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Moving Towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia

Adeline Chong*

Abstract:

This paper provides a comparative overview of the laws on the recognition and enforcement of foreign judgments in ASEAN and Australia, China, India, Japan and South Korea. It considers the principles which are shared in common and the significant differences in the laws on foreign judgments in the region. This paper argues that the laws which are canvassed here share many principles, albeit the interpretation on certain aspects may differ. Though differences exist, the differences are becoming less sharp. Further, there is a practical need for harmonisation given the plans for closer economic integration in the region. This paper argues that harmonisation is possible and should be pursued.

Keywords: foreign judgments, harmonisation, conflict of laws, private international law

A. Introduction

No litigant wants to end up with a mere paper judgment after spending time and money obtaining a judgment in its favour. The increasingly cross-border nature of today's transactions means that a judgment creditor may have to seek enforcement of the judgment in another jurisdiction. Understanding and factoring in the recognition and enforcement of foreign judgment rules of the jurisdiction(s) in which a potential judgment debtor has its assets is therefore a part of managing transaction risks.

This issue is particularly topical for Asia due to economic drivers. The establishment of closer economic ties through initiatives such as the ASEAN Economic Community, the Belt and Road initiative, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership will bring about an increase in cross-border trade and

concomitantly, a rise in cross-border disputes. The enforcement of foreign judgments is therefore an issue which is at the forefront of legal review in some Asian jurisdictions. For example, Singapore has recently reformed its statutory scheme for the enforcement of foreign judgments.[1] China's Supreme People's Court is on the cusp of issuing a "Judicial Interpretation of the Recognition and Enforcement of Foreign Judgments" to provide guidance to Chinese courts on this topic.[2] Notably, both developments expand existing local laws on foreign judgments.

Given the recent successful conclusion of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,[3] there is much interest in the idea of harmonising the laws on foreign judgments. There have been academic activities on this front in Asia.[4] One such activity is the project conducted under the auspices of the Asian Business Law Institute ("ABLI").[5] The ABLI project is focused on the recognition and enforcement of foreign judgment rules in the ten ASEAN Member

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All country reports referred to in this paper can be found in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asian Business Law Institute, 2017).
[1] The newly amended Reciprocal Enforcement of Foreign Judgments Act entered into force on 3 October 2019.
[2] Song Jianli, "International Commercial Litigation and Diversified Dispute Resolution", 30 August 2018 (http://cicc.court.gov.cn/html/1/219/199/203/1048.html accessed on 26 February 2020).
[3] It is not yet in force.
[4] Eg, the Asian Principles on Private International Law, part of which looks at foreign judgment rules. See W Chen and G Goldstein, "The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law" (2017) 13 *Journal of Private International Law* 411. See also A Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Studies in Private International Law- Asia (Hart, 2019).
[5] Information on ABLI can be found at https://abli.asia/ accessed on 26 February 2020.

States[6] and five of ASEAN's major trade partners, i.e. Australia, China, India, Japan and South Korea ("ABLI Foreign Judgments Project").[7]

This article will draw on the key findings of the ABLI Foreign Judgments Project. In Asia, there is diversity in the laws on the recognition and enforcement of foreign judgments. However, closer probing reveal many principles in common. This paper will argue that harmonisation of the foreign judgment rules *should* happen and *can* happen. To that end, this paper will first consider why harmonisation is important for the region, and then move on to the findings from the ABLI Foreign Judgments project. The common principles and differences in the laws will be examined. The success of any harmonisation effort however depends also on non-legal factors; the non-legal impediments will also be explored. In addition, the means by which harmonisation can be achieved will be considered. Through the discussion, it is hoped that it can be demonstrated that harmonisation of the recognition and enforcement of foreign judgment rules in the region is no mirage.

B. The need for harmonisation

Ensuring that foreign judgments are easily portable around the region would increase access to justice. Litigants would not fear that they would end up with a mere paper judgment and be put to the extra cost of having to litigate the merits afresh in the jurisdiction in which the judgment debtor has assets. Further, any doubt as to the enforceability of a potential judgment would result in extra transaction costs as contracting parties would insist on advance payments or guarantees.[8]

In the Asian context, recent economic developments, alluded to above, mean that the need for harmonisation is particularly acute. The ASEAN Economic Community ("AEC") has a market value of

[6] Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.
[7] Information on the ABLI Foreign Judgments Project can be found at https://abli.asia/PROJECTS/Foreign-Judgments-Project accessed on 26 February 2020.
[8] FK Juenger, "The Recognition of Money Judgments in Civil and Commercial matters" (1988) 36 *American Journal of Comparative Law* 14.

US$2.6 trillion and is home to over 622 trillion people.[9] The AEC is intended to be "highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community, integrated with the global economy."[10] The aim is not only to facilitate intra-ASEAN trade, but also to increase ASEAN's participation in the global economy.[11] The Belt and Road Initiative ("BRI") seeks to revitalise the land and sea trade routes that linked China to the rest of Asia, Africa and Europe in the past. It is aimed at improving regional co-operation by increasing the connectivity between the participating countries. Participating countries in the BRI cover more than one-third of the global GDP and over half of the world's population.[12] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") is a free trade agreement which involves most of the key states in the Pacific region. It was signed by eleven countries[13] and is currently in force in seven of them.[14] The CPTPP covers more than 13 percent of the global GDP.[15] Negotiations on another free trade agreement, the Regional Comprehensive Economic Partnership ("RCEP"), involving the 10 ASEAN Member States and Australia, China, Japan, New Zealand and South Korea, are nearing completion.

All of these initiatives will facilitate inter-regional and intra-regional trade. The increase in cross-border trade will inevitably lead to a rise in cross-border disputes. There is a practical need to ensure that there are effective dispute resolution mechanisms in place and one hallmark of an effective dispute resolution

[9] https://asean.org/asean-economic-community/ accessed on 26 February 2020.
[10] *ASEAN 2025: Forging Ahead Together* (2015), p 15 (https://www.asean.org/wp-content/uploads/images/2015/November/KL-Declaration/ASEAN%202025%20Forging%20Ahead%20Together%20final.pdf accessed on 26 February 2020).
[11] *Ibid*, pp 93-94.
[12] *The Belt and Road Initiative in the global trade, investment and finance landscape*, OECD Business and Finance Outlook 2018, OECD Publishing, Paris, p 9 (https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf accessed on 26 February 2020).
[13] Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.
[14] Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam.
[15] https://www.scmp.com/week-asia/explained/article/2186475/explained-cptpp-trade-deal accessed on 26 February 2020.

mechanism is of course the portability of a judgment or award. Cross-border disputes will frequently involve situations where the dispute is heard in one country, but the judgment debtor's assets are located in another country.

Currently, within Asia, each country relies on its own specific rules to determine if a foreign judgment ought to be enforced within its jurisdiction. The precise rules in some countries are also difficult to lay down, because there has not been much judicial or legislative consideration of the topic. Perhaps there may be a code in place, but little guidance on what the provisions mean. Not to mention that a handful of countries refuse to recognise and enforce a foreign judgment altogether. Harmonising the foreign judgment rules would obviously increase legal certainty and the portability of judgments in the region.

C. Findings from the ABLI Foreign Judgments Project

1. Background to the project

The ABLI Foreign Judgments Project was conceived against the backdrop of ongoing economic integration in the region with endeavours such as the AEC and the BRI. The project looks at foreign judgments in civil and commercial matters.[16] The project covers both *in personam* and *in rem* judgments. In its first phase, a compendium of country reports on the laws on the recognition and enforcement of foreign judgments in each of the 15 countries was published.[17] The compendium, which comprises of concise statements of the various laws written by the leading private international scholars or practitioners in each country, is aimed at lawyers and general counsel in the region but would be of general interest to scholars in the field. The compendium fills in a gap as there is a lack of reliable up-to-date information on the foreign judgment laws of some of the countries covered in the project. The second phase is the formulation of

[16] Judgments in insolvency proceedings and on the ownership of intellectual property rights, both of which raise sensitive issues, are excluded from the scope of the Asian Principles.
[17] The compendium is available for downloading free of charge on the ABLI website.

the Asian Principles for the Recognition and Enforcement of Foreign Judgments ("Asian Principles"). Seven of the original country reporters are involved in drafting the Asian Principles.[18] The Asian Principles is an attempt to state the law and to suggest the ways in which the law ought to develop regionally. It does not purport to set out a model law or comprehensive code, but it illustrates the common principles and suggests compromise solutions for the differences. It is directed at judges, practitioners, legislators and policy-makers in Asia. It is currently being prepared for publication and will be published in the near future.

The overall objective of the project is to promote the convergence of foreign judgments rules in the region. In particular, by fleshing out the common principles and exploring divergences in the laws, it is hoped that the output of the second phase of the project, ie the Asian Principles, will foster greater understanding of the foreign judgment rules in the region and help pave the way towards reform and harmonisation of the laws in the region. Sections C.4 and C.5 of this paper, in particular, draw on the draft Principles.

2. Overview of the laws in the region

The common law countries covered in the project are: Australia, Brunei, India, Malaysia, Myanmar and Singapore. The civil law countries are: Cambodia, China, Indonesia, Japan, Lao PDR, South Korea, Thailand and Vietnam. The last country, the Philippines, has a hybrid law system with influences from both Spain and the USA.

The attitudes on the recognition and enforcement of foreign judgments in Asia range on a spectrum. At one extreme end are Indonesia[19] and Thailand[20] which, generally speaking, do not enforce foreign

[18] Colin Ong QC, Yujun Guo, Narinder Singh, Yu Un Oppusunggu, Adeline Chong, Poomintr Sooksripaisarnkit and Ngọc Bich Du.

[19] There is an exception for foreign judgments on the principle of general average for salvage. See YU Oppusunggu, "Country Report: The Republic of Indonesia", paras 32–33.

[20] Thailand has recently enacted the International Convention on Civil Liability for Oil Pollution Damage 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution 1992 into its law. The domestic implementing legislation provide for the enforcement of judgments by a court which is a Contracting State to these Conventions. See Civil Liability for Oil Pollution Damage Act B.E. 2560 (2017),

judgments. In the middle of the spectrum are countries which accept the principle that foreign judgments are enforceable and have a legal framework for it, but details on how the law applies are scant: Cambodia, Lao PDR and Myanmar. The number of successful instances of foreign judgments enforcement is obscure, and very likely low.[21] The remaining countries in the study have established systems by which foreign judgments are assessed and enforced, albeit those systems vary in sophistication.

The common law countries provide for at least two routes[22] by which foreign judgments may be enforced. One of the routes is an easier route, normally by registration, for judgments from certain gazetted countries considered to be "reciprocating territories". The second route is by way of the common law rules. Under the former route, Australia,[23] Brunei,[24] Malaysia[25] and Singapore[26] each have legislation modelled on the UK's Foreign Judgments (Reciprocal Enforcement) Act 1933. India and Myanmar also offer the easier route as their Civil Procedure Codes, the relevant provisions of which are identical,[27] provide for a mechanism for enforcement of foreign judgments from "reciprocating territories" under which a judgment which qualifies for this mechanism will be treated as if it were a local judgment.[28]

s 36 and Requirement of Contributions to the International Fund for Compensation to the International Fund for Oil Pollution Damage Caused by Ships Act B.E. 2560 (2017), s 34.

[21] Y Bun, "Country Report: Cambodia", para 5; X Chantala and K Santivong, "Country Report: Lao", para 6; Minn NO, "Country Report: Myanmar", para 7.

[22] There is a third route under Singapore law, namely, foreign judgments which fall within the scope of the Choice of Court Agreements Act 2016, which enacts the Hague Convention on Choice of Court Agreements into Singapore law.

[23] Foreign Judgments Act 1991 (Cth) (No 112, 1991 as amended).

[24] Reciprocal Enforcement of Foreign Judgments Act (Chapter 177, 2000 Rev Ed).

[25] Reciprocal Enforcement of Judgments Act 1958 (Act 99).

[26] Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed). The Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), which is based on the UK Administration of Justice Act 1920, was recently repealed by Act No. 24 of 2019 with effect from a date to be determined by the government.

[27] Myanmar was previously a province of British India.

