

BURGUNDY REVISITED: A UNIFIED DOCTRINE OF SUBJECT-MATTER JURISDICTION IN THE CONFLICT OF LAWS

This article critically examines the doctrine of subject-matter jurisdiction in Singapore’s conflict of laws, tracing its origins to the seminal Court of Appeal judgment in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381. It identifies three persistent misunderstandings and advocates for a unified doctrine grounded in conflicts and substantive justice, rather than international comity. The analysis demonstrates that subject-matter jurisdiction is a doctrinal gatekeeper that cuts across and (re)shapes multiple conflicts rules. The article concludes that the doctrine’s rigorous application is vital in preserving the coherence of Singapore law in an era of ever-increasing transnational complexity.

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I. Introduction

1 In 2014, the Court of Appeal delivered the seminal decision in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* (“*Burgundy*”),¹ heralding a departure from the monolithic conception of jurisdiction in Singapore jurisprudence by bifurcating jurisdiction into personal and subject-matter jurisdiction. Personal jurisdiction, which “refers to the question of whether a person is amenable to the jurisdiction of the court in the sense that he is or can be brought before it”, has always been recognised in Singapore; hitherto unrecognised in Singapore, subject-matter jurisdiction “refers to what a court is permitted to do in terms of regulating the conduct in another country of someone over whom it has personal jurisdiction.”²

1 [2014] 3 SLR 381.

2 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [80].

2 The bifurcation, recognised in the context of what was O 11 r 8(1) of the Rules of Court (Revoked)³ (“O 11 r 8(1) (Revoked)”), unfortunately failed to catch on. Of the judgments involving service out following *Burgundy*, remarkably few gave even brief consideration to *Burgundy* subject-matter jurisdiction despite it forming part of the *ratio* of a Court of Appeal decision. Only three cases are of note: *Li Shengwu v Attorney-General*⁴ (“*Li Shengwu*”), *Allenger, Shiona v Pelletier, Olga*⁵ (“*Allenger*”), and *Shee See Kuen v PT Trikonsel Oke Tbk*⁶ (“*Shee See Kuen*”). Relevant parts of *Burgundy* and these three decisions will be canvassed in paras 4–44, and three common misunderstandings that have stymied doctrinal development will be identified. First, the misguided conflation of two different senses of subject-matter jurisdiction, only one of which is relevant in the conflict of laws. Second, the misinterpretation of *Burgundy*’s holding as being confined to certain provisions. Third, the erroneous assumption that fulfilment of the service out requirements *ipso facto* establishes subject-matter jurisdiction. Given these misunderstandings, the value of subject-matter jurisdiction remains unappreciated by the courts, which explains the underdeveloped doctrine seen today.

3 Paragraphs 45–87 present a unified doctrine of subject-matter jurisdiction: before a Singapore court may assert jurisdiction over an extraterritorial subject-matter, there must be a substantial and *bona fide* connection between that subject-matter and Singapore. It will be suggested that the normative foundations of the doctrine should be reconceptualised as being conflicts and substantive justice, not comity. This article will then revisit select conflicts rules through the lens of the reconceptualised doctrine and propose a three-step framework for applying the doctrine. A brief incursion will also be taken to show that the doctrine as it relates to service out is not only consistent with the new regime of civil procedure rules, but also more necessary than ever. Paragraphs 88–90 set out the conclusions of this reconsideration of the doctrine.

3 2014 Rev Ed.

4 [2019] 1 SLR 1081.

5 [2022] 3 SLR 353.

6 [2022] 2 SLR 239.

II. *Burgundy* and following decisions

A. *Burgundy*

4 The relevant facts of *Burgundy* may be briefly stated. *Burgundy Global Exploration Corp* (“*Burgundy*”) is a Philippine company engaged in oil and gas exploration in the Philippines. *Transocean Offshore International Ventures Ltd* (“*Transocean*”), a New York Stock Exchange-listed company, provides drilling rigs and offshore drilling services for oil and gas reserves. *Burgundy* and *Transocean* entered into an offshore drilling contract, under which *Transocean* agreed to provide a drilling rig and offshore drilling services to *Burgundy*. *Burgundy* and *Transocean* also entered into an escrow agreement governed by a non-exclusive jurisdiction clause in favour of the Singapore courts. The escrow agreement obligated *Burgundy* to deposit money into an escrow account according to a timeline, failing which *Transocean* would have the right to terminate the offshore drilling contract. When *Burgundy* failed to make the requisite deposit into the escrow account, *Transocean* exercised its right to terminate the offshore drilling contract. *Transocean* commenced proceedings against *Burgundy* for breach of the escrow agreement and obtained leave for service out on *Burgundy* in the Philippines. *Transocean* eventually obtained summary judgment against *Burgundy*.⁷

5 *Transocean* then applied for and obtained examination of judgment debtor (“EJD”) orders against the directors of *Burgundy* resident in the Philippines. Instead of applying for leave to serve the EJD orders out of jurisdiction, *Transocean* applied for and obtained leave to effect substituted service on *Burgundy*’s lawyers in Singapore. The directors applied to set aside the order allowing substituted service, but the application was dismissed by an Assistant Registrar. The directors’ appeal against the Assistant Registrar’s dismissal of the setting-aside was also dismissed by the High Court. The directors subsequently appealed to the Court of Appeal.⁸

6 Delivering the judgment of the Court of Appeal, Sundaresh Menon CJ first looked to whether the Singapore courts had the power to make EJD orders against foreign officers. Although O 48 r 1 of the Rules of Court (Revoked) (“O 48 r 1 (Revoked)”) empowered the court to make EJD orders against company officers, it was unclear whether the

7 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [5]–[19].

8 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [20]–[23].

provision was extraterritorial, *ie*, whether its scope included company officers ordinarily resident overseas.⁹

7 After analysing a slew of English cases, Menon CJ laid down five general propositions. First, jurisdiction “is not a monolithic concept”, but is bifurcated into personal and subject-matter jurisdiction.¹⁰ Second, personal jurisdiction “refers to the question of whether a person is amenable to the jurisdiction of the court in the sense that he is or can be brought before it”, while subject-matter jurisdiction “refers to what a court is permitted to do in terms of regulating the conduct in another country of someone over whom it has personal jurisdiction”.¹¹ Third, personal jurisdiction is established by service, which may be effected when the defendant is physically within the jurisdiction, or when leave has been given to serve the writ out of jurisdiction.¹² In the latter case, the court must be satisfied that it has subject-matter jurisdiction before granting such leave.¹³ Subject-matter jurisdiction is thus a precondition to personal jurisdiction. Fourth, subject-matter jurisdiction acts as a “presumptive restraint that is imposed by a court upon itself which might be capable of being displaced in the appropriate circumstances”, *ie*, “giving effect to the presumption against extra-territoriality”.¹⁴ Fifth, the Singapore courts will not adopt a public interest analysis in determining whether a law has extraterritorial effect; there is no reason in principle to give public interests more weight over private interests when conferring extraterritorial application to a law, and in any case, laws often implicate conflicting public interests which may be incommensurable.¹⁵

8 Apropos O 48 r 1 (Revoked), its underlying purpose of “enabl[ing] judgment creditors to obtain information about a corporate judgment debtor’s finances” would be served by extending it to officers ordinarily resident outside Singapore, so the presumption against

9 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [60]–[61].

10 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [80].

11 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [80].

12 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [93].

13 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [111].

14 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [81].

15 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [91].

extraterritoriality was *prima facie* rebutted.¹⁶ There was no need to impose additional limits on its extraterritorial application as it was already limited by: (a) the requirement for an *ex parte* hearing in EJD applications, in which the court has the discretion not to issue an EJD order even where procedural requirements are satisfied;¹⁷ and (b) the requirement to apply for service out of the EJD order.¹⁸ Menon CJ reasoned that “any concerns relating to the imposition of extraterritorial jurisdiction on a foreign officer can be considered and addressed at the stage where leave is sought to serve an EJD order abroad”.¹⁹

9 Transocean then attempted to rely on O 11 r 8(1) (Revoked), which provides that “leave shall not be required in any proceedings in which leave for service of the originating process has already been granted”. However, the presumption against extraterritoriality could not be rebutted. The rationale underlying the provision was “to eliminate duplicative applications for leave”; as the propriety of extraterritorial jurisdiction over the particular defendant is already assessed at the originating process stage, requiring fresh leave for overseas service of every subsequent document would be inefficient. Applying the provision extraterritorially to a non-party to the proceedings would not further its purpose.²⁰ Therefore, Transocean could not rely on the provision to evade the need to obtain leave for service out of the EJD orders.

10 Turning to whether leave should be retrospectively²¹ granted to Transocean for service out of the EJD orders, Menon CJ invoked subject-matter jurisdiction. Discretion to grant leave for service out of an EJD order had to be “exercised sparingly” because an EJD order was “directed at persons who might not necessarily be parties

16 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [90].

17 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [88].

18 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [92]–[94].

19 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [92].

20 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [105]–[106].

21 That it was retrospective did not make a material difference to the reasoning: *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [110]–[115].

to the suit requiring them to provide relevant information to the court”.²² Therefore:²³

... even though the application for leave might appear to be one that is directed at invoking the court’s personal jurisdiction over the non-party in question, that is only anterior to the further question of whether this will ultimately entail *the exercise of exorbitant substantive jurisdiction to an impermissible degree*. [emphasis added]

11 As to when the court would have subject-matter jurisdiction to allow service abroad of an EJD order, Menon CJ declined to “lay down strict or exhaustive rules”; the “fundamental question is whether the foreign officer is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him”. Since the point of an EJD order is to obtain information about the judgment debtor’s finances, the court would consider “the extent of the foreign officer’s knowledge of his company’s financial affairs”. Merely having “relevant information” alone would be insufficient. “Something more would be required”, such as the foreign officer having a key role to play in the events giving rise to the judgment creditor’s successful claim. Accordingly, Menon CJ set aside the order for substituted service of the EJD orders on the basis that leave for service out had not been obtained.²⁴

12 The court’s analysis relied heavily on the doctrine of subject-matter jurisdiction to reach the conclusion that: (a) Singapore courts have power to make EJD orders against foreign officers; (b) parties must apply for leave for service out of EJD orders; (c) leave would not be retrospectively granted to Transocean to serve the EJD orders out of jurisdiction; and accordingly, (d) the order for substituted service of the EJD orders should be set aside. The significance of the doctrine and its application shows that it formed the *ratio* of *Burgundy*. Lower courts are bound to, and the Court of Appeal should be persuaded to, apply the doctrine of subject-matter jurisdiction in analogous situations.

