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Lecture

"GLOBAL LITIGATION AND UPHOLDING JUSTICE: PURSUIT OF A PRINCIPLED APPROACH TO RECOGNITION OF FOREIGN JUDGMENTS IN TRANSNATIONAL LITIGATION"[1]

Common law rules of the "conflict of laws", or "private international law" as it is sometimes referred to, were developed and refined before transnational litigation became as common as it now is. International agreements have dealt with some of the issues arising from transnational litigation, but not all of them. Courts of the forum may encounter issues arising from possible or concluded litigation in other jurisdictions not only at the point of considering whether to permit the commencement of litigation in the forum, but also when deciding whether to permit points decided in a foreign jurisdiction to be raised or relied upon in the forum. Transnational estoppel (both cause of action estoppel and issue estoppel) has been well recognised since at least the House of Lords' decision in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853. A foreign judgment may preclude a party from relitigating an issue or a cause of action in the courts of the forum. This lecture examines how transnational estoppel fits with other principles governing the recognition of foreign judgments and with principles about *forum non conveniens* and, then, invites consideration of when the courts of the forum may refuse to give preclusive effect to a foreign judgment and what principles might guide that refusal.

1 Editorial Note: The author delivered this Yong Pung How Visiting Professorship Lecture shortly after Academy Publishing's publication of *Pioneer, Polymath and Mentor: The Life and Legacy of Yong Pung How*, a tribute to Yong Pung How CJ, a former President of the Singapore Academy of Law ("SAL"). The *Singapore Academy of Law Journal* usually only publishes lectures organised or co-organised by the SAL and its subsidiaries. This lecture has been specially selected for publication as it further highlights Yong CJ's contributions to the law, to the Judiciary and to Singapore.

The Honourable Justice Michelle **GORDON** AC[2]
Justice of the High Court of Australia; Yong Pung How Distinguished Visiting Professor, Yong Pung How School of Law, Singapore Management University.

I. Introduction

1 Reflecting on the life and career of Yong Pung How CJ, one cannot help but be in awe of not only all that he accomplished, but of the manner in which he went about realising those accomplishments. His significant contributions to the law during a long and distinguished career are well known. I do not attempt to canvass them in detail now. Rather, I limit my observations to focusing on one of the critical values and virtues which, I think, features prominently throughout, and is characteristic of, his Honour's work over the course of his life – the continuous pursuit of knowledge with a global perspective.

2 Yong CJ's inquiring mind and keen intellect were on display early. In December 1940, at the age of just 14, having received his Cambridge School Certificate at the Victoria Institution, his Honour wasted no time in applying for tertiary studies at the medical school at Raffles College.[3] The responses he received varied in tone – while some suggested that he was "crazy", the principal of Raffles College more diplomatically observed he was perhaps a bit young.[4] His Honour was advised to wait a few years until he was 16 or 17.[5] As history would have it, Yong CJ's pursuit of further study would be delayed for another five years; the Pacific War broke out in the region in December 1941 disrupting the ordinary way of life. Not one to stay idle, his Honour did various jobs throughout the war: messenger in a local bank, then a clerk, as well as some conscripted labour at one of the airfields during the Japanese Occupation in Kuala Lumpur.[6]

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2 This is an edited version of the Yong Pung How Visiting Professorship Lecture 2024 delivered at the Singapore Management University on 15 July 2024. The author acknowledges the considerable assistance of Desiree Thistlewaite in its preparation. Errors and misconceptions remain with the author.

3 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 1–2.

4 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 2.

5 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 2.

6 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 1–2.

3 At the end of the war, Yong CJ left for England to study law at the University of Cambridge.[7] In reflecting on why he settled on law as his chosen field, his Honour observed that he was "in a sense brought up in the law", as his father was a lawyer, and of all the courses on offer, the law was "the most logical".[8] Interestingly, his Honour also noted that business administration was not yet an established discipline. This was perhaps a stroke of luck, as had business and finance been as prominent a field of study as they are today, his Honour's choice in studies may well have been different, and Singapore, and the world, may not have benefited from the brilliant legal mind that came to be.

4 Reflecting on his time at Cambridge, his Honour explained that it was like finding himself "in a different sort of world. You could do almost anything you wanted provided you did not break any of the rules… there was complete freedom of expression. And there was the opportunity to interact with a lot of other people from all over the world."[9]

5 Yong CJ's enduring intellectual curiosity in the world and desire to adapt and innovate was at the core of one of his Honour's greatest contributions to the administration of justice in Singapore: the introduction of a series of sweeping reforms to transform the Singapore court system following his appointment as Chief Justice of the Supreme Court of Singapore in September 1990.[10] These reforms – which included changes to case management, alternative dispute resolution, the use of information technology and the involvement of the community in the justice process – have been described as reflecting "a readiness to move forward, a determination to be attuned to the shifting needs of modern Singapore society, and an unwavering commitment to continual improvement of the administration of justice".[11] In discussing the reforms, his Honour explained that: "The underlying thread that drove all of these reforms was the pursuit of Justice. Justice is what is expected of the courts. It is what our courts should deliver."[12] A parallel "goal was

7 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 2–3.

8 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 2.

9 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 3–4.

10 Wong Kok Weng & Sia Aik Kor, "A History of the Singapore Legal Service" in *Essays in Singapore Legal History* (Kevin Y L Tan ed) (Academy Publishing & Marshall Cavendish Academic, 2005) at p 88.

11 Mavis Chionh, "The Development of the Court System" in *Essays in Singapore Legal History* (Kevin Y L Tan ed) (Academy Publishing & Marshall Cavendish Academic, 2005) at p 117.

12 Chief Justice Yong Pung How, "Chief Justice's Foreword" in *Hall of Justice: Supreme Court Singapore* (Supreme Court, Republic of Singapore, 2006) at p 2.

to equip the judiciary to deal with the exogenous factors of global trade, advances in technology, and cultural influences, which [his Honour]… referred to as the 'three Ts': trade, tribe, and technology".[13]

6 The intersection of justice and the "three Ts" was manifest in Yong CJ's contribution to the development of a dynamic and organic Singapore legal system.[14] Speaking at the Singapore Academy of Law Second Annual Lecture in 1995, his Honour observed that:[15]

> There has been a realisation over these years that Singapore has to develop its own responses to its own legal problems; Singapore has to develop a legal system that is autochthonous, that grows out of its own soil. But autochthony does not mean that we have to be willing to part ways with [the received English law], whenever necessary. To some extent we have already done so, particularly in several aspects of procedure, in legislation and case law. We must continue to evolve our own rules of procedure, suited to our own urban, multiracial, multilinguistic, Asian society. Our approaches to the law must reflect our own Asian values, such as consensus and respect for authority and the group. We must be willing to adopt new technologies which will assist in the effectiveness of our legal system; we cannot be Luddites, forever fearful of the new.

7 Prime Minister Lee Hsien Loong, in his valedictory letter to Yong CJ upon his Honour's retirement in 2006, captured the extent of his Honour's work when he said that his Honour had "reoriented the attitudes and mindsets of the legal profession to adapt to the evolving needs of [Singaporean] society and embrace[d] change as a way of life".[16]

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13 Waleed Haider Malik, *Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons* (The World Bank, 2007) at p 20.

