

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of
Law

Yong Pung How School of Law

9-2020

General principle

Adeline CHONG

Singapore Management University, adelinechong@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), and the [Comparative and Foreign Law Commons](#)

Citation

CHONG, Adeline. General principle. (2020). *Asian principles for the recognition and enforcement of foreign judgments*. 1-17.

Available at: https://ink.library.smu.edu.sg/sol_research/3193

This Book Chapter is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

This book chapter is published in 'Asian Principles for the recognition and enforcement of foreign judgments' published by Asian Business Law Institute (ABLI).

The full book is available at:
<https://info.sal.org.sg/abli/ebooks/recognition-enforcement-foreign-judgments/>

ABLI Legal Convergence Series

**ASIAN PRINCIPLES FOR THE
RECOGNITION
AND
ENFORCEMENT
OF
FOREIGN JUDGMENTS**

Project Lead and Editor
Associate Professor Adeline Chong



ASIAN BUSINESS LAW INSTITUTE

2020

About the Asian Business Law Institute

The Asian Business Law Institute is an Institute based in Singapore that initiates, conducts and facilitates research and produces authoritative texts with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws.

DISCLAIMER

Views expressed by the Lead Authors are not necessarily those of the Editor or the Asian Business Law Institute. Whilst every effort has been made to ensure that the information contained in this work is correct, the Lead Authors, Editor and the Asian Business Law Institute disclaim all liability and responsibility for any error or omission in this publication, and in respect of anything, or the consequences of anything, done or omitted to be done by any person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

COPYRIGHT

© 2020 Asian Business Law Institute and Lead Authors.

Published by the Asian Business Law Institute.

All rights reserved. No part of this publication may be reproduced, stored in any retrieval system, or transmitted, in any form or by any means, whether electronic or mechanical, including photocopying and recording, without the permission of the copyright holder.

All enquiries seeking such permission should be addressed to:

The Secretariat
Asian Business Law Institute
1 Supreme Court Lane
Level 6
Singapore 178879
Tel No: (+65) 6332 4388
E-mail: info@abli.asia

ISBN 978-981-14-7201-5



(E-book)

ISBN 978-981-14-7202-2



(Print)

Principle 1

General Principle

As a general proposition and subject to these Principles, a foreign judgment in a commercial matter is entitled to recognition and enforcement.

Lead Author

Dr Adeline Chong*

Commentary

- a. **Meaning of “judgment”.** For the purposes of these Principles, a judgment means a decision on the merits¹ given by a court or tribunal. Judgments may be given different labels such as decisions, orders or decrees.²
- b. **“Commercial matter”.** These Principles cover the recognition and enforcement of a foreign judgment in a commercial matter. These Principles do not cover judgments on cross-border family matters, nor judgments on public law matters such as judgments relating to administrative matters or matters where a foreign State is acting in the exercise of its sovereign capacity.³

* Associate Professor, Singapore Management University and Project Lead of the Asian Business Law Institute’s Foreign Judgments Project.

1 See [para \(g\)](#) below. *Cf.* [para \(h\)](#) below.

2 Convention of 30 June 2005 on Choice of Court Agreements Art 4(1); Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters Art 3(1)(b); and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) Art 2(a).

3 Judgments on excluded matters may be referred to where these establish a point of general principle.

c. Intellectual property matters are commercial in nature. However, they raise sensitive issues owing to their territorial nature. These Principles therefore do not purport specifically to cover judgments on intellectual property matters, such as judgments on the validity or ownership of intellectual property rights. However, to the extent that an intellectual property right is itself not the thrust of the claim whose judgment is sought to be recognised and enforced, a foreign judgment would be subject to these Principles. For example, judgments on agreements dealing with intellectual property rights, such as a licensing contract or an assignment of an intellectual property right, do not hinge on the intellectual property right and its special nature. As such, these Principles are apt to cover judgments where the fact that the subject-matter is an intellectual property right is incidental.

d. Insolvency and other analogous matters are also excluded from the scope of these Principles. In *Rubin v Eurofinance SA*,⁴ the UK Supreme Court held that judgments in insolvency proceedings were to be covered by the traditional rules on the recognition and enforcement of foreign judgments; no special rules were required. However, a number of instruments on foreign judgments exclude judgments in insolvency or other analogous proceedings from their scope.⁵ Insolvency law reflects a country's economic, social and public policies and is therefore another sensitive area. Being collective proceedings, insolvency proceedings are different from a generic civil suit between private parties. It is for these reasons that insolvency and other analogous matters, such as a company being put into administration, are excluded from the scope of these Principles. Nevertheless, these Principles are appropriate for certain insolvency-related judgments where the basis for the action is the general rules of civil law. To explain the difference: a judgment on fraudulent preferences, being an action based on insolvency law, would not be covered by these Principles. However, a judgment on an action brought by, or brought against, an insolvency office-holder in relation to a contract entered into by the insolvent person or entity prior to the insolvency would fall within the scope of these Principles if the action is based on contract law.

4 [2012] UKSC 46; [2013] 1 AC 236 (24 October 2012) (Supreme Court of the United Kingdom).