[28] Code of Civil Procedure 1908 (India), ss 13 and 44A; Code of Civil Procedure 1908 (Myanmar), ss 13 and 44A.

Gazetted countries for the easier route are primarily[29] fellow Commonwealth nations. In the case of Myanmar, only the United Kingdom has been designated as a "reciprocating territory".[30]

For judgments falling under the second route, Australia, Brunei, Malaysia and Singapore largely adopt the English common law rules, albeit with deviations on a handful of points. Judgments which are not from "reciprocating territories" have to satisfy the requirements set out under section 13 of the respective civil procedure codes of India and Myanmar. These requirements also largely echo the English common law principles. Two unique principles in section 13 of the codes which are not found under English common law are that a foreign judgment shall be refused enforcement: (i) "where it appears on the face of proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India/Myanmar] in which such law is applicable";[31] and (ii) "where it sustains a claim founded on a breach of any law in force in [India/Myanmar]."[32]

The civil procedure codes and other related legislation in the civil law countries covered in this study (except Indonesia and Thailand) provide for the recognition and enforcement of foreign judgments. The laws, however, are more diverse compared to the common law countries which have all hewed closely to the English model. They are therefore less amenable to a pithy summation. Lao PDR[33] has the least receptive approach as under its law, a bilateral or multilateral agreement for the recognition and enforcement of foreign judgments must be in place between Lao PDR and the country whose judgment is before its court.[34] Court decisions are also normally not publicly accessible which leads to difficulties in

[29] Cf Australia, whose list of gazetted territories under its Foreign Judgments Act 1991 (Cth) (No 112, 1991 as amended) is notably more expansive compared to the other common law countries in this study.
[30] Z Thura, "Myanmar" in A Reyes (ed), *Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Hart Publishing, 2019), 219-220.
[31] Code of Civil Procedure 1908 (India), s 13(c); Code of Civil Procedure 1908 (Myanmar), s 13(c).
[32] Code of Civil Procedure 1908 (India), s 13(f); Code of Civil Procedure 1908 (Myanmar), s 13(f).
[33] Lao PDR's rules on enforcement of foreign judgements can be found in the Amended Law on Civil Procedure (No 13/NA, 4 July 2012), Arts 362-368.
[34] X Chantala and K Santivong, "Country Report: Lao", para 1.

understanding the requirements for foreign judgments enforcement under the law of Lao PDR.[35] While no pre-requisite of a treaty is required under Cambodian law,[36] there is also a paucity of guidance as to how the requirements set out under Cambodian law may be satisfied.[37] China,[38] Japan,[39] South Korea[40] and Vietnam[41] each have developed legal rules and a substantial body of case law on foreign judgments. A number of the countries have also signed bilateral treaties covering foreign judgments with each other with the contracting states largely reflecting political allegiances.[42] Each treaty contains different sets of rules. The Philippines,[43] the sole hybrid jurisdiction covered in this study, also has well-established rules and a substantial body of case law on enforcing foreign judgments.

The discussion for the next few parts of this article, which looks at the common principles and differences between the various legal systems, excludes Indonesia and Thailand. Before moving on though, a closer look at these two jurisdictions is warranted.

3. The outliers: Indonesia and Thailand

Under Indonesian law, a pre-requisite to enforcement is a treaty on foreign judgments between Indonesia and the country whose judgment is before its court. Indonesia has yet to sign up to any such treaty.[44] This pre-requisite of a treaty relationship is consonant with the view which emphasises foreign judgments as

[35] *Ibid*, para 6.
[36] Cambodia's rules on enforcement of foreign judgments can be found in the Civil Procedure Code (2006), Art 199.
[37] Y Bun, Country Report: Cambodia", para 5.
[38] Civil Procedure Law of the People's Republic of China, Arts 281-282; Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law [2015] No 5.
[39] Code of Civil Procedure (Law No 109 of 26 June 1996, as amended), Art 118; Civil Execution Act (Law No 4 of 1979, as amended), Art 24.
[40] Civil Procedure Act (Act No 12882, 30 December 2014), Arts 271 and 271*bis*; Civil Enforcement Act (Act No 13286, 18 May 2015), Arts 26-27.
[41] Civil Procedure Code 2015 (No 92/2015/QH13), Part 7.
[42] Eg, there are bilateral treaties covering foreign judgments between China and Lao PDR, China and Vietnam, Lao PDR and Vietnam, and Vietnam and Cambodia. For more details, refer to the relevant country reports in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asian Business Law Institute, 2017).
[43] Rules of Civil Procedure (Bar Matter No 803 (1997), Rule 39, s 48.
[44] YU Oppusunggu, "Country Report: The Republic of Indonesia", para 23.

being embodiments of the exercise of sovereign power. Given that Indonesia adheres strictly to the principles of territorial sovereignty and judicial sovereignty,[45] its reluctance to enforce foreign judgments can be understood through this prism. Litigants in Indonesia have to commence fresh local proceedings. The foreign judgment may be tendered as evidence, but the extent to which the foreign judgment would be relied upon is unclear and is up to the prerogative of individual judges.[46] Having said that, some scholars are of the view that certain foreign judgments may be recognised, namely foreign judgments of a declaratory or constitutive[47] nature which merely require passive acknowledgement from the Indonesian courts rather than active execution.[48]

The situation in Thailand is more complex. A 1918 decision of the Supreme Court of Thailand[49] (Thailand's highest court) accepted that foreign judgments are enforceable in principle, provided the foreign judgment was rendered by a court of competent jurisdiction and is final and conclusive of the merits of the case. However, it refused to do so on the facts as finality was not proven by the judgment creditor. Although Thailand is fundamentally a civil law country, decisions of the Supreme Court are highly persuasive and certain significant decisions become precedents for lower courts.[50] It is therefore rather puzzling that there is a dearth of cases on foreign judgments being put before the Thai courts for enforcement. Instead, the strategy of choice among litigants in Thailand is to commence local proceedings at which the foreign judgment is tendered as evidence, as in Indonesia. This may be due to the fact that the 1918 decision has received heavy academic criticism from Thai scholars. The general perception is that the case is an inaccurate reflection of Thai law on the recognition and enforcement on foreign

[45] *Ibid*, para 22.
[46] *Ibid*, para 36.
[47] Declaratory judgments affirm the status of a legal relationship while constitutive judgments rule out or establish a new legal relationship: *ibid*, para 20.
[48] *Ibid*, paras 26, 33 and 37. Cf Decision of the South Jakarta District Court No 258/Pdt.P/2007/PN.JAK.SEL (25 September 2007); discussed in A Kusumadara, "Indonesia" in A Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart Publishing, 2019), 244-245.
[49] Case No 585/2461 (1918). See P Sooksripaisarnkit, "Country Report: Thailand", para 8.
[50] https://cacj-ajp.org/web/thailand/home accessed on 26 February 2020.

judgments, with criticisms centreing on the President of the Supreme Court at that time, who wrote the opinion of the Court, having been allegedly unduly influenced by English law.[51] In addition, the Thai statute on private international law, which was enacted in 1938 after the Supreme Court decision, is thought not to contain any provision dealing with the recognition and enforcement of foreign judgments.[52] The cumulative effect of these two developments may have been to put off wary litigants from testing the authoritativeness of the 1918 decision.

That said, there are at least two Thai decisions where a foreign judgment played a prominent role in Thai proceedings, when the foreign judgment fulfilled much the same conditions set out in the 1918 Supreme Court case. One is a family conflicts case on the custody of the child which was decided by the Central Juvenile and Family Court of Thailand in 2005. A Swedish judgment was tendered and accepted as conclusive evidence in the local action as it was held to be a final judgment of a court of competent jurisdiction which was not contrary to the public policy of Thailand.[53] The other case, decided in 2001, is a commercial case which involved a UK cost order awarded against a Thai litigant following unsuccessful litigation before the English High Court.[54] While this case has been described as an instance where the Thai Supreme Court *enforced* the UK court order,[55] there are reasons to more equivocal on the basis of the decision.[56] One of the grounds of the Thai Supreme Court's decision is that the defendant did not raise any argument to invalidate the order, such as the English court has no jurisdiction or the decision was

[51] V Ariyanuntaka, "Jurisdiction and Recognition and Enforcement of Foreign judgments and Arbitral Awards: A Thai Perspective", p 10 (https://www.coj.go.th/th/file/get/file/20181122bfa67ef43c58bae86baeebec5456e79b084331.pdf accessed 26 February 2020); P Sooksripaisarnkit, "Country Report: Thailand", para 9. For further critisisms, see P Dejakaisaya, "Enforcement of Foreign Judgments- Thailand" (1993) 1 *Asia Business Law Review* 40, 40.

[52] P Sooksripaisarnkit, "Country Report: Thailand", paras 4-7.

[53] Case No 2551/2548 (2005). For more details on this case, see P Sooksripaisarnkit, "Country Report: Thailand", paras 14-21.

[54] Case No 6565/2544 (2001). English translation by K Phoonwathu and K Panyawongkhanti of R&T Asia (Thailand) Limited (on file with ABLI).

[55] T Leepuengtham, "Cross-border Enforcement of IP Rights in Thailand" in P Torremans (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar, 2014), 105-106.

[56] I am grateful to Mark Fisher for the discussions we had on this case.

against public order. This appears to be similar to the requirements for enforcement of a foreign judgment set out in the 1918 decision. However, in the context of the case, the reference to the defendant's lack of action does not appear to pertain to arguments which the defendant could have made before the Thai court itself against enforcement of the UK costs order, but rather, arguments which the defendant could, but did not make, before the English court to challenge the order. Another reason to doubt the status of this decision as an enforcement case is that the Thai action was pursued on the basis of section 194 of the Thai Civil and Commercial Code B.E. 2468 (1925) which provides: "By virtue of an obligation, the creditor is entitled to claim performance from the debtor. The performance may consist in forbearance."[57] Despite the tempting similarity with the common law idea of obligations underpinning the enforcement of foreign judgments, it is important to note that no similar theoretical understanding of foreign judgments has been suggested under Thai law.[58] Further, section 194 is a provision found in the section of the code dealing with Thai *domestic* law on obligations. Lastly, one would have expected a reference to the 1918 decision, given that it is the sole on-point judgment so far, if the Thai Supreme Court was purporting to enforce the UK judgment.[59] It is plausible that the court merely used the UK judgment as evidence in a fresh local action, much like what happened in relation to the later 2005 decision.

4. Common principles

Unsurprisingly, the common law jurisdictions have largely similar laws. Despite the diversity within the civil law jurisdictions, a number of principles are shared, not only between the civil law jurisdictions, but also with the common law jurisdictions (and hybrid law jurisdiction). Of course, many principles, framed

[57] English translation available at http://library.siam-legal.com/thai-law/civil-and-commercial-code-obligations-sections-194-202/ accessed on 26 February 2020.
[58] Indeed, civil law systems tend to view foreign judgments as an encroachment of local juridical sovereignty. See Juenger, *supra* n 8, 12.
[59] "[I]n practice, it is normal judicial practice for a good-quality Supreme Court decision to be followed and cited in subsequent cases which deal with similar factual problems": M Pongsapan, "Remedies for Breach of Contract in Thai Law" in M Chen-Wishart, A Loke and B Ong (eds), *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Oxford University Press, 2016), 382.

sufficiently broadly, can claim universal adoption. It has to be acknowledged that the principles set out here, while accepted in broad terms, may be interpreted or applied differently in the various jurisdictions. However, the differences in interpretation or application are more differences of detail rather than spirit, and therefore, arguably, do not detract from the "universality"[60] of the principle. In particular, the differences are of a more minor nature compared to those discussed in Section C.5, which deals with differences of principle.

The following sets out the common principles, with explanation on differences in approach. The principles may variously be set out as pre-requisites or defences under individual laws, but the discussion below will not differentiate between the two; discussion on the burden of proof in respect of each criterion is less fruitful at this stage than focusing on the substance of each principle. Apart from the exclusion of Indonesia and Thai laws, the discussion below also does not deal in detail with Singapore's Choice of Court Agreements Act 2016, which enacts the HCCCA into Singapore law, nor with the various bilateral agreements which the countries in this study have signed with each other.[61] Due to space constraints, only a summary of each principle is offered below; more detailed exposition can be found in the forthcoming Asian Principles for the Recognition and Enforcement of Foreign Judgments.

