REFERRING QUESTIONS OF FOREIGN LAW TO THE COURT OF THE GOVERNING LAW

No Longer "Lost in Translation"

The question of proof of foreign law in cross-border litigation is often a difficult one, not least because the court of the forum is being asked to make a ruling on an area of law which is by definition outside its expertise. This is not necessarily helped by expert opinions, which can be sharply conflicting, almost certainly costly, and which may not always lead to a just result. In a significant move to promote legal co-operation across jurisdictions, the Supreme Courts of Singapore and New South Wales recently signed a Memorandum of Understanding to provide a new means of determining questions of foreign law, *viz*, by the forum court referring the issue in question directly to the foreign court to make a ruling on its own law. This article examines the background and rationale of the initiative, analyses the procedures put in place to support the endeavour, and raises issues that will likely need to be resolved when the procedure is utilised in practice. It also offers some tentative suggestions on the considerations that one should bear in mind in deciding whether to apply for, or (from the court's point of view) make an order for such a reference. From a broader perspective, the possible implications on the doctrine of *forum non conveniens* will also be considered.

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I. Introduction

1 On 21 August 2010, the Supreme Courts of Singapore and New South Wales signed a Memorandum of Understanding on References of Questions of Law ("MOU"), which gave effect to an earlier oral agreement between the Chief Justices of both Courts. Article 1 of the

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MOU states that if an issue in proceedings before the forum court is governed by the law of a foreign jurisdiction, the forum court will give consideration to directing the parties to take steps to have that issue determined by the court in the foreign jurisdiction.

2 The MOU is significant because it is the first time that either court has forged ties on a legal issue. Chief Justice Chan Sek Keong stated that "[t]he MOU recognises the importance of facilitating legal cooperation in a way that has never been done before", and that he looked forward to its more widespread adoption in the future as a new means of determining complex questions of foreign law. Chief Justice Spigelman noted that the MOU could prove valuable in determining complex cross-border commercial and family disputes, and acknowledged "the growing need for closer cooperation between courts and judges".[1]

II. Background and rationale

3 The press releases of both courts recognised that, even prior to the MOU, the Supreme Court of Singapore referred a question of foreign law for determination by a foreign court in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR*[2] ("*Westacre*"). In that case, the appellant had obtained an arbitral award in its favour from an International Chamber of Commerce ("ICC") tribunal against the respondent. A year later, the appellant commenced proceedings in England to enforce the arbitral award and obtained judgment from the English High Court ("the English judgment"). Over the next few years, the appellant tried but failed to enforce the English judgment. Approximately seven years after the English judgment was obtained, the appellant found a bank account in Singapore that was linked to the respondent. The appellant applied *ex parte* to register the judgment pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act[3] ("RECJA"). The respondent then applied to set the judgment aside, with the matter eventually reaching the Court of Appeal.

4 The Court of Appeal found that one of the key questions to be determined was whether the judgment was enforceable for the purposes of the RECJA.[4] Under the RECJA, enforceability of a judgment in the jurisdiction in which it was obtained is a prerequisite of registration.

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1 Media Release from Supreme Court of Singapore dated 23 June 2010, Media Release from the Supreme Court of New South Wales dated 23 June 2010. Chief Justice Spigelman had in an earlier speech said that the practice of engaging experts on foreign law was a costly exercise and leads to significant "loss in translation" problems.

2 [2009] 2 SLR(R) 166.

3 Cap 264, 1985 Rev Ed.

4 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed).

Hence, the issue turned on whether the English judgment was enforceable without leave of the English court. Such leave had not in fact been obtained. As such, if leave was necessary, then the registration of the judgment under the RECJA had to be set aside. On this issue, the experts of the parties were diametrically opposed. Hence, the Court of Appeal adjourned the hearing and directed the appellant to refer to an English court the issue of whether the English judgment remained enforceable by way of a garnishee or third-party debt order. The matter went before Tomlinson J in *Westacre Investments Inc v Yugoimport SDPR*,[5] who answered the question in the affirmative. This determination was then admitted into evidence before the Singapore Court of Appeal and was taken into account by the court in deciding that the decision of the High Court judge should be overturned.

5 The novel approach taken by the Court of Appeal in *Westacre*[6] was undoubtedly in the minds of those instrumental in the signing of the MOU. Both Singapore and New South Wales have made concrete their commitment to the MOU by making changes to their civil procedure rules. In particular, Singapore has introduced a new O 101 to the Rules of Court, which is substantially based on the equivalent New South Wales amendment to the Uniform Civil Procedure Rules 2005.

6 Prior to the MOU, the issue of proof of foreign law had received consideration in a number of cases in Singapore.[7] The law in this regard is generally similar to the traditional English common law position, which states that where foreign law applies, it must be pleaded and proven as a fact to the satisfaction of the judge.[8] Unlike in England, issues of foreign law can be proven in two ways:[9]

(a) by directly adducing raw sources of foreign law as evidence; or

(b) by adducing the opinion of an expert in foreign law.

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5 [2008] EWHC 801 (Comm).

6 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

7 *Ong Jane Rebecca v Lim Lie Hoa* [2003] SGHC 126; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377; *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491.

8 *Dicey, Morris & Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 9-001.

9 *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491. The position in England is different. *Dicey, Morris & Collins on The Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) vol 1 states at para 9-013 that: "It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the Court, or merely by citing foreign decisions or books of authority. Such materials can only be brought before the Court as part of the evidence of an expert witness, since without his assistance the Court cannot evaluate or interpret them."

7 This statement of law has its statutory roots in various provisions of the Evidence Act.[10] Section 40 states that a court may receive as evidence the law contained in a book purporting to be published under the authority of the Government of the country or in a book purporting to be a report of the rulings of the courts of that country. Section 47 complements this by allowing the court to receive the opinions of experts as evidence of foreign law, who in the legal context, are defined by the provision as persons "specially skilled" in foreign law. Sections 60 to 62 of the Evidence Act and O 40A of the Rules of Court[11] provide the framework for the admissibility and proof of opinions obtained.

