Milligan* [1994] 1 AC 340 at 371.

[6] SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, 1981) at 6.

[7] See, eg, Law of Property (Miscellaneous Provisions) Act 1989, s 2(8) abolishing the doctrine of part performance, and the reaction of the English court in utilising estoppel instead: *Yaxley v Gotts* [2000] Ch 162 (CA).

[8] [2006] 4 SLR 884 (CA).

[9] [2008] 4 SLR 657.

[10] A large influencing factor for this early development was the doctrine of vested rights which held that foreign rights which were territorially vested had to be enforced by the court of the forum. This thinking was the basis of the first Restatement of the Conflict of Laws in the United States. It has generally been accepted to be debunked for the reason that it begs the question why the forum court should look to the law of that particular foreign territory in the first place.

[11] A recent magisterial study on the relationship between contractual rights and private international law is A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008). A broader study on the role of party autonomy in private international law relating to contracts is PE Nygh, *Autonomy in International Contracts* (OUP, 1999).

modern rationalisation, but it represents a fundamental distinction that is upheld in most legal systems. This is not to be confused with the "*in personam*" reasoning mentioned above.

[8] Finally, in the context of civil procedure and particularly in the context of private international law, "*in personam*" and "*in rem*" have specific meanings which should be distinguished from the meanings discussed above. In the jurisdictional context, *in personam* jurisdiction is obtained over a person when the court has obtained legal authority to pronounce on his rights and liabilities. *In rem* jurisdiction is obtained in respect of an item of property for the purpose of pronouncing on the rights to the ownership of the property, and if necessary making orders as to its disposal. It is important to understand that *in personam* and *in rem* jurisdiction do not necessarily lead respectively to *in personam* or *in rem* judgment. Whether a judgment is *in personam* or *in rem* depends on whether it is intended to bind the litigants only, or the whole world at large, and it is legally and practically possible that a judgment has both qualities.[12]

[9] Private international law deals with three major topics: jurisdiction, choice of law, and foreign judgments.

Jurisdiction

[10] The basis of *in personam* jurisdiction in Singapore is entirely statutory,[13] but it broadly reflects the common law position as supplemented by statute in England.[14] The *in personam* jurisdiction of the Singapore court is based on the presence or submission of the defendant within the territory at the time of the service of process. In addition, the court has discretion to grant leave for service of process abroad in accordance with the rules of court. Generally, these rules require a connection between the defendant, the cause of action or the subject matter of the suit, with Singapore.

Prohibition against deciding Foreign Title and the In Personam *Exception*

[11] There is an important limitation to such jurisdiction of the court recognised from a very early time. The court has no jurisdiction to determine a dispute relating to title to foreign land.[15] The origin of the rule was based on the old procedure of requiring a jury to be constituted from the locality of the land, and it was impossible to form a jury when the dispute relates to foreign land. The modern justification is based on the substantive considerations of international comity (respecting the policies of the *situs* of the land) and pragmatism (the situs has the final say on the enforcement of any local/foreign decrees affecting the land).[16] This limitation is clearly part of Singapore law.[17]

[12] There is an important exception to this limitation. Even when the dispute relates to title to foreign land, *in personam* jurisdiction may still be obtained over the defendant if the court is

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[12] *Pattni v Ali* [2007] 2 AC 85 (PC, Kenya).
[13] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 16; *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453 at [20]-[21]; *Indo Commercial Society (Pte) Ltd v Ebrahim* [1992] 2 SLR 1041 at 1056; *Emilia Shipping Inc v State Enterprises for Pulp and Paper Industries* [1991] 1 SLR 615 at 621-622; *Muhd Munir v Noor Hidah* [1990] SLR 999 at 1007.
[14] This has become *residual* jurisdiction as far as the United Kingdom is concerned, given the prevalence of European law.
[15] *British South Africa Co v Companhia de Moçambique* [1893] AC 602.
[16] *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508.
[17] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria (No 2)* [2009] 1 SLR 508 (CA) at [9]. *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2007] 4 SLR 565 (CA) at [41]-[46]; *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 (CA).

enforcing personal equities between the parties.[18] *Penn v Baltimore*[19] is the classic authority for this proposition.[20] The English court held that it clearly had jurisdiction in respect of an agreement to partition land, even if the land is in America. This was where the historical *in personam* reasoning was at its most potent. The decree was not intended to be executed against the *property*, but only enforced against the *person*. The recharacterisation is evident; the court sees a *contractual* dispute, not a dispute about land. The modern view of this case is that the court was being asked to enforce contractual obligations, so that jurisdiction exercised was entirely appropriate. The jurisdiction is not, however, confined to pure obligations as such. Because of the way the nature of the chancery jurisdiction has developed through acting *in personam*, it can still see obligations within traditional property concepts. For example, the express, constructive, or resulting trust is clearly recognized as a concept of property law, but the strings that the beneficiary can pull on the trustee are part of the *personal equities* that form this *in personam* exception.[21] However, there are no personal equities where the liability of a constructive trustee is alleged to arise because of principles of property law (eg, constructive notice in taking title). There is a further important limitation to this exception. The jurisdiction stops where the law of the *situs* has destroyed or presents an impediment to the enforcement of the personal equity.

[13] This type of jurisdiction was historically important when litigants did not have much faith in foreign or colonial courts, and it was economically significant for the English court to enforce charges over foreign land to encourage entrepreneurs to engage in economic activities in the colonies. Today the significance is much narrower, and is more likely to arise in cases where parties are trying to trace the proceeds of fraud from one jurisdiction to another.