14 Andrew B L Phang, "The Reception of English Law" in *Essays in Singapore Legal History* (Kevin Y L Tan ed) (Academy Publishing & Marshall Cavendish Academic, 2005) at pp 20–21.

15 Chief Justice Yong Pung How, "Speech Delivered at the Singapore Academy of Law Second Annual Lecture: 12 September 1995" in *Speeches and Judgments of Chief Justice Yong Pung How* (Hoo Sheau Peng *et al* eds) (FT Law & Tax Asia Pacific, 1996) at pp 193–194.

16 Prime Minister Lee Hsien Loong, "Valedictory letter to Chief Justice Yong" (Commemorative Issue 2006) *Inter Se* 5 at p 5. The Singapore Court of Appeal decision in *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 2 SLR(R) 614 is a case study of this principle in practice. That case involved the right of support to land which under English law at the time, extended only to land in its natural state. Delivering the judgment of the court, Yong CJ said (at [37]):

> [W]e are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it. No doubt the trial judge felt constrained by [the various authorities, including the leading English case], but this court is entitled to depart from those cases, and therefore does not suffer from any such impediment. In the event, we are of the opinion that the current state of affairs cannot be allowed to persist.

(cont'd on the next page)

8 Following his appointment as Chief Justice, Yong CJ identified that one of the challenges facing Singapore's judicial system was the significant increase in the volume of cases coming before the Supreme Court and the Subordinate Courts as Singapore developed into an international business centre.[17] And Singapore did so develop and continues to thrive as an international business centre. Indeed, it is Singapore's status as an international business centre that led me, in this lecture, to consider some of the challenges of global litigation – seeking to uphold justice and the pursuit of a principled approach to recognition of foreign judgments in transnational litigation.

II. Setting the scene: some preliminary observations about transnational litigation

9 Litigation having some foreign element, in the sense of contact with some system of law other than the law of the forum where the case is to be tried, was once uncommon. Litigation of that kind saw the development of a distinct branch of judge-made law: sometimes called "conflict of laws" and sometimes "private international law". Much of this development happened in the later part of the 19th century. A V Dicey, then Vinerian Professor of English Law at the University of Oxford, is now most often remembered as a constitutional scholar. But Dicey was one of the first English scholars to write about the conflict of laws. He spent 14 years preparing his book on "The Conflict of Laws" before it was first published in 1896. Then, and for a long time thereafter, the rules of conflict of laws in England and Wales were almost wholly judge-made rules. The fact that these rules took Dicey 14 years to record in a form that he was happy to publish says something about their detail and complexity.[18]

10 The common law rules of conflict of laws focused on three issues: First, *jurisdiction* – when courts of one forum would deal with proceedings having some contact with a jurisdiction other than that forum. Second, *recognition of foreign judgments* – that is, issues of when courts of the forum would recognise or enforce a judgment given in another forum. Third, *choice of law* – issues concerning which law to apply to the resolution of the dispute. In cases with a foreign element,

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See also, *eg*, *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80; *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30; and *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418.

17 "In Conversation: An Interview with the Honourable Chief Justice Mr Yong Pung How" (1991) 12 Sing L Rev 1 at 15–16.

18 Dicey's work was later revived and expanded by J H C Morris in *Dicey and Morris on the Conflict of Laws* (Stevens, 10th Ed, 1980).

the common law rules identified rules the court of the forum would apply to determine questions relating to issues touching the validity and consequences of contract, issues arising in claims for civil wrongs, issues about inheritance or other claims to property, and issues about status, such as marriage, divorce or insolvency.

11 The way in which we speak about conflict of laws issues must not be allowed to obscure one fundamental observation. All issues which a forum court deals with which in some way engage conflict of laws rules are issues which arise in the course of the court exercising the judicial power of the body politic which establishes the court. That court is not "enforcing" or "giving effect to" the law of some foreign state. Those functions of enforcing and giving effect to the judgment of a foreign court are functions of the body politic that establishes the court. When a forum court applies its conflict of laws rules it is applying the law of the polity which establishes the court. The law of the forum may, and often will in cases having some foreign element, seek to apply one or more rules which take their content (more or less) from the law of some other place. But to the extent that the forum court does that, it is seeking to apply the law of the forum *including* the forum's choice of laws rules.

12 Once this is understood, it is apparent that the reference to *conflict* of laws is apt to mislead. There is no conflict in the sense of one law being inconsistent with another. As has often been said, the only possible form of "conflict" of laws is a conflict in the mind of the judge who is to decide the point. The judge deciding a case will always be required to apply the law of the forum – law which includes the forum's choice of law and other conflict of laws rules.

13 Since the middle of the 20th century, as the world (or at least the world of litigation) has shrunk, the number of international agreements addressing how domestic courts should deal with issues of jurisdiction, enforcement and choice of law in cases having some foreign element has increased. Many examples can be given. They include the rules relating to international arbitration following the widespread adoption of the New York Convention,[19] but also rules about recognition and enforcement of court judgments reflected in instruments like the Hague Convention on

19 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (entered into force 7 June 1959). See, in Australia, International Arbitration Act 1974 (Cth) s 2D(d) and Sch 1.

Choice of Court Agreements,[20] and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[21]

14 Notions of reciprocity underpin important aspects of many of these arrangements. Nation states make these arrangements to create certainty in the conduct of international transactions and reduce the costs and delays that will follow from unnecessary disputes about jurisdiction, enforcement or choice of law. And that can usually best be done by adopting rules that will apply generally and without regard to whether entities based in the State Party acceding to the arrangement are claimants or defendants in the dispute. It also entails that, as a general rule, decisions of courts of other State Parties will be recognised and enforced, where those other State Parties agree to enforce the decisions of the domestic courts of the State Party that affords recognition. We see this idea reflected in Australia in the Foreign Judgments Act 1991[22] which provides for the registration of foreign money judgments in Australia. A central provision of that Act is the requirement that "substantial reciprocity of treatment will be assured in relation to the enforcement in [the country in which the judgment originates] of money judgments given in all Australian superior courts".[23]

15 But reciprocity is not the only consideration in play. It is always necessary to give close attention to whether, when, and to what extent domestic courts of a State Party, when exercising the judicial power of that state, can *refuse* to apply the rules that are agreed in the relevant international instrument. And in many international instruments providing for jurisdiction, enforcement or choice of law issues, we see express provision made about when the agreed rules need not be applied. So, for example, we are all familiar with the limited circumstances in which a foreign arbitration agreement will not be enforced[24] or a foreign arbitration award will not be recognised and enforced.[25]

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20 Convention on Choice of Court Agreements (30 June 2005) (entered into force 1 October 2015). On Australia acceding to this Convention, see Parliament of Australia, "National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements" [2016] ATNIA 7. See also Brooke Adele Marshall & Mary Keyes, "Australia's Accession to the Hague Convention on Choice of Court Agreements" (2017) 41 *Melbourne University Law Review* 246.