8 In practice, foreign law issues are primarily determined through an assessment of conflicting expert evidence. Even where authoritative texts and superior court rulings definitively pronounce on issues of law in foreign jurisdictions, such material is generally brought before the court as part of the evidence of an expert witness, as the expert's opinion is often required to interpret or apply those pronouncements.[12]

9 The supremacy placed on the role of the expert in such circumstances has been roundly criticised.[13] Doubts are often raised as to the competence and impartiality of experts[14] and the issue was given extensive treatment by the Court of Appeal in *Pacific Recreation Pte Ltd v SY Technology Inc*.[15] Order 40A of the Rules of Court[16] and Form 58 of the Subordinate Courts Practice Directions attempt to ameliorate the problem by setting out the duties of an expert witness and detailed directives on what an expert report should include.[17]

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10 Cap 97, 1997 Rev Ed.

11 Cap 322, R 5, 2006 Rev Ed.

12 As the court stated in *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [60]: "Even if raw sources of foreign law are admissible under [the relevant provisions in the Evidence Act], it does not mean that the courts are obliged to accord these sources any evidentiary weight. It is preferable that solicitors provide expert opinions on foreign law whenever possible."

13 See, *eg*, James McComish, "Pleading and Proving Foreign Law in Australia" [2007] MULR 17.

14 See, *eg*, *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 at [58]–[63].

15 [2008] 2 SLR(R) 491.

16 Cap 322, R 5, 2006 Rev Ed.

17 Form 58 is drafted as a guidance note to expert witnesses which the parties are required to furnish to the expert witnesses pursuant to para 152(2) of the Subordinate Courts Practice Directions (2006 Ed). Although there is no similar requirement in the Supreme Court Practice Directions, the court in *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [65] stated that, as a matter of good practice, the same procedure should be followed for proceedings in the Supreme Court. See also Jeffrey Pinsler, "Expert's Duty to be Truthful in the Light of the Rules of Court" (2004) 16 SAcLJ 407.

10 Even with these measures in place, it is difficult to eliminate the element of bias (whether actual or apparent) of the expert towards the party that has engaged him. Indeed, it is interesting to note the scathing comments made by the US courts on the use of foreign law experts:[18]

> Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony.

11 It may be that such problems of partiality can be mitigated by relying on court-appointed experts,[19] who would by definition be party-neutral. However, practical experience suggests that the O 40 procedure is far less utilised than experts appointed by the parties, possibly because of the ingrained adversarial nature of court proceedings. Moreover, even where parties consent to the appointment of a court expert, they are not precluded from subsequently calling their own experts to challenge the court expert's opinion.[20]

12 By comparison, the approach envisaged by the MOU and enshrined in O 101 of the Rules of Court[21] can be expected to produce a determination that is not only impartial but also authoritative. The foreign court is obviously not beholden to any of the parties to the dispute, and is purely being asked to determine a question of foreign law applied to a hypothetical factual scenario. The impartiality and competence of a foreign court for the purpose of making a determination based on its own law can quite safely be assumed, and no one will seriously dispute that the foreign court is certainly in a better position than an expert to do so. Order 101 thus gives both the court and the parties a valid option to consider, particularly where the issue of law is complex, or when there is a dearth of experts willing to provide evidence.

13 Leaving aside questions as to the ability and professionalism of the expert, the method of proving foreign law via expert testimony is almost always expensive. There are significant costs involved in hiring an expert to produce a report, depose to an affidavit and to attend a hearing or trial to be cross-examined. In this connection, the MOU recognised the difficulties and costs involved in the traditional method

18 *Bodum USA, Inc v La Cafetiere, Inc* (US Court of Appeals for the Seventh Circuit, 2 September 2010) (Judge Posner).

19 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40.

20 As was the case in *Teo Geok Fong v Lim Eng Hock* [1999] SGHC 209.

21 Cap 322, R 5, 2006 Rev Ed.

of proving foreign law. In the usual case, the O 101[22] regime is predicted to be more cost-efficient as parties simply take out an application in the foreign court, rather than having to undergo the costly process of finding and hiring a suitable expert. It is acknowledged, however, that since the parties have the right to utilise the avenues of appeal available in the foreign court, there may be occasions where the cost-savings are marginal, or when the costs of the foreign proceedings outweigh that of expert testimony. Perhaps, one possible option, to keep costs in check, is for parties to agree, or the Singapore court to order,[23] that the parties refrain from appealing against the foreign law determination made by the foreign court.

14 It is also envisaged that the O 101[24] process can be utilised to obtain a fairer result in the appropriate circumstances. In matters where proof of foreign law is an issue, the court is very often put in the unenviable position of having to choose between two perfectly reasonable but differing interpretations of foreign law, or applications thereof. This selection can produce an arbitrary and unfair result.[25] Where the determination is left to a foreign court, the courts avoid having to play the role of "super-expert" and instead rely on a determinative ruling by the court that has the requisite expertise and experience to make the correct decision.

15 In the absence of satisfactory evidence of foreign law, Singapore law is presumed to apply to the case.[26] Commonly known as the presumption of identity, the concept is a key feature of private international law in the major common law jurisdictions and has been the subject of much derision for being unrealistic and of limited assistance.[27] For obvious reasons, utilising the procedure under O 101[28] will likely avoid the need to rely on such an artificial rule of convenience.

22 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

23 Such an order may take on the flavour of an anti-suit injunction, which the court clearly has the jurisdiction, but may be reluctant, to grant.

24 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

25 Similar issues were considered in Michael Hor, "When Experts Disagree" [2000] Sing JLS 241.

26 *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811 at [79]; *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 at [44]; however, see *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [43].

27 See, *eg*, *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; Adrian Briggs, 'The Meaning and Proof of Foreign Law' [2006] Lloyd's Maritime and Commercial Law Quarterly 1 at 4; James McComish, "Pleading and Proving Foreign Law in Australia" [2007] MULR 17.