[14] All this is *subject matter* limitation to *in personam* jurisdiction;[22] this is why it is not spelt out in the legislative provision governing *in personam* jurisdiction in the statute.[23] Where the territorial *in personam* jurisdiction of the court is concerned, it does not matter whether the court is acting *in personam* in this equitable sense or not. The rules of *in personam* jurisdiction are the same whether the claim is in respect of common law or equity, or whether it is in relation to foreign immovable property.[24]

The Mareva Injunction

[15] Two modern specific areas where the reasoning of the court acting *in personam* has been applied in the context of jurisdiction are the *Mareva* injunction and the anti-suit injunction. In the case of the *Mareva* injunction, the courts addressed the need to prevent the dissipation of assets before judgment by acting on the person of the defendant even if the property is overseas. Here the law is acting *in personam* pure and simple; it is not acting on any property or

[18] There is another exception based on the incidental determination of title in the court's jurisdiction to administer estates. This exception is beyond the scope of this lecture.
[19] (1750) 1 Ves Sen 444, 27 ER 1132.
[20] It may be traced back to at least *Arglasse v Muschamp* (1682) 1 Vern 75, 23 ER 322.
[21] This type of jurisdiction has obtained approval from the European Court of Justice: Case C-294/92 *Webb v Webb* [1994] ECR I-1717.
[22] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria (No 2)* [2009] 1 SLR 508 (CA) at [8].
[23] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 16.
[24] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2009] 1 SLR 508 (CA) at [12]-[22], clarifying that the exercise of the *in personam* exception to the *Moçambique* rule does not depend on the connections of the facts with the forum.

personal rights; no rights have been established at this stage of the proceedings.[25] The legal basis of the *Mareva* injunction has been much debated, but the best explanation for it is that it is a tool of the court to prevent the abuse of the process of the court.[26] It has nothing to do with personal equities at all. Recently there has been controversy in Singapore whether the *Mareva* injunction could or should be used in aid of foreign proceedings, ie, to prevent the abuse of *foreign* process.[27] Traditionally, the common law has only been concerned with abuses of its *own* processes; it has no concern with *foreign* processes.[28] Lending aid to foreign courts raise difficult questions of policy, which I think may be better resolved by Parliament. What should perhaps be given greater consideration is the question of the extent to which *local* process should be prevented from abuse. Once proceedings are commenced in Singapore, it can amount to an abuse of process for the defendant to dissipate assets in order to frustrate the enforcement of a *local* judgment. Should it make any difference that the Singapore courts then decide that it is not the natural forum, and the case is then decided elsewhere and the result is a foreign judgment sought to be enforced in Singapore? Arguably, there is scope for a limited jurisdiction in respect of assets in Singapore in such cases.[29]

The Anti-Suit Injunction

[16] The anti-suit injunction is another classic case of recharacterisation. The court cannot tell another court in a foreign country to stop its proceedings, but it can order someone within its *in personam* jurisdiction not to commence or continue proceedings overseas. It is important to note there are different types of anti-suit injunctions. There are injunctions intended to prevent abuse of local process; these tend to occur in the jurisdiction of the courts in administering estates, including insolvency. The most common type of anti-suit is based on the acts by one party in a foreign jurisdiction which are regarded as vexatious, oppressive or unconscionable to the other party in view of the local forum being the natural forum for the trial of the case.[30] Here, the focus is again on the *personal equities* between the parties, the conduct of one party against another in relation to their pending litigation in the natural forum. More pronounced is the anti-suit injunction in cases of an exclusive forum jurisdiction clause is intended to enforce

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[25] The injunction may also be available post-judgment after the rights have been established. The basis of such an injunction is far less controversial since the court has already pronounced on the rights of the judgment creditor.

[26] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 at 897; *Barclay-Johnson v Yuill* [1980] 3 All ER 190 at 1974; *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1982-1983] SLR 362 at 367.

[27] *Swift-Fortune Ltd v Magnafica Marine SA* [2007] 1 SLR 629 (CA); *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000.

[28] It has no jurisdiction to intervene in foreign processes: *R v Commissioner of Police of the Metropolis* [1995] QB 313 (CA).

[29] *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140 (CA); *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000; *House of Spring Gardens v Waite* [1985] FSR 173 (CA). In these cases the injunctions could be sustained on the basis of a stayed jurisdiction (*local* proceedings held in suspense). A more difficult problem arises in the context of Order 11 service out of jurisdiction where the usual consequence of finding that Singapore is not the natural forum is the dismissal rather than stay of proceedings, and an unnatural forum cannot become a natural forum simply for the purpose of maintaining a *Mareva* injunction: *Baidini v Baidini* [1987] 2 FLR 463 (CA), esp at 465; *A/S D/S Svendborg v Maxim Brand Inc* (23 January 1989). Conceptually, the largest hurdle is the need for an existing cause of action justiciable within the jurisdiction; on any view, the cause of action on the *foreign judgment* is an independent one and cannot exist until the foreign judgment is granted. It is different from the substantive cause of action in respect of which jurisdiction has initially been assumed in Singapore. This latter cause of action is not merged into the foreign judgment; see note 89 below.

[30] *Societe Nationale Industrielle Aerospeatiale v Lee Kui Jak* [1987] AC 871; *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 12 (CA); *Bank of America National Trust & Savings Association v Djoni Widjaja* [1994] 2 SLR 816 (CA); *Trane US Inc v Kirkham* [2008] SGHC 240.

the contract between the parties. The basis of this type of anti-suit injunction (and also that to prevent a breach of an arbitration agreement) is today recognised to be the personal equity generated by the agreement of the parties.[31] Hence the test is different; strong cause needs to be shown why the parties should not be held to their jurisdiction agreement in the contract.[32]

The Broader Theme: From Territorial to Transactional Analysis in Jurisdiction

[17] This brings us to a broader trend in international litigation which increasingly places more focus on the personal equities between the parties, not necessarily in the strict domestic equitable sense, but in the sense of personal dealings between the parties.

[18] The most significant of these developments has actually been in the law of international arbitration. The recognition of the importance of party autonomy in the procedural context has generated an entire global system of international dispute resolution. Now there is concerted international effort to replicate this success for litigation, in the form of the Hague Convention on Choice of Court Agreements.[33] Another developing area is the law on mediation agreements.