B. The snubbing of *Burgundy* in *Li Shengwu, Allenger and Shee See Kuen*

13 Despite *Burgundy* being a Court of Appeal judgment, its development of the doctrine of subject-matter jurisdiction has received

22 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [111].

23 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [111].

24 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [112]–[115].

scant judicial attention. The doctrine's failure to gain traction may be attributed to: (1) its misguided conflation with another legal concept also known as "subject-matter jurisdiction"; (2) the misinterpretation of the holding of *Burgundy* on subject-matter jurisdiction as only applying to O 11 r 8(1) (Revoked) or O 48 r 1 (Revoked); and (3) the erroneous assumption that a fulfilment of the typical requirements for service out *ipso facto* establishes subject-matter jurisdiction.

(1) *Conflation with subject-matter jurisdiction in the prescriptive sense*

14 *Allenger* illustrates the conflation of *Burgundy*'s subject-matter jurisdiction with a legal concept of the same name. The facts are not important for our purposes; it is the High Court's discussion of subject-matter jurisdiction that demands our attention. On the definition of subject-matter jurisdiction, the High Court cited: (a) *Harvey v Derrick*²⁵ for the proposition that it refers to "the court's authority over the subject-matter of that general class of cases"; (b) *Murakami Takako v Wiryadi Louise Maria*²⁶ on its application of subject-matter jurisdiction in the context of the rule in *The British South Africa Co v The Companhia de Moçambique*²⁷ ("Moçambique") and (c) *Burgundy* for the proposition that subject-matter jurisdiction refers to "what a court is permitted to do in terms of regulating the conduct in another country of someone over whom it has personal jurisdiction".²⁸

15 What the High Court failed to realise is that the former definition is not coincident with, and is in fact vastly different from, the latter two definitions. The former definition is subject-matter jurisdiction in the prescriptive sense – that is, jurisdiction over certain categories of proceedings ("prescriptive subject-matter jurisdiction"). Jurisdiction in the prescriptive sense refers, for instance, to the Family Courts having jurisdiction over family proceedings,²⁹ or the General Division of the High Court having jurisdiction over, *inter alia*, actions involving divorce and matrimonial, admiralty, bankruptcy, infants, probate, or mediation, but not over matters that come within the ambit of the Syariah Court.³⁰ The latter two definitions, however, relate to subject-matter jurisdiction in the conflicts sense – *ie*, the extraterritorial assertion of jurisdiction with which *Burgundy* was primarily concerned ("conflicts subject-matter jurisdiction"). So explicated, the difference between the two distinct

25 [1995] 1 NZLR 314.

26 [2009] 1 SLR(R) 508.

27 [1893] AC 602.

28 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [20].

29 Family Justice Act 2014 (2020 Rev Ed) Pt 4.

30 Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 17A(1).

senses of subject-matter jurisdiction, and the implications of conflating the two, should be clear. In any case that comes before the court, prescriptive subject-matter jurisdiction must first be established, followed by conflicts subject-matter jurisdiction (to the extent that such case has extraterritorial elements), and only then may personal jurisdiction follow.

16 This conflation led the plaintiff, defendants, and court down the wrong rabbit hole. On the issue of whether the court had subject-matter jurisdiction in a matter involving the application of a foreign bankruptcy statute, the defendants relied on ss 16 and 17 of the Supreme Court of Judicature Act 1969³¹ to argue that the Singapore court's subject-matter jurisdiction "is limited only to causes of action founded upon Singapore law *generally* (as opposed to Cayman law in this case)". The plaintiff countered that s 16 "conferred *unlimited* subject matter jurisdiction" subject to certain statutory requirements. The court undertook a thorough analysis of the Supreme Court of Judicature Act 1969 before concluding that there was a "general rule of unqualified subject-matter jurisdiction" (apparently in the prescriptive sense), and that limits to that general rule are a matter of common law.³² The examples of the limits cited by the court, however, were unequivocally limits on conflicts subject-matter jurisdiction: the non-justiciability of foreign revenue laws, the public law rule, and the *Moçambique* rule.³³

17 On this confused basis, the court then held that the (prescriptive) subject-matter jurisdiction of a Singapore court to apply a foreign bankruptcy statute was grounded in s 16(1) of the Supreme Court of Judicature Act 1969. Absent proof by the defendants that "rendering assistance in foreign avoidance claims violates any fundamental sense of justice, offends any public policy or involves such a large measure of discretion such that the court should decline to exercise jurisdiction in this instance", the court found that it had subject-matter jurisdiction³⁴ – this time, presumably in both senses, though lacking analysis of conflicts subject-matter jurisdiction.

18 The conflation of subject-matter jurisdiction in the prescriptive and conflicts senses is also apparent from the Court of Appeal's judgment in *Li Shengwu*.³⁵ The Attorney-General brought proceedings against Li for scandalising contempt under the common law. The Attorney-General obtained leave for service out of Singapore of committal papers on Li,

31 2020 Rev Ed.

32 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [30]–[54].

33 See paras 45–56 below as to how these rules tie in with the doctrine of subject-matter jurisdiction.

34 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [80] and [87].

35 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081.

who was in the US. Li, citing *Burgundy*, argued that the Singapore courts lacked the requisite subject-matter jurisdiction for service out. The court agreed with Li that subject-matter jurisdiction must be established for service out. However, the court reasoned that its “substantive subject-matter jurisdiction to hear and try contempt is based on the court’s inherent jurisdiction” as a “necessary corollary of the judicial power being vested in the court” under “Art 93 of the Constitution”, and concluded that:³⁶

The weight of judicial authority is thus clearly to the effect that the authority of the High Court and Court of Appeal to hear contempt cases is inherent to their very existence as the institutions in which the judicial power of the State is vested, and the institutions charged with safeguarding and superintending the proper administration of justice.

19 The court proceeded to examine whether the requirements for service out had been fulfilled such that it had personal jurisdiction over Li.³⁷ Notably, it did not see the need to evaluate whether there was sufficient connection *à la Burgundy* to establish conflicts subject-matter jurisdiction. This observation will later be discussed when considering the third misunderstanding of the doctrine of subject-matter jurisdiction.

20 Clearly, therefore, the court’s judgment on the point of subject-matter jurisdiction was couched exclusively in the terms of prescriptive subject-matter jurisdiction. Yet, as Teo rightly observes:³⁸

[T]he Court saw its “subject-matter jurisdiction” not as relevant only to its internal jurisdiction to hear the dispute, but rather as a requirement for its international jurisdiction to allow service out, *since the Court’s internal jurisdiction to try cases of contempt was never in dispute, and since the Court noted that in cases of service out the source of its internal jurisdiction would also affect its international jurisdiction.* [emphasis added]

21 In other words, although the court undertook an analysis of its prescriptive subject-matter jurisdiction only and omitted any analysis of whether it also had conflicts subject-matter jurisdiction, it seemingly concluded that it had subject-matter jurisdiction in both senses.

22 Given that even the Court of Appeal and High Court have been operating under the assumption that the two senses of subject-matter jurisdiction are coterminous, it is no wonder that the doctrine of subject-matter jurisdiction expounded in *Burgundy* has yet to catch

36 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [98]–[113].

37 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [114].

38 Marcus Teo, “Service Out for Scandalising Contempt: An International Constitutional Jurisdiction?” [2019] Sing JLS 477 at 484.

on. It is difficult to apply and incrementally develop a doctrine when the distinct senses of the doctrine's name have not yet been recognised and differentiated.

(2) *Interpretation of Burgundy as being confined to certain provisions*

23 The second reason that *Burgundy's* doctrine of subject-matter jurisdiction has failed to gain traction is the misinterpretation of the doctrine as being confined to the provisions used in *Burgundy*. In *Shee See Kuen*, the Court of Appeal, in dealing with O 11 r 8(1) (Revoked), cited *Burgundy* for the proposition that the underlying purpose of the provision is to avoid duplicative applications for leave for service out. Despite citing *Burgundy*, Judith Prakash JCA paraphrased the rule as follows:³⁹

[I]f ... leave for service out of jurisdiction has been granted in respect of the originating process in the *underlying proceeding*, then Singapore's courts have already determined that it is appropriate to assume personal jurisdiction over the foreign party ... because in analysing the requirements for granting leave for overseas service, the lower court would have satisfied itself that it is appropriate for Singapore's courts to exercise personal jurisdiction in that case. These requirements are: (a) the claim must come within one of the heads of claim in O 11 r 1 of the ROC; (b) the claim must have a sufficient degree of merit; and (c) Singapore must be the *forum conveniens*. [references omitted]

24 There was curiously no reference to the requirement of conflicts subject-matter jurisdiction despite it being a significant holding in *Burgundy*. One possible explanation is that Prakash JCA read *Burgundy's* holding on subject-matter jurisdiction as being confined to O 48 r 1 (Revoked) and O 11 r 8(1) (Revoked). If this speculation is correct, that would be too narrow a reading of *Burgundy*.

25 First, *Burgundy* observed that the Singapore doctrine of subject-matter jurisdiction was a recognition of "the significance of [the presumption against extraterritoriality] in the specific context of jurisdiction."⁴⁰ The presumption against extraterritoriality is a canon of statutory interpretation – it applies to the interpretation of *all written law*.⁴¹ This implies that the doctrine of subject-matter jurisdiction is not statute-specific. Indeed, this accords with the generality with which Menon CJ expounded upon the doctrine.⁴²

39 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [19].

40 *Shee See Kuen v PT Trikomsel Oke Tbk* [2022] 2 SLR 239 at [78].