(a) Judgment on the merits

In general terms, a judgment on the merits is a decision which the court has made based on the facts presented and upon application of the relevant law which disposes of the claim or issue before the court.[62] "On the merits" however has a more specific meaning under the laws of India and Myanmar. Under these laws, "on the merits" requires the foreign court to have considered the evidence in the case. This does

[60] "Universality" in terms of the countries within the scope of the project, and excluding Indonesia and Thailand.
[61] These are, however, covered in the Asian Principles.
[62] *D S V Silo-Und Verwaltungsgesellschaft mbH v Owners of The* Sennar *("The Sennar (No.2)"*) [1985] 1 WLR 490, 499 *per* Lord Brandon of Oakbrook.

not mean that only a full trial of the issues through submissions by both parties would qualify as being a judgment "on the merits" under the laws of India and Myanmar. What is important is that the court considered "the truth or falsity of the plaintiff's case".[63] This has a particular bearing on default judgments. If the defendant did not appear before the court, and the court did not "apply its mind" to the evidence submitted by the plaintiff, the foreign judgment would not qualify for recognition and enforcement.[64] Conversely, if the court rendered judgment only after consideration of the plaintiff's evidence, the judgment would be entitled to recognition and enforcement under the laws of India and Myanmar, even though the judgment was rendered in the absence of the defendant. The crux is not that the default judgment was rendered *ex parte*,[65] but that it was rendered without judicial assessment of the evidence.

(b) Foreign court has international jurisdiction[66]

That the foreign court must have international jurisdiction or be a court of competent jurisdiction is generally adopted across board. However, there are differences on what law applies to determine the issue of jurisdiction. Under the common law, the doctrine of obligations underlies this area of law: a foreign judgment gives rise to an obligation which the judgment debtor, if he has conducted himself in a certain manner in relation to the foreign court, should obey.[67] What sort of conduct gives rise to that obligation is laid down by the law of the forum. Cambodia, Japan, South Korea and Vietnam also assess this issue with reference to the law of the forum.[68]

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[63] *A N Abdul Rahiman v J M Mahomed Ali Rowther* AIR 1923 Rang 319 (J); (1928) 6 ILR 552, 557 (High Court at Rangoon).
[64] See N Singh, "Country Report: India", paras 19-24 and Minn NO, "Country Report: Myanmar", paras 18-20, and the cases cited therein.
[65] Cf the law of Lao PDR where default judgments will also likely be unenforceable, but for a different reason, namely concerns of fairness. See X Chantala and K Santivong, "Country Report: Lao", para 8.
[66] See further, A Chong (principal drafter), Principle on Jurisdiction of the Court in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[67] *Godard v Grey* (1870) LR 6 QB 139, 149–150; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159; *Adams v Cape Industries plc* [1990] Ch 433, 513; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484.
[68] Cambodia: Y Bun, "Country Report: Cambodia", para 9. For Japan, South Korea and Vietnam, see *infra* text to nn 76-80.

On the other hand, the courts in the Philippines will assess whether the foreign court was a competent one by referring to the rendering court's procedural rules.[69] In other words, the jurisdiction criterion is satisfied so long as the foreign court has jurisdiction under its own laws. This effectively means that there is no requirement of international jurisdiction altogether under the law of the Philippines, at least in the sense in which this requirement is usually understood by most countries. Yet the Philippines is not alone in its approach as there is some authority under Chinese law which also tests the issue of jurisdiction solely by the law of the court of origin.[70] Having said that, there is also authority to the converse under Chinese law.[71]

As to the criteria by which to judge if the foreign court has international jurisdiction, insofar as *in personam* judgments are concerned, the common law countries generally accept two: (i) the defendant was present or resident in the jurisdiction of the court of origin at the time the proceedings were commenced, or (ii) the defendant submitted to the jurisdiction of the court of origin.[72] However, Indian law still adopts the old *Emanuel v Symon*[73] position, where nationality, instead of presence, is a ground of international jurisdiction.[74] There is some Australian authority as well which accepts nationality as a ground if the defendant was actively exercising rights of citizenship in the country of the court of origin.[75]

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[69] E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", para 10.
[70] In favour of law of court of origin: (2012) *E Wuhan Zhong Min Shang Wai Chu Zi* No. 00016.
[71] In favour of law of the forum: Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases, Art 9; *Judicial Interpretation on Recognition and Enforcement of Foreign Judgments* (5th Draft), Art 21. The various bilateral treaties to which China is a party have also not adopted a consistent stance: Y Guo, "Country Report: China", para 5(b).
[72] C Ong, "Country Report: Brunei Darussalam", paras 24-25; Minn NO, "Country Report: Myanmar", para 17(b); A Briggs, *Private International Law in Myanmar* (University of Oxford, Faculty of Law, 2015), 53-55 (https://www.law.ox.ac.uk/sites/files/oxlaw/myanmar_book_26_may_2015.pdf accessed on 26 February 2020); A Chong, "Country Report: Singapore", paras 16-17. Cf Choong YC, "Country Report: Malaysia", para 19.
[73] [1908] 1 KB 302, 309.
[74] N Singh, "Country Report: India", paras 12 and 16.
[75] *Federal Finance & Mortgage Ltd v Winternitz* (unreported, SC (NSW), Sully J, 13720/1988, 9 November 1989, BC8901479) citing *Emanuel v Symon* [1908] 1 KB 302; and *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, [2010] NSWSC 1218, (2010) 79 NSWLR 425 (Bryson AJ), [20]–[28]; *Liu v Ma* [2017] VSC 810 (Supreme Court of Victoria), [7]; *Suzhou Haishun Investment Management Co Ltd v Zhao & Ors* [2019] VSC 110, [114] In

A mirror image approach is adopted under South Korean[76] law and usually Japanese law[77] too under which the foreign court has international jurisdiction if the foreign court had assumed jurisdiction in circumstances where their home courts would have done.[78] The requirements under Vietnamese law are that: the defendant participated in oral argument without contesting the jurisdiction of the foreign court; no judgment from a third court for the same case has been recognised and enforced in Vietnam and the foreign court assumed jurisdiction before a Vietnamese court has assumed jurisdiction.[79] Further, the case must not fall within the Vietnamese court's exclusive jurisdiction.[80]

The bar of exclusive jurisdiction also applies as a matter of Chinese,[81] Japanese,[82] Lao PDR[83] and South Korean[84] laws.[85] The common law countries do not have a ground of refusal based on exclusive jurisdiction because no exclusive jurisdiction is asserted over specific subject-matter under their laws. The same effect however is achieved in most instances. For example, the common law countries would not recognise and enforce a foreign judgment deciding on *in rem* rights over immovable property[86] located within their jurisdiction. This is because in cases involving *in rem* rights over immovable property, the foreign court has international jurisdiction if and only if the property is located within its jurisdiction.

(c) Finality of the foreign judgment[87]

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contrast with Indian law where nationality supplants presence as a ground of international law, presence is also a ground of international jurisdiction under Australian law.

[76] KH Suk, "Country Report: South Korea", para 13.

[77] T Kono, "Country Report: Japan", para 7. See also K Nishioka, "Japan" in A Reyes (ed), *Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Hart Publishing, 2019), 105-106.

[78] For a criticism of the mirror-image approach, see Juenger, *supra* n 8, 15.

[79] Code of Civil Procedure (No 92/2015/QH13), Art 440(2).

[80] Code of Civil Procedure (No 92/2015/QH13), Art 440(1).

[81] Y Guo, "Country Report: The People's Republic of China", para 19.

[82] T Kono, "Country Report: Japan", para 8.

[83] Amended Law on Civil Procedure (No 13/NA) (4 July 2012), Art 366(3). See X Chanthala and K Santivong, "Country Report: Lao", para 5.

[84] KH Suk, "Country Report: South Korea", para 33.

[85] Possibly also Cambodian law: Y Bun, "Country Report: Cambodia", para 35.

[86] Also movable property.

[87] See further, NB Du (principal drafter), Principle on Finality in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).

A foreign judgment which is final raises a *res judicata* on the issue in dispute between the parties. Generally, the common law countries assess finality with reference to whether the court which rendered the judgment can vary or set aside its own order.[88] Therefore, a foreign judgment that can be appealed or is subject to appeal to a superior court in the country of origin is "final",[89] although in practical terms, a stay of the enforcement proceedings will often be granted until any appeal is dealt with in the country of origin.[90] In contrast, most of the civil law and hybrid law jurisdictions[91] would refuse to enforce judgments for which the time of appeal has not expired. The distinction between the common law and civil law approaches is a reflection of the domestic procedural laws. Generally, a judgment from a first instance court has binding effect in the common law countries while the same only becomes binding when the period for appeal to a superior court has expired in civil law jurisdictions.

Default judgments, provided fairness concerns are allayed, are largely considered as final[92] except under the law of Lao PDR.[93] As mentioned above, default judgments which are rendered without consideration

[88] *Nouvion v Freeman* (1889) 15 App Cas 1, 9.

[89] A Bell, "Country Report: Australia", paras 11 and 22; C Ong, "Country Report: Brunei Darussalam", para 30; N Singh, "Country Report: India", para 7; Choong YC, "Country Report: Malaysia", paras 12 and 24; Minn NO, "Country Report: Myanmar", fn 7; and A Chong, "Country Report: Singapore", para 14. Cf India: *Baijnath Karnani vs Vallabhadas Damani* (1933) 65 MLJ 572 (Madras High Court, 15 March 1933) overturning *Baijnath Karnani vs Vallabhadas Damani* (1932) 62 MLJ 566 (Madras High Court, 17 November 1931).

[90] A Bell, "Country Report: Australia", paras 11 and 22; C Ong, "Country Report: Brunei Darussalam", para 30.

[91] T Kono, "Country Report: Japan", para 5; KH Suk, "Country Report: South Korea", para 10; X Chanthala and K Santivong, "Country Report: Lao", para 5; E Aguiling-Pangalangan, "Country Report: Philippines", para 25. For Laos, see also Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 366. Cf Vietnamese courts would enforce a foreign judgment which has taken legal effect in the court of origin: NB Du, "Country Report: Socialist Republic of Vietnam", para 25.

[92] A Bell, "Country Report: Australia", paras 12 and 24; C Ong, "Country Report: Brunei Darussalam", para 21; Y Guo, "Country Report: The People's Republic of China", para 16; T Kono, "Country Report: Japan", para 4. Choong YC, "Country Report: Malaysia", para 13; E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", para 27; A Chong, "Country Report: Singapore", para 14; KH Suk, "Country Report: South Korea", fn 7; NB Du, "Country Report: Socialist Republic of Vietnam", paras 25 and 26.