[19] Of course, in common law system, there is already a long and established tradition of giving effect to jurisdiction agreements by stay of proceedings. The modern rationale for stay of proceedings on this basis is the enforcement of the contract between the parties;[34] this is why strong cause amounting to exceptional circumstances is required to show why the jurisdiction agreement should not be enforced.[35] More recently, the question has arisen whether damages are available for breach of contract for the breach of a jurisdiction agreement. The English court has gone so far as to allow the recovery of costs incurred in foreign jurisdiction to strike out proceedings commenced in breach of contract[36] (this can be seen as mitigation of losses arising from breach of contract), and the dicta in English cases have gone so far as to suggest that substantial damages may in fact be recoverable to reflect the full loss resulting from the breach of contract.[37]

[20] In a very interesting development in April 2009, the Supreme Court in Spain, the highest court of Spain for civil matters, decided that substantial damages were available on the basis of breach

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[31] *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (HL) at 96; *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Association Co Ltd* [2005] 1 Lloyd's Rep 67 (CA), [2004] EWCA Civ 1598; *West Tankers Inv v Ras Riunione Adriatica Di Sicurta SpA* [2005] EWHC 454 (Comm); *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603.

[32] *Donohue v Armco Inc* [2002] l Lloyd's Rep 425 (HL).

[33] Convention of 30 June 2005 on Choice of Court Agreements. It has not yet entered into force: see http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last accessed on 13 May 2009). The European Community and the United States have both signed. Mexico was the first signatory and remains the only other signatory at present.

[34] *Racecourse Betting Control Board v Secretary for Air*[1944] Ch 114 (CA) at 126; *The Fehrmarn* [1958] 1 WLR 159 (CA) at 163-164.

[35] See eg, The Hyundai Fortune [2004] 4 SLR 548; *The Vishva Apurva* [1992] 2 SLR 175 (CA) 182; *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975–1977] SLR 258 (CA) 260; *The El Amria* [1981] 2 Lloyd's Rep 119.

[36] *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517, [2001] EWCA Civ 1755. See also *A/S D/S Svendborg, D/S Af 1912 A/S, Bodies Corporate Trading in Partnership as Maersk Sealand v Ali Hussein Akar* [2003] EWHC Comm 797.

[37] *Donohue v Armco Inc* [2002] l Lloyd's Rep 425 (HL) at [48]. See also See also D Tan, "Damages for Breach of Jurisdiction Clauses" [2002] SAcLJ 342; D Tan & N Yeo, "Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?" [2003] LMCLQ 435; *cf* CH Tham, "Damages for breach of English jurisdiction clauses: more than meets the eye" [2004] LMCLQ 46; LC Ho, "Anti-suit injunctions in cross-border insolvency: A Restatement" (2003) 52 ICLQ 697, 707-709.

of a jurisdiction agreement in a contract.[38] This is highly interesting because while many common lawyers have argued the availability of such damages because they say a jurisdiction agreement is a term of the contract like any other term in the contract, it is mainly the civil lawyers who argue that the jurisdiction agreement only has procedural significance and does not give rise to the usual contractual remedies. This is a particularly important development within the context of the European Union, because the use of the anti-suit injunction in cases falling within the Brussels I Regulation which controls the allocation of jurisdiction within the European Union has been practically eradicated.[39] This may hold some lessons for the common law. Because the anti-sut injunction is seen to be intrusive of foreign proceedings in spite of the *in personam* label,[40] *in personam* techniques like damages for breach of contract (or even tort or delict[41])[42] may turn out to be more acceptable techniques.

Choice of Law

Court Acting In Personam *according to Which Law?*

[21] In the context of choice of law, the "personal equities" reasoning in the strict sense had led the law somewhat astray, while in the broader sense of having a stronger focus on the equities between parties it has been a beneficent informing principle in important developments in choice of law rules particularly in the law of obligations.

[22] For a long time, it was thought that once the court exercised its equitable jurisdiction and acted *in personam* on the defendant, all it applied was the law of the forum. There was no question of choice of law when it came to the application of equitable principles. This view appears to be still prevailing in Australia,[43] but has come under challenge elsewhere. Here, the Singapore Court of Appeal, has contributed two leading decisions[44] to Commonwealth jurisprudence, making it clear that equitable principles are subject to choice of law analysis in the same way that common law rules have long been understood to be. The question of jurisdiction and choice of law are conceptually separate, and the exercise of equitable jurisdiction still requires prior consideration of what is the law to be applied to the merits of the case. In other words, the maxim "equity acts in personam" in the strict sense which is the foundation of all equitable doctrines is a principle of *domestic* law only. One has to decide that what the domestic

[38] STS (Sala de lo Civil, Sección 1ª), sentencia núm. 6/2009 de 12 Enero. RJ 2009\544.
[39] Case C-185/07 *Allianz SpA v West Tankers Inc* (ECJ, 10 February 2009); Case C-159/02 *Turner v Grovit* [2004] 2 Lloyd's 169 (ECJ); Case C-116/02 *Erich Gasser GmbH v MISA Srl* [2004] 1 Lloyd's Rep 222 (ECJ).
[40] The *indirect* interference long has been acknowledged: see eg, *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC Brunei); *Turner v Grovit* [2002] 1 WLR 107 (HL) at [22]-[29]. The German court saw an English anti-suit injunction as a grave affront with constitutional consequences: *Re Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320. See also *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr 73 at [48]. The English court reacted with similar disgust to a New York anti-suit injunction: *General Star International Indemnity Ltd v Stirling Cooke Brown Reinsurance Brokers Ltd* [2003] ILPr 19. Of course, an anti-suit injunction may be met by an anti-anti-suit injunction, which can in turn be countered by an anti-anti-anti-suit injunction.
[41] *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA* [2006] EWHC 373 (Comm), at [26].
[42] And, possibly, refusal to recognise foreign judgments obtained in breach of contract, discussed below.
[43] *Paramasivam v Flynn* (1998) 160 ALR 202 (FCA); National Commercial Bank v Wimborne (1978) 5 BPR [97423]; *OZ-US Film Productions Pty Ltd v Heath* [2000] NSWSC 967; *OZ-US Film Productions Pty Ltd v Heath* [2001] NSWSC 298; *Virgtel Ltd v Zabusky* [2006] QSC 66, (2006) 57 ACSR 389.
[44] *Rickshaw Investments Ltd v Nicolai Baron Von Uexkull* [2007] 1 SLR 377 (CA); *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2009] 1 SLR 508 (CA). See also *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR 1086.