41 See, eg, *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [98]–[100]; and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [66]–[69].

42 See paras 4–12 above.

26 Second, *Burgundy*'s discussion of subject-matter jurisdiction was concerned with O 48 r 1 (Revoked), and the court proceeded to apply it to O 11 r 8(1) (Revoked) without seeing any need to explain the applicability of the doctrine to the latter. This confirms the doctrine was never intended to be specific to one statutory provision.

27 Third, the array of English cases cited in *Burgundy* was not limited to cases involving the English law analogues of O 48 r 1 (Revoked) and O 11 r 8(1) (Revoked). Menon CJ analysed English authorities involving orders relating to banking evidence, bankruptcy, insolvency, proceeds of crime, and contempt of court.⁴³ The diversity of statutes upon which the orders were based illustrates that the English doctrine of subject-matter jurisdiction is not limited to specific statutory provisions; it applies to all cases where the court seeks to assert extraterritorial jurisdiction over non-residents. That the Court of Appeal took reference from the English doctrine of subject-matter jurisdiction and disagreed only with its public interest analysis⁴⁴ suggests that the Singapore doctrine of subject-matter jurisdiction, too, is of similar applicability.

28 Admittedly, the English cases all pertained to non-party orders. It may therefore reasonably be objected that *Burgundy*, though not limited to particular statutory provisions, was limited to orders against non-parties. This objection is flawed. First, it is natural that only non-party cases were cited, since those were the facts before the court in *Burgundy*. It does not follow that *Burgundy* only applies to non-party cases. Second, although *Burgundy* focused on the application of the second half of O 11 r 8(1) (Revoked) – viz, “leave shall not be required in any proceedings in which leave for service of the originating process has already been granted”, we cannot forget the lead-in language of O 11 r 8(1) (Revoked): “service out of Singapore of *any summons, notice or order issued, given or made in any proceedings* is permissible only with the leave of the Court” [emphasis added]. A plain reading makes it unambiguous that it applies to all summonses, notices, and orders, not just non-party orders. Third, in *Li Shengwu*, the Court of Appeal, in discussing service out of committal papers for scandalising contempt, commented briefly on *Burgundy*:⁴⁵

[In *Burgundy*], we observed that the effect of *service in compliance with [O 11 of the Rules of Court (Revoked)]* is that the Singapore court takes jurisdiction over a person outside Singapore's territory. *This is considered to be an exorbitant*

43 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [76].

44 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [91].

45 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [94].

jurisdiction as the foundation for a court's jurisdiction is primarily territorial.
[emphasis added]

29 The court did not see fit to limit the applicability of subject-matter jurisdiction to only service out of non-party orders and regarded the doctrine as being applicable to service out generally. Fourth, there must be a sound justification for limiting the applicability of subject-matter jurisdiction narrowly to the service out of jurisdiction of orders specifically. This predicates a special factor that distinguishes non-party orders from other summonses, notices, or orders. No such factor exists. In fact, the Court of Appeal in *Burgundy* explicitly rejected distinguishing an EJD order from a winding-up order based on public interests.⁴⁶

30 Accordingly, *Burgundy's* holding should not be read as being confined only to certain statutory provisions; the spirit of Menon CJ's judgment demands that subject-matter jurisdiction be treated as such.

(3) *Erroneous assumption that fulfilling service out requirements establishes subject-matter jurisdiction*

31 We now turn to the other possible explanation for the omission in cases like *Li Shengwu* and *Shee See Kuen* to apply the doctrine of subject-matter jurisdiction.

32 There is a telling proclamation in *Li Shengwu*. As noted above, the court did not explain how the underlying dispute was sufficiently connected to Singapore in the *Burgundy* sense. However, on whether the committal papers were validly served out of Singapore under O 11 r 1(n) of the Rules of Court (Revoked), the court noted:⁴⁷

We recognise that there are several limbs in O 11 which require some connection to Singapore, for example limbs (d), (e) and (f). We should make it clear that a claimant cannot bypass the need to satisfy the requisite connection with Singapore by choosing to frame his claim under s 18(1) of the SCJA read with limb (n), the very concern highlighted by Mr Vergis. ... [O]ne of the requirements for valid service outside of jurisdiction is that Singapore must be the proper forum for the trial of the action. As such, in those situations where a connection with Singapore is required but not satisfied, the service will in all likelihood be set aside on the basis of forum non conveniens in any event. [emphasis added]

46 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [91].

47 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [166].

33 The underlying assumption here (and in Prakash JCA's quote in the previous section) is that the satisfaction of the three requirements for service out would *ipso facto* justify the court's assertion of subject-matter jurisdiction. More broadly, this assumption may explain why service out cases, whether before or after *Burgundy*, have not applied the doctrine of subject-matter jurisdiction.

34 The three requirements for service out are: "(a) the claim must come within one of the heads of claim in O 11 r 1 of the ROC; (b) the claim must have a sufficient degree of merit; and (c) Singapore must be the *forum conveniens*".⁴⁸

35 It is worth mentioning that these requirements, at least on their face, do not seem to have changed under the new Rules of Court 2021 which are now in operation. O 11 r 1 of the Rules of Court (Revoked) ("O 11 r 1 (Revoked)") has been replaced by O 8 r 1(1) of the Rules of Court 2021 ("O 8 r 1(1)"). O 8 r 1(1) provides that "[a]n originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action". Jurisdiction in this context is understood to include jurisdiction other than as established by service out, presence, or submission, such as jurisdiction based on the Choice of Court Agreements Act 2016.⁴⁹ As this is less relevant for the current purposes, this article will focus on the interpretation of "appropriate court". Reference must be made to the Supreme Court Practice Directions 2021,⁵⁰ which have "always been upheld by the courts, and the latest version is intended to be read together with the provisions under the [Rules of Court 2021]".⁵¹ Practice Direction ("PD") para 63(2) provides that:⁵²

For the purposes of showing why the Court is the appropriate court to hear the action, the claimant should include in the supporting affidavit any relevant information showing that:

- (a) there is a good arguable case that there is sufficient nexus to Singapore;
- (b) Singapore is the *forum conveniens*; and

48 *Shee See Kuen v PT Trikonsel Oke Tbk* [2022] 2 SLR 239 at [19], citing *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500.

49 2020 Rev Ed. Ardavan Arzandeh, "The New Rules of Court and the Service-out Jurisdiction in Singapore" [2022] Sing JLS 191 at 196.

50 SG Courts, "Supreme Court Practice Directions 2021" <<https://epd-supcourt-2021.opendoc.gov.sg/>> (accessed 1 February 2026).

51 Ardavan Arzandeh, "The New Rules of Court and the Service-out Jurisdiction in Singapore" [2022] Sing JLS 191 at 197.

52 Supreme Court Practice Directions 2021 para 63(2).

- (c) there is a serious question to be tried on the merits of the claim.

36 As to what may demonstrate sufficient nexus, PD paras 63(3)(a)–63(3)(t) non-exhaustively reproduce the old jurisdictional gateways under O 11 r 1 (Revoked).⁵³ Therefore, “despite being relegated to paragraphs within the practice directions, the gateways continue to play broadly the same role that they did under [the Rules of Court (Revoked)]”.⁵⁴ The discussion in this section will assume that “the approach to applying the service-out jurisdiction in Singapore under [the Rules of Court 2021] has scarcely changed” and “there is unlikely to be radical differences in the way in which courts exercise jurisdiction over defendants outside Singapore”.⁵⁵ Later, in paras 82–87 below, this assumption will be shown to be too sweeping.

37 A prefatory observation is that the test for subject-matter jurisdiction is different from that of the three requirements, since the former is a test of close connection.⁵⁶ In particular, the “serious question to be tried on the merits” requirement has no relation to whether a close connection exists; it is trite that the merits of the case are distinct from jurisdictional considerations.⁵⁷ Nevertheless, one might still entertain the possibility that the other two requirements may in effect establish some form of close connection. These will be evaluated in turn.

38 The requirement of there being sufficient nexus through the establishment of one of the jurisdictional gateways in PD paras 63(3)(a)–63(3)(t) is not coincident with subject-matter jurisdiction. To be sure, certain gateways could be considered “a perfect coincidence” with subject-matter jurisdiction,⁵⁸ including:

- (a) PD para 63(3)(c) (person duly served outside Singapore who is a necessary or proper party to the claim);
- (b) PD paras 63(3)(d)(ii)–63(3)(iv) (contractual claim in respect of a contract made by or through an agent trading or residing in Singapore on behalf of a principal trading or residing

53 Supreme Court Practice Directions 2021 para 63(3).

54 Ardavan Arzandeh, “The New Rules of Court and the Service-out Jurisdiction in Singapore” [2022] Sing JLS 191 at 197.

55 Ardavan Arzandeh, “The New Rules of Court and the Service-out Jurisdiction in Singapore” [2022] Sing JLS 191 at 198.

56 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [112]; Zhuang WenXiong, “*Burgundy*, the Bifurcation of Jurisdiction and its Future Implications” (2015) 27 SAclJ 207 at [26].

57 See, eg, *The Rainbow Joy* [2005] 3 SLR(R) 719 at [25]–[27].

58 Zhuang WenXiong, “*Burgundy*, the Bifurcation of Jurisdiction and its Future Implications” (2015) 27 SAclJ 207 at [31].

out of Singapore, governed by the law of Singapore, or containing a jurisdiction clause selecting the Singapore courts);

(c) PD paras 63(3)(g)–63(3)(i) (the subject-matter being or affecting immovable property situated in Singapore, or asserting rights over movable property situated in Singapore); and

(d) PD para 63(3)(m) (enforcement of judgment or arbitral award or other adjudication determination within the meaning of the Building and Construction Industry Security of Payment Act 2004⁵⁹).

Many others, however, are not, as the following paragraphs illustrate.