21 (2 July 2019) (entered into force 1 September 2023).

22 Cth.

23 Foreign Judgments Act 1991 (Cth) s 5(1).

24 International Arbitration Act 1974 (Cth) s 7; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (entered into force 7 June 1959) Art II, s 3.

25 International Arbitration Act 1974 (Cth) s 8; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (entered into force 7 June 1959) Art V.

16 The rules which I have been describing do not deal with all the consequences of global litigation. Let me note one obvious example but put it to one side. International instruments dealing with some aspect of international intercourse and trade will also affect litigation, no matter where it occurs. The most obvious example is the various international conventions[26] regulating the liability of carriers engaged in the international carriage of persons, baggage or cargo performed by aircraft for reward.[27] All parties to these conventions will apply the principles and rules stated in them. And in cases such as those, it is well accepted that the courts of States Parties to the conventions will seek to interpret the relevant convention uniformly.[28] At least to that extent, choice of forum may be less significant than some litigants, in other circumstances, might think.

17 It is inevitable, however, that litigants will forum shop. How courts of the chosen forum (or "shop") should respond to that is a distinct topic. For the moment, it is enough to note three points. First, forum shopping is inevitable because parties think (sometimes with cause) that litigating an issue in one forum rather than another will be advantageous. The most obvious case is where one forum provides statutory remedies which other places do not or provides procedures which one side or the other side thinks would help or hinder the prosecution of their claim or defence.[29]

18 Second, although forum shopping is inevitable, it is not universal. There are cases in which issues of forum shopping do not arise (or, at least, are not prominent) but where there is, or has been, more than one proceeding in different forums around the world against entities which are in some way related and which raise similar issues for determination. In circumstances of this kind, one side of the litigation may urge the

26 Including the Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999) (entered into force 4 November 2003) ("Montreal Convention") and the Convention for the Unification of Certain Rules Relating to International Carriage by Air (12 October 1929) (entered into force 13 February 1933) ("Warsaw Convention") (as amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (28 September 1955) (entered into force 1 August 1963), the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (18 September 1961), the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (8 March 1971) and the Montreal Protocol No 4 (25 September 1975)).

27 Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999) (entered into force 4 November 2003) Art 1.1.

28 See, *eg*, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202.

29 See, *eg*, *Karpik v Carnival plc* (2023) 98 ALJR 45 at 61.

forum court or tribunal to treat what has been decided by a court in another forum as disposing of one or more of the issues in the case in the forum. That is, parties may sometimes seek, where beneficial to their case, that a determination made in another forum (under different rules or laws) be recognised as disposing of an issue.

19 Third, it is not always possible to identify one jurisdiction as the "natural forum" for resolution of a particular dispute. The notions of "natural forum" and "judicial comity" – which might be seen to underpin the (now quite old) decision in *Spiliada Maritime Corporation v Cansulex Ltd*[30] ("*Spiliada*") recognising the doctrine of *forum non conveniens* in English law – may be more difficult to support now than when *Spiliada* was first decided.[31] The frequency, length and complexity of litigation in England about forum reveal how often the issue is not only contested but is contestable.[32] Rather than embrace notions of "natural forum", the High Court of Australia, in *Voth v Manildra Flour Mills Pty Ltd*,[33] chose a negative test of whether the chosen forum was *clearly inappropriate*. That said, the pendency of litigation in another jurisdiction may be a ground for alleging that litigation of the same or similar issues in the courts of the forum would be an abuse of process. It has been suggested[34] that the High Court of Australia's approach grew out of the fear that its adoption would promote extensive and expensive adjectival litigation ("satellite litigation", as it is sometimes called). Whether that was in fact so, and whether that fear has been realised in England, need not be decided for the purposes of this lecture.

20 It is well established that judgments of foreign courts may also engage common law doctrines of preclusion – issue estoppel and cause of action estoppel or *res judicata*[35] (whether and to what extent the proceedings in a foreign court might be relied on to estop a party from raising or relying on a point which could have been, but was not, raised in the foreign proceedings may be more controversial[36]). The application of

30 [1987] AC 460.

31 See, *eg*, Andrew Bell, "The Natural Forum Revisited" in *A Conflict of Laws Companion* (Andrew Dickinson & Edwin Peel eds) (Oxford University Press, 2021) at p 3.

32 See, *eg*, *Deripaska v Cherney (No 2)* [2009] EWCA Civ 849 at [6]–[7]; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1084 at [7]; and *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 at 375–376.

33 (1990) 171 CLR 538 at 558–559.

34 Andrew Bell, "The Natural Forum Revisited" in *A Conflict of Laws Companion* (Andrew Dickinson & Edwin Peel eds) (Oxford University Press, 2021) at p 18.

35 *Phipson on Evidence* (Hodge M Malek KC gen ed) (Sweet & Maxwell, 20th Ed, 2022) at paras 43-08 and 43-68.

36 *Cf*, *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 965; and *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

these principles must be understood not only in light of the fundamental principle identified earlier – that the courts of the forum are exercising the judicial power of the body politic that establishes those courts – but also in light of the ideas that inform the courts' response to allegations of forum shopping. The courts of the forum are not applying or enforcing the judgment of the foreign court. Hence, when a party to litigation seeks to argue that the court of the forum should give some dispositive effect to what was decided by a court sitting in a foreign jurisdiction, it is necessary to consider whether giving dispositive effect to that decision would be consistent with the proper exercise of the judicial power of the forum. Whether and when it should do that must be decided in ways that are not inconsistent with the principles which the court would apply in deciding whether it would have declined to exercise jurisdiction in the matter if it had been instituted in that court rather than in the foreign court, the decision of which is said to preclude litigation of some issue or a cause of action.

III. Considering whether and when to give dispositive effect to foreign judgment

21 What then might, or should, a court do when considering whether to give dispositive effect to a foreign judgment?

22 Obviously, the first question will be what was decided in the foreign jurisdiction? Even that seemingly simple question may hide difficulties. The nature of the difficulties can be identified by first considering questions that may arise in connection with recognition of a foreign money judgment. A foreign judgment under which money is payable will ordinarily be clear enough. Very often there will be little or no doubt about the nature of the obligation which the money judgment was intended to remedy. And it is because these matters are so often straightforward that statutory provision is commonly made for the recognition and enforcement of foreign money judgments. Even there, however, exceptions are commonly made for some or all foreign money judgments in respect of taxes or other charges of a similar nature or in respect of fines or penalties.[37] And the party seeking registration of the judgment may be required to show that the judgment which it sought to register is "final and conclusive" and was given in, or on appeal from, either any court or only a superior court of identified foreign states.[38]

37 *Cf*, the definition of "enforceable money judgment" in s 3 of the Foreign Judgments Act 1991 (Cth).

38 *Cf*, s 5 of the Foreign Judgments Act 1991 (Cth).

23 Commonly, those general rules permitting registration will be subject to rules which allow the judgment debtor to apply to set aside registration of the judgment. The grounds for setting aside registration can usually be put into two broad categories:

> (a) grounds relating to the judgment itself, such as the judgment is not, or has ceased to be, one which is registrable, or has been discharged or has been wholly satisfied; and
>
> (b) grounds relating to the circumstances in which judgment was obtained, including want of procedural fairness and fraud.