applicable law is, and then apply that law, including its principles of equity (if any). This is a trend that is supported by recent developments in England[45] as well as in New Zealand.[46]

No Equitable Bypass of Characterisation in Choice of Law

[23] One important consequence of this is that it is important to deal with the question of the choice of law for and the characterisation of issues involving equitable principles. Characterisation is an essential step in the common law choice of law methodology which leads to the relevant applicable law. Choice of law characterisation is a totally different legal creature from characterisation in domestic law; its only purpose is to inform the court as to the function of the type of rules involved in the issue thereby indicating the direction of the most appropriate applicable law. Characterisation of equitable doctrines is floating on largely uncharted waters,[47] but there are promising signs that at least it is floating. After struggling with the thorny issue in a few difficult and obscure cases,[48] the English court has finally come round to the view that a claim for dishonest assistance of breach of fiduciary duty should be characterized as a tort for the choice of law purposes.[49] In Singapore, in spite of claims being put in terms of constructive trusts, the Singapore Court of Appeal did not flinch from analyzing the problem from the perspective of the characterisation of matrimonial property.[50] In *Focus Energy Ltd v Aye Aye Soe*,[51] the Singapore High court had no difficulty seeing a breach of fiduciary claim against a company director for misdirected funds and profits as resting on the characterisation of corporate duties or, alternatively, as a claim in restitution.

[24] A further consequence of this analysis is that one can no longer hide behind the *in personam* label to enforce property rights on the basis of the same law that applies to the personal equities.[52] Because choice of law is a necessary step after assuming jurisdiction, it is necessary to characterize the question before the court. If it is a property question arises, then the choice of law rules for property should then apply. This is an important point because a number of older English cases have exercised the *in personam* jurisdiction based on the personal equities of the parties to decide on questions like priorities of securities over foreign land, and even the foreclosure of mortgages over foreign land. These will need to be reconsidered in the light of the modern understanding of the equitable jurisdiction in the context of private international law.[53]

The Broader Theme: From Territorial to Transactional Analysis in Choice of Law

[25] On a broader level, choice of law rules have grown increasingly more sophisticated. This reflects the modern acknowledgement that the purpose of choice of law rules is to achieve justice between the parties. Particularly in the case of obligations, which normally arise because of transactional dealings or equities between parties, the trend has been to move away from rigid connecting factors, and one important and growing theme is the focus on the personal dealings, or "personal equities" in the broader sense, between the parties in the determination of which

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[45] See, eg, *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 (CA); *OJSC Oil Co Yugraneft (in liquidation) v Abramovich* [2008] EWHC 2613 (Comm).
[46] *A-G for England and Wales v R* [2002] 2 NZLR 91 (CA), affirmed without reference to the choice of law point in [2003] UKPC 22.
[47] A first go has been made in TM Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004).
[48] Analyzed in TM Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004), ch 8.
[49] At least at first instance: *OJSC Oil Co Yugraneft (in liquidation) v Abramovich* [2008] EWHC 2613 (Comm).
[50] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2009] 1 SLR 508 (CA).
[51] [2009] 1 SLR 1086.
[52] Once thought to be invariably the law of the forum, but this is clearly not the case today.
[53] See TM Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004), ch 5.

law to apply which will be most just and fair to the parties. The common law recognised this very early on in the case of contractual obligations, and the courts have long given strong effect to the parties' choice of law in contracts. The law had moved more slowly in the case of torts, because the transactional equities are less obvious than in the case of contracts. However, this is recognised in the principle that one cannot always strictly apply the double actionability rule (the law of the forum and the law of the place of the wrong). Sometimes, it may be that the law governing the underlying legal relationship of the parties that is more relevant, and in exceptional cases, that ought to be the applicable law. The Singapore Court of Appeal took the common law one step forward by holding that the exception to double actionability can apply even to torts committed in the forum. There has been criticism that the court did not go far enough to remove the requirement of actionability by the law of the forum, in line with common law[54] and statutory[55] developments in some countries. There is some force in the criticism in substance, but the double actionability rule is perhaps too entrenched[56] for court to have taken such a radical step without comprehensive arguments from counsel in the case.

[26] Another trend reflecting this development is the theme of my lecture last year: the extent to which the parties' choice of law agreement in a contract can affect the applicable law for non-contractual obligations arising from the same transaction.[57] In the European Union, the Rome II Regulation on the Law Applicable to Non-contractual Obligations permits (with some restrictions) contracting parties to choose the law to govern non-contractual obligations, something which is already permissible in international arbitration generally. There are signs that the common law may be moving in this direction. A further consequence may well be the consideration of the question of whether and when damages and other contractual remedies may be available for the breach of a choice of law agreement,[58] following analogous developments in respect of the choice of jurisdiction agreement.

[27] Another development marking this trend can be seen in how a choice of law clause in a void contract can affect the choice of the law applicable to restitutionary claims arising from it. A somewhat simplistic view is that if the contract is void, then the choice of law clause can have no legal effect.[59] The Singapore Court of Appeal in *CIMB Bank Bhd v Dresdner Kleinwort Ltd*[60] has taken a more nuanced approach. It accepted that in cases where the parties have agreed to the choice of law clause and the vitiating factor did not directly impact that clause, there is nothing wrong with using that parties' choice of law as a reference point to work out the consequences of the void contract. In fact there is a strong argument in favour of it as a fair reflection of the reasonable expectations of the parties. In that case itself, however, the court ignored the choice of law clause because both parties had conducted the appeal on the basis that the contract was void because one party's agent had acted without authority. It is clear that if it had been a case

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[54] Canada (*Tolofson v Jensen* [1994] 3 SCR 1022) and Australia (*Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491).