5 Convention of 30 June 2005 on Choice of Court Agreements Art 2(2)(e); Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters Art 2(1)(e); and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) Art 1(2)(b).

e. **Recognition versus enforcement.** Recognition generally involves giving legal effect to a judgment whereby the judgment is considered to have conclusively determined the rights and obligations of the parties to the litigation. Enforcement involves giving positive relief to a judgment and entails use of the procedural mechanisms of the court addressed to ensure compliance with a judgment. Recognition can be defined broadly as including *all* legal effects of a judgment; this definition would include the enforceability of a judgment. However, in these Principles, recognition is defined more narrowly: it covers all aspects of a judgment except those relating to its enforceability.⁶ In other words, recognition and enforcement are treated as two separate concepts. This is to better differentiate between different types of judgments.

f. Some judgments, such as declaratory judgments or judgments dismissing a claim or counterclaim, are not capable of enforcement. Nevertheless, if it is entitled to recognition, the foreign judgment would raise a *res judicata* (a matter already judged) over the issue of substance which the court of origin had decided, thereby preventing re-litigation on the merits over that same issue between the same parties. That is, recognition has a preclusive effect. For example, if a defendant has been absolved from liability by the court in country X, that judgment can be raised as a defence in a fresh claim over the same matter which the plaintiff may attempt to pursue in a different court.⁷ The defendant, in this instance, would be seeking the recognition, as opposed to the enforcement, of the judgment of the court of country X.

g. **“On the merits”.** The preclusive effect of a foreign judgment extends not just to substantive issues but also procedural issues, at least at common law. While a foreign judgment must be “on the merits”, an expansive definition of “on the merits” is adopted, in the sense that “a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual

6 Francisco J Garcimartín Alférez and Geneviève Saumier, *Twenty-Second Session Recognition and Enforcement of Foreign Judgments 18 June–2 July 2019, Judgments Convention: Revised Draft Explanatory Report* (December 2018) at para 105.

7 This is possible at common law because the doctrine of merger (*transit in rem judicatam*), where the cause of action is said to be merged in the judgment thereby preventing the successful party from suing the same counter-party again on the same cause of action, does not apply to foreign judgments. See also [Principle 11 at paras \(q\)–\(x\)](#).

situation concerned”.⁸ In *Desert Sun Loan Corp v Hill*,⁹ it was accepted that an estoppel on the issue of whether the defendant had authorised an attorney to accept service on his behalf in foreign proceedings could arise. This was so despite the issue being a procedural one, provided “there was express submission of the issue in question to the foreign court, and the specific issue of fact was raised before and decided, finally and not just provisionally, by the court.”¹⁰

h. India and Myanmar’s Civil Procedure Codes require that the foreign judgment must have been “given on the merits of the case.”¹¹ Both countries adopt a very specific interpretation of the “on the merits” requirement. In *A N Abdul Rahiman v J M Mahomed Ali Rowther*,¹² the High Court at Rangoon held that:

A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff’s case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*, a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.

i. The Indian courts have noted that the requirement that the foreign judgment must be given on the merits of the case, “is a departure from the

8 *D S V Silo-Und Verwaltungsgesellschaft mbH v Owners of The Sennar (“The Sennar (No 2)”)* [1985] 1 WLR 490 (1 March 1985) (House of Lords of the United Kingdom) at 494 and 499, as cited by *Dicey, Morris and Collins: The Conflict of Laws* (Lord Collins of Mapesbury and Professor Jonathan Harris gen eds) (Sweet & Maxwell, 15th Ed, 2012) at para 14-035.

9 [1996] 2 All ER 847 (15 February 1996) (Court of Appeal of England and Wales).

10 *Dicey, Morris and Collins: The Conflict of Laws* (Lord Collins of Mapesbury and Professor Jonathan Harris gen eds) (Sweet & Maxwell, 15th Ed, 2012) at para 14-035, citing *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (Court of Appeal of England and Wales).

11 Civil Procedure Code, 1908 (Act No 5 of 1908) (India) s 13(b); and Civil Procedure Code (1908) (Myanmar) s 13(b).

12 (1928) 6 ILR 552 (16 May 1928) (High Court at Rangoon, Myanmar) at 557. In this decision, the High Court held that a default judgment rendered by the (then) Supreme Court of the Straits Settlements was not “on the merits” and thus was not enforceable. This decision was cited with approval by the Supreme Court of India in *International Woollen Mills v Standard Wool (U.K.) Ltd* (2001) 5 SCC 265; AIR 2001 SC 2134 (25 April 2001) (Supreme Court of India).

English rule”.¹³ It is also a departure from the approach taken by the other common law countries of our study on the “merits” requirement as well as the civil law and hybrid law jurisdictions.

j. This interpretation of “on the merits” does not, however, require that the judgment is rendered after a full trial of the issues through pleadings, presentation of evidence and arguments by both parties.¹⁴ Rather, the foreign judgment, however brief, must be based on a consideration of evidence adduced by the plaintiff.¹⁵ A summary judgment where the court of origin dismisses the defendant’s application for leave to defend the suit after considering the defendant’s submission is still a judgment “on the merits” even though no evidence of the plaintiff is required due to lack of a triable issue.¹⁶ Whether the foreign judgment is “on the merits” must be apparent from the judgment itself, that is, it must be clear from the judgment that the court of origin applied its mind to the matter and considered the evidence made available to it.¹⁷

k. **General.** Apart from Indonesia and Thailand,¹⁸ all the countries within the scope of our study clearly accept that foreign judgments are, in principle, entitled to recognition and enforcement.