39 Practice Direction paras 63(3)(a) (relief sought against a person with property in Singapore) and 63(3)(b) (injunction sought ordering a defendant to do or refrain from doing anything in Singapore) are clearly overinclusive and do not have regard to the extent of connection between the subject-matter of the claim and Singapore, and whether that connection is sufficiently close.⁶⁰

40 Practice Direction para 63(3)(d)(i) (contractual claim in respect of a contract made, or made as a result of an essential step taken, in Singapore) is also overinclusive because it could be merely adventitious or incidental to the transaction that the contract was made in Singapore. In conflicts jurisprudence, the *locus contractus* is rarely if ever relevant, with the focus often being the *locus solutionis*. As Zhuang notes, a New York law-governed contract made in Singapore between two Americans for delivery of goods in New York should lack the requisite subject-matter connection to justify jurisdiction based solely on the place of contracting.⁶¹

41 Given the broad phrasing of the jurisdictional gateways, the same example can be adapted to other gateways, including:

(a) PD para 63(3)(f)(i) (claim founded on a tort, *wherever committed*, which is *constituted in part* by an act or omission occurring in Singapore);

(b) PD para 63(3)(f)(ii) (claim is *partly founded on*, or is for the recovery of damages in respect of, damage

59 2020 Rev Ed.

60 Zhuang WenXiong, “Burgundy, the Bifurcation of Jurisdiction and its Future Implications” (2015) 27 SAclJ 207 at [32].

61 Zhuang WenXiong, “Burgundy, the Bifurcation of Jurisdiction and its Future Implications” (2015) 27 SAclJ 207 at [33].

suffered in Singapore caused by a tortious act or omission *wherever occurring*);

(c) PD para 63(3)(o) (restitutionary claim against trustee or fiduciary defendant and defendant's alleged liability arises out of *any act done, whether by the defendant or otherwise*, in Singapore);

(d) PD para 63(3)(p) (claim founded on *cause of action arising in Singapore*); and

(e) PD para 63(3)(s) (claim *concerns* the construction, effect or enforcement of *any written law*).

The italicised language highlights how easy it is to fall within one of these gateways. Importantly, none of these sweeping gateways require sufficient connection to be established.

42 As for the distinction between subject-matter jurisdiction and *forum conveniens*, the two are undergirded by different concerns.⁶² Subject-matter jurisdiction is concerned with sufficient connection, while *forum conveniens* is concerned with “the efficient conduct of litigation in an appropriate forum”.⁶³ While certain factual connections may overlap in analyses of subject-matter jurisdiction and *forum conveniens*, these doctrines remain jurisprudentially and functionally distinct. *Forum conveniens* entails a relative assessment of competing forums, weighing connecting factors (eg, witness locations, evidence accessibility) to identify the “most appropriate” venue. Subject-matter jurisdiction, conversely, involves an absolute threshold inquiry: whether the forum's connection to the defendant's extraterritorial conduct justifies the forum's assertion of its authority, irrespective of alternative venues. Indeed, in *Burgundy*, there was no question that Singapore was *forum conveniens*, but the doctrine of subject-matter jurisdiction still had to be applied by the court.

43 Recognising the need to limit the excessive breadth of the jurisdictional gateways, and the incompleteness of *forum non conveniens* alone as a control mechanism, Lord Collins in *Employees Compensation Assistance Fund Board v Fong Chak Kwan*⁶⁴ appeared to incorporate (a simplistic version of) subject-matter jurisdiction into the court's exercise of discretion in whether to grant leave for service out, even

62 Zhuang WenXiong, “*Burgundy*, the Bifurcation of Jurisdiction and its Future Implications” (2015) 27 SAclJ 207 at [22]–[23].

63 *Abela v Baadarani* [2013] 1 WLR 2043 at 2063; [2013] UKSC 44 at [53].

64 [2022] HKCFA 12.

after the jurisdictional gateways are cleared and *forum conveniens* is established.⁶⁵

[I]n deciding whether a case falls within one of the heads of jurisdiction, the court must consider the substance of the matter and not merely whether the case technically falls within the letter of the head of jurisdiction in question: the case must be clearly within both the letter of the rule and the spirit of the head ... *If the plaintiff has no real connection with the forum, then the court may refuse leave, or set it aside, on the basis that the claim is not within the spirit of the rule, irrespective of whether the claim satisfies the discretionary forum conveniens factors ...* [emphasis added]

44 It is clear, then, that the unspoken assumption that the satisfaction of the three requirements for service out would *ipso facto* justify the assertion of subject-matter jurisdiction by the court is erroneous. In each case with extraterritorial elements, the court must satisfy itself that it has conflicts subject-matter jurisdiction in addition to the traditional service out requirements.

III. A unified doctrine of subject-matter jurisdiction

45 Without a solid normative foundation, the doctrine cannot stand, however misunderstood it may have been. This article now seeks to identify this crucial foundation, upon which a unified doctrine of subject-matter jurisdiction will be constructed.

A. Normative foundation

46 In *Burgundy*, the court did not elucidate the normative justification for the doctrine of subject-matter jurisdiction, but explained that the doctrine of subject-matter jurisdiction was a manifestation of the presumption against extraterritoriality. The rationale for the presumption against extraterritoriality was expounded in *Public Prosecutor v Taw Cheng Kong*.⁶⁶ “other States may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories.”⁶⁷

47 *Burgundy* also cited with approval Lord Diplock’s judgment in *Amin Rasheed Corporation v Kuwait Insurance Co*:⁶⁸

65 *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFCA 12 at [117]–[121].

66 [1998] 2 SLR(R) 489.

67 [1998] 2 SLR(R) 489 at [69].

68 [1984] 1 AC 50 at 65–66. See also *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [93].

[T]he jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of *granting leave under R.S.C., Ord. 11, r. 1 (1) (f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction ... Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r. 1 (1) should be exercised with circumspection* in cases where there exists an alternative forum ... [emphasis added]

48 Later in *Burgundy*, the court applied the doctrine of subject-matter jurisdiction, the crucial question being “whether [granting leave for service out of jurisdiction] will ultimately entail the exercise of exorbitant substantive jurisdiction to an impermissible degree”.⁶⁹ In *Li Shengwu*, the court remarked that *Burgundy* stood for the proposition that service out is “an exorbitant jurisdiction as the foundation for a court’s jurisdiction is primarily territorial. *Considerations of international comity therefore enter the picture* and require that the scenarios in [the service out provisions] be carefully delimited and defined”⁷⁰ [emphasis added].

49 Simply put, the prevailing normative justification for the doctrine of subject-matter jurisdiction relied upon by the Court of Appeal is comity, which generally means that “the courts must respect the sovereignty and autonomy of other states”,⁷¹ taking into account that the courts are perceived as an organ of the country regardless of “the internal distribution of powers within a state”.⁷² But as conflicts scholars know, the problem with relying on comity is that what it entails is difficult to pin down; “comity-based rationales have unstable or ambiguous meanings”.⁷³ The amorphous nature of comity has led some to denounce its usefulness as a jurisdiction-abnegating principle. Nye Perram J in *Habib v Commonwealth of Australia*⁷⁴ held that “[n]o doubt comity between the nations is a fine and proper thing, but it provides no basis whatsoever for this court declining to exercise the jurisdiction conferred on it by Parliament”.⁷⁵ Also on point is Briggs’s observation on the risk of judicial invocations of comity: “It would indeed be unsatisfactory if a judicial reference to comity had the effect of turning the question which arose for decision into a purely discretionary one, but if comity lacks precise definition, there is a risk that this is exactly what it will do.”⁷⁶

69 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [111].

70 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [94].

71 *Belhaj v Straw* [2017] AC 964 at 1147; [2017] UKSC 3 at [225].

72 *R v Lyons* [2003] 1 AC 976 at [40].

73 Tan Yock Lin, “Tainted Contracts in the Conflict of Laws” (2020) SAclJ 1003 at [24].

74 [2010] FACFC 12.

75 [2010] FACFC 12 at [37].

76 Adrian Briggs, *The Principle of Comity in Private International Law* vol 354 at p 87 in *Collected Courses of the Hague Academy of International Law* (Brill, 2012).

50 This is not to say that comity has no place in the conflict of laws. However, comity, without more, cannot be used as a justification (or even as a guiding principle) save in straightforward cases. Comity alone could justify the granting of state immunity⁷⁷ or the recognition and application of foreign laws without scrutiny of their content.⁷⁸ But it cannot justify the scope of the restrictive doctrine of state immunity, where states may only be made parties to an action which relates to *acta jure gestionis*. Neither can it justify the extent to which foreign laws and actions are free from scrutiny. In *Belhaj v Straw*,⁷⁹ Lord Sumption reasoned that comity required the English courts to refrain from determining the legality of the executive acts of a foreign state.⁸⁰ However, Lord Mance, also relying on comity, came to the conclusion that no such restraint should be placed on the English courts because “excess[es] of executive power will or may be expected to be corrected by the judicial arm”. Treating “any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state ... could mean ignoring, rather than giving effect to, the way in which a state’s sovereignty is expressed”.⁸¹ Though both their Lordships decided the scope of the act of state doctrine based on comity, Lord Sumption used it to justify an expansive rule while Lord Mance used it to justify a narrow one. Such cases exemplify Briggs’ concern of comity being used as a disguise for judicial discretion.

51 So too here. Comity could at most be used to justify the existence of the doctrine of subject-matter jurisdiction. It could be said that the assertion of civil personal jurisdiction over foreign defendants is, in a sense, trespass by one sovereign state upon the authority of another. The assertion of such jurisdiction would only be permissible where the foreign state has been “particularly involved” with the subject-matter of the action,⁸² such that the action would “more properly” be the foreign state’s “business to deal with what has happened”.⁸³ But this reasoning is far from convincing. As Lord Sumption observed:⁸⁴

This characterisation of the jurisdiction to allow service out [as exorbitant] is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the Defendant

77 *The Parlement Belge* (1880) 5 PD 197 at 214–215.

78 William Dodge, “International Comity in American Law” (2015) 115 *Columbia Law Review* 2071 at 2078–2079.

79 [2017] AC 964; [2017] UKSC 3.

80 *Belhaj v Straw* [2017] AC 964 at 1148–1150; [2017] UKSC 3 at [228]–[232].

