

Joinder of Non-Consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement

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Abstract

In this article we explore the approach of the Singapore International Commercial Court (the 'SICC') to jurisdiction and joinder of non-consenting parties, and way that any resulting judgments are likely to be treated by foreign enforcing courts. This novel juncture arises as international commercial courts, such as the SICC, rely predominantly upon party autonomy to enliven their jurisdiction over disputants. This does not require any territorial link of the parties or the dispute to the host jurisdiction (Singapore). At the same time, however, the SICC is granted a mandate under Singaporean law to join non-consenting parties, again with no necessary territorial link. Where such joinder occurs, any resulting judgment is likely to face significant difficulties if recognition and enforcement is sought outside of Singapore. To support this argument, we first set out the ways in which non-consenting disputants may be joined to proceedings before the SICC, and offer some initial thoughts on how these powers are likely to be exercised. Second, we argue that any such exercise of jurisdiction – that lacks either territorial or consent-based jurisdiction grounds – is unlikely to gain support internationally, by reference to transnational recognition and enforcement approaches, and the SICC's most likely recognition and enforcement destinations. Finally, we offer some concluding remarks about the utility of international commercial court proceedings against non-consenting parties, including the possibility they may impact on domestic recognition and enforcement approaches in foreign States.

Keywords: international commercial courts, international business courts, third parties, third party joinder, recognition and enforcement

1 Introduction

In early 2015, the Singaporean Government constituted the Singapore International Commercial Court (SICC)

as a division of the High Court of Singapore, to provide an alternative to arbitration for the resolution of international commercial disputes. Perhaps, most importantly, the SICC's jurisdiction is predominantly derived from disputants' exclusive choice of forum and requires no underlying link or links to Singapore beyond this choice. Because of this, the SICC is intimately concerned with its perceived attractiveness in the eyes of transnational disputants.¹ To this end, it offers disputants more flexible court procedures compared to traditional national courts, straddling and 'hybridising' aspects of commercial court practice, that are 'strongly influenced' by international commercial arbitration practice.² For example, the SICC offers a range of procedural accommodations, such as with respect to confidentiality, proof of foreign law and rules of evidence.³ Further reflecting influence from arbitration, the SICC is able to be constituted by both or either 'local' and international judges, rather than solely judges trained in a domestic legal tradition.⁴ These procedures are

1. This is particularly so as the SICC expressly aims to compete with international commercial arbitration, and commentators have noted the potential role that international commercial courts may play in the face of both long-standing and emerging concerns about the impartiality and limited qualifications of some arbitrators: see, e.g., M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' 31(2) *Arbitration International* 193, at 197 (2015).
2. M. Yip, 'The Resolution of Disputes before the Singapore International Commercial Court', 65(2) *International and Comparative Law Quarterly* 439.
3. M. Yip, 'Singapore International Commercial Court: A New Model for Transnational Commercial Litigation' in Ying-jeou Ma (ed.), *Chinese (Taiwan) Yearbook of International Law and Affairs* (Brill, 2016) vol. 32, 155, at 156. For a comprehensive exposition of the mandate of the SICC, and its early experiences as recorded in initial judgments, see, generally: A. Godwin, I. Ramsay & M. Webster, 'International Commercial Courts: The Singapore Experience' 18(2) *Melbourne Journal of International Law* 1 (2017).
4. At the risk of stating the obvious, the regular use of foreign judges diverges significantly from national court practice in Singapore (and most of the world), where judges are drawn almost exclusively from a local judiciary. At the same time, for those familiar with arbitral practice, the idea that disputants may prefer, and be able to select, their decision maker(s) – usually with expertise in the subject matter of the commercial relationship, or in international dispute resolution generally – goes without saying. Yet rather than considering the selection of the decision maker from the central position of party autonomy (as in international arbitration), or relatively 'randomly' (as most traditional courts do), the selection of International Judges occurs via the grant of a broad discre-

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designed to be attractive to foreign disputants and to ultimately allow the SICC to join with other Singaporean institutions to ‘enhance [Singapore’s] status as a leading forum for legal services and commercial dispute resolution’,⁵ based upon the SICC reinforcing the ‘Singaporean brand’ of dispute resolution.⁶ Despite this push to derive custom through attracting disputants’ exclusive choice of forum, the SICC has an express mandate under Singaporean law to compulsorily join non-consenting parties, including naming them as additional plaintiffs or defendants, to its proceedings.

At first glance, this seems to be an oxymoron: if the SICC derives its jurisdiction from an exclusive choice of forum, it should not have any ability to compulsorily join what can be described as a ‘true’ third party.⁷ In this sense, the SICC straddles the conventional arbitration-litigation divide. As arbitration is grounded in party autonomy an arbitrator can have no authority or jurisdiction over parties who have not agreed to arbitration.⁸ Reflecting this idea, allowing joinder of a ‘true’ non-consenting party (rather than a mere non-signatory) has been described as ‘anathema to the internal logic of consensual arbitration’.⁹ By contrast, it is usual practice for traditional courts to rely upon joinder or consolidation of proceedings involving third parties without requiring their consent.¹⁰ Thus, the SICC derives jurisdiction in a ‘hybrid’ fashion: like international commercial arbitration, the SICC draws upon an original exclusive choice of forum between disputants who have

agreed to arbitrate; however, it also expressly markets its ability – underpinned by Singaporean law – to compulsorily join disputants to this original dispute.¹¹ Yet, by doing so – deriving jurisdiction from the consent of disputants, with no necessary underlying link to the jurisdiction – SICC judgments lose the traditional territorial bases for jurisdiction relied upon for recognition and enforcement in foreign States.

It is in this uncomfortable juncture that the focus of this article arises: given that Singaporean law authorises the SICC to compulsorily join non-consenting parties to its proceedings, how is any resulting judgment that does so likely to be handled beyond Singapore? We attempt to answer this question by focusing on what is likely to be the most controversial subset of judgments: attempts to join non-consenting parties who, apart from this joinder, have no underlying link or links to Singapore. The recognition-and-enforcement prospects of any resulting judgments are particularly important for the SICC, as it aims to attract foreign litigants in circumstances where the dispute or the disputants themselves have no connection to Singapore. In such cases, the third party against whom judgment is rendered may not have significant (or indeed, any) attachable assets within Singapore.¹² Where this is the case, the support of a foreign enforcing court is required to give practical effect to the third-party SICC judgment in most circumstances.¹³ In this article, we argue that such judgments are presently likely to face significant difficulties when recognition and enforcement is sought outside of Singapore. To support this argument, we make two related claims. First, as Section 2 sets out, the SICC has a broad and discretionary mandate to join non-consenting parties to its proceedings. Second, as analysed in Section 3, this mandate is not presently supported at the recognition-and-enforcement stage, across the most likely applicable recognition-and-enforcement regimes. These range, in order of potential reach, from the transnational¹⁴ to the

tion to the Chief Justice to select the judges to hear a particular dispute or a class of disputes: see Section 9(4)(b).