13 *R.E. Mahomed Kassim and Co. v Seeni Pakir Bin Ahmed and Ors* AIR 1927 Mad 265; 50 Mad 261; (1927) 52 MLJ 240 (1 September 1926) (Madras High Court, India) at [16] (per Venkatasubba Rao, J), cited with approval in *International Woollen Mills v Standard Wool (U.K.) Ltd* (2001) 5 SCC 265; AIR 2001 SC 2134 (25 April 2001) (Supreme Court of India).

14 This was the holding in *Chintamani Padhan v Paika Samal* AIR 1956 Orissa 136 (17 February 1956) (Orissa High Court, India) which was overruled in *Trilochan Choudhury v Dayanidhi Patra* AIR 1961 Orissa 158 (1 December 1960) (Orissa High Court, India) at [13]. See *International Woollen Mills v Standard Wool (U.K.) Ltd* (2001) 5 SCC 265; AIR 2001 SC 2134 (25 April 2001) (Supreme Court of India).

15 *Trilochan Choudhury v Dayanidhi Patra* AIR 1961 Orissa 158 (1 December 1960) (Orissa High Court, India) at [8], cited with approval in *International Woollen Mills v Standard Wool (U.K.) Ltd* (2001) 5 SCC 265; AIR 2001 SC 2134 (25 April 2001) (Supreme Court of India).

16 *Mr Navin Khilnani v Mashreq Bank Psc* 146 (2008) DLT 134 (25 May 2006) (Delhi High Court, India) at [17].

17 *Govindan Asari Kesavan Asari v Sankaran Asari Balakrishnan Asari* AIR 1958 Kerala 203 (11 October 1957) (Kerala High Court, India). See also *Algemene Bank Nederland Nv v Satish Dayalal Choksi* AIR 1990 Bom 170 (7 December 1989) (Bombay High Court, India) at [28]. Both cases are quoted with approval by the Supreme Court of India in *International Woollen Mills v Standard Wool (U.K.) Ltd* (2001) 5 SCC 265; AIR 2001 SC 2134 (25 April 2001) (Supreme Court of India).

18 See paras (zc)–(zg) below.

l. Various methods are adopted to give effect to foreign judgments: via international conventions, bilateral agreements and statutory schemes, among others. Some of the countries will only enforce a foreign judgment if an international convention or agreement, concerning the recognition and enforcement of each other's judgments, is in place between the country of the court addressed and the country of the court of origin.¹⁹

m. **Aims.** The portability of judgments across borders achieves several objectives. It facilitates international trade and business. This is because transaction costs due to the legal risks involved in doing cross-border business are lowered. Litigants also obtain greater access to justice. The successful party does not end up with a mere paper judgment and thus does not need to pursue duplicative proceedings in another jurisdiction. The globalisation of trade and prevalent movement of persons and assets across borders requires that judgments given in one country can be enforced against assets in another country.²⁰

n. **Recognition and enforcement by way of international conventions and bilateral agreements.** The Convention of 30 June 2005 on Choice of Court Agreements (**Hague Choice of Court Agreements Convention**) entered into force on 1 October 2015. Under the Convention, the Contracting States²¹ agree that, subject to certain defences, judgments from a court of a Contracting State, where that court was the chosen court designated in an exclusive choice of court agreement concluded in a civil or commercial matter, must be recognised and enforced. Singapore enacted the Convention into its

19 See Principle 5 at paras (k)–(m).

20 *First Property Holdings Pte Ltd v Nyunt* [2019] NSWSC 249 (13 March 2019) (Supreme Court of New South Wales, Australia) at [8].

21 Currently, Denmark, the European Union (excluding Denmark), Mexico, Montenegro, Singapore and the United Kingdom (as of 1 May 2020). According to the terms of the Withdrawal Agreement between the United Kingdom and the European Union, European Union law, which includes the Hague Choice of Court Agreements Convention, will continue to apply to and in the United Kingdom during the transition period. The United Kingdom has notified the Depositary that it intends to deposit a new instrument of accession prior to the termination of the transition period, which ends on 31 December 2020. Ministry of Foreign Affairs, Kingdom of the Netherlands The Hague, "Convention of 30 June 2005 on Choice of Court Agreements (The Hague, 30 June 2005): Notification pursuant to Article 34 of the Convention" (31 January 2020) <https://treatydatabase.overheid.nl/en/Treaty/Details/011343/011343_Notificaties_23.pdf> (accessed 1 May 2020)

law in 2016.²² China signed the Convention on 12 September 2017,²³ while Australia is purportedly taking steps to implement the Convention into its law.²⁴

o. Recently, delegates of the 22nd Diplomatic Session of the Hague Conference adopted the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (**Hague Judgments Convention**).²⁵ The Convention is complementary to the Hague Choice of Court Agreements Convention and covers situations where the parties have not agreed on a choice of court agreement. The Hague Judgments Convention contains bases for recognition and enforcement of foreign judgments and sole grounds on which foreign judgments may be refused recognition and enforcement. Unlike the Hague Choice of Court Agreements Convention, the Hague Judgments Convention provides for an opt-out bilateralisation mechanism where a Contracting State may avoid establishing a treaty relationship with a specific Contracting State(s) to the Convention.²⁶ To-date, it has been signed by Uruguay and Ukraine, and is yet to come into force.

p. The countries within the scope of our study may also have ratified or acceded to international conventions on a specific subject-matter which contain provisions dealing with the recognition and enforcement of foreign judgments falling within the scope of the specific convention. For example, Australia, Brunei, Cambodia, China, India, Indonesia, Japan, Malaysia,

22 Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) (Singapore). See Adeline Chong, “Country Report: Singapore” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 29–37.