[93] X Chanthala and K Santivong, "Country Report: Lao", para 8. Cf Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and Lao PDR (25 January 1999), Art 21(1)(3).

of the evidence would not be considered as judgments "on the merits" under the laws of India and Myanmar. [94]

The position on judgments in interlocutory proceedings vary, even within jurisdictions with the same legal tradition. Interlocutory judgments are not enforceable in most of the civil law courts.[95] At common law, an interlocutory judgment which finally determines the rights of the parties in respect of a specific issue could be considered as final for that particular issue.[96] For example, a judgment rendered in interlocutory proceedings on the validity of a choice of court agreement could be entitled to recognition under the common law. Singapore, however, has gone even further. Under the recently amended Reciprocal Enforcement of Foreign Judgments Act, interlocutory judgments and orders could be enforceable.[97] An interlocutory judgment need not be final and conclusive to qualify for enforcement under the Act.[98]

(d) No review on the merits and irrelevance of mistake by the foreign court[99]

Révision au fond is prohibited. [100] Any purported mistakes made by the court of origin cannot be investigated at the recognition and enforcement stage, otherwise this undermines the principle of finality

[94] N Singh, "Country Report: India", paras 19-24 and Minn NO, "Country Report: Myanmar", paras 18-20, and the cases cited therein.
[95] Y Bun, "Country Report: Cambodia", para 22; T Kono, "Country Report: Japan", para 4; and X Chanthala and K Santivong, "Country Report: Lao", para 7.
[96] A Bell, "Country Report: Australia", para 21; C Ong, "Country Report: Brunei Darussalam", para 21 fn 21; N Singh, "Country Report: India", para 7; and A Chong, "Country Report: Singapore", para 14. See also *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372, [101].
[97] Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 2(1).
[98] Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 3(2)(b).
[99] See further, Y Guo (principal drafter), Principle on Merits Review in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[100] A Bell, "Country Report: Australia", paras 13 and 25; C Ong, "Country Report: Brunei Darussalam", para 39; Y Bun, "Country Report: Cambodia", para 23; Y Guo, "Country Report: The People's Republic of China", para 20; N Singh, "Country Report: India", paras 5 and 28; T Kono, "Country Report: Japan", at para 20; X Chanthala and K Santivong, "Country Report: Lao", para 4; Minn NO, "Country Report: Myanmar", para 18; E Aguiling-Pangalangan, "Country Report: the Philippines", paras 31 and 33; A Chong, "Country Report: Singapore", paras 25 and 32; KH Suk, "Country Report: South Korea", para 5; NB Du, "Country Report: Socialist Republic of Vietnam", paras 41–42.

of litigation. That said, if the mistake is clear and egregious, it may be considered unjust or against public policy to recognise and enforce the foreign judgment.[101]

The general prohibition against a review on the merits does not mean that no examination of the foreign judgment may be undertaken. However, any evaluation of the foreign judgment is confined to assessing whether the foreign judgment qualifies for recognition and enforcement. For example, punitive damages are unenforceable under the laws of some countries. An examination of the foreign judgment to see if the damages awarded are compensatory or punitive in nature is permitted.[102]

(e) Public policy[103]

Unsurprisingly, all of the jurisdictions will not recognise and enforce a foreign judgment which violates their public policy.[104] The wording may not specifically refer to public policy or ordre public, but it would cover analogous ground. For example, the law of Cambodia mandates that the judgment must not violate "the public order or morals of Cambodia".[105]

The Civil Procedure Codes of India and Myanmar refer specifically to "breach of any law in force in [India/Myanmar]."[106] These provisions may not be relied on merely because the foreign court applied a law which is different from local law on the same issue.[107] There is also the question of whether breaches

[101] A Bell, "Country Report: Australia", para 13; E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", paras 2, 3, 31, 32 and 33; *Bank of the Philippine Islands Securities Corporation v Edgardo V. Guevara* G.R. No 167052 (11 March 2015).
[102] See, eg, KH Suk, "Country Report: South Korea", para 5.
[103] See further, YU Oppusunggu (principal drafter), Principle on Public Policy in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[104] A Bell, "Country Report: Australia", paras 16 and 26; C Ong, "Country Report: Brunei Darussalam", paras 23 and 29; Y Guo, "Country Report: The People's Republic of China", paras 35-36; T Kono, "Country Report: Japan", para 12; Choong YC, "Country Report: Malaysia", paras 17 and 24; E Aguiling-Pangalangan, "Country Report: the Philippines", para 19; A Chong, "Country Report: Singapore", paras 18 and 33; KH Suk, "Country Report: South Korea", para 45; NB Du, "Country Report: Socialist Republic of Vietnam", para 39 ("basic principles of the law of Vietnam").
[105] Y Bun, "Country Report: Cambodia", para 8.
[106] Civil Procedure Code (India), s 13(f); Civil Procedure Code (Myanmar), s 13(f).
[107] P Diwan and P Diwan, *Private International Law: Indian and English* (4th rev and enlarged edn, 1998, Deep & Deep Publications), 648; Minn NO, "Country Report: Myanmar", para 21.

of unwritten laws are captured by these provisions as the ephemeral concept of public policy covers unwritten laws too. Indian courts have, however, referred to public policy as a ground for refusing to enforce foreign judgments, even though "public policy" is not referred to in section 13 of its Civil Procedure Code.[108] A further point to note about the Indian and Myanmarese provisions is that they more obviously serve to vindicate the forum's sovereignty compared to a broad understanding of public policy, which, as seen below, includes protection of both state and private litigants' interests. This observation also applies in relation to the provision in Laotian law that the judgment must not "affect the peace and social order of the Lao PDR".[109]

The content of public policy is for each jurisdiction to decide. Indeed, considerations of sovereignty mean that it would be unlikely for the contents of public policy to be harmonised.[110] Some jurisdictions may utilise this defence largely to protect the interests of the country of the forum.[111] Other jurisdictions also include the protection of the interests of private litigants within the rubric of public policy: whether the proceedings in the court of origin conformed to due process principles is considered part of public policy in many of the countries.[112] Indeed, both substantive and procedural aspects of a foreign judgment are assessed as part of the rubric of public policy. In some jurisdictions, grounds of refusal such as fraud and inconsistency with a local judgment are not dealt with as independent defences but rather subsumed within the public policy defence.[113] There is also, of course, an overlap between public policy and natural justice.

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[108] N Singh, "Country Report: India", para 30.
[109] X Chantala and K Santivong, "Country Report: Lao", para 4.
[110] Except to the extent that it could be argued that there is a form of "transnational" public policy. See A Chong, "Transnational Public Policy in Civil and Commercial Matters" (2012) 128 *Law Quarterly Review* 88.
[111] Eg, China: Y Guo, "Country Report: The People's Republic of China", para 35.
[112] Brunei: C Ong, "Country Report: Brunei Darussalam", para 36; Cambodia: Civil Procedure Code (2006), Art 199(c) and Y Bun, "Country Report: Cambodia", para 12; Japan: Code of Civil Procedure (Law No 109 of 26 June 1996, as amended), Art 118(iii) and T Kono, "Country Report: Japan", para 13; South Korea: Civil Procedure Act (Act No 12882, 30 December 2014), Art 217(1)(c), KH Suk, "Country Report: South Korea", paras 52- 55.
[113] Eg, Japan: T Kono, "Country Report: Japan", paras 13-14; South Korea: KH Suk, "Country Report: South Korea, paras 54-55.

Other examples of foreign judgments which fall foul of public policy are foreign judgments based on foreign gambling debts[114] and those which award punitive or exemplary damages.[115]

(f) Natural justice or due process[116]

Breach of natural justice, or lack of due process, feature prominently in the foreign judgment rules. In some countries, the right to due process is elevated to a constitutional right.[117] All jurisdictions insist that the defendant must have been treated fairly at trial before the court of origin and there is similarity in the ideas of natural justice, namely, foreign judgments procured in circumstances where the defendant did not receive notice or timely notice of the proceedings, would be refused recognition and enforcement. The idea that the foreign court must be an impartial one is also part of natural justice principles.[118]

The concept of timely notice examines whether the defendant was given notice in sufficient time to prepare for his defence. While most of the jurisdictions refer to their own notions of natural justice — eg, what constitutes timely notice — the Philippines[119]and Vietnamese[120] laws assess whether there was any breach of natural justice by reference to the law of the court of origin.

The idea of lawful and proper service also pervades the concept of due process, especially for countries for which service of a writ is seen to be a sovereign act. Several of the countries explicitly provide for an

[114] Singapore: *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 and A Chong, "Country Report: Singapore", para 20; Japan: T Kono, "Country Report: Japan", para 12. Cf Malaysia: Choong YC, "Country Report: Malaysia", para 20.
[115] Eg, Brunei: C Ong, "Country Report: Brunei Darussalam", para 33; Japan: T Kono, "Country Report: Japan", para 12; South Korea: KH Suk, "Country Report: South Korea", paras 49 and 51; likely Laos: X Chanthala and K Santivong, "Country Report: Lao", p 119 fn 17. Cf the Philippines: Civil Code of the Philippines (Republic Act No 386 (1949)), Art 2229 and E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", para 22.
[116] See further, YU Oppusunggu (principal drafter), Principle on Lack of Due Process in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[117] Eg, The Constitution of the Republic of the Philippines (1987), Art 3 s 1.
[118] *Price v Dewhurst* (1837) 8 Sim 279; 59 ER 111. See also A Bell, "Country Report: Australia", para 26; Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases, Arts 10(d) and 22(c)(ii).
[119] E Aguiling-Pangalangan, "Country Report: the Philippines", para 24.
[120] Vietnam's Civil Procedure Code (No 92/2015/QH13) Art 439(3); NB Du, "Country Report: Vietnam", para 26.

independent ground of refusal based on lack of proper service on the defendant.[121] Whether proper service has been effected is usually assessed according to service rules of the foreign court, but the service cannot breach certain fundamental criteria of the law of the court addressed.[122] Further, it should be noted that six of the countries within the scope of the project have enacted the Hague Service Convention[123] into their laws.[124] The Philippines has also recently acceded to it and the Convention should enter into force in the Philippines later this year. If the country of the court of origin and the country of the court addressed are both signatories to the Convention and the defendant is served with a writ from the former country in the latter country, the Convention's provisions, as enacted by the latter country, will have to be complied with.

(g) Fraud[125]

That the foreign judgment must not have been procured by fraud is generally accepted. In the common law and hybrid law countries, fraud is an independent defence to the recognition and enforcement of a foreign judgment. In the civil law countries, fraud tends to be considered as subsumed under the public policy exception. This is the case under Chinese, Japanese and South Korean laws.[126] The status of fraud in foreign judgments is more elusive under the law of Cambodia, Lao PDR and Vietnam although it is

[121] Eg, Japan's Code of Civil Procedure, Art 118(ii); South Korea's Civil Procedure Act, Art 217(1)(b).
[122] Eg, (Supreme Court of Japan) (28 April 1998) *Minshū* No 52–3 (http://www.courts.go.jp/app/hanrei_en/detail?id=392) (accessed 26 February 2020): "Summons or service of the order required for the commencement of litigation to the defendant …. does not have to be summons or service on the basis of the Japanese law of civil procedure, but must be sufficient for the defendant actually to become aware of the commencement of the litigation and to defend himself."
[123] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
[124] I.e. Australia, China, India, Japan, South Korea and Vietnam.
[125] See further, Narinder Singh (principal drafter), Principle on Fraud in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[126] Y Guo, "Country Report: The People's Republic of China", paras 29 and 35; T Kono, "Country Report: Japan", para 13; KH Suk, "Country Report: South Korea", para 54.

possible that it could fit under other grounds for refusal which deal with violations of public order and morals and violation of local laws.[127]

The approaches to fraud vary. Brunei law[128] follows the generous, although oft-criticised[129] English common law position that "fraud unravels everything".[130] This means that fraud can be investigated afresh at the recognition and enforcement stage even though no new evidence is put forward and the court of origin had considered and rejected the evidence.[131] Fraud can also be raised even if the judgment debtor had knowledge of the fraud at the time of the original proceedings but chose not to raise it at that time.[132] This liberal approach to fraud has been said not to fall foul of the prohibition against a review of the merits on grounds that the court of origin was deceived and therefore did not decide the issue.[133] The soundness of this reasoning may be questioned from both a legal and policy perspective. This expansive approach to fraud undoubtedly undermines the principle of finality of litigation.