5. Singapore International Commercial Court Committee, ‘Report of the Singapore International Commercial Court Committee’ (November 2013) [55].
6. M. Hwang, ‘Commercial Courts and International Arbitration – Competitors or Partners?’ 31(2) *Arbitration International* 193, at 196 (2015).
7. A ‘true’ third party in this scenario is a third party that is at arms-length from the original parties and the contract between them. It is not merely a ‘non-signatory’, which suggests only that the third party may not have complied with the requirements of writing or signature, but who might otherwise be brought into the contract by some form of deemed agreement. In this article, we prefer the term ‘non-consenting party’, but we also use the terms ‘third party’ and ‘true third party’ interchangeably, unless otherwise apparent from the context. For an expansive discussion of the operation of these ideas in the context of international commercial arbitration, see S. Strong, ‘Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?’ 31 *Vanderbilt Journal of Transnational Law* 915 (1998). In the context of international litigation, Black and Pitel comprehensively explore the way in which a forum selection clause may extend beyond the prima facie contracting parties: V. Black and S. G. A. Pitel, ‘Forum-Selection Clauses: Beyond the Contracting Parties’ 12(1) *Journal of Private International Law* 26 (2016).
8. Noting, of course, various devices developed to join disputants to arbitration despite not appearing, on the face of the arbitral agreement, to have consented to it, as considered thematically in B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2005) 7 (and following).
9. *PT First Media TBK v. Astro Nusantara International BV* [2014] 1 SLR 372 (Unreported, Court of Appeal) 197.
10. Chief Justice Hwang (of the DIFC Courts in Dubai), for example, notes that some disputants select dispute resolution in English courts – as opposed to international commercial arbitration – to allow for this possibility: Hwang, above n. 6, 198.

11. Singapore International Commercial Court Committee, above n. 5, at 12.
12. S. Menon, ‘International Commercial Courts – Towards a Transnational System of Dispute’, *Opening Lecture for the DIFC Courts Lecture Series* 2015:12. This is particularly likely to arise where third parties become involved at later stages of the proceedings.
13. For an exposition of the limited circumstances that parties may still pursue recognition and enforcement, despite a lack of available assets, see, further, E. Bettoni, ‘Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets’ 10(1) *New York University Journal of Law and Business* 155, at 168 (and following) (2013). Indeed, it has recently been argued that despite the seeming futility of such a course of action, the burden of proof should be reversed such that the judgment debtor would need to establish that enforcement of a foreign judgment in a jurisdiction where they do not have assets is an abuse of process: H. Kupelyants, ‘Recognition and Enforcement of Foreign Judgments in the Absence of the Debtor and His Assets within the Jurisdiction: Reversing the Burden of Proof’ 14(3) *Journal of Private International Law* 455 (2018).
14. See Section 3.1, below. These instruments are the extant *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) (‘Convention on Choice of Court Agreements’), which is applicable to disputants’ exclusive choice of forum), and the broad-based Judgments Project draft, put forward by Hague Conference on Private International Law, which remains under negotiation (the most recent draft, as at the time of writing,

reciprocal Commonwealth-driven statutory approach to recognition and enforcement and the underlying common law it is built upon.¹⁵ As the committee tasked with initially establishing the SICC noted, these approaches are important as they are the primary recognition-and-enforcement regimes that the SICC judgments are likely to face.¹⁶ Finally, having set out why these judgments are likely to find little legal support under transnational recognition-and-enforcement approaches, we consider in our concluding remarks the broader impact such judgments may have. We turn now to consider how the SICC approaches questions of joinder, focusing on how the SICC may approach the joinder of non-consenting parties.

2 Joinder of Third Parties in the SICC under Singaporean Law

Joinder is the process by which additional parties, beyond the original disputants, can be added to ongoing proceedings. This is usually at the request of one of the original disputants, usually with the approval of the rendering fora (in the context of this article, the SICC). Thus, it logically follows that for joinder of a non-consenting party to occur, proceedings must have been commenced already by the ‘original parties’ before the SICC. For this reason, before considering the SICC’s approach to joinder, it is prudent to briefly consider the SICC’s jurisdiction to hear disputes over consenting disputants.¹⁷ The SICC is constituted as a division of the High Court of Singapore under the *Supreme Court of Judicature Act 1969 (Chapter 322)*,¹⁸ and as such, it has jurisdiction to hear a cause of action where the matter:

- a. is international and commercial in nature;
- b. is one that the High Court may hear and try in its original civil jurisdiction; and
- c. satisfies such other conditions as the Rules of Court may prescribe.¹⁹

These requirements are explored in some detail in the Singapore Rules of Court at Order 110, where the terms ‘international’ and ‘commercial’ are given a broad sphere of application, including where the original parties agree the proceedings are international and commercial.²⁰ Alternatively, proceedings may be brought

before the SICC if the High Court of Singapore makes an order transferring a matter commenced under its jurisdiction to the SICC.²¹ Where proceedings are originally commenced before the SICC, however, the original parties must have a written jurisdiction agreement that states the parties’ consent and submit to the SICC’s jurisdiction.²² For any agreement between the parties drafted after 1 October 2016, an agreement that confers jurisdiction to the High Court is also taken to provide consent for the SICC to hear the matter, unless a ‘contrary intention appears in the agreement.’²³ The requirement of agreement as to the SICC’s jurisdiction, as will be seen later in following part, is a significant factor in why foreign enforcing courts may give effect to SICC judgments. However, the SICC’s reliance upon the original parties’ consent to have a claim to jurisdiction is not carried over to the power of the SICC to join third parties. In other words, a non-consenting third party may still be validly joined to SICC proceedings as long as the written agreement between the original parties exists, a dispute is on foot in the SICC and the third party is validly served under Singaporean law.²⁴

Under Singaporean law, this mandate to join third parties is broad and discretionary. Specific rules for the SICC’s joinder of third parties (termed ‘joinder of other persons as parties’) are set out in Order 110, Rule 9, which provides that:

1. 9.—In an action where the Court has and assumes jurisdiction, or in a case transferred to the Court under Rule 12, a person may, subject to paragraph (2), be joined as a party (including as an additional plaintiff or defendant, or as a third or subsequent party) to the action if—
 - a. the requirements in these Rules for joining the person are met; and
 - b. the claims by or against the person—...
 - (ii) are appropriate to be heard in the Court.
2. A State or the sovereign of a State may not be made a party to an action in the Court unless the State or the sovereign has submitted to the jurisdiction of the Court under a written jurisdiction agreement.
3. In exercising its discretion under paragraph (1), the Court must have regard to its international and commercial character.

Order 15, Rule 4, of the Rules of Court clarifies that a third party may be joined so long as the SICC provides leave or, alternatively and additionally, if there is either ‘some common question of law or fact to be tried’ or if all rights to relief arise from ‘the same transaction or series of transactions’.²⁵ These tests are similar to joinder provisions in many other common law jurisdic-

comes from the Special Commission on the Recognition and Enforcement of Foreign Judgments, held on 24-29 May 2018) (‘2018 Draft Convention’).

15. See Section 3.2, below.

16. Singapore International Commercial Court Committee, above n. 5, at 55.

17. See, for a more detailed analysis of establishing jurisdiction before the SICC, M Yip, above n. 3, at 163-71.

18. *Supreme Court of Judicature Act 1969* s 18A.