23 Yujun Guo, “Country Report: The People’s Republic of China” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 34.

24 Andrew Bell, “Country Report: Australia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 33. See also Michael Douglas, “Choice of Court Agreements under an International Civil Law Act” (2018) 34(3) *Journal of Contract Law* 186; and Joint Standing Committee on Treaties, *Report 166: Implementation Procedures for Airworthiness-USA; Convention on Choice of Courts-accession; GATT Schedule of Concessions-amendment; Radio Regulations-partical [sic] revision* (Parliament of the Commonwealth of Australia, November 2016) at para 3.15.

25 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters preamble.

26 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters Art 29.

Myanmar, the Philippines, Singapore, South Korea, Thailand and Vietnam²⁷ have each acceded to the International Convention on Civil Liability for Oil Pollution Damage 1969 (either the original text or the amended 1992 text) which provides a compensation mechanism for persons who suffer oil pollution damage resulting from maritime casualties involving oil tankers. This Convention has an article providing for the recognition and enforcement of judgments from courts of Contracting States.²⁸

q. A number of countries in our study have signed bilateral agreements which provide for the recognition and enforcement of each other's judgments if the judgment fulfils conditions spelled out in the relevant agreement.²⁹ For the purposes of these Principles, we have focussed on the bilateral agreements that the countries in our study have executed with one another and which cover commercial matters. That is, the agreements that Cambodia, China, Lao and Vietnam have entered with one or more of each other.³⁰ These countries are all part of China's *Belt and Road Initiative*.

27 That is, all countries of our study save for landlocked Lao. See Yujun Guo, "Country Report: The People's Republic of China" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 4.

28 International Convention on Civil Liability for Oil Pollution Damage 1969 Art 10.

29 Namely, (1) **Cambodia and Vietnam** (see the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Youdy Bun, "Country Report: Cambodia" at paras 25–27; Bích Ngọc Du, "Country Report: Socialist Republic of Vietnam" at paras 5–6), (2) **China and Lao** (see the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Yujun Guo, "Country Report: The People's Republic of China" at paras 2–5; Xaynari Chanthala and Kongphanh Santivong, "Country Report: Lao" at paras 2–3 and 9), (3) **China and Vietnam** (see the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Yujun Guo, "Country Report: The People's Republic of China" at paras 2–5; Bích Ngọc Du, "Country Report: Socialist Republic of Vietnam" at para 7), and (4) **Lao and Vietnam** (see the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Xaynari Chanthala and Kongphanh Santivong, "Country Report: Lao" at paras 2–3 and 9; Bích Ngọc Du, "Country Report: Socialist Republic of Vietnam" at para 8).

30 (1) **Cambodia–Vietnam**: Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam (signed 21 January 2013) (translated) (កិច្ចព្រមព្រៀងស្តីពីការជួយគ្នាទៅវិញទៅមកផ្នែកបុគ្គិលធម៌ក្នុងវិស័យរដ្ឋប្បវេណី រវាងព្រះរាជាណាចក្រកម្ពុជានិងសាធារណរដ្ឋសង្គមនិយមវៀតណាម and Hiệp định tương trợ tư pháp trong lĩnh vực dân sự giữa Cộng hòa xã hội chủ nghĩa Việt Nam và Vương quốc Cam-pu-chia), an English translation of which is available on the *National Assembly of the Kingdom of Cambodia* website at <<http://>

(continued on the next page)

r. Under the laws of Indonesia³¹ and Lao,³² a multilateral or bilateral agreement on the recognition and enforcement of foreign judgments between these countries and the country of the court of origin is a pre-requisite before a foreign judgment would be recognised and enforced. Under Cambodian law, a “guarantee of reciprocity” is required before the Cambodian court is prepared to enforce a foreign judgment.³³ While this “guarantee of reciprocity” is not strictly speaking limited to a treaty relationship, it is difficult to think of any other mechanism which may provide the requisite guarantee of reciprocity.³⁴

national-assembly.org.kh/ViewLawFile.aspx?LawDID=457 (accessed 1 May 2020);