81 *Belhaj v Straw* [2017] AC 964 at 1086; [2017] UKSC 3 at [65].

82 Timothy Endicott, “Comity Among Authorities” (2015) 68 *Current Legal Problems* 1 at 9.

83 *Toprak Mansulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA* [1979] 2 Lloyd’s Rep 98 at 106–107.

84 *Abela v Baadarani* [2013] 1 WLR 2043 at 2062–2063; [2013] UKSC 44 at [53].

and a corresponding interference with the sovereignty of the state in which process was served. *This is no longer a realistic view of the situation. ...* The characterisation of the service of process abroad ... is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the Defendant to decide whether and if so how to respond in his own interest. *It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'.* [emphasis added]

52 The assertion of jurisdiction over a foreign subject-matter could hardly be said to offend comity any longer. We must therefore look elsewhere for a stronger normative foundation for the existence and scope of the doctrine of subject-matter jurisdiction.

53 It is suggested that the doctrine of subject-matter jurisdiction should be founded on the values espoused by the conflict of laws. *Masri v Consolidated Contractors International (UK) Ltd (No 4)*,⁸⁵ cited and largely endorsed by the Court of Appeal save for its public interest analysis, affirmed the respondent's submission that subject-matter jurisdiction should only be asserted where there is "a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction".⁸⁶ The "source of jurisdiction" here refers to the public international law concept of the adjudicative jurisdiction of the courts. As Mills suggests, the conflict of laws addresses public international law concerns, such as by imposing "constraints on the exercise of adjudicative jurisdiction", through doctrinal technique.⁸⁷ If this is right, then it stands to reason that the requirement of a substantial and *bona fide* connection is one of many doctrinal constraints imposed by the conflict of laws. Accordingly, the doctrine of subject-matter jurisdiction must align itself with, and promote, the vital values of the conflict of laws.

54 Two values are relevant for our purposes. First, the conflict of laws is a system of meta-justice that allocates transnational disputes between private parties to appropriate legal systems for resolution.⁸⁸ Being a dispute allocation system, the conflict of laws values "conflicts

85 [2010] AC 90 (HL).

86 *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 (HL) at [18].

87 Alex Mills, "Private Interests and Private Law Regulation in Public International Law Jurisdiction" in *The Oxford Handbook of Jurisdiction in International Law* (Stephen Allen ed) (Oxford University Press, 2019).

88 Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) at pp 10–23; Alex Mills, "Connecting Public and Private International Law" in *Linkages and Boundaries in Private and Public International Law* (D French, K McCall-Smith & V Ruiz Abou-Nigm eds) (Hart Publishing, 2018) at pp 22–23.

justice⁸⁹:⁸⁹ having similar disputes consistently decided under the same law to achieve uniformity of result through the loyal application of law (whether domestic or foreign), regardless of the forum in which disputes are adjudicated. This indifference to adjudicating forum discourages forum shopping, thereby promoting certainty and procedural fairness in transnational disputes.⁹⁰ Comparative studies show that this is a crucial objective that conflicts systems worldwide espouse.⁹¹ Second, substantive justice answers the analytically subsequent question of what makes a system of law appropriate to govern an issue. Substantive justice is the upholding of fairness and private justice through the protection of the parties' reasonable expectations (objectively ascertained).⁹² Commitment to substantive justice is reflected in conflicts systems globally through their preference for the law most closely connected to the occurrence and parties⁹³ and their correlative reticence to apply fortuitous or unforeseeable systems of law.⁹⁴

55 The twin pillars of conflicts and substantive justice support the existence and delimit the scope of the doctrine of subject-matter jurisdiction. There cannot be *Burgundy* close connection where, due to the subject-matter of the action, the Singapore courts are unable to reasonably approximate “the substantive principles and assumptions of the system concerned” and conform with the “prevailing, formal standards of argumentation” in order to come to “a result which the foreign court might plausibly have secured.”⁹⁵ Likewise, there cannot

89 For the origin of the term, see Gerhard Kegel, “The Crisis of Conflict of Laws” (1964) 112 *Recueil des cours* 93 at 185. Also called “decisional harmony” in Alex Mills, “Connecting Public and Private International Law” in *Linkages and Boundaries in Private and Public International Law* (D French, K McCall-Smith & V Ruiz Abou-Nigm eds) (Hart Publishing, 2018) at p 26.

90 Gerhard Kegel, “The Crisis of Conflict of Laws” (1964) 112 *Recueil des cours* 93 at 122; Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 372.

91 *Private International Law at the End of the 20th Century, Progress or Regress?* (Symeon Symeonides ed) (Kluwer Law International, 1999) at pp 73–74.

92 See Joseph W Singer, “Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws” (2015) *University of Illinois Law Review* 1923 at 1925–1926; *Dacey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury ed) (Sweet and Maxwell, 15th Ed, 2012) at [1-006]; and *Lew, Solomon v Kaikhushru Shiyav Nargolwala* [2021] 2 SLR 1 at [79]: “... recognise the role of the law in giving effect to reasonable expectations, objectively ascertained. This role is as relevant and defensible in circumstances outside contract, or where the existence of a contract is in dispute, as it is once the existence of a contract is agreed or established.”

93 See, eg, *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC) at 198; and American Law Institute, *Restatement of the Law (2d) of Conflict of Laws*, § 145.

94 See, eg, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377.

95 Richard Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998) at p 309.

be *Burgundy* close connection where parties do not reasonably expect the Singapore courts to assert jurisdiction over the subject-matter of the action.

56 That these values underlie the doctrine is something that Canadian conflicts jurisprudence has already recognised for some years. In *Morguard Investments Ltd v De Savoye*,⁹⁶ the Supreme Court of Canada “develop[ed] an organizing principle of Canadian private international law, albeit with constitutional undertones”, by adopting a test of “real and substantial connection” to mitigate the risk of jurisdictional overreach by provinces.⁹⁷ Aside from comity – bound to be given passing mention in conflicts cases – the motivation behind the development of the doctrine was to uphold “the principles of fairness and order”.⁹⁸ Similarly, *Hunt v T&N plc*⁹⁹ held that “assumptions of jurisdiction by a province and its courts must be grounded in principles of order and fairness in the judicial system”.¹⁰⁰ As the Supreme Court of Canada explained in *Club Resorts v Van Breda*,¹⁰¹ “order” refers to ensuring of a “degree of predictability of reliability” in the system of private international law (*ie*, conflicts justice), while “fairness” refers to upholding “the expectations of the parties ... in a specific case” (*ie*, substantive justice).¹⁰²

B. Conflicts rules that come under doctrine of subject-matter jurisdiction

57 Conflicts subject-matter jurisdiction is not coterminous with, and does not merely comprise, a limiting rule on service out. Properly understood, subject-matter jurisdiction is a doctrine – a unifying framework comprising multiple rules that share underlying normative principles – which requires that there be a substantial and *bona fide* connection between Singapore and an extraterritorial subject-matter before a Singapore court may assert jurisdiction over such subject-matter.

58 The doctrine explains the normative foundations and delimits the scope of several disparate conflicts rules. Service out, the *Moçambique* rule, foreign act of state rules, and the public law taboo each restrict judicial authority over particular subject-matters. These rules have traditionally been justified on varying and sometimes contradictory grounds – comity,

96 [1990] 1 SCR 393.

97 *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 at [22]–[25].

98 *Morguard Investments Ltd v De Savoye* [1990] 1 SCR 393 at 1095–1096.

99 [1993] 4 SCR 289.

100 *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 at [27].

101 [2012] 1 SCR 572.

102 *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 at [38].

territoriality, institutional competence, separation of powers. The doctrine draws these rules together and reveals their common underlying logic: each rule identifies categories of subject-matter where courts lack the close connection necessary to loyally apply foreign law or vindicate parties' reasonable expectations. Unifying the doctrine in this way serves critical functions that neither the individual rules nor the abstract values of conflicts and substantive justice alone can achieve. First, it explains why these structurally different rules nonetheless share common exceptions and limitations. Second, it provides principled boundaries for rules whose scope has proven controversial. Third, it provides courts a framework for recognising new limitations on jurisdiction in future cases involving novel subject matters. When confronted with unprecedented extraterritorial scenarios, courts can simply ask: does a substantial and *bona fide* close connection exist such that conflicts and substantive justice are served? This promotes an incremental, principled development of these conflicts rules. To this end, a three-step framework will be proposed in the next section of this article.

(1) *Service out*

59 We begin by examining service out. While assertion of jurisdiction under common law originally depended on service of a writ or summons on a defendant present within the state's territory, that quickly evolved because "these archaic jurisdictional notions no longer suited a country with far-flung commercial activities".¹⁰³ Instead, common law jurisdictions enacted legislation that conferred the courts the discretion to serve writs or summons out of jurisdiction.¹⁰⁴ Although framed in terms of service owing to tradition, these legislative changes in effect "amounted to a reform that reflected the civil law approach".¹⁰⁵ The civil law approach to jurisdiction remains faithful to the Roman law principle of *actor sequitur forum rei*, which manifests as the general rule that a defendant may only be sued in the courts where they are domiciled.¹⁰⁶

103 Friedrich K Juenger, "The American Law of General Jurisdiction" (2001) 1 *The University of Chicago Law Forum* 141 at 144.

104 Such as what is now Rules of Court 2021 O 8 r 1(1). See also Friedrich K Juenger, "The American Law of General Jurisdiction" (2001) 1 *The University of Chicago Legal Forum* 141 at 144.

105 Friedrich K Juenger, "The American Law of General Jurisdiction" (2001) 1 *The University of Chicago Legal Forum* 141 at 144.