Some jurisdictions have therefore moved away from the English common law position.[134] Indian[135] and Singapore[136] laws distinguish between intrinsic[137] and extrinsic fraud.[138] Under these laws, the usual

[127] Y Bun, "Country Report: Cambodia", paras 13–14; X Chanthala and K Santivong, "Country Report: Lao", p 119 fn 17; cf NB Du, "Country Report: Vietnam", para 42.
[128] C Ong, "Country Report: Brunei Darussalam", para 32.
[129] *Owens Bank Ltd v Bracco* [1992] AC 443; *Owens Bank Ltd v Etoile Commercial SA* [1995] 1 WLR 44.
[130] *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712 *per* Lord Denning.
[131] *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295; *Vadala v Lawes* (1890) 25 QBD 310.
[132] *Syal v Heyward* [1948] 2 KB 433.
[133] *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295, 306.
[134] See also *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court of Canada).
[135] *Sankaran Govindan v Laskhmi Bharathi & Others* [1975] 3 SCC 351; *Masterbaker Marketing Ltd v Noshir Moshin Chinwalla* AIR 2015 (NOC) 771 (13 March 2015) (High Court of Bombay).
[136] *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515; A Chong, "Country Report: Singapore", para 19. This is true of Singapore common law rules. It is unclear if the same distinction applies under the Reciprocal Enforcement of Foreign Judgments Act.
[137] Intrinsic fraud has been defined as fraud which goes to the merits of the case and to the existence of a cause of action: *Beals v Saldanha* [2003] SCC 72, [45].
[138] Extrinsic fraud has been defined as fraud going to the jurisdiction of the court or fraud which misleads the court into believing it has jurisdiction over the cause of action: *Beals v Saldanha* [2003] SCC 72, [45]. Examples are where the defendant had never been served with process, the action was undefended without the defendant's default, where the defendant had been fraudulently persuaded by the plaintiff to let the judgment go by default or some fraud to the defendant's prejudice had been committed in the foreign court: *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515, [21], citing *Woodruff v McLennan* (1887) 14 OAR 242.

generous rule applies in relation to extrinsic fraud, ie fraud which is external to the merits of the case. However, intrinsic fraud which goes to the merits of the case can only be pleaded at the recognition and enforcement stage upon proof of new evidence which reasonable diligence on the part of the judgment debtor would not have uncovered at the time of the original proceedings.[139] Recent authority in Australia is also in favour of a strict approach on fraud.[140]

No equivalent concept of fraud being "a thing apart"[141] exists under the other systems. This explains the stricter approach taken towards fraud in the hybrid and civil law jurisdictions. Only extrinsic fraud may be raised at the recognition and enforcement stage under the law of the Philippines.[142] This is also likely to be the case under Chinese law, although there is a lack of authority on this point.[143] The concepts and distinction between intrinsic and extrinsic fraud are not adopted under Japanese and South Korean laws, which instead rely on the concept of procedural fraud. Procedural fraud is an aspect of procedural public policy.[144] Examples of such fraud would be the submission of false evidence, perjured testimony and the intentional suppression of important evidence.[145] The South Korean Supreme Court has held that procedural fraud can only be raised at the recognition and enforcement stage if the judgment debtor could not raise fraud in the court of origin and the burden on the judgment debtor is a high one.[146] The Japanese courts have not been consistent in their treatment of fraud, with the Supreme Court of Japan

[139] This stance has also been criticised, namely, as taking the side of the fraudster against a negligent judgment debtor: A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014), para 6.194.
[140] *Xu v Wang* [2019] VSC 269, [84]; *Doe v Howard* [2015] VSC 75, [123]-[131]. Cf *Ki Won Yoon v Young Dung Song* (2000) 158 FLR 295.
[141] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61, [15].
[142] E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", para 17.
[143] Y Guo, "Country Report: The People's Republic of China", para 29.
[144] T Kono, "Country Report: Japan", para 13; KH Suk, "Country Report: South Korea", para 54.
[145] T Kono, "Country Report: Japan", para 13; KH Suk, "Country Report: South Korea", para 54.
[146] KH Suk, "Country Report: South Korea", para 54.

refusing to consider fraud in one case on grounds that it amounted to a review of the merits of the foreign judgment.[147]

Whereas there are differences in application in respect of the other principles set out in this section, at least countries with the same legal tradition have tended to adopt the same approach in relation to that specific principle. This cannot quite be said of fraud, which, as can be seen above, boasts of considerable diversity in approach, even within countries with the same legal background.

(h) Inconsistent Judgments[148]

It is generally accepted that a local judgment can prevail over a conflicting foreign judgment dealing with the same issue between the same parties. This is clearly the case when the local judgment is earlier than the foreign judgment, in keeping with the principle of finality of litigation. The common law countries have not frequently grappled with the situation where the local judgment is the later one.[149] The dominant position, based on mainly civil law provisions and authorities, is that the local judgment will be preferred even if it is later in time.[150] Indeed, the preference for local judgments is such that some laws provide that a foreign judgment may not be recognized and enforced if local proceedings are on foot although judgment has yet to be handed down.[151] This abrogation from *res judicata* principles is entirely defensible

[147] Case No: 1994 (O) 1838 (28 April 1998)(http://www.courts.go.jp/app/hanrei_en/detail?id=392 accessed on 26 February 2020); cf Tokyo High Court Judgment (27 February 1990) *Hanrei Jihō* No. 1344 p. 139; Tokyo District Court Judgment (14 January 1994) *Hanrei Jihō* No. 1509, p. 96.

[148] See further, C Ong (principal drafter), Principle on Inconsistent Judgments in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).

[149] One exception is *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ 287 where the Court of Appeal of Malaysia gave precedence to the earlier foreign judgment.

[150] Eg, Japan: *Marubeni America Corp. v. Kabushiki Kaisha Kansai Tekkasho* (Osaka District Court) (22 December 1977, Hanrei Taimuzu No. 362, at p 127; Vietnam: Civil Procedure Code (No 92/2015/QH13), Art 439(5); China: Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Issued 30 January 2015; enacted 4 February 2015), Art 533 (The Shanghai High People's Court hosts an English translation at <http://www.hshfy.sh.cn/shfy/English/view.jsp?pa=aaWQ9MzY4ODU3JnhoPTEmbG1kbT1FTl8wNAPdcssPdcssz> (accessed 26 February 2020)).

[151] Eg, Vietnam: Civil Procedure Code (No 92/2015/QH13), Art 439(5); China: Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Issued 30 January 2015; enacted 4 February 2015), Art 533. Cf *Lee v Citibank* [1981] HKCA 149.

as it maintains the internal coherence of a legal system. [152] It would be odd for a court to accord a greater *res judicata* effect to a foreign judgment compared to its own judgment.

There is very little authority on the position when the court addressed is faced with two conflicting foreign judgments, each of which satisfies the requirements for recognition and enforcement. Given the absence of parochial concerns in this situation, the earlier foreign judgment ought to be preferred, in line with the principle of finality of litigation. Indeed, it is likely that the common law countries, at least, will follow the English common law position of prioritising the earlier foreign judgment.[153] Chinese and South Korean laws will also likely prefer the earlier foreign judgment. [154]

(i) Judgments in rem[155]

In the commercial context, a judgment *in rem*, which is good against the whole world, would involve a determination of title or possession to property or order the sale of a property in satisfaction of a claim against the property itself.[156] While the common law and hybrid law countries divide up judgments into judgments *in personam* (a judgment against a person which only binds the parties and their privies) and judgments *in rem*, such a division is unknown in the civil law countries. That said, judgments *in rem*, whether that terminology is adopted or not, are entitled to recognition[157] and enforcement under most of the common law[158] and civil law systems. The difference is on the criteria by which the foreign court is

[152] K Clermont, "Limiting the Last-in-Time Rule for Judgments" (2017) 36(1) *The Review of Litigation* 1, 50 (in the context of the US last-in-time rule).
[153] *Showlag v Mansour* [1995] 1 AC 431; A Bell, "Country Report: Australia", para 27; C Ong, "Country Report: Brunei", para 38; A Chong, "Country Report: Singapore", para 23. This is confirmed to be the case under Singapore law: see *First Global Funds Ltd PCC v PT Bank JTrust Indonesia, TBK* [2020] SGHC 32, [18].
[154] Y Guo, "Country Report: China", para 32; KH Suk, "Country Report: South Korea", para 55.
[155] See further, N Singh and A Chong (principal drafters), Principle on *In rem Judgments* in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[156] L Collins (gen ed), *Dicey, Morris and Collins: The Conflict of Laws* (15th edn, 2012, Sweet & Maxwell), para 14-019.
[157] At common law, a foreign judgment *in rem* has been argued to involve recognition rather than enforcement as the judgment functions as an assignment of property according to the *lex situs*: L Collins (gen ed), *Dicey, Morris and Collins: The Conflict of Laws* (15th edn, 2012, Sweet & Maxwell), para 14-110.
[158] Cf Myanmar: Minn NO, "Country Report: Myanmar", para 11.

judged to have international jurisdiction. At common law, the property must be within the jurisdiction of the foreign court. In the civil law countries, no special rule applies for judgments *in rem*; the jurisdiction of the foreign court is assessed according to the usual international jurisdiction requirements laid down by the court addressed, subject to exclusive jurisdiction being claimed in relation to certain types of property, namely immovable property located within local jurisdiction or property which must be registered in local registries. For example, Japanese courts have exclusive jurisdiction over an action with respect to registration where the place of registration is Japan.[159] Given that Japanese courts usually adopt the mirror image rule to assess the international jurisdiction of the foreign court, the foreign court would be found to have international jurisdiction in an action relating to, say, the registration of land if and only if the land is located in the jurisdiction of the court. However, other actions relating to rights *in rem* to immovable property are not subject to exclusive jurisdiction under Japanese law. Therefore, if the foreign court has international jurisdiction on other grounds, such as submission by the defendant to the jurisdiction of the foreign court, that court would have international jurisdiction under Japanese law, even though the foreign judgment relates to a right *in rem* over immovable property located elsewhere.[160]

5. Differences

The above section has considered the common principles which are adopted by the laws in the region. Although there are differences in terms of interpretation and application, in the main, the core idea is embraced by the various laws. In contrast, in this section, issues on which there is significant disparity in approach will be identified.

(a) Reciprocity[161]

[159] Code of Civil Procedure, Article 3-5(2).
[160] K Takahashi, 'The Jurisdiction of Japanese Courts in a Comparative Context' (2015) 11 *Journal of Private International Law* 103, 122.
[161] See further, Y Guo (principal drafter), Principle on Reciprocity in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).

Reciprocity in the context of judgments recognition and enforcement essentially means that the court of a country will refuse to recognise and enforce the judgment from the court of another country unless that court would enforce its judgment. The requirement is most commonly associated with civil law jurisdictions, but the common law countries each have a reciprocal foreign judgments statute or provision in its code on civil procedure under which judgments from courts of gazetted countries are afforded a registration or uncomplicated enforcement mechanism.[162] This is an easier route compared to enforcing a judgment under the common law rules as it obviates the need to commence a fresh local action under which the foreign judgment gives rise to an obligation under local law. Instead, a foreign judgment from a gazetted country which fulfils the statutory requirements will be treated as if it were a local judgment upon successful registration or an equivalent mechanism. Countries are normally gazetted upon proof of "reciprocal" treatment being meted out to the forum courts' judgments. The determination of which countries are to be gazetted is left to the executive branch of government.

Reciprocity in the common law countries, however, plays a more limited role compared to the civil law jurisdictions. In the civil law jurisdictions, reciprocity is a mandatory pre-requisite to the recognition and enforcement of a foreign judgment. Notably, outside of the statutory enforcement schemes, the common law countries do not require reciprocity as a condition to enforcement under the common law rules. Reciprocity is also not a condition under the law of the Philippines. Although the courts in the Philippines have referred to reciprocity and the US Supreme Court decision of *Hilton v Guyot*[163] in foreign judgments cases,[164] the citation to *Hilton* is not for the condition of reciprocity[165] but rather for its explanation of

[162] s 44A of India's and Myanmar's respective Civil Procedure Codes does not refer to "registration" but the procedure is similar in that a foreign judgment of a reciprocating territory will be executed locally as if it had been passed by the local court upon the filing of a certified copy of the judgment.
[163] 159 US 113 (1895).
[164] Eg, *Mijares v Ranada* G.R. No 139325 (12 April 2005); *Asiavest Merchant Bankers (M) Berhad v Court of Appeals and Philippine National Construction Corporation* G.R. No 110263 (20 July 2001).
[165] The Uniform Foreign Money- Judgments Recognition Act (1962) does not include a provision on reciprocity. Cf American Law Institute, Foreign Judgments Recognition and Enforcement Act, § 7(b) (Proposed Federal Statute 2005).

comity being the basis of the recognition and enforcement of foreign judgments.[166] The requirement of reciprocity thus features as a key difference between the laws of the common law and civil law jurisdictions and a potentially big stumbling block to harmonisation. In addition, the civil law countries in the study also vary in their interpretation and treatment of the principle of reciprocity.