(2) **China–Lao:** Agreement on Judicial Assistance in Civil and Criminal Matters between the People’s Republic of China and Lao People’s Democratic Republic (signed 25 January 1999) (translated) (中华人民共和国和老挝人民民主共和国关于民事和刑事司法协助的条约 and ສົນທິສັນຍາລະຫວ່າງ ສປປ ລາວ ແລະ ສປ ຈີນ ວ່າດ້ວຍການຮ່ວມມືທາງດ້ານຍຸຕິທຳໃນເລື່ອງແພ່ງ ແລະ ອາຍາ); (3) **China–Vietnam:** Agreement on Judicial Assistance in Civil and Commercial Matters between the People’s Republic of China and the Socialist Republic of Vietnam (signed 19 October 1998) (translated) (中华人民共和国和越南社会主义共和国关于民事和刑事司法协助的条约 and Hiệp định tương trợ tư pháp Về các vấn đề dân sự và hình sự giữa Cộng hoà xã hội chủ nghĩa Việt Nam và Cộng hoà nhân dân Trung Hoa); and (4) **Lao–Vietnam:** Agreement on Judicial Cooperation in Civil and Criminal Matters between Lao People’s Democratic Republic and the Socialist Republic of Vietnam (signed 6 July 1998) (translated) (ລາວ-ຫວຽດນາມ: ສົນທິສັນຍາລະຫວ່າງ ສປປ ລາວ ແລະ ສສ ຫວຽດນາມ ວ່າດ້ວຍການຮ່ວມມືທາງດ້ານຍຸຕິທຳໃນເລື່ອງແພ່ງ ແລະ ອາຍາ and Hiệp định tương trợ tư pháp Về dân sự và hình sự giữa nước Cộng hoà xã hội chủ nghĩa Việt Nam và nước Cộng hoà dân chủ nhân dân Lào).

- 31 Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 23. While Indonesia has an Agreement on Judicial Cooperation with Thailand, it does not cover the recognition and enforcement of judgments and in any event, the Agreement does not appear to have been utilised so far: Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 25.
- 32 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) (Lao PDR) Art 362 (translated) (ກົດໝາຍວ່າດ້ວຍ ການຕໍາເນີນຄະດີແພ່ງ (ສະບັບປັບປຸງ). See Xaynari Chanthala and Kongphanh Santivong, “Country Report: Lao” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 1 and 4.
- 33 Civil Procedure Code (2006) (Cambodia) Art 199(c) (translated) (ក្រមនីតិវិធីរដ្ឋប្បវេណី នៃព្រះរាជាណាចក្រកម្ពុជា).
- 34 Youdy Bun, “Country Report: Cambodia”, in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 15–17.

s. **Enforcement by way of statutory schemes independent of international conventions or bilateral agreements.** The countries of our study who are³⁵ or were³⁶ part of the Commonwealth of Nations have in place statutory schemes which provide for the enforcement of foreign judgments of the courts of countries which are gazetted or registered under the statute.³⁷ These schemes, in the main, cover the enforcement, and not the recognition, of foreign judgments.³⁸ It should be made clear that these statutory schemes are not conversions of signed international conventions or agreements into national law; they operate independently of such conventions and agreements. For example, Singapore has a statutory scheme in the form of the Reciprocal Enforcement of Foreign Judgments Act (**REFJA**)³⁹ which applies to judgments of certain gazetted courts. Singapore has also ratified the Hague Choice of Court Agreements Convention by enacting the Choice of Court Agreements Act⁴⁰ which applies to judgments which have been rendered by a Contracting State pursuant to an exclusive choice of court agreement in its favour. The REFJA expressly “does not apply to any judgment which may be recognised or enforced in Singapore under the Choice of Court Agreements Act 2016”.⁴¹ Both statutes have their own field of operation.

t. Countries are gazetted or registered under the statutory schemes on the basis of a representative of the government or the Head of State of the

35 Namely Australia, Brunei, India, Malaysia and Singapore. Except for India and Myanmar, the statutory schemes are based on the UK Foreign Judgments (Reciprocal Enforcement) Act 1933. Singapore has another statutory scheme—the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) (**RECJA**)—which is based on the UK Administration of Justice Act 1920. It was recently repealed by Act No 24 of 2019 with effect from a date to be determined by the government. For this reason, the RECJA is not discussed in these Principles.

36 That is, Myanmar.

37 References to “statutory schemes” of enforcement in the Principles should be understood to refer to the reciprocal judgments enforcement legislation in each of Australia, Brunei, India, Malaysia, Myanmar and Singapore that are independent of international conventions. The term does not include Singapore’s Choice of Court Agreements Act.

38 Although some provisions may deal with the recognition of a foreign judgment: see, *eg*, Foreign Judgments Act 1991 (Act No 112 of 1991, as amended) (Cth) (Australia) s 12; Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) (Brunei) s 9; Reciprocal Enforcement of Judgments Act 1958 (Act 99) (Malaysia) s 8; and Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) (Singapore) s 11.

39 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) (Singapore).

40 Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) (Singapore).

41 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) (Singapore) s 2A.

country of the court addressed being satisfied of reciprocity of treatment being accorded to its own courts' judgments in the country of the court of origin.⁴² The concept of reciprocity used here is different from that used by the civil law countries when determining whether to recognise and enforce a foreign judgment.⁴³ The assessment of reciprocity is solely the prerogative of the executive branch of government under the statutory schemes, and the courts do not reassess the issue of reciprocity at the enforcement stage.⁴⁴ Conversely, the courts play a large role in determining whether reciprocity is satisfied in the civil law countries.

u. The procedure under these statutory schemes is similar across the board.⁴⁵ Generally speaking, if the foreign judgment is from a court of a gazetted or registered country, the judgment may be registered under the relevant statute and, subject to any challenges to its registration, will be treated and executed as if it were a local judgment.⁴⁶ This method of direct enforcement contrasts with the more cumbersome procedure⁴⁷ for foreign judgments falling outside of the statutory schemes.

v. **Recognition and enforcement outside of international conventions, bilateral agreements and statutory schemes.** Save for Indonesia, Thailand, Lao and (*seem*) Cambodia, foreign judgments are generally entitled to recognition and enforcement even if they do not fall within conventions,

42 See the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Andrew Bell, "Country Report: Australia" at para 2; Colin Ong, "Country Report: Brunei Darussalam" at para 3; Narinder Singh, "Country Report: India" at para 2; Choong Yeow Choy, "Country Report: Malaysia" at paras 8 and 26; and Adeline Chong, "Country Report: Singapore" at paras 5–6.