106 See, eg, 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, Recital 15: "The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile." See also Art 4(1): "Subject to this
(cont'd on the next page)

60 The primary reason for this general rule is “to protect the rights of the defendant”¹⁰⁷ by “mak[ing] it easier, in principle, for a defendant to defend himself”.¹⁰⁸ Put differently, there was a shift in the underlying principle of assertion of jurisdiction from territoriality to defendant fairness. This focus on defendant fairness in the context of service out is a manifestation of substantive justice; while the plaintiff cannot complain that they had not reasonably expected an action to arise in the forum when they themselves commenced the action in that forum, the law on service out recognises that a non-domiciled defendant’s reasonable expectations must be protected. The law achieves this through the doctrine of subject-matter jurisdiction: where there is a close connection between the subject-matter and the forum, the defendant would objectively have the reasonable expectation that an action relating to that subject-matter would arise in that forum. This also explains the waivable nature of service out restrictions; where a defendant submits to the jurisdiction of the forum, the defendant is admitting a close connection exists and that it was within their reasonable expectation that an action relating to that subject-matter would arise in that forum.

(2) *Moçambique rule*

61 The *Moçambique* rule provides that “the court does not have jurisdiction to entertain proceedings involving determination of title to foreign land”, except where such determination is only incidental to an adjudication on personal obligations between the parties (“personal equities exception”).¹⁰⁹ The *Moçambique* rule is relevant because “the issue is one where the court has no jurisdiction over the subject-matter of the claim ... what the court lacks is subject-matter jurisdiction” – which must be taken in the conflicts sense as the court only lacks jurisdiction *vis-à-vis* foreign title – “not personal jurisdiction”.¹¹⁰

62 Some assert that the *Moçambique* rule is based on comity, recognising that where land is concerned, “a sovereign is entitled to assert a double prerogative, to make laws for its own country and to have those laws adjudicated in its own courts exclusively”.¹¹¹ This is especially

Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

107 *A-S Autoteile Service GmbH v Malhé* Case C-220/84 at [15].

108 *Group Josi Reinsurance Company SA v Universal General Insurance* Case C-412/98 at [35].

109 *Ng Teck Sim Colin v Hat Holdings Pte Ltd* [2010] 4 SLR 840 at [2] and [32].

110 Adrian Briggs, *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) at [4.06], cited with approval by the Court of Appeal in *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508.

111 *Ng Teck Sim Colin v Hat Holdings Pte Ltd* [2010] 4 SLR 840 at [37].

so because determinations of foreign title involve “possible conflict with foreign jurisdictions, and the possible entry into and involvement with political questions of some delicacy”.¹¹² But if we reason from comity, the *Moçambique* rule should result in non-justiciability properly understood: “an issue ... inherently unsuitable for judicial determination by reason only of its subject-matter”.¹¹³ If the rule were truly concerned with exclusivity of adjudication over a subject matter fundamental to the sovereign, then the well-established personal equities exception would be an unjustifiable aberration; the coercion of foreign defendants through binding orders with sanctions for non-compliance which in substance affects title to that subject-matter should not be justifiable – and arguably, neither would incidental determinations of title.

63 The better view is that the *Moçambique* rule, as a facet of subject-matter jurisdiction, seeks to uphold conflicts justice. In direct determinations of foreign title, the potential intertwining of foreign title with delicate political questions,¹¹⁴ complexities raised as anterior issues to be resolved,¹¹⁵ relevance of foreign custom and tradition,¹¹⁶ and even constitutional implications¹¹⁷ all render a domestic court’s loyal application of foreign law unlikely; it would be difficult for a domestic court to reach “a result which the foreign court might plausibly have secured”.¹¹⁸ When faced with insurmountable difficulties in reasonably approximating the content of the foreign law, courts should not assert jurisdiction, lest they be accused of “making up rules of law to be applied under the guise of foreign law”.¹¹⁹ Put differently, the forum court would lack subject-matter

112 *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 at 537.

113 *Shergill v Khaira* [2015] AC 359 at 377; [2014] UKSC 33 at [41].

114 *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 at 537.

115 See, eg, *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508 at [30]. The Court of Appeal noted, in the context of *forum non conveniens*, that the determination required consideration of the communal property doctrine and the legal consequences of non-disclosure of marital property under Indonesian law. These “complexities raised” were “better dealt with by the Indonesian courts”.

116 See, eg, *Ng Teck Sim Colin v Hat Holdings Pte Ltd* [2010] 4 SLR 840 at [37]: “The present case goes further as the dispute to title possibly involves issues relating to Thai custom and tradition of the community given the expert witnesses’ evidence that under Thai law, there is no official document to prove one’s title to a building, unlike the case of one’s title to land.”

117 *Griggs Group Ltd v Evans* [2003] EWHC 2914 (Ch) at [118]: “In unruly times the very pittance of the sovereign might depend on his ability tightly to control land ownership. Later on, ownership of land might confer a right to vote or to seek election to the legislature. For a foreign court to determine titles to land might amount to undermining the constitution of the country.”

118 Richard Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998) at p 309.

119 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 374.

jurisdiction because there cannot be a close connection between the subject-matter and the forum where the forum cannot reasonably approximate the contents of the applicable foreign law. Contrariwise, where the determination is merely incidental to an adjudication on the personal obligations between parties, these complications are less likely to arise. There is “no sound reason why a claim *in personam* in respect of foreign immovables arising out of a prior contract [or other equitable claims] ... should fail”¹²⁰ when domestic courts typically have no issue so applying foreign law. In such cases where the personal equities exception is applicable, the subject matter of the action is properly identified to be the personal obligations between the parties, not the foreign immovables; that foreign immovables are tangentially involved with the subject matter therefore does not preclude a finding that there is a close connection between the subject matter of the action and the forum. Unlike restrictions on service out, the *Moçambique* rule cannot be waived because, save for situations where the personal equities exception is engaged, it would be impossible for the forum to reasonably approximate the contents of the applicable foreign law, regardless of whether the parties agree otherwise.

(3) *Foreign acts of state*

64 The rules on foreign acts of state provide that, where the action involves foreign legislative or executive acts, courts must presume the validity or legality of such acts in deciding the dispute at hand.¹²¹ Where the rules on foreign acts of state apply, the courts will not have the subject-matter jurisdiction to assess the validity or legality of the foreign legislative or executive acts. Unfortunately, the jurisprudence on foreign acts of state is convoluted, and courts cannot agree on the scope of the rules. As Teo explains:¹²²

Courts fundamentally cannot decide which area of law they should look to for answers, be it public international law, comity, domestic constitutional law or private international law. Having disagreed on the starting point for their discussion, courts then unsurprisingly disagree on whether the [rules] should exist, and if so, what its scope should be.

65 For reasons explained earlier, comity cannot be the basis of the rules on foreign acts of state.¹²³ Neither can public international law. Assessments of “validity or legality of a foreign state’s acts under its

120 *Griggs Group Ltd v Evans* [2003] EWHC 2914 (Ch) at [115].

121 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 362.

122 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 362.

123 See nn 78 to 82 above and accompanying text.

own laws are no longer seen as assertions of international jurisdiction under public international law” today, with no assertion of prescriptive jurisdiction (since only the foreign state’s laws are asserted over its acts) or enforcement jurisdiction (since domestic court decisions do not bind the foreign state).¹²⁴ Further, the doctrine of recognition under public international law only obliges a state to recognise a state’s sovereignty, such recognition not extending to the laws of that sovereign state.¹²⁵ Public international law thus cannot support the foreign act of state rules.

66 Reliance on domestic constitutional law, too, is misplaced. The constitutional separation of powers doctrine does not require the Judiciary to be bound by the Executive’s recognition of, or refusal to recognise, the sovereignty of a foreign state, since it is up to the Judiciary to determine whether the state fulfils the public international law criteria for statehood.¹²⁶ Domestic constitutional law *a fortiori* does not require the Judiciary to be bound by the Executive’s determinations of whether certain foreign legislative or executive acts should be recognised. Further, since domestic courts can adjudicate upon domestic public law, that the subject matter involves an adjudication on public law (albeit foreign) does not take the matter beyond the Judiciary’s constitutional competence.¹²⁷

67 The justifications for the rules on foreign acts of state, as rules forming part of the doctrine of subject-matter jurisdiction, should be found within private international law itself,¹²⁸ in accordance with Lord Wilberforce’s authoritative statement in *Buttes Gas v Hammer*¹²⁹ that the rules on foreign acts of state are found “within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied”.¹³⁰ Grounded in private international law and guided by the values of conflicts and substantive justice, the previously confused scope of the rules on foreign act of state can now be elucidated: all courts, except those of the relevant foreign state, should decline to assess the validity or legality of foreign legislative or executive acts as they lack the

124 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 369.

125 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 369; Chen Ti-Chiang, *The International Law of Recognition* (Stevens & Sons, 1951) at pp 146–147.

126 Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) at paras [10.21]–[10.28] and [10.79]–[10.80].

127 Kurt Lipstein, “Proof of Foreign Law: Scrutiny of its Constitutionality and Validity” (1967) *British Yearbook International Law* 265 at 266.

128 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 371.

129 [1982] AC 888.

130 [1982] AC 888 at 931.

subject-matter jurisdiction to do so. Given the inextricable intertwining of public law with public policy and politics in foreign legislative or executive acts, “courts engaged in public law adjudication tend to favour fact-specificity and flexibility rather than certainty and coherence”.¹³¹ The “ubiquity of fact-specificity and flexibility in public law adjudication” entails that a domestic court’s attempts “to loyally apply foreign public law when assessing the validity or legality of foreign legislative and executive acts” will often end in failure, thereby undermining conflicts justice. After all:¹³²

... courts cannot even take for granted that foreign courts would continue to apply any past foreign public law principles when guessing the new public law rules to be applied, or indeed even be sure that the foreign court would rely on rules rather than open-ended reasoning frameworks, and thus have no basis upon which they can attempt to approximate the foreign court’s decision.