[55] In England, the Private International Law (Miscellaneous Provisions) Act 1995 replaced most of the common law with a rule based on where the events constituting the tort occurred, subject to an exception. It has now been largely superseded by Rome II Regulation on the Law Applicable to Non-Contractual Obligations (applicable to the European Union as a whole), which looks to the law of the country where injury occurred, subject to several exceptions.

[56] It was clearly stated to be Singapore law in *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (CA), and has been applied on previous occasions: *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party)* [2005] 1 SLR 409; *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641. *Cf Teo Cher Teck v Goh Suan Hee* [2009] 1 SLR 749 at [5]. Double actionability subject to an exception remains the choice of law rule in the majority of Commonwealth jurisdictions.

[57] TM Yeo, "The Effective Reach of Choice of Law Agreements" (2008) 20 SAcLJ 723.

[58] A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008), ch 11.

[59] *Baring Brothers & Co Ltd v Cunninghame District Council* [1997] CLC 108.

[60] [2008] 4 SLR 543 (CA).

of say, misrepresentation as to the subject matter of the contract (and not the choice of law clause) and the contract is subsequently rescinded, the choice of law clause would remain a relevant consideration. However, one could perhaps go a step farther to argue that the difference between a valid but voidable contract which is then rescinded, and on the other a void but ratifiable contract which is not ratified, is a rather technical one of domestic law.[61] In both cases, there could be sufficient dealings between the parties on the basis of the choice of law agreement for it to be legally relevant to the restitutionary consequences of the void contract. The policy arguments in favour of a one-stop litigation venue in the court's approach to jurisdiction agreement[62] are highly relevant too in the way it should approach a choice of law agreement.

Foreign Judgments

[28] In Singapore, a foreign *in personam* judgment may be enforced by action at common law or, if from gazetted countries, be registered under one of two statutes for direct enforcement. A number of Commonwealth countries are gazetted under the Reciprocal Enforcement of Commonwealth Judgments Act,[63] while Hong Kong SAR is the only territory gazetted under the Reciprocal Enforcement of Foreign Judgments Act.[64] The principles in the common law and under statutory regimes are broadly similar (though not the same). Basically, a foreign judgment may be enforced if it is from a court of law of competent jurisdiction, it is final and conclusive in the foreign jurisdiction, the foreign court has, in the view of the enforcing forum (Singapore), international jurisdiction over the party sought to be bound,[65] and it is a judgment for a fixed or ascertainable sum of money, and it is not subject to any defences. Defences include judgments obtained by fraud or in breach of natural justice and contravention of the fundamental public policy of the forum. It is important to note that foreign judgments may also be *recognised*, without being enforced, to raise an estoppel on a cause of action or an issue. The legal requirements are the same, except the judgment need not be for a sum of money.

Foreign Judgment Obtained in Breach of Contract

[29] One aspect of the *in personam* reasoning in the broad sense of focusing on the personal dealings between the parties operate in the way the law sees an *agreement* between the parties to submit to a foreign jurisdiction as a legitimate basis of international jurisdiction. It does not matter if the defendant subsequently reneges on the agreement and refuses to submit to the foreign jurisdiction in fact. Having agreed to submit, the judgment debtor will not be allowed to go back on his words and to deny the fact of submission. The common law has long recognized this principle. The Hague Convention on Choice of Court Agreements 2005 attempts to broaden the international acceptance of this proposition. Under the common law, an agreement to submit may also arise by estoppel.[66] This is another example of personal equities operating in the realm of recognition and enforcement of foreign judgments.

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[61] The best illustration of this technical difference is probably found in the law relating to minor's contracts, where some types of contracts do not bind the minor until ratified, and some types of contracts bind the minor until rescinded, even though the vitiating factor is the same.
[62] *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254 (HL), especially at [27].
[63] Cap 264, 1985 Rev Ed.
[64] Cap 265, 2001 Rev Ed.
[65] Presence in or submission to the foreign jurisdiction at the time of the proceedings, or agreement to submit before or during the proceedings.
[66] See *Adams v Cape Industries Plc* [1990] Ch 433 at 466. See also, in a different context, *The Nile Rhapsody* [194] 1 Lloyd's Rep 382 (CA), and *The Burns-Anderson Independent Network Plc v Wheeler* [2005] EWHC 575 (QBD), [2005] 1 Lloyd's Rep 580 at [39]-[40].

[30] In this part of my lecture I focus on two slightly more controversial issues. The first relates to the narrower *in personam* sense and the way it can be used as a defence to the enforcement of a foreign judgment. If A agrees by contract that he will not enforce a foreign judgment against B, then B may obtain an injunction to restrain B from enforcing that foreign judgment against B in breach of contract.[67] This proposition is so obvious that it is not stated as a defence in the textbooks. If A, by represents by words or conduct to B that he will not rely on a foreign judgment against B, and B relies on that representation to his detriment, personal equities are created and A can be estopped from relying on that foreign judgment.[68] That is also too obvious a proposition to find stated in the textbooks.

[31] The more difficult situation in the common law[69] is where there is no agreement or estoppel in relation to the foreign judgment as such, but the foreign judgment is obtained in breach of a jurisdiction agreement.[70] This is stated as a defence under the Reciprocal Enforcement of Foreign Judgments Act, but there is no mention of this in the Reciprocal Enforcement of Commonwealth Judgments Act, and its status as a defence under the common law is unclear. One has to be mindful that the Singapore court does on occasions exercise its jurisdiction even though proceedings are commenced in Singapore in breach of a jurisdiction clause if strong cause amounting to exceptional circumstances can be demonstrated. It may well be that a foreign court may have exercised its jurisdiction on the same principles. However, the argument in this case, as in the previous two examples above, is not that there is anything wrong with the judgment as such, but given the personal dealings between the parties, whether it is just that the foreign judgment should be enforced by the party acting in breach of contract. The issue of international comity is not engaged. There are three arguments in favour of such a defence. First, one of the remedies for breach of contract is a mandatory injunction to undo or prevent the effects of the breach. Thus, in principle, the innocent party can ask for an injunction to restrain the contract breaker from enforcing the foreign judgment because to do so would be to bring home the consequences of the breach of contract. As Atkin LJ pointed out in *Ellerman Lines Ltd v Read*:[71]

> If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment.