24 Consistent with the fact that registration is a matter to be decided by the courts of the registering state, it is the law of the registering state which will determine whether and when the courts of the original state had jurisdiction over the judgment debtor.[39]

25 All of these features of registration of foreign money judgments are consistent with, or can be seen as emerging from, the former judge-made rules about recognition and enforcement of foreign judgments. All of them reflect the application of the law of the forum (of the registering state) to determine whether and when a judgment will be registered in that jurisdiction. The conclusions about jurisdiction and sufficiency of procedural fairness implicit in the original court giving judgment against the judgment debtor are *not* treated as determinative of those issues, but other issues often arise and are more complex.

26 Issues about *amenability* to the jurisdiction of the foreign court and want of procedural fairness can be very complex. Three cases are illustrative of some of these issues. In *Adams v Cape Industries plc*[40] ("*Cape Industries*"), plaintiffs in a class action against subsidiaries of Cape Industries plc engaged in the mining of asbestos in South Africa and its marketing (in the US and elsewhere) sought to enforce in England a default judgment given against Cape and some of its subsidiaries in the United States District Court for the Eastern District of Texas. The trial of that application took 34 days. The appeal to the Court of Appeal took 19 days.

27 The decisive point in the case was that the primary judge (Scott J) and the Court of Appeal (Slade, Mustill and Ralph Gibson LJJ) found that the defendant corporations were not present within the US and that, accordingly, no matter the basis on which the United States District Court had taken jurisdiction, the English courts would not recognise the US

39 *Cf*, ss 7(4)–7(5) of the Foreign Judgments Act 1991 (Cth).
40 [1990] 1 Ch 433.

court as competent to grant the judgement it had granted.[41] The primary judge and the Court of Appeal further held that the *method* by which the US court had come to the amount of the judgment awarded was contrary to the requirements of substantial justice demanded by English law.[42] As such, enforcement was refused.

28 I mention that case not only to make the point that the laws of the forum determine whether the judgment should be enforced, but to invite your attention to the detailed examination of US procedure that was made at trial. The forensic advantage of showing that what was done in the US court departed from its own rules is obvious (it is much easier to persuade a judge to find that a court has acted contrary to substantial justice if it has departed from its own rules). But the time and effort devoted to showing departure from the applicable US rules should not be allowed to suggest that the forum's rules about amenability to jurisdiction and about substantial justice depend on first showing that the court in which the foreign judgment was given departed from its own rules of procedure.

29 In the same year that *Cape Industries* was decided, the High Court of Australia decided *Voth v Manildra Flour Mills Pty Ltd*.[43] In that case, a majority in the High Court said that a conclusion that a foreign tribunal was the appropriate forum "necessarily involves assumptions or findings about the comparative claims of the competing foreign tribunal, including the standards and impartiality *of its members*"[44] [emphasis added]. The court went on to say that "there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case".[45]

30 In this respect, English law seems to have travelled far beyond the criticisms Lord Brandon made in 1984 in *The Abidin Daver*[46] of comparisons between the capacities of Turkish and English courts to try the dispute justly and satisfactorily. Lord Brandon spoke of the court below having paid "mere lip service" to the need to avoid such comparisons and said, of an affidavit that had been filed in support of the claim to have the dispute tried in England, that it cast aspersions on the capacity of a Turkish court to try the action properly and on the independence from

41 *Adams v Cape Industries plc* [1990] 1 Ch 433 at 477 at 550.
42 *Adams v Cape Industries plc* [1990] 1 Ch 433 at 500–501 and 568.
43 (1990) 171 CLR 538.
44 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559.
45 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559.
46 [1984] AC 398.

the executive of any Turkish lawyer acting for the owners of a foreign ship against the owners of a Turkish ship without sufficient grounds.[47]

31 Twenty-five years later, the appeal to the Court of Appeal in the UK, in *Deripaska v Cherney (No 2)*[48] ("*Deripaska*"), proceeded on the footing of findings by the primary judge that "the risks inherent in a trial in Russia (*assassination, arrest on trumped up charges, and lack of a fair trial*) [were] sufficient to make England the forum in which the case can most suitably be tried in the interest of both parties and the ends of justice"[49] [emphasis added]. These are large conclusions. While they are conclusions about risk, they were seen as risks sufficient to refuse to require the plaintiff to litigate the dispute in Russia which the primary judge concluded was the natural forum for its resolution. The Court of Appeal dismissed the appeal against the primary judge's orders.

32 There can be no escaping the conclusion that applying a natural forum test can in some cases require a court to do what the High Court of Australia said should be avoided – sit "in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case".[50] But even applying the Australian approach of "clearly inappropriate forum" (rather than the notion of there being a "natural forum") there will be cases where the court of a forum is asked to pass judgment on the quality of justice that a party would receive in the competing foreign forum. Arguments of the kind advanced in *Deripaska* would be as relevant no matter which of the competing tests were to be applied.[51] Even so, adopting one test rather than the other does affect the way in which arguments will be framed and decisions reached. A party seeking to meet the former test by reference to the "quality" of justice said to be offered elsewhere must frame their argument in a way that will show actual deficiencies in the foreign forum rather than simply inviting the court to say that the local system is somehow "better" than what is provided in the foreign forum. The court deciding the matter must be persuaded to go beyond bare comparison and positively find (as the primary judge did in *Deripaska*) that litigation in the foreign forum would be attended by unacceptable risks of injustice.

33 Considering the justice of foreign proceedings is not confined to questions of proper forum before a trial and judgment. Considerations of the same kind may be required in deciding whether to register a foreign

47 *The Abidin Daver* [1984] AC 398 at 424–425.
48 [2009] EWCA Civ 849.
49 *Deripaska v Cherney (No 2)* [2009] EWCA Civ 849 at [1].
50 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559.
51 See Ardavan Arzandeh, Forum (Non) Conveniens *in England: Past, Present, and Future* (Hart, 2019) at pp 87–90.

judgment and may also be relevant to questions of preclusion based on foreign judgments after a substantive trial and judgment. When deciding whether to register a foreign judgment, an opposing party may allege that the judgment awarded was contrary to the requirements of substantial justice. Again, to say that what a foreign court has done departed from "substantial justice" is a large conclusion which a court will not reach lightly. Yet, as has already been noted, the English Court of Appeal found in *Cape Industries* that a judgment given in the US District Court was contrary to the requirements of substantial justice.

IV. The courts' existing toolkit

34 So, can a principled basis for determining whether or not to recognise a foreign judgment be identified? What are the possible approaches? I propose to approach the answer to that question by addressing five particular aspects of the courts' existing toolkit for dealing with transnational litigation. For each tool, I will discuss the principle which underpins it; how to evaluate the tool; what each tool or principle is trying to address and the countervailing considerations.[52] I will then address some common threads.