68 A rule that courts lack the subject-matter jurisdiction to assess the validity or legality of foreign legislative and executive acts would create a system with a high level of international uniformity because, first, there is empirical evidence that courts rarely strike down legislative or executive acts as unconstitutional, and second, such a rule provides courts a singular point-of-reference to align and co-ordinate their approaches in similar future disputes.¹³³ Such international uniformity also promotes substantive justice by shaping the reasonable expectations of future litigants, who should reasonably expect the forum courts to reject any assessment of the validity or legality of foreign legislative and executive acts (with the understanding that they can later invoke the well-established public policy exception to deny recognition of those acts¹³⁴). In the terms of *Burgundy*, there cannot be a close connection between foreign legislative and executive acts and the forum, since parties would not reasonably expect the Singapore courts to determine the validity or legality of a foreign legislative or executive act; parties would however reasonably continue to expect that the Singapore courts adjudicate the other subject-matters to which it has a close connection. Thus understood, the foreign act of state rules pertain not to the proof of foreign law (as a “presumption” may suggest), as there is no amount of evidence of foreign law that a litigant may present that would enable

131 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 377.

132 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 378.

133 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 383.

134 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 387–388.

a forum court to adjudicate on such acts, but go to the forum court's lack of jurisdiction to do so.

(4) *Public law taboo*

69 The fourth “rule” to discuss is the public law taboo,¹³⁵ which provides that courts generally have no jurisdiction over actions to enforce, directly or indirectly, a foreign state's penal, revenue, or other public laws.¹³⁶ The precise scope of the public law taboo, however, is unsettled as what constitutes enforcement of a foreign public law remains unresolved, and the existence of the public law taboo itself is fraught with controversy.¹³⁷

70 *The Republic of the Philippines v Maler Foundation*¹³⁸ (“Maler”) concerned a judgment granted by the Philippines Supreme Court based on Philippine law for the forfeiture of title to funds in favour of the Republic of the Philippines. The Court of Appeal noted in *obiter* that recognition of the foreign judgment would amount to indirect enforcement of a foreign public law because the relevant law forfeited property of public officials derived from illegal sources in favour of the state, the proceedings leading up to the judgment were instituted by the state, and the impugned provision engaged the state interest of clamping down on corruption by punishing and deterring public officials.¹³⁹

71 However, in the Australian case of *Robb Evans of Robb Evans & Associates v European Bank Ltd*¹⁴⁰ (“Robb Evans”), a receiver appointed by the US Federal Trade Commission sued in New South Wales to recover the proceeds of a credit card fraud. The funds to be recovered were based on the profits of the wrongdoers rather than the losses of the fraud victims and could therefore be said to be penal rather than compensatory. Further, the funds recovered would first be pooled with the US Treasury, and there was a possibility that the undistributed surplus would be returned to the US Treasury. The court however held

135 For Singapore, see *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389; for the UK, see *The United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172; [2009] EWCA Civ 27; for Australia, see *Her Majesty's Attorney-General in and for the United Kingdom v Heinemann Publishers Australia Proprietary Ltd* (1988) 165 CLR 30 (HCA); and for the EU, see *Hellenic Republic v Nikiforidis* C-135/15; EU:C:2016:774.

136 Dicey, *Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris eds) (Sweet and Maxwell, 15th Ed, 2012) at [5R-019].

137 See, eg, William Dodge, “The Public-Private Distinction in the Conflict of Laws” (2008) 18 *Duke Journal of Comparative International Law* 371.

138 [2014] 1 SLR 1389.

139 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [68]–[70].

140 [2004] NSWCA 82.

that, adopting a substance over form approach, the case was merely one of a “recoupment of funds with a view to their return to persons deprived of those funds”, did not involve an exercise of a power peculiar to government, and would therefore not amount to the enforcement of a foreign public law.

72 Adding to the confusion, it has also been held that an undertaking by the claimant not to seek to enforce a penal provision can bring the case out of the scope of the public law taboo. In *United States Securities and Exchange Commission v Manterfield*¹⁴¹ (“*Manterfield*”), the SEC obtained a worldwide freezing order from the English courts over the assets of the defendant in support of their proceedings in Massachusetts over allegations that the defendant was running a fraudulent investment scheme. The issue was whether the public law taboo precluded the English court from continuing the freezing order. The England and Wales Court of Appeal held that the public law taboo was not engaged on the facts. Although the assets in question would potentially be subject to both disgorgement and civil monetary penalties, the SEC undertook to only disgorge the assets for distribution to the defrauded investors. The undertaking was only given because the assets available would be unlikely to meet even the sum to be disgorged and distributed to investors. The court nevertheless held that “[t]he substance of what the SEC will seek to enforce (if they prevail in the action), and in relation to which they seek to preserve the assets, is the disgorgement of what they allege to be the proceeds of fraud” only, and would therefore not fall foul of the public law taboo.¹⁴²

73 To resolve the controversy surrounding the public law taboo, we must identify the true impulse that shapes the rule. The apparent rationale for the public law taboo has been said to be that enforcing certain foreign public law would “amount to an unwarranted extension of the sovereign power ... by one state within the territory of another”.¹⁴³ The High Court in *Her Majesty’s Revenue & Customs v Hashu Dhalomal Shahdadpuri*¹⁴⁴ echoed this view, noting that the enforcement of penal or revenue laws were paradigm examples of assertions of sovereign authority.¹⁴⁵ In short, the rationale for the public law taboo appears to be the obverse of a court paying heed to comity; just as the state in which the forum court lies should not assert its sovereign power within the territory of another in

141 [2010] 1 WLR 172; [2009] EWCA Civ 27.

142 *United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172 at 177–180; [2009] EWCA Civ 27 at [15]–[24].

143 *United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172 at 177; [2009] EWCA Civ 27 at [11].

144 [2011] 2 SLR 967.

145 [2011] 2 SLR 967 at [7].

the name of comity, the forum court should not allow a foreign state to assert its sovereign power within the forum court's state.

74 Comity however cannot justify the existence or delineate the scope of the public law taboo. Indeed, as with the *Moçambique* rule, reasoning from comity should entail in non-justiciability properly understood. As is clear from the authorities above, especially *Manterfield*, it does not. And aside from the reasons already explained above, all of which are applicable here, an assertion of sovereign authority in a foreign state or *vice versa* should not be inherently or automatically objectionable. As Dodge astutely observes, a “flat refusal to permit any action at all” would also be offensive to comity, and:¹⁴⁶

... ignores the substantial benefits that may be had from cooperation. If U.S. courts refuse to enforce Canadian tax judgments, and Canadian courts refuse to enforce U.S. ones, each country's treasury will be reduced – to the harm of both the country and those of its respective taxpayers who are unable similarly to evade paying their taxes. The same is true of antitrust law. A cartel member or monopolist may not be amenable to personal jurisdiction in the country whose laws it has violated. If U.S. courts refuse to enforce Canadian antitrust laws, and Canadian courts refuse to enforce U.S. ones, some cartel members and monopolists will escape liability and, as a result, enrich themselves at the expense of consumers.

75 Since the public law taboo involves the question of whether the forum court has the jurisdiction to adjudicate a claim which involves the enforcement of a foreign public law, it makes more sense for it to be viewed as part of the doctrine of subject-matter jurisdiction. The question should therefore be whether upholding the public law taboo promotes conflicts and substantive justice. It is submitted that it does, but only to the extent that the relevant foreign public laws are of a constitutional or administrative nature.

76 In relation to conflicts justice, there is an argument to be made that the forum court may find foreign public laws more difficult to apply than foreign private laws. This proposition however requires more specificity, since it is difficult to conceive that foreign public law in general would inherently be more difficult to apply than foreign private law; courts around the world have correctly noted that while there “may be difficulty in interpreting foreign revenue laws[,] such difficulties are met with in relation to other foreign laws with which the Courts have on occasion to grapple”,¹⁴⁷ and have also rejected assertions that, for instance,

146 William Dodge, “The Public-Private Distinction in the Conflict of Laws” (2008) 18 *Duke Journal of Comparative International Law* 371 at 391–392.

147 *Commissioner of Taxes v McFarland* 1965 (1) SA 470 (Witwatersrand Local Division) at 473.

“courts lack the competence to examine the validity of unfamiliar foreign tax schemes”.¹⁴⁸ Indeed, in *Manterfield* and *Robb Evans*, there were no issues in applying foreign public law. Even the Court of Appeal in *Maler* never once expressed any concerns or difficulties with interpreting or enforcing the Philippine judgment. It is therefore suggested that the only foreign public laws that are much more difficult to handle are those of a constitutional or administrative nature, as (again) the “ubiquity of fact-specificity and flexibility in public law adjudication” entails that a domestic court’s attempts to loyally apply foreign constitutional and administrative law will often end in failure, thereby undermining conflicts justice.¹⁴⁹

77 As for substantive justice, where the forum court applies a choice-of-law rule that chooses the foreign system of law with a close connection to the issue at hand, which would objectively be within parties’ reasonable expectations, it is curious why the forum court would then balk at the idea of enforcing laws that are part of the chosen system of law. The sole exception, again, is foreign public laws that are of a constitutional or administrative nature. Substantive justice would be promoted by such a clear-cut rule: future litigants should reasonably expect the forum courts to reject any enforcement of foreign constitutional or administrative laws.

78 The doctrine of subject-matter jurisdiction therefore refines the public law taboo to a narrow one. Courts generally have the jurisdiction over actions to enforce, directly or indirectly, a foreign state’s public laws, except where such laws are of a constitutional or administrative nature. Admittedly, it is difficult to conceive of a situation where a forum court would be asked to enforce a constitutional or administrative law of a foreign state, but there should be no hesitation in relegating a highly controversial rule such as the public law taboo to a marginal role if it means furthering the primary goals of the conflict of laws.

C. *Synthesising a unified doctrine of subject-matter jurisdiction*

79 The foregoing section demonstrates that the doctrine of subject-matter jurisdiction undergirds several well-known conflicts rules – including service out, the *Moçambique* rule, acts of state, and the public law taboo – and elucidates the scopes of each rule. By insisting on a substantial and *bona fide* connection between the forum and the subject-matter, the jurisdictional reach of the Singapore courts is

148 *Pasquantino v United States* 544 US 349 at 370 (2005).

149 Marcus Teo, “Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine” (2020) 16(3) *Journal of Private International Law* 361 at 377.

aligned with the legitimate expectations of litigants and the demands of international order, thereby ensuring that the courts do not arrogate to themselves the adjudication of matters for which they are institutionally or normatively unsuited, whether by reason of the foreign nature of the subject-matter or the intricacies of foreign constitutional or administrative law.