28 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

III. The procedural framework

A. An examination of O 101

16 The schematic of O 101 of the Rules of Court[29] is straightforward. Rule 2 sets out the governing procedural framework where one or more parties are of the view that an order for reference of questions of foreign law to a foreign court may be appropriate ("r 2 order"). In such a situation, the applicant should take out a summons, supported by affidavit for the court to make such an order.[30] Although this is not regulated by the rule, the affidavit should presumably contain all the relevant information necessary for the court to make the appropriate order. Rule 4 is the relevant provision in this regard, as it sets out the various elements that must be contained in the order of court. Accordingly, the applicant should assist the court as far as possible by framing the issue of foreign law that is to be determined by the foreign court. Bearing in mind the background and overriding rationale as discussed above, it may also be useful to state on affidavit why the applicant believes that the issue of foreign law is better determined by the foreign court, as opposed to the more usual course of assessing opposing expert evidence on the foreign law issue.

17 Applications for a r 2 order have a limited scope in two respects. First, only the High Court and the Court of Appeal have the jurisdiction to hear such applications, as O 101 r 1[31] expressly defines "Court" in this narrow sense. Also, an application under r 2 may only be made "[w]here in any proceedings before the Court there arises any question relating to the law of any specified foreign country or to the application of such law …". On a literal construction, applications under r 2 can only be made where the existing proceedings are being heard in the High Court or Court of Appeal. Parties involved in proceedings in the Subordinate Courts thus cannot avail themselves of the procedure in r 2, even if they were willing to take out an application in the High Court.[32] Second, the

29 Cap 322, R 5, 2006 Rev Ed.

30 See Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 101 r 2(3).

31 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

32 An interesting question is whether the procedure is available to matrimonial proceedings commenced in the High Court, which by virtue of the Supreme Court of Judicature Act (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2007 (Cap 322) are transferred to be heard and determined by a District Court. This may be helpful, since foreign law issues are likely to arise because matrimonial disputes are increasingly cross-border in nature, and especially in light of proposed amendments to the Women's Charter (Cap 353, 2009 Rev Ed) which will allow the Singapore court to make ancillary orders in relation to overseas divorces recognised by Singapore. It may be, however, that O 101 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) cannot apply because such proceedings are governed by the Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2006 Rev Ed).

question of foreign law must be related to the law of a "specified foreign country", which is defined in r 1 as a foreign country specified in r 6. To date, New South Wales, Australia is the only country specified under the latter rule.

18 Order 101 r 3[33] provides for the power of the court to direct a party to file proceedings in a foreign court to determine a question of foreign law. It is worth noting that parties can be directed under r 3 to seek a determination from "any Court of competent jurisdiction in any foreign country (not being a specified foreign country)". This means that while an application under r 2 can only be taken out in respect of specified foreign countries, it is still open for the court, to order that foreign proceedings be commenced in *any jurisdiction other than those specified in r 6* to seek a determination of an issue of foreign law. The uncertainties inherent in such an approach are further discussed in paras 26–36 of this article.

19 As stated above, O 101 r 4[34] sets out the various elements that must be incorporated into an order of court, namely:

> (*a*) state the question that is to be determined in relation to the law of the foreign country;
>
> (*b*) state the facts or assumptions upon which the question is to be determined;
>
> (*c*) contain a statement to the effect that the Court in the foreign country may vary the facts or assumptions and the question to be determined; and
>
> (*d*) state whether and to what extent the parties may depart from the facts or assumptions in the determination of the question by the Court of the foreign country.

20 The drafting of O 101 r 4[35] is unusual in the context of the Rules of Court as it is framed as a direct instructive to the court, rather than the more usual formulation which prescribes the form and content of the application. This is presumably justified on the basis that it is the order of court (and not the application) that will be forwarded to the foreign court to deliberate upon. It is this international element that distinguishes the r 2 order from the usual order of court contemplated by the Rules of Court.

21 Depending on the stage at which the application under O 101 r 2[36] is brought, the court may already have conflicting expert evidence

33 Rules of Court (Cap 322, R 5, 2006 Rev Ed).
34 Rules of Court (Cap 322, R 5, 2006 Rev Ed).
35 Rules of Court (Cap 322, R 5, 2006 Rev Ed).
36 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

before it, and have a firm grasp of the precise issue that it would like the foreign court to determine. Where it does not, r 4(3) becomes important as it allows the foreign court to depart from the facts and assumptions set out by the Singapore court as well as vary the precise question to be determined. Rule 4(4) complements r 4(3) as it gives the Singapore court latitude to control any variation of (a) the issue of foreign law to be determined, and (b) any of the underlying facts and assumptions by the applicant in the foreign court. While it is certainly prudent for both the foreign court and the applicant in that court to have that residual power to make variations where necessary, it is hoped that this power is rarely invoked and only in exceptional circumstances. Ultimately, referrals to the foreign court under the Rules of Court are to aid the Singapore court in rendering a just decision in a cost-efficient manner. The danger of variation is that the foreign court's determination becomes irrelevant or unusable to the Singapore court, which would presumably have framed the question in a manner most useful to itself. Parties would therefore be well advised to exercise caution when departing from the facts and legal issues framed.