A. A trial within a trial: role of expert evidence and presumptions in identifying relevant foreign law

35 Judges asked to make findings that the judgment awarded was contrary to the requirements of substantial justice, or other like bases, face difficulties. In considering whether to give dispositive effect to a foreign judgment, a court of the forum must first understand the context in which the judgment was given; that is, it must identify the substantive and procedural law that applied to the making of the decision. Almost always, the procedures adopted by the foreign court will be wholly unfamiliar to the judge. As was said in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[53] ("*Carl Zeiss*"), foreign law (and thus the procedural law of a foreign court) is a question of fact to be decided by evidence. The judge must therefore rely entirely on the nature and quality of the expert evidence that is presented by the parties. Resolving any conflict of opinion without full exploration and testing of the competing opinions of the kind that would occur at trial of an action may be very difficult. In this sense, courts of the forum will sometimes be required to have a trial within a trial. In addition, the judge must put to one side any assumption

52 See Annex: overview and comparison of the courts' toolkit at pp 27–28 below.
53 [1967] 1 AC 853 at 920.

that the procedures which the judge knows and applies are the only procedures which will ensure the provision of substantial justice.

36 One of the recurring difficulties in dealing with any issue of foreign law is what to do if the expert evidence does not deal with an aspect of the matter that emerges as important. The High Court of Australia faced this difficulty in *Neilson v Overseas Projects Corporation of Victoria Ltd*[54] ("*Neilson*"), an international tort case concerning an Australian living in the People's Republic of China ("PRC") who was injured in a fall in an apartment provided to her by an Australian company. The question was what law was to be applied by the Australian court hearing the action for damages for negligence? The law of the place of commission of the tort – the PRC – provided that the law of the place in which the infringement occurred shall be applied, but, if both parties are nationals of the same country or are domiciled in the same country, the law of their own country or their place of domicile may also be applied.[55] The central issue decided in the case was about the doctrine of *renvoi*.[56]

37 Little or no useful evidence was given at trial about how a Chinese court would apply the applicable PRC law. All that the trial court had was a translated text of the provision and the expert's assent to the proposition that the power given by the provision was to be exercised according to fairness and the justice of the case.[57] These circumstances prompted some discussion in the High Court of the presumption that, absent evidence to the contrary, foreign law is presumed to be the same as the law of the forum.[58] But resort to that presumption proved unnecessary, it being found that no matter whether a PRC court would apply notions of fairness and justice according to domestic principles or would apply the principles of the parties' nationality or domicile, the result would not differ in the case.

54 (2005) 223 CLR 331.

55 General Principles of Civil Law of the People's Republic of China (12 April 1986) (entered into force 1 January 1987) Art 146.

56 Explained as, "The doctrine whereby the courts of one country in certain circumstances apply the law of another country in resolving a legal dispute. A problem arises in private international law when one country's rule as to conflict of law refers a case to a law of a foreign country, and the law of that country refers the case back to the law of the first country (remission) or to the law of a third country (transmission).": see "Renvoi" *Oxford Reference* <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100414214> (accessed 30 July 2024).

57 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 371–372.

58 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 372, 411–413 and 416–417; *cf*, 343, 348–349 and 396.

38 This may not always be so. And if it is not such a case, a court may be compelled to retreat to the foreign law presumption that has been identified. There may be no other outcome available. The courts of the forum "know no foreign law".[59] An English translation of the text of foreign written law is not necessarily to be construed as if it were a local statute. Not only is there the difficulty presented by the fact of translation, but different rules of construction may be applied in the foreign jurisdiction.[60] And, in an adversarial system like Australia's, it is for the parties, not the court, to decide the ground on which their battle will be fought,[61] and it is the parties who will retain the expert or experts who give evidence. Often, and especially in hearings that are not a full trial of ultimate issues, it will be the parties who frame the questions which the experts consider. And the way in which a question is framed may affect the way in which an expert witness frames their opinion about the relevant content of foreign law.

B. Identifying substance of foreign court's decision: doctrines of preclusion

39 Applying doctrines of preclusion based on a foreign judgment, whether cause of action estoppel, issue estoppel, or the wider form of estoppel countenanced by *Henderson v Henderson*[62] ("*Henderson*"), depends upon the court of the forum identifying what was decided by the foreign court. That identification by the court of the forum, too, has its own particular difficulties. Lord Wilberforce was surely right to say, in *Carl Zeiss*, that from the nature of things, identifying what issues were decided by a foreign court may be difficult and demand caution:[63]

> The right to ascertain the precise issue decided, by examination of the [foreign] court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique, and substantive law is not the same as our own, make it difficult or even impossible to establish the identity of the issue there decided with that attempted here to be raised, or the necessity for the foreign decision.

59 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370.
60 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370.
61 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370.
62 (1843) 3 Hare 100; 67 ER 313. See also *MAD Atelier International BV v Manes* [2020] 3 WLR 631 at 655; *PAO Tatneft v Ukraine* [2021] 1 WLR 1123 at 1140–1142; and David A R Williams QC & Mark Tushingham, "The Application of the *Henderson v Henderson* rule in International Arbitration" (2014) 26 SAcLJ 1036.
63 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 967.

40 But if what was decided *can* be identified, is the court of the forum to give effect to that decision by finding the parties are precluded from challenging it in proceedings brought in the forum? Or is the case one in which the point now sought to be taken is a point which could have been but was not agitated in the foreign court? If it is, are the wider notions of preclusion countenanced in *Henderson* or the closely-related idea of abuse of process engaged?

41 The Court of Appeal of Singapore recently looked at transnational issue estoppel twice: in *Merck Sharp & Dohme Corp v Merck KGaA*[64] ("*Merck Sharp*") in 2021 and in *The Republic of India v Deutsche Telekom AG*[65] ("*Deutsche Telekom*") in 2023. The first case arose out of litigation about the use of a trade name. The second concerned an international arbitration and the effect to be given in Singapore (where it was sought to enforce the arbitral award) to a decision of the Swiss Federal Supreme Court (the court of the seat of the arbitration) rejecting challenges to the award.

42 As the joint judgment said in *Deutsche Telekom*, there are four principles to be applied in *domestic* law in deciding whether there is an issue estoppel:[66]

> (a) the prior judgment must be final and conclusive on the merits;
>
> (b) the prior judgment must be given by a court of competent jurisdiction;
>
> (c) there must be commonality of the parties to the prior proceedings and to the proceedings in which estoppel is raised; and
>
> (d) the subject matter of the proposed estoppel must be the same as what has been finally decided in the prior judgment.

43 But, as the plurality acknowledged, those principles must be modified in determining whether there is a *transnational* issue estoppel.[67] Those modified principles were expressed as:

64 [2021] 1 SLR 1102.
65 [2024] 1 SLR 56.
66 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [63].
67 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [64].

> (a) … that the foreign judgment must:
>
> (i) be a final and conclusive decision on the merits;
>
> (ii) originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and
>
> (iii) not be subject to any defences to recognition.
>
> (b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised.
>
> (c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment.

44 Under the common law, "the most common [defences to recognition] concern a contravention of the public policy of the forum, where the foreign judgment was obtained by fraud or in breach of natural justice, or if it would amount to the direct or indirect enforcement of foreign penal, revenue or other public laws".[68] There may also be express defences under specific statutes of the forum.