19. *Ibid.*, s 18(d).

20. *Rules of Court Order 110*, Rule 1, ss 2(a)(iv), 2(b)(iii).

21. *Supreme Court of Judicature Act 1969* 18J(2); *Rules of Court Order 110*, Rule 7, 12(1).

22. *Rules of Court Order 110*, Rule 7(1)(b).

23. *Ibid.*, Order 110, Rule 1(2)(ca).

24. *Ibid.*, Order 16, Rule 3; Order 110, 9(1).

25. Order 15, Rule 4(1)(a), Order 16, 1.

tions.²⁶ Thus, the only limitation to joinder of third parties in the SICC is a non-mandatory consideration (in sub-section (3)) of whether there is an ‘international and commercial character’ to the claims against the third party or the third party’s relationship with the original parties.²⁷ Consequently, there is a broad discretion for the SICC to join a third party, other than a State. This does not require that the third party have, or have had, any connection to the jurisdiction in which the SICC is constituted (Singapore), nor that the third party has consented to the SICC’s jurisdiction. As the SICC can join parties upon its own motion, it can even join a third party in circumstances where all parties (including the third party and the original parties) oppose this joinder. Given the appearance of this broad mandate to join third parties, the way in which this discretion is likely to be exercised remains an open and critical question.²⁸

Although there have been no judgments of the SICC that join third parties,²⁹ it is, nonetheless, possible to venture some initial – and very tentative – observations as to the possible contours of this discretion. First, it is likely that the SICC’s ‘formal’ discretion to join third parties will – over time, as case law develops – come to mask some developing body of rules or norms.³⁰ At present, the only formal guidance arises in the Rules of Court, which provides a largely discretionary basis; however, this discretion is unlikely to prove to be unfettered or completely ‘open-ended’ in practice.³¹ Second, to the extent that the judgments of other Singaporean judicial organs assist – which they may not to any significant degree, as the SICC has a unique mandate to attract disputants with no link to Singapore – it is apparent that Singaporean courts take a relatively wide approach to the issue of joinder and misjoinder in considering the application of the Rules of Court in commercial matters.³² For example, the position of the High Court – of which the SICC is constituted as a division – is that its power to ‘bring and keep the appropriate parties before it’ is sufficiently wide to extend to allow the joinder of a defendant even in circumstances ‘where no cause of action is asserted against a particular defendant’.³³ Nevertheless, it has also been noted – albeit in a case testing executive discretion in detention matters – that the very ‘notion of a subjective or unfettered discre-

tion is contrary to the rule of law’.³⁴ Third, the situations where such joinder is likely to arise are those that are likely to *require* joinder to effectively resolve a dispute, in line with the SICC’s constituent motif of acting in a ‘commercially sensible’ fashion. As Hwang suggests, these may involve contracting relationships based upon a ‘web’ of contracts, such as those arising from ‘employer/main contractor/subcontractor’ and ‘insurance/reinsurance/retrocession’ contracts.³⁵

Fourth, and perhaps most notably, the SICC, mindful of the potential international enforcement difficulties (outlined in the part that immediately follows), will likely be exceedingly cautious in joining non-consenting parties. This will particularly be the case where the third party does not have a presence or assets within Singapore, as recourse to foreign enforcing courts is likely to be required. Thus, as part of its original decision to join a non-consenting party, the SICC is likely to consider the foreign enforcement prospects of any resulting judgment against that non-consenting party. This kind of approach parallels what has been controversially described as a ‘duty’ of arbitrators to render an enforceable award.³⁶ In this sense, the decision maker is heeding not only his or her own local law (which, in the case of the SICC, allows broad discretion with respect to joinder) but is taking a proactive stance in attempting to render a judgment that is likely to be acceptable for its intended enforcement audience. Keeping in mind these tentative views about the way in which the SICC’s discretion to join third parties is likely to be exercised, it is useful to turn now to consider the treatment any resulting judgments may face when they come for recognition and enforcement in foreign courts.

3 Recognising and Enforcing SICC Judgments against Non-consenting Parties

To be able to compete for disputant custom with other forms of international commercial dispute resolution, the SICC needs to satisfy disputants that its judgments will be recognised and enforced in other jurisdictions. It is in this context that a potential disconnect arises between the SICC’s broad-based discretionary approach to joinder of non-consenting parties and the more restrictive approach of enforcing courts. If such judgments are not supported by recognition-and-enforcement regimes, this limits the SICC judgment’s utility

26. A. Reyes, ‘Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court’ 2 *Journal of International and Comparative Law* 337, at 355 (2015).

27. As compared to establishing jurisdiction over the original claim.

28. J. Landbrecht, ‘The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?’ 34(1) *ASA Bulletin* 112, at 118-9 (2016).

29. All SICC judgments to date can be found on the SICC website, and none of these refer to joinder: *SICC – Hearings & Judgments*, available at: <https://www.sicc.gov.sg/hearings-judgments/judgments> (accessed 29 March 2019).

30. J. Hill, ‘The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958’ 36(2) *Oxford Journal of Legal Studies* 304, at 306 (2016).

31. As Hill argues in the context of enforcing arbitral awards: *Ibid.*

32. *Tan Yow Kon v. Tan Swat Ping & Ors* [2006] 3 SLR 881.

33. *Ibid.* at [58].

34. *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

35. Hwang, above n. 6, at 195.

36. As Platte notes, there is some controversy in describing this as a ‘duty’ that an arbitral panel faces, but a consideration of eventual recognition-and-enforcement prospects is nonetheless an identifiable phenomenon within the context of international commercial arbitration: M. Platte, ‘An Arbitrator’s Duty to Render Enforceable Awards’ 20(3) *Journal of International Arbitration* 307 (2003).

(to the extent it binds a third party) beyond Singapore. Note that we do not consider in significant detail the recognition-and-enforcement prospects of a judgment made against an original party to SICC proceedings, although it should perhaps be noted there are relevant severance provisions under the recognition-and-enforcement regimes studied in this article that allow for a judgment to be recognised and enforced against one party (e.g., an original party) but not another (e.g., a non-consenting third party) if only part of a judgment is eligible for recognition and enforcement.³⁷ To explore the impact of recognition and enforcement on non-consenting parties, we first consider the likely treatment of a SICC judgment that compulsorily joins a third party, under the two key 'global' transnational regimes, before considering the Commonwealth-driven statutory reciprocal recognition-and-enforcement regime (and the common law that underlies it). As the Committee Report setting up the SICC noted originally, these approaches are important as they are the primary recognition and enforcement that SICC judgments are likely to face.³⁸ As the remainder of this part discusses, enforcement difficulties are likely to arise as each regime requires some connection, or submission, to the jurisdiction of the rendering court, for obligations to recognise and enforce to activate. This stands in contrast to the SICC's discretionary mandate, which does not require either factor.