43 See [Principle 5 at paras \(i\)–\(r\)](#). In relation to the Philippines, see [Principle 5 at para \(s\)](#).

44 See *eg*, the comments in *Lim Soo Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150 (Court of Appeal of the Supreme Court of Western Australia, Australia) (14 August 2017) at [41].

45 See the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Andrew Bell, "Country Report: Australia" at paras 3 and 8–19; Colin Ong, "Country Report: Brunei Darussalam" at para 12; Narinder Singh, "Country Report: India" at para 2; Choong Yeow Choy, "Country Report: Malaysia" at paras 8–9; and Adeline Chong, "Country Report: Singapore" at para 7.

46 The procedure under s 44A of India's and Myanmar's respective Civil Procedure Codes does not involve "registration" but 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.

47 See [para \(z\)](#) below.

agreements and statutory schemes.⁴⁸ Except for the four afore-mentioned countries, the civil law and hybrid law countries of our study provide for the recognition and enforcement of foreign judgments in its civil procedure codes and/or related legislation. The common law countries of our study would also enforce foreign judgments from courts of countries which are not gazetted as “reciprocating” territories under their respective statutory schemes. Such judgements would be considered under the common law rules.

w. In relation to foreign judgments falling outside of international conventions, bilateral agreements and statutory schemes, each country relies on its own rules in this regard, although the vast majority of the broad requirements are shared in common.

x. **Soft law instruments.** The courts of some countries have also entered into instruments such as Memoranda of Guidance which offer guidance on the applicable rules for the recognition and enforcement of each other’s judgments.⁴⁹ Such instruments are not legally binding but nevertheless illustrate a general commitment to the recognition and enforcement of each other’s judgments, in addition to offering useful guidance on the applicable rules adopted by each country. In addition, the Nanning Statement (南宁声明),⁵⁰ which was approved at the 2nd China–ASEAN Justice Forum held

48 For the position of Indonesia and Thai laws, see below [paras \(zc\)–\(zg\)](#) below.

49 Eg, 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 (signed 10 February 2020); 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 (signed 31 August 2018); and Exchange of Letters on cross-border enforcement of money judgments between the Singapore International Commercial Court and Supreme Court of Victoria (Commercial Court) (signed 24 March 2017). The memoranda of guidance and letters are available on the website of the Singapore International Commercial Court at <<https://www.sicc.gov.sg/guide-to-the-sicc/enforcement-of-money-judgments>> (accessed 1 May 2020).

50 People’s Court News Media Corporation, “The 2nd China–ASEAN Justice Forum Nanning Statement”, *The Supreme People’s Court of the People’s Republic of China* (9 June 2017) (translated) (人民法院新闻传媒总社,《第二届中国-东盟大法官论坛南宁声明》, 中华人民共和国最高人民法院, 2017年6月9日). See also Guodong Du and Meng Yu, “The Nanning Statement: A Milestone in Recognizing and Enforcing Foreign Judgments in China” *China Justice Observer*, 10 July 2018 <<https://www.chinajusticeobserver.com/a/the-nanning-statement-a-milestone-in-recognizing-and-enforcing-foreign-judgments-in-china>> (accessed 1 May 2020).

in 2017, has as one of its items of consensus⁵¹ the promotion of the mutual recognition of civil and commercial judgments.⁵²

y. **Theoretical bases.** While the theoretical basis for enforcement by way of an international convention, bilateral agreement or statutory scheme lies in the doctrine of parliamentary supremacy or is a function of the executive branch of government, a different explanation must be found for enforcement outside of these modes.

z. Insofar as the common law countries are concerned, the doctrine of obligations is the theoretical basis for the enforcement of foreign judgments *in personam* (judgments against a person).⁵³ The doctrine of obligations focusses on the conduct of the judgment debtor.⁵⁴ If the judgment debtor has conducted himself or herself in a certain manner in relation to the court of origin,⁵⁵ the foreign judgment, if it fulfils certain other conditions, gives rise to a debt which the judgment debtor is obliged to obey. The judgment creditor sues on this debt in the court addressed by way of a fresh local action, usually by way of summary proceedings (that is, without a full trial). Therefore, to speak of

51 People's Court News Media Corporation, "The 2nd China-ASEAN Justice Forum Nanning Statement", *The Supreme People's Court of the People's Republic of China* (9 June 2017) (translated) (人民法院新闻传媒总社,《第二届中国—东盟大法官论坛南宁声明》, 中华人民共和国最高人民法院, 2017年6月9日, 七). An English translation of the Nanning Statement is available on the *China Justice Observer* website at <<https://www.chinajusticeobserver.com/p/nanning-statement-of-the-2nd-china-asean-justice-forum>> (accessed 1 May 2020).