45 The notion of "transnational jurisdiction" requires satisfaction of one of three (perhaps four) different bases on which the foreign court has exercised jurisdiction: (a) the defendant being present in the jurisdiction of the court whose decision is said to give rise to the estoppel; (b) the defendant's agreement to submit to that court's jurisdiction; or (c) the defendant counterclaiming (or (d) the defendant otherwise participating in the litigation). Even so, as the Court of Appeal identified, there may yet be a defence to recognition. As was said in *The Good Challenger*,[69] the application of principles of issue estoppel is subject to the overriding consideration that "it must work justice and not injustice" – a principle that is to be traced in England to at least the House of Lords decision in *Arnold v NatWest Bank Plc*.[70]

46 While the majority's decision in *Deutsche Telekom* develops the principles for when a court will intervene to preclude the reagitation of an issue, they may not entirely cure the difficulties identified by Lord Wilberforce in *Carl Zeiss*. That is, it remains a potentially difficult and demanding task for a court of the forum to examine a foreign court's judgment for the purpose of preclusion, and such task should be approached with the necessary caution. The task will be especially difficult the greater the difference between the legal systems of the forum

68 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [64] and [66].
69 [2004] 1 Lloyd's Rep 67 at 77.
70 [1991] 2 AC 93 at 107 and 109. See also *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at 1130–1131 and *PAO Tatneft* [2021] 1 WLR 1123 at 1135.

court and the foreign judgment in question, a topic to which I will return shortly.

C. Primacy Principle: a presumptive principle capable of disapplication

47 In addition to the traditional doctrines of preclusion, the Court of Appeal in *Deutsche Telekom* also considered the Primacy Principle,[71] a presumptive principle capable of disapplication,[72] that the enforcement court of an arbitral award will accord primacy to an earlier decision of the seat court without specific recourse to transnational issue estoppel.[73] Inherent in the principle is the proposition that decisions of courts of the seat enjoy a "specially elevated status in law in case of repeat challenges".[74] While limited to matters of international arbitration, there is clear appeal in the apparent simplicity of such a presumption. However, as the Court of Appeal recognised, the adoption of the principle is not without its own difficulties, which extend to "identifying its doctrinal basis and … formulating its substantive content and outer limits".[75] Further, as Mance J said, given the availability and flexibility of the existing tools – the doctrines of issue estoppel and the power recognised in *Henderson* to restrain abuses of process – there is a broader question as to the utility to be served by "the addition of a Primacy Principle to the court's armaments".[76]

D. Public policy of the forum and substantial justice

48 Issues about the basis on which a foreign court exercised jurisdiction in a matter may then overlap with issues about the public policy of the forum and ideas of substantial justice, which, as mentioned above, can raise their own set of difficulties.[77] If the foreign judgment in question was given without the defendant actively contesting the merits of the claim made, there may be lively debate about whether the judgment should be recognised. But even if the defendant did actively contest the foreign proceedings, there may remain a question about whether the

71 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [50].
72 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [130].
73 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [103]–[130] and [194]–[221].
74 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [214] and [221].
75 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [104].
76 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [198]–[202], [212], [214] and [220].
77 See, *eg*, *Corporación Mexicana De Mantenimiento Integral, S De RL De CV v Pemex-Exploración Y Producción* 832 F 3d 92 at 107 (2nd Cir, 2016); and *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [66]–[68] and [196].

judgment reached there should be given preclusive effect by the courts of the forum or the defendant in the foreign proceeding be prevented from agitating issues that might have been, but were not, agitated in the foreign forum.

49 There are two separate, but overlapping, reasons for this. First, as a matter of substantive law, the rules arising from the doctrine of *res judicata* exist to ensure that there is "finality in litigation and that a party should not be twice vexed in the same matter".[78] Second, courts are concerned to protect their processes from abusive, "wasteful and potentially oppressive duplicative litigation".[79] Both are underpinned by the public interest of efficiency and economy in the conduct of litigation. That said, in considering whether agitation of an issue that could have been raised in earlier proceedings, but was not, amounts to an abuse of process, courts will avoid dogmatic application of principle in favour of a more flexible approach which allows them "to give effect to the wider interests of justice raised by the circumstances of each case".[80] The question then becomes at what point are efficiency and economy to be traded for justice?

E. Level of confidence in integrity of judicial systems of other states

50 Observers do not have the same level of confidence in the integrity of the judicial system of every state around the world. Cases like *Deripaska* show that counsel in that case thought that they could mount an argument showing that the lack of trust in the integrity of a particular foreign judicial system was well founded at least in the sense that there was cogent evidence of a *sufficiently high risk of miscarriage of the process* to warrant not compelling the parties to litigate in that system, even if, as the opposing party asserted, it was the "natural" forum in which to litigate the dispute.[81] And the primary judge accepted that there was a sufficiently high risk of miscarriage in the foreign courts not to compel litigation there.

51 Might issues of this kind arise in connection with transnational issue estoppel or other forms of preclusion?

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78 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

79 *Takhar v Gracefield Developments Ltd* [2020] AC 450 at 478. See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 184–185.

80 *Takhar v Gracefield Developments Ltd* [2020] AC 450 at 478. See also *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

81 *Deripaska v Cherney (No 2)* [2009] EWCA Civ 849 at [8].

52 At first sight, when considering whether to recognise a judgment of a foreign court, or give it preclusive effect, it may be said that proving "risk" of miscarriage is not sufficient to warrant refusing recognition or preclusion. But is that right? Would it always be necessary to show that the particular judgment in issue was affected by some miscarriage? Necessary or not, would it be enough to show that the result reached was manifestly unreasonable and could not be explained except as affected by some form of a miscarriage? How could that be done except by full trial? Are there cases where evidence of the kind advanced in *Deripaska* would warrant refusal of recognition? Or would those issues be subsumed within an attack on the foreign decision as perverse and, on that account, not to be recognised?[82]

53 Would submission to the jurisdiction of the foreign court (whether by prior agreement or active participation in the proceedings) point against, or even prevent, the disappointed litigant in those proceedings making arguments of the kind that succeeded in *Deripaska* in later litigation raising the same or connected issues? Would considerations of the kind that were examined in *Deutsche Telekom* and treated as giving primacy to the decisions of the courts of the seat of an arbitration point against or prevent the disappointed litigant making *Deripaska* arguments? Are the considerations mentioned in *Deutsche Telekom* to be treated as rooted primarily in the New York Convention, or do they have roots in wider ideas about the consequences of voluntary submission to jurisdiction?

54 How do any of these issues intersect with the practical point made in *Carl Zeiss* when Lord Reid said:[83]

> Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point.

82 *Cf*, *Simpson v Fogo* (1862) 1 H&M 195; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 917–918 and 922; *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at 1129; and *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [93]–[95], [129] and [178].

83 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 917.