3.1 Transnational Recognition-and-Enforcement Regimes

Perhaps the most effective way that the enforcement prospects of SICC judgments can be communicated is in circumstances where some form of transnational treaty-based regime compels a foreign enforcing court to give effect to these judgments. Ease of transnational recognition and enforcement is particularly important for the SICC, as it is pitched at attracting disputants and competing with – or at least as an alternative to – not just courts but also arbitral tribunals.³⁹ The product of the latter, of course, has the benefit of widespread facilitated recognition and enforcement of arbitral awards under the 1958 *UNCITRAL Convention on the Recognition and Enforcement of Arbitral Awards* (hereafter 'the New York Convention').⁴⁰ To explore the treatment of foreign judgments, we set out the approach of the two key 'global' transnational instruments that govern the recognition and enforcement of foreign judgments and

consider how they might apply to a third-party judgment of the SICC. First, and the only instrument currently in force, is the 2005 *Convention on Choice of Court Agreements* ('2005 Convention'), currently in force between the European Union (and all of its Member States), Mexico, Montenegro, Singapore and the United Kingdom.⁴¹ The 2005 Convention aims to harmonise and promote the recognition and enforcement of foreign judgments in a similar fashion to the New York Convention's approach to arbitral awards. It applies only where parties to a dispute have validly entered into an agreement that exclusively determines a forum to have jurisdiction over their dispute.⁴² In other words, it can only apply upon one jurisdictional basis: where a forum (or potentially multiple fora) in a single jurisdiction is *chosen* and the jurisdiction of other courts/States is clearly excluded.⁴³ For the sake of simplicity, we refer to this forum as the 'rendering court' (which, in the context of this article, is the SICC). Broadly mirroring the New York Convention, and also the SICC's constitutive requirements in the *Supreme Court of Judicature Act*, the 2005 Convention has broad application to international commercial and civil matters, with only limited exceptions.⁴⁴ As such, it has real application to judgments rendered by the SICC and, understandably, forms a key part of the SICC's marketed enforcement strategy.⁴⁵ At present, the 2005 Convention is the only transnational recognition-and-enforcement regime that is in force.

The second instrument, which remains under negotiation (albeit at an advanced stage), is encapsulated in the approach of the draft *Convention on the Recognition and Enforcement of Foreign Judgments* (the 'Draft Judgments Convention').⁴⁶ The negotiations underpinning this draft are undertaken under the auspices of the Hague Conference on Private International Law, with a view towards finalisation of a Convention at a targeted Diplomatic Session in mid-2019.⁴⁷ These negotiations are also referred to as the broad-based judgments project, as they take a broader approach to jurisdictional bases than the sole base of an exclusive choice of forum (covered in the 2005 Convention). As with the 2005 Convention and the New York Convention, the Draft Convention has broad application to a range of international civil and

37. See, e.g., 'Convention on Choice of Court Agreements', above n 14, Art. 15; '2018 Draft Convention' above n 14, Art. 9; and, the *Reciprocal Enforcement of Commonwealth Judgments Act* (Chapter 264) s 3(3)(b), which grants the enforcing court 'the same control and jurisdiction over the judgment' as it would judgments of the enforcing court.

38. 'Report of the Singapore International Court Committee', above n. 5, [42]-[46].

39. *Ibid.* at 11-12.

40. The reach of which is clear from its widespread acceptance globally: *UNCITRAL, Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 12 January 2019).

41. Hague Conference on Private International Law, *HCCH I #37 – Status Table*, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (accessed 29 March 2019). Note that some of these States, whilst signatories to the Convention, have not yet implemented it into their domestic laws. See, e.g., China and the United States of America.

42. 'Convention on Choice of Court Agreements', above n. 14, Art 3(a).

43. *Ibid.*, Art 1.

44. *Ibid.*, Art 1(1).

45. See, for example, Singapore International Commercial Court, 'Note on Enforcement of SICC Judgments' 2, available at: https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_enforcement_guide2cac21700a1d6b0c895eff0000f6c7a3.pdf where it is noted, at [2], that "SICC judgments can be enforced in almost all major commercial jurisdictions and in many other regional ones".

46. '2018 Draft Convention', above n. 14.

47. Hague Conference on Private International Law, 'Conclusions & Recommendations Adopted by the Council' in *Council on General Affairs and Policy of the Conference* (2018):1.

commercial matters in dispute, excluding only some limited areas, such as intrinsically sensitive disputes relating to consumer and employment matters, insolvency and some aspects of intellectual property law.⁴⁸ Whilst the Draft Convention allows for a range of acceptable bases of jurisdiction, these bases broadly rely either upon disputant consent or submission to the jurisdiction of the rendering court (similar to the 2005 Convention) or, alternatively, upon whether there is a sufficient connection between the parties or matter with the jurisdiction of the rendering court. The relationship between these themes in providing bases for establishing jurisdiction and eligibility of SICC judgments for recognition and enforcement against non-consenting parties under both conventions will be explored below.

3.1.1 Consent and Submission to Jurisdiction

Given our focus on SICC judgments against third parties coercively joined to proceedings, it should be immediately evident that jurisdictional grounds related to consent and submission are unlikely to oblige a foreign court to give effect to any such judgment (or at least the part that purports to extend to the third party). For clarity, however, it is useful to set out why this is so, by considering the nature of the transnational recognition-and-enforcement provisions and the different methods by which a party may have consented or submitted to the jurisdiction of the court.

(a) Contractual agreements

Cumulatively, the 2005 Convention and the Draft Convention cover all jurisdictional bases related to parties consenting by agreement to the rendering court's jurisdiction. These jurisdictional bases, however, are unlikely to be established where recognition and enforcement is sought against a non-consenting party coercively joined to SICC proceedings.

Let us first turn to the 2005 Convention, which applies only in circumstances where parties make an exclusive choice of forum in favour of the rendering court (Articles 1 and 8). If any choice of forum is made, it is likely to be construed as an exclusive one (at least under Singaporean law), as Section 18F(1)(b) of the Singaporean *Judicature Act*⁴⁹ provides that any agreement conferring jurisdiction over a matter to the SICC is taken to be an exclusive agreement. To this end, Article 8(1) of the 2005 Convention provides that:

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

In any event, the Draft Convention, if successful, will cover the remainder of the field of third-party agreement. This is because Article 4 of the Draft Convention

provides a similar obligation to recognise and enforce judgments that meet one or more bases for recognition in Article 5. Relevantly for consent to a particular forum, such as the SICC, Article 5(1)(m) provides a jurisdictional base if:

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an 'exclusive choice of court agreement' means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts. Thus, the Draft Convention – in a bid to extend application to choice-of-forum agreements that would not be covered under the 2005 Convention – creates a jurisdictional basis for recognition and enforcement for all other 'non-exclusive' choices of forum.⁵⁰

What is immediately apparent is that these provisions, to activate obligations in favour of recognition and enforcement, require the third party to have 'designated' a court. Thus, they do not extend any obligation to recognise and enforce foreign judgments against third parties who have *not* manifested consent in some way. This is so even in circumstances where a third party may be factually implicated or involved in a matter which is governed by a choice-of-forum agreement that conferred jurisdiction upon the rendering Court.⁵¹ It should be noted, however, that a party against whom recognition and enforcement is sought need not be a party to the original agreement conferring jurisdiction upon the Court. If a third party submits and consents to the SICC's jurisdiction – at any time before or during the dispute – Convention obligations may apply, as at this point, they will have designated a court. Under both the Draft Convention and the 2005 Convention, the only formality required for this agreement is that it be 'in writing' or 'any other means of communication which renders information accessible so as to be useable for subsequent reference'.⁵² Therefore, if a third party provides consent in this manner, a SICC judgment is eligible for recognition and enforcement under these instruments. However, without any consent, no obligations arise for enforcing courts to give effect to any judgment (or part thereof) against a third party. Consequently, SICC third-party judgments do not stand to be recognised or enforced under consent-based jurisdic-

48. '2018 Draft Convention', above n. 14, Art. 2.