For some countries, only formal reciprocity in the form of a treaty or bilateral agreement suffices. This is the position under the law of Lao PDR.[167] Cambodian law requires a "guarantee of reciprocity", and as such guarantee can only be provided by a treaty or bilateral agreement,[168] its position in effect is identical to that of Lao PDR. China currently requires *de facto* reciprocity, where it has to be established that the foreign court had previously enforced a Chinese judgment.[169] Japan[170] and South Korea[171] adopt *de jure* reciprocity, which is more liberal in that the expectation that their judgments would be enforced by the foreign court even though there is no prior authority would meet the requirement. The Japanese and South Korean courts consider if the foreign court has similar requirements for enforcement of a similar type of Japanese or South Korean judgment respectively. Vietnamese courts exhibit the most relaxed approach to reciprocity, where the requirement is seemingly satisfied so long as the foreign judgment fulfils the other requirements for enforcement under Vietnamese law.[172]

[166] E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", paras 7–8.
[167] Law on Civil Procedure (No 13/NA) (4 July 2012), Art 362. See X Chanthala and K Santivong, "Country Report: Lao", para 4.
[168] Civil Procedure Code (2006), Art 199(d). See Y Bun, "Country Report: Cambodia", paras 15–17.
[169] Y Guo, "Country Report: The People's Republic of China", para 11.
[170] T Kono, "Country Report: Japan", para 16.
[171] KH Suk, "Country Report: South Korea", paras 39-40.
[172] *Choongnam Spinning v E & T Company* Decision No 2083/2007/QĐST-KDTM (People's Court of Ho Chi Minh City), affirmed on appeal in *Choongnam Spinning v E & T Company* Decision No 62/2008/QDKDTM-PT (Court of Appeal of the Supreme People's Court in Ho Chi Minh City); *DBS Bank Limited v Ms Vu Thi Bich Loan* No.1186/2016/QĐST-DS (2 December 2016, First Instance Court of Ho Chi Minh City), affirmed on appeal in *DBS Bank Limited v Ms Vu Thi Bich* Loan No.111/2017/QĐPT-KDTM (21 June 2017, Court of Appeal of the Supreme People's Court in Ho Chi Minh City). See further, NB Du, "Country Report: Socialist Republic of Vietnam", paras 11–17.

Mention must also be made of another variant of reciprocity, ie that of presumptive reciprocity set out in the Nanning Declaration approved at the 2nd China-ASEAN Justice Forum on June 8 2017.[173] The Nanning Declaration is more of a gesture of goodwill among the judiciary in the region rather than a legally binding document, but its approach to reciprocity marks a fundamental shift for some of the signatory courts. Presumptive reciprocity requires the court addressed to presume that there is a reciprocal relationship between the countries of the court addressed and the court of origin, as long as there is no precedent of the court of origin refusing to recognise and enforce a judgment on the ground of lack of reciprocity from the court addressed. Some issues on how this would work in practice have to be resolved; for example, what if the court of origin has both enforced and refused to enforce judgments of the court addressed on the ground of lack of reciprocity?[174] Read literally, the explanation in the Nanning Declaration would appear to indicate that any instances of the court of origin having refused to enforce a judgment of the court addressed on the ground of lack of reciprocity would mean that presumptive reciprocity is not satisfied notwithstanding any later decision of the court of origin reversing its negative stance on reciprocal relations with the court addressed. This approach would of course rob presumptive reciprocity of much of its promise. Presumptive reciprocity does not appear to have been applied by the signatory courts to date, although this is most probably due to lack of opportunity rather than lack of support for the principle.

Countries which adopt reciprocity tend to view foreign judgments as an emanation of foreign juridical sovereignty encroaching on local juridical autonomy,[175] instead of treating foreign judgments as according private rights acquired under foreign laws.[176] Imposing reciprocity as a requirement to enforcing foreign

[173] Text available at: http://cicc.court.gov.cn/html/1/219/208/209/800.html accessed on 26 February 2020.
[174] See, relatedly, in connection with *de facto* reciprocity: G Du and M Yu, "How Chinese Courts Determine the De Facto Reciprocity in Recognizing Foreign Judgments?", 16 July 2019 (https://www.chinajusticeobserver.com/a/how-chinese-courts-determine-the-de-facto-reciprocity accessed on 26 February 2020).
[175] Juenger, *supra* n 8, 12.
[176] Dissenting judgment in *Hilton v Guyot* 159 US 113 (1895), 233.

judgments is to use "sovereignty as a bargaining chip".[177] Countries which adopt reciprocity may do so, in part, to incentivise foreign countries to recognise and enforce its own judgments.[178] The evidence that the adoption of reciprocity achieves this objective is paltry.[179] Reciprocity inappropriately casts judges as political tools, penalises private litigants and is inefficient as it forces parties to have to litigate afresh in what ought to be the enforcing forum.[180] In addition, if both the court addressed and the court of origin adopt *de facto* reciprocity, they become trapped in an intractable circle. This has been indeed the experience between China and Japan whose courts have engaged in tit-for-tat behavior.[181]

The evidence is that reciprocity as a pre-condition to the recognition and enforcement of foreign judgments is losing favour in many jurisdictions worldwide.[182] Some of the countries within this study have gradually become more liberal in their interpretation of reciprocity.

For example, Vietnamese law has moved from insisting on a treaty relationship as evidence of reciprocity to accepting reciprocity other than pursuant to a treaty relationship[183] in its reform of its Code of Civil Procedure in 2004.[184] Further to this change, Vietnamese courts have been generous in finding that reciprocity is satisfied as mentioned above. The former Japanese Great Court of Cassation held in 1933 that the conditions for recognition of Japanese judgments in the court of origin must be equal to, or more lenient than, the equivalent conditions under Japanese law.[185] This was departed from by the Supreme

[177] Juenger, *supra* n 8, 31.
[178] JF Coyle, "Rethinking Judgments Reciprocity" (2014) 92 *North Carolina Law Review* 1109; Juenger, *supra* n 8, 32.
[179] B Elbalti, "Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite" (2017) 13 *Journal of Private International Law* 184, 214.
[180]JF Coyle, *supra* n 178, 1120-1126.
[181] B Elbalti, *supra* n 179, 206-208.
[182] A Dutta, "Reciprocity" in J Basedow *et al* (eds), *Encyclopedia of Private International Law*, vol 2 (Elgar, 2017) 1466 at 1470; B Elbalti, *supra* n 179.
[183] Civil Procedure Code (2015), Art 423(1)(b).
[184] NB Du, "Country Report: Socialist Republic of Vietnam", p 217 fn 35.
[185] Case 1933 (O) No 2295 (5 December 1933). See B Elbalti, *supra* n 179, 192-193.

Court in 1983 when it held that the conditions in the court of origin only need to be substantially similar to those under Japanese law.[186]

China's approach to reciprocity is also evolving. Despite the existence of a 1999 South Korean judgment which enforced a Chinese judgment, Chinese courts twice refused to enforce South Korean judgments on the ground of lack of reciprocity.[187] However, a Chinese court has recently recognised and enforced a South Korean judgment on the basis of the 1999 South Korean decision.[188] In addition, in the draft Judicial Interpretation on Recognition and Enforcement of Foreign judgments, *de jure* reciprocity is adopted.[189] There are still issues that would need to be refined, such as whether reciprocity exists in relation to a specific state in a federated country or in relation to the entire country,[190] but the recent developments signal China's efforts to liberalise its law on foreign judgments.

While reciprocity remains as one of the key hurdles to harmonising the foreign judgment rules in the region, it can be seen that some of the countries are moving away from a strict approach on this requirement. Reciprocity has been said to be on its way to becoming "a paper tiger with trimmed claws".[191] There is reason to believe that this prophesy applies to the countries in this study which currently adopt reciprocity.

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[186] Supreme Court of Japan (7 June 1983) *Minshū* No 37-5, at p 611. English translation available at http://www.courts.go.jp/app/hanrei_en/detail?id=70 accessed on 26 February 2020.
[187] Y Guo, "Country Report: The People's Republic of China", p 57 fn 34.
[188] (2018) Lu 02 Xie Wai Ren No.6" ((2018)鲁 02 协外认 6 号) (English translation available at: https://www.chinajusticeobserver.com/p/2018-lu-02-xie-wai-ren-no-6 accessed on 26 February 2020). See also M Yu and G Du, "Chinese Court First Recognizes a South Korean Judgment: Another Sign of Door Open for Foreign Judgments", 16 April 2019 (https://www.chinajusticeobserver.com/a/chinese-court-first-recognizes-a-south-korean-judgment accessed on 26 February 2020).
[189] Provisions of the Supreme People's Court on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art 18 (draft, October 2017).
[190] S Gong, "The Chinese Court's Enforcement of a U.S. Civil Judgement", 17 April 2018 (https://blogs.law.nyu.edu/transnational/2018/04/the-chinese-courts-enforcement-of-a-u-s-civil-judgement/ accessed on 26 February 2020).
[191] B Elbalti, *supra* n 179, 218.

(b) Enforcement of non-monetary judgments[192]

Under the common law, the underlying doctrine in this area is the doctrine of obligations.[193] The foreign judgment gives rise to a debt which the judgment debtor is obliged to obey. The action on the foreign judgment was traditionally by way of an action for *indebitatus assumpsit*. This action required a monetary sum to be owed to the plaintiff[194] and necessarily precluded the enforcement of non-monetary judgments. The abolition of the old forms of action in the Judicature Act 1873 did not expand the jurisdiction of the courts.[195] This historical backdrop has continued to influence the modern approach to non-monetary judgments: most of the common law countries in the ABLI study do not enforce non-monetary judgments. There are two exceptions. The first is India,[196] where foreign non-monetary judgments may be enforced if they comply with the conditions set out under section 13 of its Civil Procedure Code.[197] The other is Singapore, although it has done so only in recent times. Non-monetary judgments are enforceable under the Choice of Court Agreements Act 2016,[198] which enacts the Hague Convention on Choice of Court Agreements into Singapore law. The recently amended Reciprocal Enforcement of Foreign Judgments Act also allows for the enforcement of non-monetary foreign judgments if "having regard to the

[192] See further, P Sooksripaisarnkit (principal drafter), Principle on Non-Monetary Judgments in A Chong (ed), *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Asian Business Law Institute, forthcoming).
[193] *Godard v Grey* (1870) LR 6 QB 139, 149–150; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159; *Adams v Cape Industries plc* [1990] Ch 433, 513; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484. For criticism of the doctrine, see HL Ho, "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 *International and Comparative Law Quarterly* 443.
[194] RW White, "Enforcement of Foreign Judgments in Equity" (1982) 9 *Sydney Law Review* 630, 631.
[195] White, *ibid.*
[196] N Singh, "Country Report: India", para 39; Sai Ramani Garimella, "India" in *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Anselmo Reyes ed) at p 303; N Chadha and S Narula, "Enforcement of Foreign Judgments: India"*, Getting the Deal Through*, October 2018 (https://gettingthedealthrough.com/area/46/jurisdiction/13/enforcement-foreign-judgments-india/ accessed on 26 February 2020).
[197] The enforcement procedure under section 44A of the Indian Civil Procedure Code, which covers judgments from superior courts of reciprocating territories, only allows for the enforcement of monetary judgments. However, non-monetary judgments from these courts would be entitled to enforcement if they satisfy the requirements ofsection 13. The section 13 requirements also apply to judgments (monetary and non-monetary) from courts of non-gazetted countries.
[198] (Cap 39A, 2017 Rev Ed).

circumstances of the case and the nature of the relief contained in the judgment, [the court] is satisfied that such enforcement would be just and convenient."[199] It may not be "just and convenient" for the Singapore court to enforce a non-monetary judgment if practical difficulties would arise or there are issues of policy and convenience.[200] In this case, the Act allows for the court to order the monetary equivalent of the non-monetary relief.[201]

In contrast to the general common law position, the hybrid law and most of the civil law jurisdictions readily enforce certain types of non-monetary judgments. This is the case under the laws of the Philippines, Japan, Lao, South Korea and Vietnam which enforce foreign non-monetary orders such as those for specific performance and final injunctions.[202]

Why this dichotomy between the common law and civil law approaches to foreign non-monetary judgments? The common law reluctance may partly be explained by the historical baggage still shouldered by the common law countries. There is also the concern that the enforcement of foreign non-monetary orders would require a disproportionate allocation of judicial resources, [203] a concern which applies equally in relation to domestic law where damages are the normal remedy for breach of contract. Further, certain non-monetary orders may infringe on individual rights and enforcement may therefore give rise to public policy concerns. The civilian law attitude can be explained by the fact that specific performance is readily available and is usually the default remedy under domestic law.[204] The doctrine of good faith is

[199] Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 4(3A)(a).
[200] Official Reports- Parliamentary Debates (Hansard), Vol 94, 2 September 2019. (https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-377 accessed on 26 February 2020).
[201] Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 4(3A)(b).
[202] E Aguiling-Pangalangan, "Country Report: The Philippines", para 38; T Kono, "Country Report: Japan", p 106 fn 8; X Chanthala and K Santivong, "Country Report: Lao", p 119 fn 12; KH Suk, "Country Report: South Korea", para 11; NB Du, "Country Report: Vietnam", paras 12-14 and 20.
[203] This was alluded to in *Pro-Swing v Elta* [2006] 2 SCR 612, 2006 SCC 52, paras [24], [46]-[48], [92]-[93]; cf para [99].
[204] Eg, Japanese Civil Code (Amendment Act of No. 78 of 2006), Art 414(1); Korean Civil Act (Act No 471, Feb 22 1958, as amended), Art 389(1).

also incorporated into civilian codes.[205] The civil law jurisdictions are much more comfortable with non-monetary orders compared with the common law jurisdictions.