V. Questions which arise?

55 All these are questions that may arise when one party to litigation in the forum seeks to rely on a decision in the courts of another forum as precluding argument about one or more of the issues arising in that litigation. I offer no definite answer to any of the questions. But together, the questions may be thought to call for caution when a party asks the court of the forum to preclude itself from deciding for itself an issue necessary for the determination of the litigation. Identifying what has been decided earlier and whether it has been decided finally will not always be easy. Dealing with a claim that what was decided should not be given determinative effect because the foreign decision was wrong or perverse because the matter was not tried fairly and impartially may soon become the trial of the very issue which one side says should not be relitigated.

56 Neither *Merck Sharp* nor *Deutsche Telekom* raised issues of these kinds. But, at least to my eye, neither decision foreclosed debate about them. If they are to be debated, I think it will be important to consider whether the applicable principles are stated in ways that are not at odds with other areas of the law dealing with transnational litigation: especially issues about *forum non conveniens* and the recognition of foreign judgments.

VI. Applicable principles and possible approaches?

57 What then might underpin the applicable principles and possible approaches or tools that courts might take in resolving these issues? For the moment at least, determination of the applicable principles depends upon how the courts develop the common law. I say "for the moment at least" because I am not aware of any active proposal for legislative intervention or international agreement about these issues. Like any common law doctrine, principles will emerge and be developed in a succession of cases. It is, therefore, neither possible nor desirable to try now to prescribe or describe comprehensively what those principles and approaches should be. But there are some particular points that merit consideration.

58 First, as I have said, there is the negative consideration that the principles and approaches which are adopted not be at odds with, or clash with, the other areas of the law dealing with transnational litigation which I have mentioned – the law about *forum non conveniens* and the law about recognition of foreign judgments.

59 Second, but no less importantly, because the governing principles and approaches are to be applied by the courts of the forum exercising the judicial power of *that* forum, it follows that the principles which are adopted must allow the courts of the forum to refuse to give preclusive effect to the decision of a foreign jurisdiction. If that is so, the question becomes when may the courts of the forum do that?

60 In stating the relevant principles in *Deutsche Telekom*, the Court of Appeal referred to the requirement that there not be any "defences to recognition", but there was no occasion in that case to examine the application of that aspect of the principles.[84] Rather, the focus of the decision necessarily fell on issues arising directly or indirectly from the New York Convention.

61 The ambit to be attributed to the notion of a defence to recognition of the preclusive effect of a foreign judgment will, I suggest, necessarily be affected by how the criteria for recognition of the foreign judgment are framed. As I have noted earlier, reciprocity of recognition is the central criterion for recognition of a foreign money judgment under the Australian Foreign Judgments Act. In extradition cases in Australia, the very making of an extradition treaty and its adoption as the law of Australia is to be taken by the courts as demonstrating that Australia is to assume that the courts of the place to which extradition is sought will administer justice according to law. And in the field of arbitration, *Deutsche Telekom* shows that the exercise of party autonomy designating a seat of the arbitration carries with it the consequence that the decisions of the courts of the seat are to be given effect elsewhere.

62 Should any of these ideas inform, or be reflected in, the criteria to be applied by a court in deciding whether to give preclusive effect to a foreign judgment? Or are they matters better left to be reflected in the necessarily piecemeal development of notions of a defence to enforcement? Is it enough for a party seeking to have the forum give preclusive effect to a foreign judgment to show that the forum would recognise a money judgment given in that jurisdiction? Would the fact that a money judgment would be recognised, or the existence of extradition arrangements with the foreign jurisdiction, be taken as barring the party opposing recognition from making arguments of the kind made in *Deripaska* to the effect that the foreign judicial system as a whole was not impartial? Would a defendant barred from making a general argument of that kind, nevertheless be able to argue that the particular proceedings which yielded the judgment relied on were unjust?

84 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [64] and [66].

63 There would be little dispute that preclusive effect should not be given to a foreign judgment if to do so would be contrary to the public policy of the forum. But, of course, "public policy" is an elusive expression and there may be debate about its application (just as there has been in the context of arbitration, the New York Convention and the Model Law). And adding (even substituting) reference to "substantial injustice" as one (or the) criterion for refusing preclusive effect necessarily leaves what may seem to be a large area for potential controversy.

64 Are these questions which suggest too mechanical an approach? What room, if any, should there be for the courts of the forum to exercise some discretion? What factors would guide the exercise of that discretion? Cases about the exercise of the discretion to stay proceedings brought in breach of an agreement to refer disputes to a foreign court show how that kind of approach might work.[85] In Australia, "the Court's discretion has not been restricted by any exclusive definition of the circumstances which will warrant a refusal of a stay".[86] Instead, the authorities reveal that what is required is a weighing of the various countervailing reasons for granting a stay taking into account all the circumstances of a particular case.[87]

65 I greatly doubt that any one of the approaches I have mentioned is perfect; each has its strengths and weaknesses. I suspect that the preferred approach may be to adopt a set of criteria the same as, or at least substantially similar to, the approach currently in development in Singapore. But even if that is the approach settled on, I think it remains necessary to keep the various considerations I have mentioned in view, including ideas of substantial justice and whether there is a sufficiently

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85 *Cf*, *The Eleftheria* [1970] P 94 at 99–100.

86 *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 501 at 509.

87 In *The Eleftheria* [1970] P 94 at 99–100, Brandon J found that, without limiting the range of circumstances:

> … the following matters, where they arise, have been found to be relevant: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

Many of these matters echo considerations raised by courts grappling with transnational litigation.

high risk of miscarriage of process. In the end, real-world considerations will have a role to play, because the disputes giving rise to these issues are borne out of a real-world context. Transnational litigation may well arise out of business ventures in jurisdictions where the judicial system may not be robust. The venturer may contract with the state or a party closely aligned with the state in that jurisdiction. Does investing in that kind of jurisdiction carry with it an acceptance of the judicial system as you find it, or does it permit the investors to seek to challenge a decision of that judicial system in another forum?

66 For each of us involved in transnational litigation – whether as litigant, practitioner or judge – it is necessary to know, understand and apply each tool appropriately: to know and understand the principle underpinning each tool, how to evaluate the tool, what each tool or principle is trying to address and the countervailing considerations. In applying the tools, each case must be looked at individually. To talk of coherence in transnational litigation is difficult. First, it is a label. Second, it is a label at too high a level of generality or, put in different terms, not sufficiently specific. Third, coherence with and between what? In the arbitral context, that is arguably more straightforward. Party autonomy – choice – is a significant factor from the outset: commercial arrangements are made on an informed basis which includes the arbitration agreement, the choice of forum and the choice of law. On one view, the primary principle is simply mirroring or reflecting that autonomy.

67 Whichever tool or combination of tools is adopted, two key pillars of Yong CJ's conceptualisation of the law – that it is dynamic and organic – serve as useful lodestars against which to assess the suitability and development of the approach. The model settled on ought to be dynamic so that it can respond to internal and exogenous factors of change. It should also be organic to reflect and adapt to local issues, practical realities and values. But perhaps of even greater guiding effect is the underlying rationale for his Honour's efforts in bringing about reform. That is, any attempt by the courts to articulate a solution to the issues discussed today should be guided by an unwavering commitment to the continual improvement of the administration of justice. In the words of Yong CJ: "Justice is what is expected of the courts. It is what our courts should deliver."[88]

88 Chief Justice Yong Pung How, "Chief Justice's Foreword" in *Hall of Justice: Supreme Court Singapore* (Supreme Court, Republic of Singapore, 2006) at p 2.