49. *Supreme Court of Judicature Act 1969* (Singapore).

50. By excluding agreements under the Convention to avoid overlap: 'Judgments Convention: Revised Preliminary Explanatory Report' (May 2018) 41-2 [188].

51. Reyes, above n. 26, at 355.

52. 'Convention on Choice of Court Agreements', above n. 14, Art. 3(c).

tional grounds in both the extant and proposed transnational recognition-and-enforcement instruments.⁵³

(b) Deemed consent via procedural submission

In addition to jurisdictional bases premised upon consent to a choice of forum, the Draft Convention also provides further bases for recognition and enforcement based upon what can be broadly termed ‘consent through procedural submission’. The first of these arises if the person against whom recognition and enforcement is sought brought the original claim in the rendering court (Article 5(1)(c)). By definition, this cannot be the *third party*, so it has no application. Article 5(1)(l) may also have some reach against third parties, as it creates a jurisdictional base for recognition and enforcement against any party if they join in the original proceedings and bring on a counterclaim, unless the filing of the counterclaim was necessary ‘to avoid preclusion’. In these circumstances, lodgement of the counterclaim is seen as constituting submission to the jurisdiction of the SICC.⁵⁴ However, it is unlikely a properly advised third party resisting the SICC’s jurisdiction would voluntarily involve themselves in proceedings to such an extent as to bring a counterclaim. A third party will also be deemed to have consented, pursuant to Article 5(1)(e) of the Draft Convention, if it ‘expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given’. In this way, a party seeking recognition and enforcement may raise an argument that a third party consents to the SICC’s jurisdiction, if that third party argued the merits of the case. However, this express consent is not easy to prove. Indeed, the Revised Preliminary Explanatory Report,⁵⁵ states that a mere failure to contest the rendering Court’s jurisdiction under the laws of the State of origin is not enough to represent express consent to jurisdiction for the purposes of Article 5(1)(e). This is so even in the event that the third party goes on to argue the merits of the case before the Court as a participant in the proceedings.⁵⁶ Nonetheless, provided a third party objects to the SICC establishing jurisdiction over the original dispute in a timely manner, it is unlikely this provision would provide a basis for recognition and enforcement of SICC judgments in foreign jurisdictions against coercively joined third parties. The application of Article 5(1)(f) further reinforces the need for express consent or direct submission to the jurisdiction of the rendering court for a judgment to be eligible for recognition and enforcement. This jurisdictional ground arises where:

the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.

This provision clarifies, in discussing the point at which a party must object and contest submission and in combination with Article 5(1)(e), that if a party properly and promptly contests or opposes the jurisdiction of the rendering court, there will be no grounds for recognition and enforcement under the Draft Convention where the party continues to argue the case if their objection to jurisdiction is unsuccessful.⁵⁷ It should be noted that the use of the word ‘defendant’ includes third parties joined to proceedings, with defendant defined under the Draft Convention as ‘a person against whom the claim or counterclaim was brought in the State of origin’.⁵⁸ Therefore, Article 5(1)(f) appears to offer a basis for recognition and enforcement of judgments against third parties if they do not object to the Court’s jurisdiction, despite any disagreement they may have with it, as a failure to object would amount to submission and implied consent.⁵⁹

Nonetheless, this jurisdictional ground remains problematic. First, it appears the clause is intended to allow for recognition and enforcement where disgruntled parties are dissatisfied with the judgment delivered from the rendering court and decide to challenge the jurisdiction of the rendering court to avoid compliance. Second, and perhaps more fundamentally, the operation of the latter part of 5(1)(f) – which provides an exception to relying upon a failure to object to jurisdiction as a basis for resisting recognition and enforcement – must be considered. Somewhat paradoxically, it may be that the SICC’s broad discretion to join third parties – if ‘*appropriate to do so*’, as discussed above – may limit the recognition-and-enforcement prospects of any resulting judgment against the third party. This is because it increases the likelihood of the latter part of 5(1)(f) coming into operation to exclude this ground as a basis for recognition and enforcement in many cases.⁶⁰ The strong transnational mandate of the SICC, including express references to its ability to join third parties,⁶¹ coupled with the absence of clear criteria required to join a third party to proceedings, makes it difficult to establish that a challenge to jurisdiction would have been successful. Therefore, it will be difficult to argue a third party should be deemed to have submitted to the SICC’s jurisdiction by failing to raise an objection, particularly because of the high threshold requiring that it be ‘evident’ that a chal-

53. Reyes, above n. 26, at 356.

54. ‘Judgments Convention: Revised Preliminary Explanatory Report’, above n. 50, 41 [193].

55. *Ibid.*, 43 [140].

56. *Ibid.*, 43 [140]. For examples of express consent, see 32 [142] of the Preliminary Explanatory Report, including where a party agrees to defend a case in the jurisdiction of a State in correspondence or the defendant orally informs the court of an acceptance of its jurisdiction to hear the matter.

57. *Ibid.*, 43 [148].

58. Hague Conference, above n. 47, Art. 3(1)(a); ‘Judgments Convention: Preliminary Explanatory Report’, above n. 50, 14-15 [64]-[66].

59. ‘Judgments Convention: Preliminary Explanatory Report’, above n. 50, 28 [134].

60. *Ibid.*, 29 [142].

61. ‘Report of the Singapore International Court Committee’, above n. 5, [22]-[25].

lenge would fail.⁶² Nonetheless, the Preliminary Explanatory Report suggests that a common method by which it could be shown that an objection would fail is for the enforcing court to consider past cases.⁶³ Given that the SICC's stated approach at its most extreme – joining to proceedings parties who have no territorial link to Singapore – is novel internationally and is the dearth of any cases in the SICC attempting to join a third party, this is, however, unlikely to offer insight. To the extent, however, that a permissive approach to joinder develops over time in the SICC, the greater the basis for the third-party judgment debtor to resist recognition and enforcement (even if the third party failed to object to the SICC's jurisdiction in the original decision).

3.1.2 Territorial Connections to Jurisdiction

Most other jurisdictional bases for recognition and enforcement identified under the Draft Convention rely upon some form of territorial, personal or real connection between either the parties or the transaction/matter that gave rise to the dispute and the country of the rendering court. Considering the flexibility of the SICC's ability to join third parties who have no significant connection to Singapore, and the focus of the SICC to hear and decide international matters, it is evident there would be extreme difficulties in relying upon this category of eligibility grounds in seeking enforcement of SICC third-party judgments. The majority of these grounds are set out in Article 5,⁶⁴ and Article 5(1)(a–b), (d) and (g)–(k) and the entirety of Article 6 of the Draft Convention all make reference to either the parties or cause of action having a connection to the 'state of origin' (the jurisdiction of the rendering court). Similar issues arise as with the consent grounds because it is a requirement that the party against whom recognition and enforcement is sought be the party that satisfies the basis for recognition and enforcement.