The continual refusal to enforce foreign non-monetary judgments is out of keeping with modern developments: both the 2005 and 2019 Hague Conventions cover the recognition and enforcement of non-monetary judgments. Indeed, other common law countries have moved away from the traditional stance against enforcement of non-monetary judgments. The Canadian Supreme Court has led the way on this issue: in *Pro-Swing v Elta*,[206] it held that foreign judgments which provide for a non-monetary remedy ought to be enforceable in principle, pursuant to the court's equitable jurisdiction. Criteria to be considered when determining if its discretion should be exercised in favour of enforcing a foreign non-monetary order include whether the terms of the foreign order are clear and specific, and whether enforcement is a good use of judicial resources. [207] Some common law courts elsewhere have since followed suit.[208]

The strategy to circumvent the prohibition is to commence a fresh local action and then plead the foreign non-monetary judgment as raising a *res judicata*. The foreign non-monetary judgment must, of course, fulfil the conditions for recognition. Remedies are strictly speaking for the *lex fori*,[209] so there is a possibility that the court addressed cannot[210] or would not replicate the order obtained in the foreign court. But there is also a chance that it can and would do so, or at least it would order a remedy that is closely analogous to the original foreign order. Given that the effect of directly enforcing the foreign non-

[205] Eg, Philippines Civil Code (Republic Act No. 386), Art 1159; Japanese Civil Code (Amendment Act of No. 78 of 2006), Art 1(2); Korean Civil Act (Act No 471, Feb 22 1958, as amended), Art 2(1); Vietnamese Civil Code (The Law No 91/2015/QH13), Art 3(3).
[206] [2006] 2 SCR 612, 2006 SCC 52. It has been followed in, *inter alia*, *United States v Yemec* 2010 ONCA 414; *Blizzard Entertainment Inc v Simpson* 2012 ONSC 4312; *Van Damme v Gelber* 2013 ONCA 388.
[207] A 4:3 majority held that in its discretion, the order should not be enforced.
[208] *Miller v Gianne* [2007] CILR 18 (Grand Court, Cayman Islands); *Brunei and Bandone v Fidelis* [2008] JRC 152 (Royal Court, Jersey).
[209] *Phrantzes v Argenti* [1960] 2 QB 19.
[210] Because the remedy is unknown under its law.

monetary judgment could likely be replicated using this round-about route, it would be more efficient and cost-effective to allow for direct enforcement. After all, the reasons underpinning the principle of finality in litigation apply equally to monetary and non-monetary judgments.

In the absence of Parliamentary intervention, the courts should be prepared to reform the law. At common law, the jurisdiction to enforce foreign non-monetary orders is founded in equity.[211] Discretion is built into the exercise of a court's equitable jurisdiction. The discretion should, of course, be exercised with reference to principles, but this paper is not the occasion to explore what sort of principles will be appropriate. The point being made here is that concerns about disproportionate use of judicial resources and infringement of individual rights may be catered for under the court's equitable jurisdiction to enforce foreign judgments. Further, this development would still consistent with the underlying doctrine of obligations:

> "The foreign court order is seen as creating a new obligation on the defendant. In the case of a money judgment, this is a debt. In the case of a non-money judgment, it is a different sort of obligation. A court enforcing a foreign judgment is enforcing the obligation created by that judgment."[212]

It is suggested that policy and principle call for a reform of the law of the common law countries which still refuse to enforce foreign non-monetary judgments.

6. Conclusion to Section C

The countries in the region share a number of principles, in which deviations are in terms of interpretation rather than core conception. A handful of the deviations could be characterised as being not

[211] White, *supra* n 194.
[212] [2006] 2 SCR 612, 2006 SCC 52, [89] *per* McLachlin CJ.

insubstantial,[213] but arguably, there is less of an obstacle given that there is at least a shared base on which to move forward. The two main differences are the requirement of reciprocity, which the civil law countries adopt but not the common law countries under the common law rules, and the status of foreign non-monetary judgments, which are enforceable in most of the civil law countries but not in most of the common law countries. On the former, there are promising signs that an attenuated form of reciprocity is gaining popularity. On the latter, there are again encouraging developments which signal that the traditional common law position against the enforcement of non-monetary foreign judgments will be rendered obsolete in the near future. There are of course two outlying countries: Indonesia and Thailand. However, the position under Thai law appears to be equivocal. Under Indonesian law, foreign judgments of a declaratory or constitutive nature are arguably entitled to recognition. At the very least, a foreign judgment may be tendered as evidence in local actions and is thus not completely bereft of any legal effect in both jurisdictions. Thus, overall, it can be seen that from a purely legal point of view harmonisation of the recognition and enforcement of foreign judgment rules is feasible.

Whether harmonisation happens however is not down to purely legal factors. The next section explores the non-legal factors that may have an impact on harmonization efforts.

D. Whether harmonisation is feasible: non-legal reasons

Harmonisation of foreign judgment rules have elicited more interest in some countries compared to others. Litigants in cross-border disputes naturally gravitate towards systems with more mature legal systems. Inevitably, some courts will end up being net judgment exporters and others, net judgment importers. Judgment exporters, which stand to gain the most from reform and harmonisation are unsurprisingly the jurisdictions which are actively engaging with this topic. For example, Singapore

[213] In particular, in respect to the criteria by which a foreign court is adjudged to have international jurisdiction of the foreign court and the operation of fraud as a ground for refusal.

established the Singapore International Commercial Court ("SICC") on 5 January 2015, following which it swiftly signed up to the HCCCA less than three months later.[214] The SICC aims to attract litigation with little connection to Singapore and cement Singapore's reputation as an international dispute resolution hub. One can anticipate that many of the SICC's judgments will be rendered against judgment debtors with assets located outside of Singapore. China has set up two international commercial courts, one each in Shenzhen and Xi'an. The Chinese International Commercial Courts were primarily set up to deal with disputes arising from the BRI. China has also signed up to the HCCCA, although, unlike Singapore, it has yet to enact it into its law. It appears that Australia will shortly enact the HCCCA into its law.[215] There have been calls for Australia to establish an international commercial court too.[216]

In contrast, judgment importer countries may lack the impetus to reform the law. The benefits of harmonisation, however, are not confined to judgment exporter countries. Harmonisation would also benefit net judgment importer countries in myriad ways. It would benefit countries whose laws in this area are still undeveloped by creating certainty and predictability. It would encourage others to do business with local citizens, as the former would have the confidence that any judgment resulting from a dispute, wherever procured, could be enforceable against the local citizen's assets. This would have a consequential positive economic effect on that country.

[214] On 25 March 2015. The HCCCA was enacted into Singapore law by the Choice of Court Agreements Act 2016, which entered into force on 1 October 2016.
[215] A Bell, "Country Report: Australia", para 33. See also https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ChoiceofCourts/Report_166/section?id=committees%2Freportjnt%2F024013%2F24043 accessed on 26 February 2020.
[216] The Honourable Chief Justice Marilyn Warren and the Honourable Justice Clyde Croft, "An International Commercial Court for Australia: Looking beyond the New York Convention", Paper presented at the Commercial CPD Seminar Series, Melbourne, 13 April 2016. Cf The Honourable Justice Andrew Bell, "An Australian International Commercial Court- Not a Bad Idea or What a Bad Idea?", Paper presented at the 2019 ABA Biennial International Conference, Singapore, 12 July 2019 (http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190712.pdf accessed on 26 February 2020).

Another impediment to harmonisation effects may be a disparity in judiciary standards. The maturity of legal systems vary in the region, hence judicial standards are not consistent from country to country. There may be doubts on the part of a court in one jurisdiction as to whether the quality of justice of a court in another jurisdiction meets its standards. The Hague Judgments Convention has an "opt out" bilateralisation provision to cater to this concern.[217] Political allegiances may also be difficult to shake off- bilateral treaties covering foreign judgments tend to be signed between countries with the same political background. Reciprocal statutory enforcement schemes also generally cover countries sharing the same legal tradition.

The concern about the quality of justice in the court of origin, however, can be dealt with by invoking the public policy ground for refusal or, alternatively, depending on the circumstances, the breach of natural justice defence. On the point of political allegiances, it may be observed that the judiciary in the region are making concerted efforts to reach out to one another. The Nanning Declaration is a prominent example of this effort. In the specific context of the recognition and enforcement of foreign judgments, the Chinese and Singapore courts have signed a Memorandum of Guidance ("MOG") on the recognition and enforcement of money judgments in commercial cases with each other.[218] A similar MOG was recently signed between the Myanmarese and Singapore courts.[219] The Supreme Court of Victoria (Commercial Court) and the Singapore International Commercial Court have also exchanged Letters on

[217] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Art 29.
[218] Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases, 31 August 2018 (https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/spc-mog-english-version---signed.pdf accessed on 26 February 2020). The modern practice of court-to-court memoranda appears to originate from the Dubai International Financial Centre Courts, which has actively concluded MOGs and MOUs on various issues with other courts. The Standing International Forum of Commercial Courts (SIFoCC) has also launched a Multilateral Memorandum on Enforcement of Commercial Judgments for Money (https://www.sifocc.org/wp-content/uploads/2019/06/Multilateral-Memorandum-on-Enforcement.pdf accessed on 26 February 2020).
[219] Memorandum of Guidance as to Enforcement of Money Judgments between the Supreme Court of the Union, Republic of the Union of Myanmar and the Supreme Court of the Republic of Singapore, 10 February 2020 (https://www.supremecourt.gov.sg/docs/default-source/default-document-library/memorandum-of-guidance-as-to-enforcement-of-money-judgments6968352b60bb48f9be9766d2642a6684.pdf accessed on 26 February 2020).

the cross-border enforcement of money judgments.[220] The Memoranda of Guidance and Exchange of Letters clarifies the requirements to be fulfilled for the cross-border enforcement of money judgments in each other's jurisdictions. They are not binding. To that end, they may be thought to be not of much practical utility. However, the MOG between the Singapore and Chinese courts is significant because it confirms the earlier case of *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd*[221] that there is reciprocity between China and Singapore from the point of view of Chinese law. This is useful, as not all Chinese courts may take the same view on the existence of reciprocal relations between China and a particular country.[222] The MOG between the Singapore and Myanmarese courts also helpfully clarifies certain points of Myanmarese law on foreign judgments. Further, the intangible value of such agreements should not be discounted; they do much to engender confidence in the enforceability of the judgments of a signatory court in the other jurisdiction.

E. The route to harmonisation

There are several routes by which harmonisation could be achieved. These routes are not mutually exclusive, although perhaps some are more achievable than others.