[32] This was a case where the judgment creditor was restrained by injunction from relying on a judgment obtained in foreign proceedings. The judgment creditor had earlier promised the

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[67] This is the simple prohibitory injunction to enforce a contract (which is readily available as a remedy: *Doherty v Allman* (1878) 3 App Cas 709), as illustrated in the anti-suit injunction to prevent the breach of a jurisdiction agreement.

[68] *Showlag v Mansour* [1995] 1 AC 431 (PC Jersey) at 440-441.

[69] In the United Kingdom, the Civil Jurisdiction and Judgments Act 1982, s 32, created a statutory defence for foreign judgments subject to the non-European regime.

[70] If there had been an anti-suit injunction previously issued by the forum and the judgment was obtained in breach of the court order, then a separate public policy defence of contempt of court arises, and the foreign judgment will not be recognized or enforced: *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr 73. It is the conduct of the party procuring the judgment that is brought into question, not the foreign judgment itself.

[71] [1928] 2 KB 144 (CA) at 155. See also *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 (CA) at 439. See further, A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008) at [9.32]-[9.36].

judgment debtor not to bring those proceedings and had also lied in court about the dealings between the parties leading to the making of that promise. Under Singapore law, the lie in court would not be the basis of a fraud defence since it could not be said that there was fresh evidence not reasonably discoverable at the time of the foreign trial of the fraud.[72] Under Singapore law, the case will have to stand purely on the breach of contract ground. Although there were a number of references to fraud in the judgment, the passage of Atkin LJ indicates that the breach of covenant was sufficient ground for the court to act.

[33] Secondly, it would be a more pragmatic solution to refuse the enforcement of a foreign judgment obtained in such circumstances than to allow a counter-claim for damages for breach of jurisdiction agreement. Thirdly, it would bring the common law in line with the position that Parliament expressly provided for under the Reciprocal Enforcement of Foreign Judgments Act.

[34] Under the Reciprocal Enforcement of Commonwealth Judgments Act, there is discretion to refuse registration where it is not just and convenient that the judgment should be enforced in Singapore.[73] For a long time, I have been puzzled by the case of *Lam Soon Cannery Co v Hooper & Co*,[74] a decision by the Federal Court in Malaysia on an appeal from Singapore. There was a sale of goods contract between the parties. The buyer instructed the seller to put an earlier date on the bills of lading, which would put the seller in breach of contract. Subsequently, the buyer obtained an arbitration award against the seller for damages for breach of contract in the misdating of the bills of lading, the award was enforced as a judgment in England, and the judgment was then brought to Singapore to be registered.

[35] The Federal Court refused registration on the basis that it was not just and convenient to enforce the judgment; the buyer would not be allowed to take advantage of his own wrong. At first blush, this looked like a very odd decision and appears to go against international comity in the refusal to enforce the foreign judgment based on the merits of the underlying dispute; the seller should have argued waiver of breach during the arguments on the merits, and it should be too late to raise the argument now.[75] But there is another way of looking at the facts. Waiver is not the only possible construction. One could also argue that there was a separate implied contract at the time of the request: the seller promised to misdate the bills of lading on the buyer's counter-promise not to sue the seller for breach of contract. On this view of the facts, the personal equities operated independently of the sale contract and the proceedings based on sale contract leading to the arbitration award and then the English judgment. The Federal Court directed no criticism at the English judgment or at the way the breach of contract action was resolved.[76] The only criticism was levelled against the seller for reprehensible conduct in breaching a separate agreement not to bring an action on the breach of the sale of goods contract.

[36] A question that will frequently arise is whether the innocent party had waived the breach of the contract and is thereby estopped from arguing that the judgment had been obtained in breach of

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[72] *Hong Pian Tee v Les Placements Germain Inc* [2002] 2 SLR 81 (CA).
[73] S 3(1).
[74] [1965-1968] SLR 76 (FC, Singapore).
[75] The conclusiveness of a foreign judgment on the merits was recently strongly affirmed in *Hong Pian Tee v Les Placements Germain Inc* [2002] 2 SLR 81 (CA). This principle also includes what should have been argued in the foreign court: see, eg, *Wu Shun Foods Co Ltd v Ken ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877.
[76] Alternatively, promissory estoppel could be argued. There was a promise not to enforce the right to correct dating of the bills and detrimental reliance which made it unconscionable in the circumstances to sue. The position of the seller having irrevocably been altered, the operation of this estoppel is not merely suspensory. It would therefore be inequitable for a party in breach of a promise enforceable in equity to enforce the legal right to sue (and consequently the foreign judgment obtained thereby).

contract. In principle that argument must be available. However, it should not be confused with the argument whether the innocent party had submitted to the jurisdiction of the foreign court in the sense that he had accepted the foreign court had jurisdiction (in the sense of legal authority) to hear the case. Submission is one of those tricky legal words which can have different meanings in different contexts. If all the party has acknowledged is that the foreign court *could* as a matter of law hear the case, then all he is accepting is that the foreign court has jurisdiction over him; it says nothing about whether he has forgiven the breach of contract. If, on the other hand, the party acknowledges that the court not only could, but *should*, hear the case, then he is saying that he does not regard himself or the other party as being bound by the agreement. The second amounts to a waiver of the jurisdiction agreement, but not the first. So, if a contracting party resists an argument that the existence of strong cause justifies the foreign court exercising jurisdiction, that is said to be a submission to the foreign jurisdiction, because he cannot ask the court not to exercise the jurisdiction without legally acknowledging the existence of the jurisdiction.[77] But whether that is right or not as a proposition of law,[78] it does not follow that the party has waived the breach of contract. Indeed, defending the action can be seen as an act of mitigation.