22 Order 101 r 5[37] provides the procedural framework for applications that are addressed to the Singapore court. It is a mirror image of r 2, except that it specifies in addition that the application must be brought by way of originating summons, supported by affidavit. It is interesting to note that r 5 is also confined to specified foreign countries as defined by r 6. Further, there is no provision which expressly caters to the jurisdiction of the court to consider an application for the determination of Singapore law in order to assist proceedings in a foreign court generally. It is thus an open question as to whether r 5 precludes the court from hearing such applications in respect of non-specified foreign jurisdictions. The principles of international comity and reciprocity would favour the Singapore court hearing such applications and providing legal assistance to foreign courts where possible. The extension of such a courtesy will also help to raise the profile of Singapore law in foreign lands. Of course, it is quite another issue whether our law on declaratory relief allows such determinations to be made where there is in a sense no *lis* actually pending between the parties before the Singapore court. Happily, the *Westacre*[38] experience would suggest an affirmative answer, to the extent that the Singapore Court of Appeal did not appear to expect any difficulties in the UK court granting such a declaration based on hypothetical facts. This is so at any rate where the reference is from a court of law, as opposed to the

37 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

38 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

parties knocking on the doors of the Singapore court on their own initiative.[39]

B. Comparison with New South Wales Rules

23 It is perhaps worth highlighting at this point that, although both New South Wales and Singapore gave effect to the MOU through amendments to their rules of civil procedure, the rules enacted in the jurisdictions differ in some key respects. The New South Wales amendments were effected via the Uniform Civil Procedure Rules (Amendment No 34) 2010 ("the NSW Rules 2010"), which took effect on 25 June 2010. Firstly, the NSW Rules 2010 impose an additional requirement on the party contending that there is an applicable foreign law to file a notice to the court. Rule 6.43 of the NSW Rules 2010 states as follows:

> 6.43 Filing of notices
>
> (1) A party who contends that an issue in proceedings in the Supreme Court is governed by foreign law must file and serve on the other parties affected by the issue a notice (a foreign law notice) setting out the relevant principles of foreign law and their application to the issue.
>
> (2) The foreign law notice must be filed and served by the party contending that an issue is governed by foreign law not more than 6 weeks after the filing by that party of a summons, statement of claim, statement of cross-claim or defence in respect of the proceedings.
>
> (3) A party on whom a foreign law notice is served who disputes the principles of foreign law or their application must file and serve on the other parties affected by the issue a notice setting out the matter or matters in dispute (a notice of dispute as to foreign law).
>
> …
>
> (4) The notice of dispute as to foreign law must be filed and served not more than 8 weeks after the date of service of the foreign law notice.

24 This requirement can be analogised to pleadings in our local context. Generally speaking, having such foreign law notices is helpful to crystallise the dispute as to foreign law at an early stage of the proceedings and make it known to the court and parties from the

39 Even in the latter scenario, Tomlinson J's decision in *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm) suggests that this can be done. The learned judge expressed the view that the judgment creditor there could have first applied for declaratory relief from the English court before proceeding in the Singapore court, even without a court direction for it to do so.

outset. However, it should be observed that on one reading of r 6.43 of the NSW Rules 2010, the rule does not seem to go so far as to make the filing of such notices a prerequisite to the filing of an application for an order that an issue of foreign law be referred to a foreign court under r 6.44.[40] It would also seem that the phrase "[a] party who contends that an issue in proceedings in the Supreme Court is governed by foreign law must file and serve … a notice …" under r 6.43 should not be interpreted to mean that a party who *fails* to file a foreign law notice is thereby precluded from subsequently contending (for example, at trial) that an issue within the proceedings is governed by foreign law. In complex cases, the dispute of foreign law may only be articulated or framed at a very late stage in proceedings. *Westacre*[41] is a classic example. In such situations, it would be unrealistic to expect the parties to frame the foreign law issue at an early stage in the proceedings.

25 The legislators in New South Wales have also given effect to the MOU more expansively, in that the r 6.43 notice and r 6.44 orders are not confined to "specified foreign countries" with which New South Wales has signed an MOU, but rather apply to questions regarding the law of all countries other than Australia, which can be determined by the courts of all countries other than Australia (see r 6.42 of the NSW Rules 2010). Another key distinction from the Singapore rules is that the New South Wales regime envisages a referral only upon an application made by one of the parties, and only when there is *consent among the parties* that such a referral be made (see r 6.44 of the NSW Rules 2010). This is in contrast to O 101,[42] which contemplates a potential contested application as to whether a foreign law referral should be made, as well as expressly preserves the power of the court to, of its own motion, refer a question of foreign law to a foreign court for determination. The effect of r 6.44 of the NSW Rules 2010 is that, in situations where the parties disagree as to whether a referral should be made, the court cannot adjudicate on whether it is indeed best in all the circumstances to refer the question to a foreign court.

IV. Uncharted waters

26 As with any initiative, the new procedure for foreign law reference brings with it novel questions that may not lend themselves to obvious answers, at any rate not when the project is still at a nascent stage. This part highlights some potential issues, which await judicial clarification.

40 Uniform Civil Procedure Rules (Amendment No 34) 2010 r 6.44 is the equivalent of the Singapore Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 101 r 2.

41 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

42 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

A. Effect of foreign court ruling

27 Some degree of uncertainty exists in relation to the effect of the foreign court ruling made on the reference from our court. There are two aspects to this. First, to what extent are the parties and the Singapore court (in the instant case) bound by the findings and ultimate decision of the foreign court? In respect of expert evidence generally, it is established law that when experts conflict, the court is entitled to choose which opinion to accept.[43] Even where there is only one expert opinion, the court is not required to unquestioningly accept the unchallenged evidence.[44] Indeed, in the specific context of foreign law experts, the Court of Appeal in the relatively recent case of *Poh Soon Kiat v Desert Palace Inc* rejected the opinion of the expert on California law.[45] In doing so, the court referred to a rule of prudence with regard to expert evidence, since "it is merely common sense that no party would call an expert to testify against its own case".[46] Intuitively, matters ought to stand differently, however, when the opinion on foreign law is rendered by the foreign court itself. Insofar as the objective of the foreign law reference is precisely to obtain an *authoritative* determination of the content of the foreign law and its application, which is at the same time *objective* and without party-bias, one would think that the foreign ruling *must* be accepted by the courts here. Yet this may not be an entirely secure proposition once we inquire into the precise nature of the foreign court ruling, and how it is actually incorporated into the local proceedings. In *Westacre*,[47] Tomlinson J's ruling[48] was brought into the Court of Appeal proceedings as an exhibit to an affidavit filed by the appellant's solicitor in the reference proceedings. It was admitted by the Court of Appeal as further evidence in the adjourned hearing. For what it is worth, the manner of its incorporation suggests that the status of the foreign court ruling may be no different from any other expert evidence. The waters are also slightly muddied because of the possibility that the court in the foreign country "may vary the facts or assumptions and the question to be determined". In addition, the order for reference is supposed to state the extent to which the parties "may depart from the facts or assumptions in the determination of the question by the Court

43 *Tengku Jonaris Badlishan v PP* [1999] 1 SLR(R) 800, applying *McLean v Weir* [1973] 3 CCLT 87. *Cf Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 (in relation to conflicting medical opinions).