52 Yujun Guo, "Country Report: The People's Republic of China" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 12.

53 See the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Colin Ong, "Country Report: Brunei Darussalam" at para 41; Narinder Singh, "Country Report: India" at para 6; Choong Yeow Choy, "Country Report: Malaysia" at para 22; and Adeline Chong, at para 8. Cf. Andrew Bell, "Country Report: Australia" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 7. See also *Godard v Grey* (1870) LR 6 QB 139 (10 December 1870) (Court of the Queen's Bench of England and Wales) at 149–150; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159 (10 December 1870) (Court of the Queen's Bench of England and Wales); *Adams v Cape Industries plc* [1990] Ch 433 (27 July 1989) (Court of Appeal of England and Wales) at 513 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (1 April 1992) (House of Lords of the United Kingdom) at 484.

54 Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 *Law Quarterly Review* 87 at 94.

55 See Principle 2 at paras (l)–(p).

“enforcing a foreign judgment” is a misnomer: rather, a local action produces a local judgment and it is the local judgment that is enforced.

za. The doctrine of obligations has been described as being “purely historical and theoretical”.⁵⁶ It is probable that the modern justification for recognising and enforcing a foreign judgment includes the principles of *res judicata* and international comity.⁵⁷ The Canadian Supreme Court in *Beals v Saldanha*⁵⁸ focussed on international comity and essentially disregarded the doctrine of obligations when it decided that a foreign judgment is eligible for recognition and enforcement in Canada where there was a “real and substantial connection” between the court of origin and the subject matter of the action or the defendant.⁵⁹ None of the common law countries involved in our study have thus far chosen to follow the Canadian position.⁶⁰

zb. The theoretical basis for recognising and enforcing foreign judgments appears to be less frequently articulated in the civil law jurisdictions, although pragmatic considerations such as avoiding inconsistent decisions, providing finality of outcome and meeting the needs of the international business community are sometimes cited.⁶¹ Comity and the generally accepted principles of international law provide the theoretical underpinnings for the recognition and enforcement of judgments in the Philippines.⁶²

56 *Rubin v Eurofinance* [2012] UKSC 46; [2013] 1 AC 236 (24 October 2012) (Supreme Court of the United Kingdom) at [9]. For criticisms of the doctrine, see Hock Lai Ho, “Policies Underlying the Enforcement of Foreign Commercial Judgments” (1997) 46(2) *International and Comparative Law Quarterly* 443 <DOI: 10.1017/S0020589300060516>.

57 See the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Andrew Bell, “Country Report: Australia” at para 7; and Narinder Singh, “Country Report: India” at para 6.

58 [2003] 3 SCR 416 (18 December 2003) (Supreme Court of Canada).

59 Adrian Briggs, “Recognition of Foreign Judgments: A Matter of Obligation” (2013) 129 *Law Quarterly Review* 87 at 94–96.

60 See [Principle 2 at para \(s\)](#). Cf. China under the Interpretations of the Supreme People’s Court on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (fifth draft, October 2017) (translated) (最高人民法院关于承认和执行外国法院民商事判决若干问题的规定): see [Principle 2 at para \(s\)](#).

61 See the following country reports in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017): Youdy Bun, “Country Report: Cambodia” p 43, fn 11; Yujun Guo, “Country Report: The People’s Republic of China” at para 6; Kwang Hyun Suk, “Country Report: South Korea” at para 1.

62 Elizabeth Aguiling-Pangalangan, “Country Report: Republic of the Philippines” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 7–8.

zc. **Indonesia and Thailand.** The position of Indonesia and Thailand on the recognition and enforcement of foreign judgments may not be intractable. In certain limited contexts, foreign judgments are enforceable.

zd. In the case of Indonesia, foreign judgments in respect of the principle of general average for salvage are enforceable.⁶³ Outside of this specific context, it may also be the case that certain types of foreign judgments would be entitled to recognition at least. Foreign judgments of a declaratory or constitutive nature merely require the Indonesian court to passively acknowledge the existence of the foreign judgment and thus it is possible that the Indonesian courts would be prepared to accord such judgments recognition.⁶⁴ Foreign judgments which require the active assistance of the Indonesian court to have legal effect are not enforceable.⁶⁵ In such cases, a judgment creditor would have to sue afresh before the Indonesian courts. The foreign judgment may be submitted as *prima facie* evidence in court but it would not be considered to raise a *res judicata*.⁶⁶

ze. Article 436(1) of the Code of Civil Procedure (Rv), which is inherited from Dutch colonial laws, states that foreign judgments are generally unenforceable in Indonesia. The general unenforceability of foreign judgments under Indonesian law can be attributed in part to its chequered legal history, as well as its adherence to the principles of territorial sovereignty and judicial sovereignty.⁶⁷ A multilateral or bilateral agreement between Indonesia and the country of the court of origin on the enforcement of foreign judgments is

63 Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 32–33.

64 Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 26, 33 and 37. The position is similar under the common law: see [Principle 7 at para \(d\)](#).

65 Outside the context of general average for salvage.

66 Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 29.