Article 5(1)(a) of the Draft Convention, as an example of a clause referring to the state of origin, provides a basis for recognition and enforcement where:

- a. the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;⁶⁵

What is interesting about this provision – and several of the provisions relating to a connection to the state of origin – is that the word 'person' (rather than 'defendant', for example) is used in order to potentially extend the categories of persons against whom recognition and

enforcement can be sought.⁶⁶ This is explored further in the Preliminary Explanatory Report produced by the Working Group, however, where it is noted that a 'person' against whom recognition and enforcement is sought must be the one who has the connection to the state of origin.⁶⁷ Where a third party has been joined to proceedings without such a connection, the fact that another party against whom judgment may also have been rendered was connected to the state of origin (and therefore against whom a judgment is recognisable and enforceable) does not provide a basis for recognition and enforcement against the unconnected third party. The Draft Convention is also relatively clear that for commercial matters, a connection to the state of origin is required to establish a ground for recognition and enforcement (unless, of course, consent or submission can be established). With respect to non-contractual obligations (primarily where a cause of action can be founded in tort), 'the act or omission directly causing... harm' must have occurred in the state of origin for a judgment to be eligible for recognition and enforcement.⁶⁸ Similarly, judgments rendered in respect of a (breached) contractual obligation also require a connection to the state of origin. Eligibility will be established where the obligation was, or should have been, performed 'unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State'.⁶⁹ Therefore, the Draft Convention expresses a strong intention to only provide a basis for recognition and enforcement where the central act, omission or transaction to the cause of action is sufficiently connected to the state rendering judgment. As a result, none of these territorial grounds activate any obligations under the Draft Convention to recognise and enforce SICC judgments against third parties with no territorial link to Singapore in the types of matters referred to in this article.

By way of brief recapitulation, then, the SICC's potentially broad approach to compulsory joinder (requiring no link to Singapore) seems incompatible, or at least unsupported, by obligations to recognise and enforce judgments under both the 2005 and the Draft Conventions. Even if this were not the case, and a jurisdictional base could be found against a non-consenting third party, it may be that joinder of this third party would offend the public policy of the enforcing State, and hence be a reason to refuse to give effect to a foreign judgment.⁷⁰ Given that there is unlikely to be an accept-

62. 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 29 [143].

63. *Ibid.*, 29 [144].

64. These connections are well rehearsed and widely accepted, including, for example, formulations based upon the place of business, ordinary or habitual residence of one or more of the parties, the place for where the transaction occurred or the location of the property in dispute. See, e.g., the factors set out in the 2018 Draft Convention, above n. 14, Art. 5.

65. '2018 Draft Convention', above n. 14, Art. 5(1)(a).

66. 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 23 [111].

67. *Ibid.*, 23-4 [111]-[113]; see also (from the 2016 Draft Convention where the bases read the same): 'Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues' (April 2016) 18 [70].

68. '2018 Draft Convention', above n. 14, Art. 5(1)(h). It should be noted, however, that the harm itself need not occur in the state of origin so long as the act or omission causing it is sufficiently connected.

69. *Ibid.*, Art. 5(1)(g).

70. As Black and Pitel suggest, joinder of a third party in a manner that is not consistent with or supported by the law of the enforcing court may be such an example: Black and Pitel, above n. 7, at 58 (at fn 120).

able jurisdictional basis in the first instance, issues of public policy do not directly arise (as there is no need to activate a ground for refusal). Nonetheless, for completeness sake, we note that a public policy ground for refusal exists in both the 2005 Convention (Article 9(e)) as well as the 2018 Draft Convention (Article 7(1)(c)), where giving effect to a foreign judgment is ‘manifestly incompatible’ with the enforcing court’s public policy. Because of the difficulty of achieving recognition and enforcement under transnational instruments, other international and domestic approaches to recognition and enforcement become of greater importance for the SICC. For this reason, we turn to consider the preeminent international recognition-and-enforcement scheme that the SICC relies upon in this respect.

3.2 The Commonwealth Model and Common Law Approaches to Recognition and Enforcement

Despite a lack of transnational obligations on foreign enforcing courts to recognise and enforce, SICC judgments against coercively joined third parties, nevertheless, stand to be considered under other transnational or domestic recognition-and-enforcement approaches. This is because the transnational obligations, set out in the immediately preceding section, primarily hold participating States only to a set of minimum standards which provide a ‘floor’ for when a judgment must be given effect to.⁷¹ As a result, enforcing courts of States that implement a relevant recognition-and-enforcement instrument can never violate it by giving effect to foreign decisions, instead, ‘only by failing to do so’.⁷² In other words, if a transnational instrument does not oblige an enforcing court to give effect to a foreign decision, this remains a matter for the municipal (domestic) law of the enforcing court. Indeed, even if a ground for refusal is found, enforcing courts remain free to still give effect to the offending foreign decision.⁷³ This means that there is scope for enforcing courts, if consistent with their domestic laws, to recognise and enforce a third-party SICC judgment, above and beyond their minimum obligations under transnational instruments.

Although this article is in no way intended as an exhaustive overview of domestic recognition-and-enforcement practice globally, given Singapore’s common law heritage and its stated recognition-and-enforcement audience,⁷⁴ it is useful to consider as an exemplar how a third-party SICC judgment would be treated under the Commonwealth Model of recognition-and-enforcement, which itself is premised upon the common law.

3.2.1 Recognition and Enforcement under the Commonwealth Model

The SICC, as a key component of its enforcement strategy, emphasises the enforcement prospects available to its judgments under the British dominion- and Commonwealth-inspired Reciprocal Enforcement Acts.⁷⁵ For this reason, despite its evident inapplicability to third-party joinder, it is useful to briefly consider this approach. Referred to in this article as the ‘Commonwealth Model’, this model refers to a series of reciprocal acts, originally promulgated in and by the United Kingdom, that serve to promote and privilege recognition and enforcement between several historically related States.⁷⁶ The *Administration of Justice Act 1920* (UK) is the first of two Acts that constitute the fundament of the Commonwealth Model. Section 9 of the 1920 Act establishes the basic registration system that underlies the model, relevantly providing that:

Where a judgment has been obtained in a superior court in any part of His Majesty’s dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the [enforcing court] ... to have the judgment registered in the court, and on any such application the court may, if all the circumstances of the case, they think it just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

The *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) is ‘patterned closely’ on the 1920 Act,⁷⁷ and provisions modelled on this Act are in force in many Commonwealth countries, for example, New Zealand, Singapore and Zimbabwe. To a greater extent than the 1920 Act, it is based on concepts of reciprocity rather than dominion;⁷⁸ for example, it allows judgments obtained in specified courts of other Commonwealth States, privileged under bilateral treaties, to be enforced via registration – including in Australia, Canada,

71. See, in the context of the 2005 Convention, Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) 23. The Draft Convention as well as the New York Convention also follow a similar approach. Note, however, that domestic approaches can choose to refrain from providing residual recourse to national law. See, e.g., s 2A of the Singaporean version of the Commonwealth Model, as reflected in *Reciprocal Enforcement of Commonwealth Judgments Act* (Chapter 264) (Singapore). This provision clarifies that ‘this Act [Singapore’s implementation of the Commonwealth Model] does not apply to any judgment which may be recognised or enforced in Singapore under the Choice of Court Agreements Act 2016’.