44 *Sakthivel Punithavathi v PP* [2007] 2 SLR(R) 983; *Saeng-Un Udom v PP* [2001] 2 SLR(R) 1. This is similarly the case even if the opinion is from a court-appointed expert under O 40 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed): *Non-Drip Measure Co Ltd v Strangers Ltd* [1943] 6 RPC 142; *Minnesota Mining & Manufacturing Co v Beiersdorf Australia Ltd* (1980) 144 CLR 253.

45 [2010] 1 SLR 1129.

46 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [23].

47 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

48 *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm).

of the foreign country". As mentioned above, this is no doubt flexibility in-built into the procedure to cater to situations where the foreign law issue may not have been framed in an accurate or comprehensible way when viewed through the lens of the foreign court, or where the local proceedings have not reached a sufficiently mature stage for the factual issues to be crystallised with certainty. Presumably, if the factual underpinnings of the foreign law opinion have been varied, either by the foreign judge, or by the parties themselves in the Singapore proceedings, there is a stronger case for saying that the finding ought no longer to be binding, insofar as it may still be material for the purpose of resolution of the dispute at hand. But leaving aside the instances where the factual assumptions are modified, if one of the parties is dissatisfied with the foreign court's determination, is it open to him to still persuade the Singapore court not to follow the foreign determination? Or is it incumbent upon him to exhaust his avenues of appeal in the foreign court, beyond which he is precluded from disputing or challenging that finding before the Singapore court?[49] It may of course also be possible, although this is not provided in the rules, for the parties to undertake to the court to be bound by the pronouncement of the foreign court.

28 There is also uncertainty as to the status of the foreign court determination more generally, for the purpose of the rules on recognition of foreign judgment, and the principles of *res judicata* and issue estoppel. We all know that in order for a foreign judgment to be entitled to recognition under our private international law rules, one of the prerequisites is that it be a final and conclusive judgment, which is on the merits.[50] There is no difficulty in characterising the foreign ruling as final and conclusive, as long as it is not a decision capable of being re-opened by the same court which pronounced it (as opposed to in the context of an appeal).[51] The trickier part relates to whether it can be regarded as a determination on the merits. If the referral is to be treated as asking the foreign court to answer a *hypothetical* question, as the *Westacre*[52] experience (in particular Tomlinson J's decision)[53] would seem to suggest, one would be hard pressed to assert that the foreign ruling is a determination on the merits, bearing in mind that a decision on the merits is one which establishes certain facts as proved and expresses a conclusion with regard to the effect of applying the

49 The Court of Appeal did note that there was no appeal in the UK proceedings against Tomlinson J's decision on the foreign law determination: see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [13].

50 *The Vasiliy Golovnin* [2007] 4 SLR(R) 277 at [38]; *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088.

51 *The Vasiliy Golovnin* [2007] 4 SLR(R) 277; *The Sennar (No 2)* [1985] 1 WLR 490.

52 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

53 *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm).

applicable legal principles to the factual situation concerned.[54] Such reasoning also reinforces the view that the foreign court ruling may, at the end of the day, be in reality no different in *nature* from any other expert evidence, save that it would of course almost certainly be of a weightier variety. The practical significance of this is not necessarily limited to the instant case before the court. In litigation between A and B before the Singapore court, during the proceedings of which a reference is made to the New South Wales court for determination of an issue governed by Australian law, would that determination create an issue estoppel, such that if A were to subsequently bring another suit against B, that same issue can no longer be revisited (assuming it is equally relevant to this second dispute)? The answer may well turn on whether that foreign court determination was in fact accepted by the Singapore court in the first suit, hence forming part of its adjudication so as to trigger the rule on issue estoppel. On such a view, if the action between A and B in Singapore was discontinued before trial without a substantive adjudication on the merits, and A were to bring another action against B in respect of the same matter say in England, it would appear that it remains open for A to relitigate that point in the subsequent suit, since no issue estoppel can arise unless and until that foreign law ruling is incorporated into an actual judgment of a Singapore court on the merits.

29 That the foreign court determination may be no more than another expert opinion also has implications when considering whether a challenge can still be mounted against it in the context of an appeal before the Singapore court. Consider a situation where the High Court had ordered the foreign law reference and accepted the foreign court's determination in coming to its substantive decision. If a subsequent appeal is filed against the High Court's decision, the party dissatisfied with the foreign court's determination may seek to ask the Court of Appeal to overrule the High Court's finding on the foreign law. If the foreign court's determination was merely expert evidence that was accepted by the High Court, the High Court's finding on foreign law is regarded as a finding of fact which can certainly be challenged on appeal.

B. Where dispute as to lex causae

30 Where a referral is made, the assumption must be that we know what the *lex causae* is. A nice question is what happens if there exists, as is common in cross-border litigation, a dispute between the parties as to the identity of the governing law, quite apart from its content. Where there is a contest as to choice of law, it is not immediately obvious how

54 *The Sennar (No 2)* [1985] 1 WLR 490.

and when the process of referring foreign law will take place. It seems unlikely that the procedure under O 101 of the Rules of Court[55] is intended only for cases where there is agreement between parties on the governing law. That would be giving the new provision an excessively restrictive ambit.