Bilateral treaties could be negotiated and concluded between countries, and indeed, there are a number in place between the countries in the ABLI project.[223] However, concluding bilateral treaties takes time. The specific conditions which apply for each treaty which a country signs is unlikely to be identical. This

[220] Exchange of Letters on cross-border enforcement of money judgments between Singapore International Commercial Court and Supreme Court of Victoria (Commercial Court), 20 March 2017 and 24 March 2017 (https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc-and-supct-of-victoria-200320171fb63033f22f6eceb9b0ff0000fcc945.pdf) and (https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/here09b63033f22f6eceb9b0ff0000fcc945.pdf) (both accessed on 26 February 2020).
[221] *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd* [2018] 4 CMCLR 17; (2016) SU 01 XIE WAI REN No.3 (2016 苏 01 协外认 3 号).
[222] See R Garnett, "Increasing Co-operation between Australia and China in the Recognition and Enforcement of Judgments" (2018) 19 *Melbourne Journal of International Law* 1, 7-8.
[223] There are bilateral treaties which cover foreign judgments between Cambodia and Vietnam, China and Lao PDR, China and Vietnam, and Lao PDR and Vietnam.

makes the law unnecessarily convoluted as different rules end up applying depending on which country's judgment is at issue.[224]

Another possibility would be for each country to adopt statutory enforcement schemes which provide for an easier enforcement route for judgments from countries who agree to reciprocate in kind, like those already in existence in the common law countries. This would have the advantage over bilateral treaties in having the same set of rules apply, at least to judgments from the "reciprocating" countries. Another advantage is that the conferment of status as one of the "reciprocating" countries could also be done without a treaty in place between the relevant countries thereby making it an easier process, albeit some degree of political negotiation and engagement would of course be required.

However, the experience in the region so far with both bilateral treaties and statutory enforcement schemes in favour of judgments from "reciprocating" countries has been that they are largely confined to countries with similar legal traditions and/or political allies. Success in one-to-one negotiations between countries without such relationships may be less assured. A bigger negotiating table may persuade countries to be more accommodating as the benefits of a more comprehensive agreement would be greater. An ASEAN-wide or ASEAN plus major trade partners multilateral treaty on the recognition and enforcement of foreign judgments is thus another option. Indeed, there have long been calls for the former.[225] For countries which insist on reciprocity, the requirement is obviously satisfied if there is a multilateral treaty in place. One could consider the European Union, which has had considerable success in harmonising its private international law rules, as a template for ASEAN. In fact, ASEAN has borrowed certain features from the EU. In the ASEAN Charter, ASEAN has a legal personality similar to that of the

[224] Eg, the various treaties which China has signed on the recognition and enforcement of foreign judgments. See generally, Y Guo, "Country Report: The People's Republic of China".
[225] P Koh, "Foreign Judgments in ASEAN- A Proposal" (1996) 45 *International and Comparative Law Quarterly* 844; C Ong, *Cross-border litigation within ASEAN: The Prospects for Harmonisation of Civil and Commercial Litigation* (1997, Kluwer Law International).

EU. The three pillars of the ASEAN Community- the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community- also call to mind the three pillars of the EU as introduced by the Treaty of Maastricht (now superseded by the Treaty of Lisbon). However, there are significant differences between the two institutions which mean that the experience of the EU may not be easily transferable to ASEAN. For one, the ASEAN model is an inter-governmental one as compared with the EU which is a supranational organisation with its own institutions. ASEAN's mode of decision making is thus very different from the EU mode. The cultural and political backdrop of ASEAN Member States also spans a large spectrum- from religious to secular systems, and from democratic to communist to systems controlled by the army. While it would be too simplistic to characterise the EU as a homogeneous region versus ASEAN as a heterogeneous region, it would probably be fair to say that the EU Member States are more homogeneous compared to the ASEAN Member States. That said, there is greater awareness within ASEAN of the importance of harmonising business laws in the region to better facilitate cross-border trade given the establishment of the AEC.[226] The AEC Blueprint 2025 contains ambitious plans for closer integration of not only the economy but also other aspects of ASEAN.[227] This could form the basis for sparking the call to harmonise the foreign judgment rules in the region.

In connection with this, countries in the region could be encouraged to sign up to the Hague Convention on Choice of Court Agreements, and/or the Hague Judgments Convention. This would be an efficient option as no time need be spent on deliberations. However, it has to be considered if the provisions of these Conventions would be acceptable.

[226] Eg, the ASEAN Agreement on Electronic Commerce was recently concluded.
[227] The ASEAN Secretariat, ASEAN Economic Community Blueprint 2025 (2015) (https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf accessed on 26 February 2020).

Of the two Conventions, the HCCCA stands a better chance of adoption in the region.[228] It centres on the idea of respecting party autonomy in relation to choice of court agreements. It is currently in force in thirty countries to date. As party autonomy in relation to contract is widely accepted in the region, [229] the odds are that countries would be receptive to a concerted push being made for this option. However, the HCCCA is limited in scope. Adopting only the HCCCA would fall short of the objective of harmonising the foreign judgment rules in the region as it would leave a large swathe of the law unharmonised. That swathe is covered by the Hague Judgments Convention.

When one considers the provisions of the Hague Judgments Convention, it can be seen that they accommodate many of the features of the laws of the countries within the ABLI project. The grounds of refusal set out in Article 7, in particular, coheres with the commonly accepted grounds. The idea of natural justice under Article 7(1)(a) includes not only the requirement of timely notice that is accepted across board, but also allows refusal on grounds of service which does not comply with the fundamental principles of the requested state. The latter, as seen above, is a requirement under some of the civil law countries within the study. Fraud is not confined to procedural fraud,[230] as is the case under the HCCCA,[231] but includes substantive fraud and is thus expansive enough to cover all iterations of the concept. The content of public policy is left for each Contracting State to determine, albeit the Convention only allows refusal when recognition or enforcement of the foreign judgment would be "manifestly incompatible" with the public policy of the requested State.[232] Relatedly, Article 10 explicitly makes it clear that the requested court may refuse to recognise or enforce a judgment awarding punitive or exemplary damages,

[228] It has been enacted into Singapore law. China has signed the Convention and reportedly Australia will enact it into its law soon. See *infra*, text to nn 214-215.
[229] See, *eg*, see Y Bun, "Country Report: Cambodia", paras 9–11; Minn NO, "Country Report: Myanmar", para 2; E Aguiling-Pangalangan, "Country Report: Republic of the Philippines", para 40; KH Suk, "Country Report: South Korea", para 28.
[230] Hague Judgments Convention, Art 7(1)(b).
[231] HCCCA, Art 9(d).
[232] Hague Judgments Convention, Art 7(1)(c).

remedies which many of the countries in the project consider to be anathema. Courts are allowed to prefer their own judgments over a conflicting foreign judgment, irrespective of timing,[233] as is the preferred position of the countries in the project which deal with this issue. In fact, Article 7(2) even accommodates countries for whom the seising of an action by a local court would automatically lead to the impotence of a foreign judgment.[234]

The idea of when a foreign judgment should be given effect in the requested state, which is commensurate with the discussion above of when a foreign judgment is "final", should brook little objection.[235] Non-monetary judgments are enforceable under the Convention but not under most of the common law countries of the study. Nevertheless, this should create not create too big a difficulty as the traditional common law position is ripe for overturning. The Convention also excludes from its scope controversial issues, such as judgments on intellectual property, whose inclusion may have given pause to many countries.[236] In addition, the opt-out bilateralisation clause[237] should also give comfort to countries who are wary of opening their doors to judgments from any and every Contracting State.

Where an issue may arise is in relation to the list of indirect jurisdiction grounds set out in Article 5. Article 5 contains grounds which are not currently adopted across board. As far as the common law countries are concerned, presence or residence and submission (whether by way of agreement or by way of conduct before the foreign court) are the accepted bases of international jurisdiction of the foreign court. Article 5, however, goes beyond setting out bases focused on a connection between the defendant and the foreign court and submission by the defendant. It also contains bases based on a connection between the claim and the state of origin. While these may be considered an appropriate connection for the

[233] Hague Judgments Convention, Art 7(1)(e).
[234] However, Art 7(2) sets two pre-conditions i.e. that the local court was seised before the court of origin and there is a close connection between the dispute and the local court.
[235] Hague Judgments Convention, Arts 4(3)-4(4).
[236] The list of excluded matters can be found in Art 2(1).
[237] Hague Judgments Convention, Art 29.

assumption of jurisdiction by a court in relation to an action before it, it is far from certain that it would embrace the same grounds to assess the international jurisdiction of the foreign court.[238] In addition, for some of the countries in the study, it is difficult to tell whether the extensive bases of indirect jurisdiction set out in Article 5 would be acceptable, given the lack of clarity on this point under domestic laws.[239]

While the Convention is the fruit of compromise between countries with varied backgrounds, and attempts to balance both common law and civil law concerns, it is not a given that countries in the region would be willing to sign up to it. This could be due to concerns over its substantive provisions, in particular, its "laundry list"[240] of indirect jurisdiction bases. In addition, one cannot discount non-legal considerations. Its recent provenance and hence consequential lack of familiarity would add to the reluctance to be the first few on board.[241] There may also be something to be said about countries feeling more of a sense of ownership and commitment towards a text which has been closely negotiated amongst a relatively small handful of countries, rather than towards a global text where the discussion and decisions are inevitably driven and dominated by countries with more economic and political powers. If a multilateral convention is to provide the route to harmonisation, perhaps an ASEAN or ASEAN plus major trade partners effort would yield more impactful results.

Outside of formal means of harmonisation as above, one should not discount an "organic" movement towards harmonisation. This is a more piece-meal and laborious process, and would unlikely result in complete harmonisation. Portability of judgments in the region would of course be ensured if there were to be total harmonisation, and total harmonisation would be the utopian ideal, but something less than that would also probably be satisfactory. What is needed are clearer laws and a more liberal approach to

[238] Notably, the common law does not adopt symmetry between the rules on jurisdiction and the rules on foreign judgments. See *Schibsby v Westenholz* (1870) LR 6 QB 155.
[239] Eg, There is little guidance on this issue as a matter of Cambodian and Lao PDR laws.
[240] Apparently so-called by some: see D Goddard, "The Judgments Convention- The Current State of Play" (2019) 29 *Duke Journal of Comparative & International Law* 473, 483.
[241] To date, only Uruguay and Ukraine have signed it. The Convention is not yet in force.

foreign judgments overall to secure the portability of judgments across borders. To that end, organic harmonisation could end up being the more realistic route.

In fact, one can already discern signs of this happening.[242] The increasing liberalisation of attitude towards reciprocity, as detailed above, is one example of organic convergence of the law. Attitudes towards the enforcement of non-monetary judgments are also slowly but surely changing in the common law world. There are signs that the concept of fraud and what forms can be raised in relation to foreign judgments are evolving.

For convergence to occur organically, there has to be awareness of how other countries deal with specific issues. This may be through the conclusion of Memoranda of Guidance or Memoranda of Understanding between countries or between courts of countries. Further, scholarly work like the ABLI Foreign Judgments Project, if properly disseminated, will contribute to understanding developments elsewhere. The persistence of litigants is also a factor: for example, despite previous authorities against the enforceability of South Korean judgments in the Chinese courts, the third time turned out to be a charm.[243]

F. Conclusion

The issue of harmonising the recognition and enforcement of foreign judgment rules in Asia essentially boils down to three questions. Should it be done? Can it be done? Will it be done?

The answer to the first question is obvious. There are micro and macro level benefits should harmonisation take place. At the micro level, litigants will obtain greater access to justice and transaction costs will be reduced. At the macro level, laws will gain in clarity, countries will attract more trade and

[242] See further, B Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments" (2014) 16 *Japanese Yearbook of Private International Law* 264.
[243] *Supra*, text to nn 187-188.

courts will attract more international litigation. Countries which may assume they have little to gain through any harmonisation endeavour would also reap its benefits.

Can it be done? If the question is framed with purely legal considerations in mind, the answer is arguably yes. The comparison of the laws on foreign judgments has shown that the countries in the region have much more in common than there are differences. There is sufficient common ground for the seeds of harmonisation to be planted and flourish. Seemingly intractable requirements such as the requirement of reciprocity is, on closer perusal, not so intractable after all.

The last question can only be answered by those with crystal balls. The *sine qua non* will of course be political will. What can be said is that the economic developments in the region give rise to a promising environment in which impetus could be created for harmonisation efforts to commence in earnest.