72. M. Paulsson, *The 1958 New York Convention in Action* (Wolters Kluwer, 2016) 124. Paulsson’s comments are made with respect to the New York Convention but are equally applicable to both the 2005 Convention and the 2018 Draft Convention.

73. See, in the context of 2005 Convention, Brand and Herrup, above n. 71, at 110, who note that the use of the permissive language of ‘may’ allows this (Art. 9 of the 2005 Convention). This is consistent with the approach of the Draft Convention (Art. 7(1) provides ‘Recognition or enforcement may be refused if ...’).

74. ‘Report of the Singapore International Court Committee’, above n. 5, see 20-2 [42]-[51].

75. *Ibid.*, [42].

76. Each jurisdiction thus has its own Acts, but they are, in large, part modelled on the original UK Acts: *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) ch. 13, 23 and 24 Geo 5; *Administration of Justice Act 1920* (UK) ch. 81, 10 and 11 Geo 5.

77. B. Paige, ‘Foreign Judgments in American and English Courts: A Comparative Analysis’ 26(3) *Seattle University Law Review* 591, at 611 (2003).

78. See Section 1 of the 1933 Act, which establishes the requirement for reciprocity.

Guernsey and India. Read together, these Acts demonstrate that the Commonwealth Model operates as a statutory judgment registration system, premised on the idea that States that share a degree of familiarity and legal and institutional similarity should derive greater comfort in giving preferential treatment to foreign judgments originating from the 'recognised' courts of other such States.⁷⁹ Importantly, this approach is not dependent or even necessarily premised on international treaties; instead, this is a reciprocal statutory registration scheme, the participation of which is largely driven either by British dominion or historical ties to Empire or the Commonwealth. Consequently, the model refers and relies upon the underlying common law in each participant State, as reflected in the model's approach to recognition and enforcement. This can be seen by the model adopting, consistent with the common law, a presumption in favour of recognition and enforcement, subject to the usual exceptions for potentially objectionable judgments or classes of judgments (usually on grounds of procedural fairness).⁸⁰ In fact, this presumption is likely strengthened as the model seems to (implicitly) presume that a foreign judgment is recognisable, rather than placing the onus of proving this on the plaintiff (as the common law usually does).

Unfortunately for the prospects of judgments against non-consenting parties, the Commonwealth Model does not provide for judgments to be given effect to if the third party has no territorial link to the rendering court or did not consent or submit to the jurisdiction of the SICC. Indeed, such judgments are expressly excluded from the statutory scheme. To make this point – given our focus on the SICC – we consider both the Singaporean implementation of the Commonwealth Model as well as the original United Kingdom formulation, noting that the approach of both is broadly consistent with the approaches in most international implementations of the Commonwealth Model.⁸¹ First, with respect to the Singaporean Act, an attempt to give effect to a foreign judgment against a third party is frustrated by Section 3, which sets out a series of 'Restrictions on registrations', and relevantly provides:

- (2) No judgment shall be ordered to be registered under this section if —
- a. the original court acted without jurisdiction;
 - b. the judgment debtor, being a person who was neither carrying on business nor ordinarily resident

within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; ...

This is consistent with the approach in the 1933 Act in the United Kingdom,⁸² Section 4 of which relevantly provides:

- (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
- (a) shall be set aside if the registering court is satisfied —
 - ...
 - (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - ...
 - (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; ...

Both Acts – again, representing exemplars of the Commonwealth Model more broadly – provide further provisions that deem certain areas within the rendering court's jurisdiction. However, consistent with the transnational experience set out above, these factors require some territorial or consent-based link to establish jurisdiction.⁸³ Absent such links, a SICC judgment implicating a non-consenting third party is not able to be recognised or enforced under the Commonwealth Model.

3.2.2 Common Law Recognition and Enforcement

Underlying the Commonwealth Model is each participating jurisdiction's residual common law approach to recognition and enforcement. This reliance on the common law is seen in the approach and design of the Model, but also in instances where the Model allows further residual recourse to common law enforcement, even in circumstances where both transnational and Commonwealth Model regimes are either not plead or are, for some reason, excluded or inapplicable. In this sense, jurisdictions that more closely model the approach in the 1920 UK Act allow for residual recourse to the common law, even if that statutory regime does not apply or is excluded, as the registering court retains ultimate discretion,⁸⁴ based upon a catch-all provision for recognition based upon 'if it is just and convenient that the judgment should be enforced in the United Kingdom'.⁸⁵ The 1933 UK Act, however, moves the Model towards

79. Previously referred to as 'superior' courts: *Civil Jurisdiction and Judgments Act 1982 (UK)* Sch 10.

80. Paige, above n. 77, at 619.

81. *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore)*. This is not surprising, as like other Commonwealth Model participants, the Act is drawn closely upon the original UK Act. See: H. L. Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' 46(2) *The International and Comparative Law Quarterly* 443, at 456 (1997). Note that there is also another Singaporean Act, *The Reciprocal Enforcement of Foreign Judgments Act (Chapter 265)*, which only has application to Hong Kong and thus is of limited use in assessing international prospects of recognition and enforcement: 'Report of the Singapore International Commercial Court Committee', above n. 5, at 20 [42].

82. *Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK)*. The provisions of this Act with respect to jurisdiction and recognition and enforcement are similar to the approach in Singapore in the *Reciprocal Enforcement of Foreign Judgments Act (Chapter 265)*, referred to at footnote 77.

83. *Ibid.*, s 4(2); *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore)* s 5(2).

84. A. Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 6th ed, 2015) 759.

85. *Administration of Justice Act 1920 (UK)* 9.

a more 'closed' basis: it expressly provides that foreign judgments which can be registered pursuant to that Act cannot be enforced in any other way.⁸⁶ The Singaporean *Reciprocal Recognition and Enforcement Act*, for example, follows more closely in the footsteps of the 1920 Act, as residual recourse to common law recognition-and-enforcement approaches are allowed.