Foreign Courts Acting In Personam

[37] The second point I want to raise in the context of foreign judgments is the converse of *Penn v Baltimore*.[79] It is generally accepted that a foreign judgment can have no effect on title to immovable property in Singapore.[80] So a foreign judgment that orders the registration of property in Singapore is a nullity as far as Singapore law is concerned. Insofar as the judgment makes any pronouncement on ownership or vesting of *title* to property (whether movable or immovable), it can only be effective for property within its competent *in rem* jurisdiction, ie, property within its own territorial jurisdiction. But what of the *in personam* effect of the foreign judgment? What if the foreign judgment (like that in *Penn v Baltimore*) had ordered the *defendant* to take the requisite steps to convey the property?

[38] The first objection is that such foreign judgments *indirectly* affect title to local land. However, if the court of the forum is prepared to make such orders itself on the basis that they act *in personam* and do not affect title to foreign land, it does not seem consistent with international comity to take this objection against a foreign court exercising a similar type of jurisdiction, if the foreign judgment is *otherwise enforceable*. This leads to the second objection. The law at present only allows the enforcement of foreign judgments for *a fixed or ascertainable sum of money*. Canadian law has taken the radical step of allowing the enforcement of non-monetary judgments,[81] but the main line of reasoning is based on rendering assistance to litigation in foreign countries,[82] and this has not yet been followed in other Commonwealth jurisdictions. On this basis, it is simply not possible to enforce foreign judgments ordering the transfer of immovable or movable property wherever situated.

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[77] At least in the context of international jurisdiction: *Henry v Geoprosco International Ltd* [1976] QB 726 (CA).

[78] A more pragmatic approach was sounded in at *WSG Nimbus Pte Ltd v Board of Control of Cricket in Sri Lanka* [2002] 3 SLR 603 at [54], the court preferring to consider whether the party had "taken a step in the proceedings which necessarily involved waiving their objection to the jurisdiction." The context is particularly relevant as it was dealing with the question whether the parties were still bound by their arbitration agreement in view of the legal proceedings in a foreign court.

[79] (1750) 1 Ves Sen 444, 27 ER 1132.

[80] *Duke v Andler* [1932] SCR 734; *Loke Wan Wye v Registrar of Deeds, Singapore* [1929] SSLR 234.

[81] *Pro Swing Inc v Elta Golf* 2006 SCC 52, [2006] 2 SCR 612.

[82] The Singapore courts have been far more restrained when it comes to assisting foreign litigation: *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 (CA); *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206.

[39] However, there are suggestions in two Singapore cases that a foreign judgment ordering the defendant to convey property in Singapore may be enforceable in Singapore. In *Murakami Takako v Wiryadi Louise Maria (No 1)*,[83] involving a dispute relating to matrimonial property located in various jurisdictions of an Indonesian-domiciled couple, the Court of Appeal was faced with many questions on an appeal primarily on issues of pleading, one of which was whether a foreign judgment which ordered the defendant personally to transfer immoveable property in Singapore could be enforced within the limitation period of Singapore. The enforceability in principle of the foreign judgment was not contested by the parties, and the court only addressed its mind to the question of limitation. For the purpose of the appeal, the unchallenged enforceability of the foreign judgment was treated on the same basis as the enforcement of a debt,[84] which is at best a highly dubious proposition. In *Murakami Takako v Wiryadi Louise Maria (No 2)*,[85] the court in declining to exercise jurisdiction on the basis of *forum non conveniens*, assumed that a judgment from an Indonesian court ordering division of immovable property in Australia could be enforced in Australia.[86] Since the same common law conflict of laws principles are applicable in Australia and Singapore on this point, by implication it is suggesting that an Indonesian judgment in relation to Singapore property would be enforceable in Singapore.

[40] Does the law in Singapore now allow the enforcement of non-monetary foreign judgments? I don't think the case goes so far. The starting point is that any foreign judgment from Indonesia may have some *in rem* and some *in personam* effect. In so far as it decides who owns property in Singapore, it is *in rem* and has no effect as a foreign judgment under the law of Singapore. Insofar as it orders a party to convey property, it is not a judgment for a sum of money and cannot be enforced as such in Singapore. Under Singapore choice of law rules, the law of Indonesia applies as the law governing the matrimonial property of the couple who are domiciled in Indonesia. The assumption made in the *Murakami* case is that this choice of law rule applies also to immovable property in Singapore,[87] which is a reasonable assumption to make. This reflects that the personal dealings between the parties[88] as a couple are of a higher order of priority than the situation of the land when it comes to choice of law. On the other hand, third parties dealing with the property ought to be able to rely on the *lex situs* to gain good title, eg, as a bona fide purchaser.

[41] On this assumption, the proper thing to do with the Indonesian judgment is to produce it as evidence of Indonesian law for the purpose of applying Indonesian law as the choice of law, or get it *recognised* as an *in personam* judgment to raise an issue estoppel in Singapore. It is not to get it *enforced*. The party holding such a judgment has to plead a cause of action; in this case, it is based on property law, specifically, the law relating to matrimonial property. Singapore private international law recognises a choice of law category for community matrimonial property holdings, even though such a concept does not exist within the domestic law of Singapore. In this case, the choice of law rules point to Indonesian law. The only way for such a choice of law rule to work in so far as property in Singapore is concerned is to enlist the *in personam* reasoning in aid of the applicable foreign law. The *in personam* reasoning will then be used to replicate the matrimonial property rule that the court is enforcing.

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[83] [2007] 4 SLR 565 (CA).
[84] [2007] 4 SLR 565 (CA) at [15] and [27].
[85] [2009] 1 SLR 508 (CA).
[86] Ibid at [36]. In this respect, see also *Murakami v Wiryadi* [2006] NSWSC 1354 at [51], where the New South Wales Supreme court appears to have assumed the same.
[87] See also *Murakami v Wiryadi* [2006] NSWSC 1354 at [51].
[88] It is important to note that these personal equities was the basis of the Singapore court assuming jurisdiction in so far as foreign immovable property was concerned in the first place. In this respect see also *Bunbury v Bunbury* (1839) LJ 8 Ch 297 at 302-303.