31 In the majority of cases where parties disagree as to what the *lex causae* is, this would be resolved by the court after trial. In such a case, it may be thought that any reference to the foreign court will be far too late in the day, at least to the extent that the referral process is intended to save costs and time. Hence, if the dispute is not only as to the content of any foreign law, but more fundamentally which foreign law is the *lex causae*, a party desirous of utilising the O 101[56] procedure prior to trial may wish to first make an application for the court to determine the antecedent question of choice of law, and only thereafter apply under O 101 for the court to refer the foreign law question to the relevant foreign court. In this connection, it is interesting to compare again our procedural regime with that of New South Wales. As mentioned above, under its Uniform Civil Procedure Rules 2005, the New South Wales Supreme Court will refer the question of foreign law to the foreign court only with the consent of all the parties. The Australian referral process therefore does not envisage the situation where there is a contest between parties as to what is the foreign governing law. Yet, the Australian procedure provides for the filing of foreign law notices and the notices of dispute as to foreign law. A similar procedure is absent in O 101. In such a situation, it may have been helpful to have a procedure which allows the court and the parties to facilitate the resolution of the question of foreign law before a referral is then made under O 101. Having such notices may assist the court in early determination of the applicability of the foreign law. Be that as it may, one may argue that the pleadings already suffice for this purpose. Moreover, there is already machinery available within our existing rules of civil procedure to cater to the problem. In this regard, O 14 r 12, under which a party can seek the court's determination of a question of law may be utilised to determine the *lex causae*, in order to thereafter refer any issues relating to that foreign law to the foreign court for determination.

32 Having said the above, it is of course still open for the parties or the court to initiate the referral process at a later stage, whether during trial or even in the midst of appellate proceedings, as was the case in *Westacre*.[57] Even in such instances, the advantage of obtaining an

55 Cap 322, R 5, 2006 Rev Ed.
56 Rules of Court (Cap 322, R 5, 2006 Rev Ed).
57 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

authoritative and objective opinion as to foreign law remains undiminished. In fact, one could argue that the issues become more crystallised and concrete as the proceedings mature, such that the foreign law issue can be more accurately framed. In such a scenario, however, the argument that the referral process will result in the savings of costs is surely weakened, particularly where expert witnesses have already been brought on board.

C. Non-specified jurisdictions

33 Another area of uncertainty relates to the extent to which a reference for determination can be made to a foreign court which is not a specified jurisdiction. This is important, because we only have New South Wales specified under O 101 r 6[58] thus far. It is true that in *Westacre*,[59] the Court of Appeal did, pursuant to probably its inherent powers under the common law, order a question of foreign law to be determined by the UK court. But the specific context of that case must be borne in mind, namely that the court was trying to determine whether the foreign (UK) judgment that had earlier been registered in Singapore, could still be enforced by means of garnishee order more than six years after. That was the foreign law question, and it made sense to refer it to the English court, because it was a UK judgment to begin with which was then subsequently registered here. It is also of some significance that reciprocal enforcement legislation already exists between the two countries. Indeed, these were considerations mentioned by Tomlinson J,[60] who also opined that, in any event, the party seeking to enforce that judgment in Singapore should have first applied to the English court for declaratory relief. The learned judge also referred to two earlier English decisions, which were similarly applications to the English court to obtain a ruling on the enforceability of a judgment for the subsequent purpose of enforcing it in another jurisdiction. It is possible to therefore view what the Court of Appeal did in *Westacre* within a narrow compass: a reference to a foreign court could be made if one is trying to determine the enforceability of a locally registered foreign judgment. On that interpretation, the procedure under O 101 would go further than the existing common law, insofar as it does not confine in any way the nature of the foreign law question that can be the subject of reference.

34 The query then becomes whether a Singapore court would refer questions of foreign law generally, outside of the *Westacre*-type

58 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

59 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

60 *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm).

scenario,[61] to the foreign court of a non-specified jurisdiction. It will be recalled that parties can utilise the avenue under O 101 r 2 of the Rules of Court[62] to apply for a foreign law reference only in respect of the foreign court of a specified jurisdiction. If this means that any attempt to refer to a non-specified country can only be made at common law, it remains an open question how far the courts are willing to go beyond the kind of situation in *Westacre*. However, it is crucial to remember that the scope of r 3, which allows the court to order a referral on its own motion, is, somewhat surprisingly, not limited to specified jurisdictions. On a literal reading of O 101, it means that while parties are unable to rely on O 101 to apply for a court order to refer a question of Indian law to the courts in New Delhi, the Singapore court can, however, if it so wishes, make such an order on its own. One may wonder why such a distinction, in terms of the countries to which a reference can be made, is drawn between rr 2 and 3. Surely, it must remain open to the parties to still make an application to ask the court to invoke its power under r 3 to order a reference to a non-specified jurisdiction, notwithstanding the reference in r 3 to the court doing so "on its own motion". There seems to be no reason why a court cannot do something, which it would otherwise have power to do, simply because it is being asked to do so on the application of a party (as opposed to doing so on its own accord).

35 If that is so, the difference then, between the treatment of a specified and non-specified jurisdiction, probably lies only in the readiness of the Singapore court to refer the question of foreign law to the respective foreign court. All things being equal, it must quite certainly be the case that the court would be more willing to refer to the court of a specified country. If nothing else, the fact that the New South Wales court can be expected to be receptive to the reference must be a consideration in favour of making such an order. This is because of the reciprocity under O 101 r 5,[63] in that the Singapore court would similarly be willing to determine a question of Singapore law for the purpose of assisting the proceedings in the specified foreign country. On this point, a parallel can be drawn with the regime for reciprocal enforcement of foreign judgments, as compared to the bringing of a common law action to enforce. The availability of a detailed legislative framework facilitates the enforcement of judgments from the specified jurisdictions under the RECJA and REFJA,[64] just as O 101 performs the same role for the purpose of referring questions of foreign law to the courts of the specified jurisdictions. It may well be that the specification of

61 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

62 Cap 322, R 5, 2006 Rev Ed.

63 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

64 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed). This obviates the need to bring a writ action at common law to obtain judgment.

jurisdictions under r 2 also serves a signalling function, inviting parties to apply for references to the New South Wales court, in light of the MOU.