Annex
Overview and comparison of the courts' toolkit

	Foreign law presumption (*Neilson*)	Expert evidence (*Cape Industries*)	Common law doctrines of preclusion	Restrict abuse of process (*Henderson*)	Primacy Principle (*Deutsche Telekom*)	Miscarriage of process (*Deripaska*)
Source	Transnational litigation	Transnational litigation	Common law, Transnational litigation	Procedural rule – origins in early arbitration cases	International arbitration	Conflict of laws – appropriate or natural forum
What is the principle?	Absent evidence to the contrary, foreign law is presumed to be the same as the law of the forum.	Foreign law, including procedural law of a foreign court, is a question of fact decided by evidence.	Parties prevented from re-litigating in subsequent proceedings an issue that was the subject of final determination in an earlier proceeding.	Parties prevented from raising claims and defences in subsequent proceedings which could have been pursued in earlier proceedings but were not.	Enforcement court will act upon a rebuttable *presumption* that it should regard a prior *decision of seat court* on matters going to validity of award as *determinative*.	Whether cogent evidence of *sufficiently high risk of miscarriage of process* to support inference that lack of trust in integrity of foreign judicial system is well-founded and warrants not compelling parties to litigate in that system, even if foreign system was the "natural" or "appropriate" forum.

	Foreign law presumption (*Neilson*)	Expert evidence (*Cape Industries*)	Common law doctrines of preclusion	Restrict abuse of process (*Henderson*)	Primacy Principle (*Deutsche Telekom*)	Miscarriage of process (*Deripaska*)
How to evaluate?		Parties present expert evidence on relevant substantive and procedural aspects of foreign law. Discretion exercised by the forum court includes, as one fact, the foreign evidence as found.	• Foreign judgment must: o be *final and conclusive* decision on merits; o originate from *court of competent jurisdiction* with transnational jurisdiction over party sought to be bound; and o not subject to *defence to recognition*: *eg*, contrary to public policy of forum; obtained by fraud or breach of natural justice; or (in)direct enforcement of foreign penal, revenue or public laws. • *Subject matter of estoppel must be same as that decided in prior judgment.* • Must be *commonality of parties* to prior proceedings and to the proceedings in which estoppel raised.	Relevant criteria include: • whether claim subject of *final and conclusive* decision of foreign court; • previous adjudication by a *court of competent jurisdiction*; • whether appeal rights were exhausted in foreign forum; • whether matter sought to be raised in subsequent proceedings was a *matter in difference* at time of earlier proceedings; • whether there are any "special circumstances" which make it *unjust or inappropriate* to apply the rule.	*Presumption may be displaced*: • by *public policy considerations* applicable in jurisdiction of enforcement court; • by demonstration: o of procedural deficiencies in decision-making of seat court; or that to uphold seat court's decision would be repugnant to fundamental notions of what enforcement court considers just; o where it appears to enforcement court that the decision of the seat court was plainly wrong. Not satisfied by mere disagreement with a decision on which reasonable minds might differ.	Relevant criteria include: • whether foreign court *lacks expertise or specialism* to handle relevant dispute; • whether any evidence of *corruption or lack of independence* in foreign forum; • *costs* involved in bringing action in foreign forum; • whether in the circumstances of the case, *fair and just* hearing can occur in foreign forum.

	Foreign law presumption (*Neilson*)	Expert evidence (*Cape Industries*)	Common law doctrines of preclusion	Restrict abuse of process (*Henderson*)	Primacy Principle (*Deutsche Telekom*)	Miscarriage of process (*Deripaska*)
What is the principle predominantly trying to address?	• *Real-World #1*: courts of the forum know no foreign law.	• *Substantial justice*: to avoid making assumptions that procedures which court knows and applies are only procedures which will ensure provision of substantial justice because: o *Real World #1*: courts of the forum "know no foreign law"; and o procedures adopted by foreign court may be wholly unfamiliar to forum court.	• *Substantial justice*: remains flexible enough to allow courts scope not to apply them where, in all the circumstances of the case, it would be contrary to justice to follow or uphold a prior judgment. • *Public interest of efficiency and economy in the conduct of litigation*. Concern of courts to protect their processes from abusive, wasteful and potentially oppressive duplicative litigation. • *Public interest in finality of litigation.*	• *Public interest of efficiency and economy in the conduct of litigation*. Concern of courts to protect their processes from abusive, wasteful and potentially oppressive duplicative litigation. • *Public interest in finality of litigation.*	• *Public interest of efficiency and economy in the conduct of litigation.* Parties seek to rely on principle to avoid time and expense otherwise involved in establishing technical requirements of transnational issue estoppel. • *Public interest in finality of litigation.*	• *Substantial justice*: varying levels of confidence in integrity of judicial system. • *Real-World #2*: recognises that degree of independence of the judiciary from executive may vary across different countries, and that parties may sometimes be prejudiced by having to sue in foreign court because they would, for political, racial, religious, or other reasons be unlikely to get a fair trial.

	Foreign law presumption (*Neilson*)	Expert evidence (*Cape Industries*)	Common law doctrines of preclusion	Restrict abuse of process (*Henderson*)	Primacy Principle (*Deutsche Telekom*)	Miscarriage of process (*Deripaska*)
Countervailing considerations	• *Simple* to apply, but less accurate. • *Undermines judicial comity*: encourages assumptions that procedures of forum only procedures which will ensure provision of substantial justice.	• *Party dependent*: o parties in adversarial systems decide ground on which case will be fought and retain experts who give evidence; o the way in which question is framed by parties may affect the way in which expert frames their opinion. • *Resource intensive*: it can require a great deal of evidence. • *Static / inflexible*: expert evidence may not deal with all aspects of a matter that emerges as important. • *Engages judicial comity*.	• *Established doctrines*. • *Narrow* set of criteria. • *Flexible?*: scope to enable courts to avoid having to follow a prior judgment in circumstances where it would be inappropriate to do so? *Eg*, Real World #2	• *Established rule*. • *Narrow* set of criteria. • *Flexible?*: scope to enable courts to avoid having to follow a prior judgment in circumstances where it would be inappropriate to do so? *Eg*, Real World #2	• *Limited* to matters of international arbitration. • *Unclear doctrinal basis* for elevating court of the seat status. • *Unclear outer limits*: and if same as estoppels, query utility in light of other tools. • *Inflexible*: provides a neat, simple rule, but lacks flexibility of other doctrines of preclusion to adjust for special circumstances.	• *Undermines judicial comity*: passing judgment on the quality of justice of another legal system (may lead to what Arzandeh described as "judicial chauvinism"). • *Lack of certainty*: greater potential for inconsistent or "unpredictable" *outcomes*. • *Resource intensive*: it can require a great deal of evidence to prove that a foreign court is unsuitable.