67 Yu Un Oppusunggu, “Country Report: The Republic of Indonesia” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 2 and 22.

a prerequisite under Indonesian law.⁶⁸ As Indonesia is not a signatory to any such agreements, its courts have not enforced any foreign judgment.⁶⁹

zf. In the case of Thailand, the prevalent view amongst scholars is that the Act on Conflict of Laws, which was enacted in 1938 (B.E. 2481),⁷⁰ does not include the recognition and enforcement of foreign judgments within its scope.⁷¹ However, recent developments are the enactments of 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 Thai law. The domestic Thai statutes provide for the enforcement of a judgment which is given by a court of a country which is a Contracting State to the relevant Convention.⁷²

zg. Outside this specific context, there is an old, albeit heavily criticised case, where the Supreme Court of Thailand (Thailand's highest court) accepted that a foreign judgment in a commercial matter could in principle be recognised and enforced.⁷³ However, the general consensus of scholars is that

68 Yu Un Oppusunggu, "Country Report: The Republic of Indonesia" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 23.

69 Yu Un Oppusunggu, "Country Report: The Republic of Indonesia" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 24.

70 Act on Conflict of Laws B.E. 2481 (1938) (Thailand) (translated) (พระราชบัญญัติว่าด้วยการขัดกันแห่งกฎหมาย พ.ศ. ๒๔๘๑).

71 Poomintr Sooksripaisarnkit, "Country Report: Kingdom of Thailand" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 4-7.

72 Civil Liability for Oil Pollution Damage Caused by Ships Act B.E. 2560 (2017) (Thailand) Art 36 (translated) (พระราชบัญญัติ ความรับผิดชอบทางแพ่งต่อความเสียหายจากมลพิษน้ำมันอันเกิดจากเรือ พ.ศ. ๒๕๖๐) and Requirement of Contributions to the International Fund for Compensation for Oil Pollution Damage Caused by Ships Act B.E. 2560 (2017) (Thailand) Art 34 (translated) (พระราชบัญญัติ การเรียกเงินสมทบเข้ากองทุนระหว่างประเทศ เพื่อชดเชยความเสียหายจากมลพิษน้ำมันอันเกิดจากเรือ พ.ศ. ๒๕๖๐). I am grateful to the Honourable Justice Vichai Ariyanuntaka for this information.

73 Judgment of the Supreme Court of Thailand 585/2461 (translated) (คำพิพากษาฎีกาที่ 585/2461). See Poomintr Sooksripaisarnkit, "Country Report: Kingdom of Thailand" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 8-9.

the case does not accurately reflect Thai law on this issue.⁷⁴ Under Thai law, a judgment creditor will be well advised to commence a fresh local action. As under Indonesian law, the foreign judgment may be admissible as evidence in the Thai action.⁷⁵ There are at least two cases where foreign judgments have been taken into account in the Thai action: Judgment of the Supreme Court of Thailand 6565/2001 (translated) (คำพิพากษาศาลฎีกาที่ 6565/2544)⁷⁶ and Judgment of the Juvenile and Family Court 2551/2548 (translated) (คำพิพากษาศาลเยาวชนและครอบครัวที่ 2551/2548).⁷⁷ However, the fact that it is now possible to enforce a foreign judgment under Thai law, albeit in the limited context of oil pollution, is promising and may potentially lead the way towards foreign judgments generally being “directly” enforceable in Thailand rather than given effect through this “backdoor” method.

zh. **Suggested way forward.** From the survey above, it can be seen that the recognition and enforcement of foreign judgments is largely accepted by the countries of our study. There are a variety of modes by which a foreign judgment is given effect, some of which present more hurdles compared to others. Given the advantages that would accrue should judgments be freely portable across borders, judgments recognition and enforcement should not only be a universal principle, but the requirements for recognition and enforcement should be considered carefully so as not to raise unreasonable impediments. The latter is the objective underlying the following Principles.

74 Poomintr Sooksripaisarnkit, “Country Report: Kingdom of Thailand” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 9.

75 Poomintr Sooksripaisarnkit, “Country Report: Kingdom of Thailand” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at para 20.

76 This case has been described as an “enforcement” case (Tosaporn Leepuengtham, “Cross-border Enforcement of IP Rights in Thailand” in Paul Torremans (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar, 2014) at 105–106) but it is more probable that the Thai court used the foreign judgment as evidence in the Thai action. Notably, the claim was brought on the basis of section 194 of Thailand’s Civil and Commercial Code B.E. 2468 (1925) (Thailand) (translated) (ประมวลกฎหมายแพ่งและพาณิชย์) which is a rule of Thailand’s domestic law of obligations. This strongly suggests that it was not an “enforcement” case, at least, not in the sense meant by these Principles. See further Adeline Chong, “Moving Towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia” (2020) 16 *Journal of Private International Law* 31 <DOI: 10.1080/17441048.2020.1744256> at 39–40.

77 For more details on this case, see Poomintr Sooksripaisarnkit, “Country Report: Kingdom of Thailand” in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong ed) (Asian Business Law Institute, 2017) at paras 14–21.

ISBN 978-981-14-7201-5



9 789811 472015

(E-book)

ISBN 978-981-14-7202-2



9 789811 472022

(Print)