D. Costs of referral

36 Turning to the more practical issue of costs, O 101[65] does not make clear which party should bear the costs of the referral proceedings. *Westacre*[66] does not provide much guidance in this regard as costs orders were not made in respect of the foreign proceedings. There is some sensitivity in this matter as the foreign court may make costs orders for the proceedings before it which may not always be in accord with that envisaged by the home court. A neat and practical way of approaching this matter is for the courts in Singapore to simply allow the foreign court to address the question of costs. The costs order made can then be treated as a disbursement and dealt with at taxation once the main action has been disposed of.

V. When should reference be made

37 The timing of the application will likely be one of the most important factors to be taken into account in deciding whether a reference should be made to the foreign court. This is primarily because the stage of the proceedings at which an order for foreign law reference is made would likely determine whether the procedure can achieve its aim of saving costs and reducing delay. Generally speaking, the earlier in the proceedings the reference is made, the greater the likelihood of costs savings. If a party is of the view that it will be beneficial to have a question of foreign law determined by the foreign court, he will probably be well advised to take up an O 101[67] application early, and certainly prior to the engagement of any experts on the question of foreign law, to prevent any wasted costs. If pleadings are properly drafted so as to crystallise the key issues, it may be possible to consider a referral to the foreign court from as early as at the close of pleadings.

38 That said, as alluded to above, there may be difficulty in framing any foreign law issue accurately if the proceedings are not sufficiently mature. Also, one may know that a foreign law referral is desirable only after seeing that the quality of the expert evidence is lacking (such that the foreign law may not be properly proved leading to the presumption that it is the same as the *lex fori*), or that the competing expert opinions

65 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

66 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

67 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

are so sharply divergent that the court finds the job of being the "super-expert"[68] impossible. Indeed, in cases where the court of its own motion decides to order such a referral, one would expect this to take place at trial. In *Westacre*[69] itself, it was in fact only at the appellate stage when the Court of Appeal decided to direct the parties to refer the question of foreign law to the UK courts, after realising how irreconcilable the expert opinions in that case were. The state of the expert evidence, including its quality and comprehensibility, as well as the degree of divergence between the conflicting opinions, could therefore also be relevant considerations.

39 Whether referring the question pursuant to O 101[70] will save costs very much depends on the nature of the foreign court procedures. In addition to the receptiveness of the foreign court, the efficiency of its case disposal mechanism is obviously material, as is the extent to which an appeal can be mounted against the foreign law determination. The latter factor would clearly have an impact on any potential delay in the Singapore court proceedings as a result. Quite apart from the issue of costs, and in the context of the other objective of obtaining an authoritative ruling on foreign law, it probably means that the quality of that country's justice system and the competence of its courts are also factors, although comity concerns will in all likelihood dictate that these do not come to the fore in the court's overt reasoning process.

40 If legal questions can be cleanly separated from the factual ones, this will obviously be conducive to a reference being made. This is all the more so if there is agreement between the parties as to the identity of the governing law, and the only dispute relates to its content or application to the facts. As highlighted above, where we have a contest as to choice of law, it will likely be necessary to seek a preliminary determination by the court as to what the governing law is in order to facilitate a reference under O 101.[71] This is particularly important if the intention is to obtain the foreign law determination early, prior to trial.

41 What is perhaps less obvious is the proposition that the parties' choice of jurisdiction may potentially be a relevant consideration as well. The reasoning is as follows. If the parties had an exclusive jurisdiction clause in their contract in favour of Singapore, it is probably uncontroversial that the parties want the Singapore courts to determine all questions in relation to their contractual disputes, be it issues of fact

68 A term used in Michael Hor, "When Experts Disagree" [2000] Sing JLS 241 (see Pt VIII).

69 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166

70 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

71 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

or law. To put it conversely, the parties did not intend for another court to decide any issues arising from their contractual dispute, and this must arguably extend to how the governing law of their contract should be applied to the facts. This line of reasoning gains traction particularly where the parties' choice of jurisdiction is different from their express choice of law. This suggests that the parties specifically envisaged that the courts in the selected jurisdiction would determine the application of what would be, from the adjudicating court's perspective, the foreign governing law. If the parties had selected the Singapore courts to have exclusive jurisdiction over any dispute arising from their contract which is expressly governed by Ruritanian law, a legitimate argument resisting any reference to the courts in Ruritania is that it is precisely the intention of the parties that a Singapore court determines how Ruritanian law should be applied to resolve their dispute.[72] It may of course be said that even if a reference is made to the foreign court, ultimately the dispute would be resolved on the merits by the Singapore courts, and effect is still given to the contractual bargain. However, parties may have selected the Singapore courts for a myriad of reasons, including, for instance, the relative efficiency of its case disposal. They could have shunned the courts in Ruritania because cases take a long time to go through the judicial system there. If reference is then made to the Ruritanian courts to determine the question of Ruritanian law, the proceedings in Singapore may be subject to delay, which is precisely what the parties had tried to prevent by their contract. In short, for contractual cases at least, the parties' intentions should not be overlooked.

VI. Implications for natural forum doctrine

42 In conflict of laws discourse, although jurisdictional principles are kept separate from issues of choice of law, there may not always be a bright dividing line. One aspect of the interplay between jurisdiction and choice of law is in relation to the natural forum doctrine. It is generally accepted that the applicable law of the dispute is a relevant factor in determining where the *forum conveniens* is.[73] The logic is simple: the court of the applicable law must be in the best position to apply its own laws. Not only would this lead to "savings in time and resources in litigating the dispute in the forum of the applicable law",[74] it arguably also contributes to rectitude in the decisions made since it is

72 On the other hand, the argument can plausibly be made that the parties must be taken to be aware of O 101 in Singapore's Rules of Court (Cap 322, R 5, 2006 Rev Ed), and contemplated the possibility that the Singapore court may refer the question of Ruritanian law to the Ruritanian courts.