[42] Thus, the steps in the analysis would be: (1) a claim for property rights to be adjusted in accordance with the applicable law for matrimonial property; (2) the recognition of an *in personam* judgment to raise an issue estoppel on how the property is to be divided between the parties (or their privies) bound by the judgment; and (3) the Singapore court grants appropriate relief accordingly after applying the law indicated by the relevant choice of law rule. The appropriate relief may involve using the concepts of trust to give the best effect to the applicable law.

[43] A foreign court order ordering specific performance of a contract for the sale of land in Singapore (unlikely as the scenario might be today) would be "enforceable" in the same way. The contracting party will seek to enforce the sale contract in Singapore,[89] and plead that the foreign *in personam* judgment be recognized to raise an issue estoppel on the existence of the contractual obligation to sell the land, and then ask the Singapore court accordingly for the decree of specific performance of that obligation.[90]

[44] In other words, it is irrelevant whether the foreign court is acting *in personam* in the *Penn v Baltimore* sense. The more important question is what could properly constitute an issue estoppel from the *in personam* effect of the foreign judgment in terms of the substantive obligations of the parties.

Conclusion

[45] In summary:

a. The maxim that "equity acts *in personam*" in its original sense of enforcement against the person only and *not against his property* is no longer of significance today, whether in domestic or private international law.

b. Insofar as the maxim "equity acts *in personam*" is about the decree *acting on the person*:

i. It remains important as a bypass technique in (a) allowing the court to assume jurisdiction (albeit subject to natural forum considerations) over persons in disputes relating to foreign land even though it cannot decide on questions of title; (b) allowing the court to restrain persons from carrying on foreign litigation even though it cannot give orders to the foreign court; and (c) allowing the court to restrict a person from disposing of overseas assets even though the assets are outside the jurisdiction and control of the court. But it is important to note that these are just techniques, and there are important substantive policies underlying each area. Many, but not all, have to do with personal equities.

ii. However, the maxim has little significance in choice of law analysis. It does not provide a bypass to choice of law or characterisation. It may, however, be an

[89] The contractual obligation does not merge into a foreign judgment: see, eg, *JM Lyon & Co v Meyer and Goldenberg* (1893) 1 SSLR 19; *Malaysia Credit Finance Bhd v Chen Huat Lai* [1992] 2 SLR 859.

[90] This analysis is borne out in *Singh v Singh* [2009] WASCA 53 (CA, Western Australia). Other cases where a foreign judgment purportedly declaring that the defendant held property (outside the jurisdiction of the foreign court) on constructive trusts have been successfully pleaded to be *recognized* to raise issue estoppel are: *Buffum v Gordon* (NSW SC, 23 September 1980); *International Credit and Investment Co (Overseas) Ltd (in liq) v Adham* [1996] CILR 89 (Grand Court, Cayman Islands). A finding by the foreign court of the absence of a trust can likewise be recognised: *O'Hara v Chapman Estate* (1988) 46 DLR (4th) 504 (CA, Saskatchewan). Any attempt to *enforce* a foreign judgment declaring a constructive trust is bound to fail: see, eg, *Koch v Chew* (1997/1998) 1 OFLR 537 (HC, BVI).

important technique in replicating the property effects of a choice of law rule without directly affecting property rights as such.

iii. Personal equities leading to the court acting *in personam* on a party may be relevant at the stage of recognition or enforcement of a foreign judgment. Its particular significance to a foreign judgment obtained in breach of contract remains to be further explored.

c. Insofar as the maxim that equity acts *in personam* reflects a concern of justice in the personal dealings between parties, this has had broad impact in all three areas of private international law:

i. In the jurisdictional context, this is reflected in increasing significance of party autonomy in choice of dispute resolution forum (arbitration, litigation, or mediation). More recent developments include the award of damages for breach of jurisdiction agreements.

ii. In the choice of law context, there has for a long time been a shift from territorial connections to softer connections which often pay greater attention to the personal dealings between the parties. One nascent area is the extent to which the parties can actually choose in their contract the law to govern not only their contract but also non-contractual obligations arising from the same transaction. Another development is the extent to which the choice of law agreement in a void contract can affect the law governing the restitutionary consequences of the void contract. A further question may be raised, following developments in the field of jurisdiction, whether there can be damages or other contractual remedies for the breach of a choice of law agreement.

iii. In the context of foreign judgments, it has long been accepted that an agreement to submit to the foreign jurisdiction is a good ground of international jurisdiction entitling the foreign judgment to recognition and/or enforcement, whether or not the judgment debtor subsequently reneges on the agreement. This is a effect intended to be globalised by the Hague Convention on Choice of Court Agreements 2005. A more controversial question awaiting further judicial development in the common law is the effect of a breach of promise in obtaining a foreign judgment.

d. Whether a foreign court has acted *in personam* in the equitable sense has no relevance to the recognition or enforcement of the foreign judgment in Singapore. In this context, completely different concepts of *in personam* and *in rem* are used, depending on whether the foreign judgment is intended to bind the parties to the judgment only whether in respect of personal or property rights , or to bind the whole world in respect of an item of property. A foreign judgment *in rem* only has effect for immovable property within its territorial jurisdiction and at best only has limited effect on movable property outside its jurisdiction. A foreign judgment may however, provide evidence of foreign law whether it is binding or not, for the purpose of applying choice of law. An *in personam* foreign judgment ordering the transfer of property, whether within or outside the foreign jurisdiction, is not enforceable at common law or under the statutory regimes because it is not a judgment for a sum of money. Nevertheless, it may be *recognised* for the purpose of raising an issue estoppel upon a cause of action sued on in the Singapore courts.