80 We may synthesise the foregoing into a three-step framework for a Singapore court to apply to determine whether it has conflicts subject-matter jurisdiction:

(a) *Identification of the precise subject-matter.* The court should first isolate the core subject-matter of the claim, focusing on the legal and factual nucleus of the cause of action. For instance, where foreign immovables are implicated, is the court being asked to determine foreign title, or is the court being asked to decide whether a party is personally obliged under an existing contract to take certain actions in respect of the foreign immovables? This step ensures the jurisdictional inquiry centres on the substantive grounds of the claim and excludes incidental or peripheral issues. In this step, the court should also be careful to separate out disparate legal issues. For instance, a cause of action that implicates foreign executive or legislative acts can be bifurcated into two distinct subject-matters: (i) the validity or legality of such foreign executive or legislative acts; and (ii) the cause of action itself. Each subject-matter should be independently tested for the purposes of establishing subject-matter jurisdiction.

(b) *Assessment of whether there is a close connection between the subject-matter identified and Singapore.* The inquiry is whether a substantial and *bona fide* close connection exists between the identified subject-matter and Singapore. In this step, the court should identify the factual connections which are relevant to the cause of action in question, which are necessarily fact-sensitive but may include the location of events or transactions giving rise to the claim, the location of the parties involved, the *situs* of any relevant property, the place of performance of contractual or legal obligations, and the parties' conduct, communications, and implied or stated expectations. The factual connections identified should then be weighed based on their significance, taking into account the nature of the claim and the legal context. Some connections may carry more weight than others depending on their relevance to establishing a genuine nexus between the subject-matter and Singapore. The court must be mindful not to treat the presence of any single connection

as dispositive but rather engage in a holistic assessment of the connections collectively.

(c) *Verification of the existence of a close connection by reference to the twin pillars of conflicts justice and substantive justice.* If, after weighing the factual connections identified in the second step, the court considers that there is a close connection between the subject-matter and the forum, the court should verify this finding by assessing whether such finding promotes conflicts and substantive justice. If there is indeed a substantial and *bona fide* close connection, then international uniformity of result through the loyal application of law and parties' reasonable expectations should naturally be furthered. On the other hand, if asserting subject-matter jurisdiction may undermine these outcomes, the court should carefully re-examine the factual connections and their respective assigned weights. This verification process ensures that the factual assessment in the second step is not merely a mechanical weighing but is critically examined against the overarching normative goals of conflicts and substantive justice, safeguarding the legitimacy and uniformity of the jurisdictional assertion.

81 While courts in practice often apply jurisdictional rules such as those concerning service out, the *Moçambique* rule, the foreign act of state doctrine, and the public law taboo in a straightforward, rule-bound manner, it is imperative not to lose sight of the doctrinal foundations that undergird these rules. The temptation to mechanically apply hard-and-fast rules without considering their underlying principles should be resisted. The doctrine of subject-matter jurisdiction expounded on above provides a unifying normative framework that elucidates why such rules exist, how they interrelate, and where their limits lie. While this framework should not forestall efficient adjudication in clear-cut cases, it should be used as a guiding compass in complex or edge cases where the jurisdictional question is less certain or where exceptions to established rules are considered. In such circumstances, returning to the doctrine enables courts to maintain coherence in the conflict of laws.

D. Subject-matter jurisdiction and the Rules of Court 2021

82 This section will be but a brief incursion because the doctrine of subject-matter jurisdiction, as just shown above, undergirds more than just service out. Nevertheless, since service out led to the genesis of (or, more precisely, the first reference to) the doctrine of subject-matter jurisdiction in Singapore jurisprudence, it is worth briefly touching upon the statutory basis for applying the doctrine to service out under the Rules of Court 2021.

83 It is interesting to note at the outset that the Court of Appeal in *Burgundy* did not hesitate to read into the Rules of Court (Revoked) the doctrine of subject-matter jurisdiction by applying the presumption against extraterritoriality, essentially suggesting that subject-matter jurisdiction is a canon of statutory interpretation.¹⁵⁰ Presumably the court did so out of necessity in *Burgundy*, as it was faced with a factual matrix which came under one of the jurisdictional gateways in O 11 r 1 (Revoked) and in which the Singapore courts were the natural forum, such that without invoking subject-matter jurisdiction, the court would have had no reason not to assert personal jurisdiction over the non-party in question. However, given the discussion above on the normative basis for the doctrine of subject-matter jurisdiction, it is clear that subject-matter jurisdiction is more than just a canon of statutory interpretation.¹⁵¹ In any case, there is no longer a need to artificially narrow the scope of subject-matter jurisdiction to the realm of statutory interpretation because the Rules of Court (Revoked) have since been superseded by the Rules of Court 2021, which readily accommodate the doctrine.

84 As explained earlier, O 8 r 1 provides that service out of Singapore will be allowed if the Singapore court is the appropriate court to hear the action. The Singapore court is the appropriate court where it fulfils the requirements of PD para 63(2) – *viz*, that there is a good arguable case that there is sufficient nexus to Singapore, that Singapore is the *forum conveniens*, and that there is a serious question to be tried on the merits of the claim. Practice Direction para 63(3) then provides that, for the purposes of determining sufficient nexus, the claimant should refer to “any of the ... non-exhaustive list of [twenty] factors”.

85 Although it was assumed earlier in this article that the new regime for service out under the Rules of Court 2021 did not present a radical departure from that of the Rules of Court (Revoked), that assumption is not completely accurate. A key difference which is important to note is that the factors in PD para 63(3) are non-exhaustive. In contradistinction, the grounds under O 11 r 1 (Revoked) were

150 See Marcus Teo, “Service Out for Scandalising Contempt: An International Constitutional Jurisdiction?” [2019] Sing JLS 477 at 483–484: “However, the Burgundy doctrine of ‘subject-matter jurisdiction’ only ‘giv[es] effect to the presumption against extra-territoriality’ by narrowing the ambit of broadly-worded statutory provisions conferring personal jurisdiction. Therefore, it is formally a canon of statutory interpretation applicable to Order 11 heads of jurisdiction, not a separate and additional requirement above Order 11 that claimants must fulfil.”

151 For criticism on pigeonholing subject-matter jurisdiction into canons of statutory interpretation, see Maria Hook, “The Statutist Trap and Subject-Matter Jurisdiction” (2017) 13 *Journal of Private International Law* 435 at 457–460.

exhaustive, since the claim “must come within the scope of one or more” of the jurisdictional gateways.¹⁵² The intention of making the new service out provision more expansive is confirmed by the Civil Justice Commission Report. Chairman Tay Yong Kwang J observed that it is now “unnecessary for a claimant [to] scrutinise the long list of permissible cases set out in the [Rules of Court (Revoked)] in the hope of fitting into one or more descriptions”. The expansion of the service out provision is intended to avoid “the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list”.¹⁵³ This explains why Mah and Yoong (rightly) view the revised Rules of Court 2021 as having the potential to not only “substantially widen” existing jurisdictional gateways, but also create new jurisdictional gateways on which claimants can rely.¹⁵⁴

86 Given the expansion of the service out provision under the Rules of Court 2021, there is an even greater need to impose appropriate constraints on service out. While the majority of the UK Supreme Court in *FS Cairo (Nile Plaza) LLC v Lady Brownlie*¹⁵⁵ held that “an unnaturally restrictive reading of the [jurisdictional] gateways” for service out was unnecessary given the presence of the “safety value” that is *forum conveniens*,¹⁵⁶ it has already been explained in paras 42–44 above that the function and objectives of *forum conveniens* are not coincident with that of subject-matter jurisdiction. The jurisdictional gateways should be limited in so far as the objectives of the conflict of laws are compromised.

87 The question, then, is where the doctrine of subject-matter jurisdiction fits into the statutory framework, without unnecessarily limiting the doctrine to merely being a canon of statutory interpretation. This question is not difficult to answer. The phrase used in PD para 63(2)(a) – that there must be “sufficient nexus to Singapore” – is broad enough to encompass the close connection test for subject-matter jurisdiction. That the list in PD para 63(3) is one of the *non-exhaustive factors* is also significant. Unlike gateways, which are either established or not, the PD does not provide that the presence of a factor or factors automatically establishes “sufficient nexus” for the purposes of PD para 63(2)(a). Accordingly, the Rules of Court 2021 read together with the PD can accommodate the incorporation of the doctrine of subject-matter jurisdiction as the non-explicated link between the

152 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].

153 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 16.

154 Ian Mah & Aaron Yoong, “Service Out under the New Rules of Court” (2023) 35 SAclJ 174 at [19]–[26].

155 [2022] AC 995; [2021] UKSC 45.

156 [2022] AC 995 at 1024–1025; [2021] UKSC 45 at [77].

non-exhaustive factors and “sufficient nexus”, with ample room for the court to incrementally develop the doctrine as it sees fit.

IV. Conclusion

88 The conflict of laws landscape is thought to be littered with disparate, confusing, and sometimes contradictory rules. Where courts have attempted to draw them together, they have often done so based on nebulous ideas like comity. This article shows that some of these rules and their scope can be solidly founded on and coherently explained and elucidated by the doctrine of subject-matter jurisdiction.

89 It is emphasised that the doctrine of subject-matter jurisdiction advanced in this article is not merely a technical threshold for service out, nor is it confined to specific statutory provisions or categories of orders. Rather, it functions as a doctrinal gatekeeper and framework which can be applied to all cases with an extraterritorial element. The goal of the doctrine, simply put, is to ensure that the courts adjudicate only matters for which they are normatively suited, guided by the twin lodestars of conflicts and substantive justice.

90 It is hoped that the Singapore courts will follow the lead of *Burgundy* to rigorously apply and incrementally develop the doctrine of subject-matter jurisdiction. Its continued evolution will be indispensable to maintaining the legitimacy, predictability, and integrity of the Singapore court system and Singapore law in an era of ever-increasing transnational complexity.