73 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377; *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543.

74 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [63].

more likely that the foreign law would be applied correctly to the facts. And the greater the perceived differences between that foreign law and the *lex fori*, the greater would be the impetus to leave the application of the former to the foreign court.

43 There has, however, always been some lingering doubt on how far such reasoning can take us. After all, the perceived advantage of having a court apply its own domestic law may be illusory if it turns out that the foreign court which is regarded as the natural forum may not in fact be of the same view that its domestic law is the *lex causae*. It is therefore not unsurprising that the *lex causae* is but one of many possible factors in the *Spiliada* analysis.[75] Moreover, where the laws of the foreign country are substantially similar to the *lex fori*, it has been held that the choice of law factor may become a neutral one.[76]

44 The weight to be attributed to foreign law as a factor in the natural forum inquiry may now be reduced further, if questions of foreign law can be actually referred to the foreign court. In the weighing exercise, what the foreign law is may as a result no longer be as significant. This is because even if the dispute is governed by foreign law, the adjudication of the substantive dispute can still continue in Singapore without the Singapore courts having to decide on the issue of foreign law, thereby avoiding the attendant difficulties of such an exercise. In other words, we no longer need to stay the entire proceedings in order for the foreign court to decide the question of foreign law. An alternative dedicated avenue is now available to facilitate that process of foreign law determination, while at the same time allowing the substantive matter to remain in our courts.

45 From a broader perspective, such a phenomenon seems in line with the observable trend that it seems generally more difficult now to persuade the court that it is the *forum non conveniens*. In recent local decisions, the court has played down on the significance of various factors traditionally considered as important in the *Spiliada* analysis.[77] In *Chan Chin Cheung v Chan Fatt Cheung*,[78] while it was acknowledged as true the general proposition that the location of witnesses is an important factor in cases involving significant factual disputes, the Court of Appeal took the view that this was not a critical factor when the tussle is between Singapore and Malaysia as the forum, because "Malaysia and Singapore are neighbouring states and travel time between the two countries should pose no real challenge for witnesses

75 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.
76 *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [13].
77 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.
78 [2010] 1 SLR 1192.

from either side".[79] The Court of Appeal further referred to s 4(1) of the Evidence (Civil Proceedings in Other Jurisdictions) Act,[80] which can allow the court to provide for the obtaining of evidence in Singapore for Malaysian proceedings, again neutralising witness location as a factor. In this connection, mention can also be made of O 66 of the Rules of Court,[81] which provides for the taking of evidence through examination of witnesses for the purpose of foreign proceedings.

46 Even if the competing forum is further afield than our neighbouring countries, the increasing mobility cross-borders must mean that witness location becomes less relevant. This is not only in terms of air travel, but also technology such as video-conferencing which allows a witness to give evidence from far away.[82] And human beings are not the only ones who are no longer constrained by territorial boundaries. Documentary evidence is also becoming less "location-specific", with e-mail, soft copies and electronic discovery. It does seem that traditional factors which go toward the convenience of litigation now feature less prominently in the natural forum inquiry.

VII. Conclusion

47 While the referral process does not purport to resolve all the problems that have been documented on the issue of proof of foreign law, it does offer a fairly efficient and cost-effective alternative means by which the court and parties can seek a determination of an issue that is based on foreign law. However, there are many unresolved questions that this article has tried to catalogue, which will hopefully be resolved as the procedure set out in O 101 of the Rules of Court[83] is utilised.

48 Looking into the future, it may not be altogether far-fetched to contemplate a single piece of litigation taking place in discrete pockets concurrently in different jurisdictions, with each court examining a certain aspect of the case in tandem. The Singapore court may be the forum where the primary substantive dispute will eventually be decided, but parties could have obtained an order to refer a question of foreign

79 The Court of Appeal in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 at [35] agreeing with the observation made by the High Court in *Ismail bin Sukardi v Kamal bin Ikhwan* [2008] SGHC 191 at [26].

80 Cap 98, 1985 Rev Ed.

81 Cap 322, R 5, 2006 Rev Ed.

82 The Court of Appeal in *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [29] acknowledged the view that "[t]he easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings", although the court did go on to say that the physical location of a witness nonetheless remains a factor.

83 Cap 322, R 5, 2006 Rev Ed.

law to a foreign court for determination. At the same time, they could be relying on the depositions taken by the courts in a third foreign country where some of the material witnesses are located. Where the assets of one party are located in yet another country, there could be applications for Mareva injunctions in that jurisdiction in order to preserve the assets for satisfaction of any judgment that may eventually be obtained in Singapore.[84] Some degree of judicial co-operation and co-ordination would of course be required, but this is not wholly novel. In the context of cross-border insolvency, for example, such judicial collaboration is not unknown and there are signs of increasing universalism in insolvency administration.[85] This new initiative to refer foreign law may be part and parcel of the evolving nature of the modern litigation process, from a rigidly territorial system to a more flexible "borderless" one based on judicial co-operation across jurisdictions. In such a changing landscape, the role for the natural forum doctrine, inasmuch as it seeks to identify the courts in a single jurisdiction as the clearly and distinctly more appropriate forum in which to conduct the litigation of the case, may be on the decline.

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84 In Singapore, a Mareva injunction can be obtained from the courts in support of foreign arbitration: see s 12A(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). However, it remains unclear whether such a "free-standing" Mareva injunction can be granted in aid of foreign court proceedings. In this regard, there appears to be a conflict of High Court authorities: see *Petroval v Stainsby* [2008] 3 SLR(R) 856 and *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000.

85 See, *eg*, *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852; Teo Guan Siew, "Pushing the Limits of Judicial Assistance in Cross-Border Insolvencies" (2008) 20 SAcLJ 784.