Although each common law jurisdiction has its own legal sources and precise approach to recognition and enforcement, at a high level, most approaches can be said to share two key features:⁸⁷ first, a presumption in favour of giving effect to foreign judgments; and, second, despite (or perhaps because of) this presumption, the enforcing court retains residual control to refuse to give effect to judgments that offend fundamental procedural protections or the public policy of the enforcing States.⁸⁸ Consistent with other transnational approaches, these exceptions to the presumption are limited. They arise only in circumstances where: proceedings are in some way 'irregular', that is, occasioned by either a breach of due process, such as by fraud, or a breach of natural justice; or, if giving effect to the foreign judgment conflicts with the public policy of the enforcing State, for example in cases where the issue or issues 'resolved' by the foreign judgment have already been decided elsewhere (as giving effect to such judgments offends fundamental moral and legal values). See, for example, the case of *Tahan v. Hodgson*, where the District of Columbia Circuit Court notes that international commerce requires that foreign judgments be recognised, except where inconsistent with fundamental concepts of justice and fairness in US law such that it is 'repugnant to fundamental notions of what is decent and just'.⁸⁹ Additionally, the 'thrust of English cases', as well as the 'thrust' of jurisdictions derived from English common law, is that foreign judgments should generally be given effect to, 'unless the foreign judgment contradicts fundamental principles' of the enforcing court.⁹⁰ Yet, a crucial part of the process of recognition and enforcement in most common law jurisdictions that fol-

low the English approach involves a review of the rendering court's jurisdiction as a necessary requirement before the presumption in favour of recognition and enforcement operates. For example, it is seen as the 'first and foremost prerequisite', or as a 'fundamental requirement', that when enforcing a judgment *in personam* (distinct from a judgment *in rem*)⁹¹ foreign court has exercised a jurisdiction that the enforcing court recognises in its own conflict of laws.⁹² As noted in Dicey, Morris and Collins' *Conflict of Laws*:⁹³

It is not enough, it must be again emphasised, that the foreign court is duly invested with jurisdiction under the foreign legal system. It must also have jurisdiction according to the English rules of the conflict of laws.

This is commonly referred to as 'international jurisdiction' or 'jurisdiction in the international sense'. Under such a conception, it is 'irrelevant', for the purposes of recognition and enforcement, whether the foreign court had jurisdiction according to that foreign court's own law.⁹⁴ Instead, what matters is that the enforcing court is satisfied that the rendering court has exercised some form of jurisdiction that the enforcing court considers acceptable under its own laws. The traditional basis for doing so in *in personam* cases has been broadly classed into four categories based upon:⁹⁵ presence in the rendering State, participation in proceedings, submission via voluntary appearance or voluntary submission to the rendering court's jurisdiction.⁹⁶ This was emphasised perhaps most recently by the English Court of Appeal in *Adams v. Cape Industries*, which noted that at the recognition-and-enforcement stage:⁹⁷

in determining the jurisdiction of the foreign court ... our court is directing its mind to the competence or otherwise of the foreign court to summon the defendant before it and to decide such matters as it has decided ... in the absence of any form of submis-

86. Section 6 provides that 'No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.'

87. In the United States, this formulation can be traced back to *Hilton v. Guyot* (1895) 159 US 113, 144. This continues to inform current recognition-and-enforcement practice: G. Born, *International Civil Litigation in United States Courts: Commentary and Materials* (Kluwer Law International, 1996) 12, discusses extensively *Hilton's* approach to recognition and enforcement of judgments and the (significant) extent to which it informs modern practice despite a range of developments and codification in some States. See, for examples of Australian and English approaches, respectively: M. Davies, A. Bell & P. Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed., 2014) 895 (and following); A. V. Dicey, L. Collins & J. H. C. Morris, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 2015) 15.

88. See *eg In Sik Choi v. Kim, Lee & Or* 50 F 3d 233 (3rd Circuit 1995) at 252, where the court stresses that comity should be accorded to the greatest extent possible to respect foreign laws.

89. 662 F 2d 862 (DC Circuit 1981) at 864-8.

90. J. Turner, 'Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant?' 2013(4) *New Zealand Law Review* 653, at 669 (2013).

91. Despite the ready recognition of judgments *in rem* under English common law – for example, judgments that relate to immovable property, or adjudicate on status – these judgments rarely come for enforcement: Dicey, Collins and Morris, above n. 87, at [14-110]. For this reason, we focus on *in personam* jurisdiction, as this is the jurisdiction most likely to be implicated by third-party SICC cases (which necessarily have a commercial character) and most likely to require recognition and enforcement in a foreign enforcing court.

92. Davies, Bell & Brereton, above n. 87, at 4.04; Dicey, Collins and Morris, above n. 87, at [14-055].

93. Dicey, Collins & Morris, above n. 87, at [14-129].

94. Briggs, above n. 84, at 692.

95. Dicey, Collins & Morris, above n. 87, at [14R-044] (and accompanying commentary). See, further for a detailed exposition of English case law on international jurisdiction, Briggs, above n. 84, at 690-715.

96. This formulation of acceptable international jurisdiction is similar to what is required in other common law recognition-and-enforcement approaches that derive from the English tradition: see, further, Reyes, above n. 26, at 338; *Aratra Potato Company Limited Morello International Limited v. The Owners of the Ship 'El Amria'* 1979 Folio 326 (Unreported, ewhc.qb.admiralty); see, e.g., in Canada, T. J. Monestier, 'Jurisdiction and the Enforcement of Foreign Judgments' 42 *Advocates' Quarterly* 107, at 110 (2013–2014).

97. *Adams v. Cape Industries Plc* [1990] Ch. 433, 517-8.

sion to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of the suit

This insistence on some form of presence or deemed or actual submission – similar to the transnational instruments analysed above – presents a very real problem for the enforceability of SICC judgments that compulsorily join non-consenting parties.

Furthermore, given that international jurisdiction is a fundamental prerequisite to recognition and enforcement, it would logically follow that it would offend the public policy of the enforcing court to give effect to such a judgment. This point is made, in the context of the 2005 Convention, by Black and Pitel, who argue that it is possible that recognition and enforcement may be denied based on an extension of jurisdiction based upon the ‘closely related’ doctrine being considered ‘manifestly incompatible’ with the public policy of the enforcing State.⁹⁸ Common law recognition and enforcement also limits recognition and enforcement on this basis. For example, as noted in Dicey, Morris and Collins: ‘A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy’.⁹⁹ The same is true under the 1933 Commonwealth Model Act, which provides, in s 4(1)(v), that registration of a foreign judgment must be set aside if ‘the enforcement of the judgment would be contrary to public policy’ in the enforcing court. By contrast, the 1920 Act, in s 9(1)(2)(f), only excludes judgments where the ‘cause of action’ plead in the proceeding ‘could not have been entertained by the registering court’. It is, nonetheless, arguable that pursuing a cause of action against a non-consenting party with no recognised jurisdictional basis (in the enforcing court, at least) could satisfy this ground. Thus, it is likely that a judgment against a non-consenting party who lacks any deemed or actual presence or submission to the rendering court could offend public policy and hence, stands as a bar to recognition and enforcement under both the common law and the Commonwealth Model Acts (acting as a proxy for other common-law-based or inspired reciprocal recognition-and-enforcement regimes).

For these reasons – and although joinder without territorial links, or links based on presence or submission to jurisdiction, is permissible under Singaporean law – enforcing courts in English common law jurisdictions are not compelled to enforce such judgments. This may be either due to a strict conception of a ‘prerequisite’ requirement of jurisdiction or even because of the potential application of an overriding public policy concern as to the appropriateness of the SICC exercising jurisdiction over a foreign entity in a transaction that occurred outside the bounds of the State’s (Singapore’s) jurisdiction. Thus, we are left in much the same position as considering statutory or transnational regimes: absent another jurisdictional basis (such as consent or a

territorial link), none of the approaches to recognition and enforcement analysed compel recognition and enforcement of third-party SICC judgments.

4 Concluding Remarks

Whilst the SICC is likely to be an attractive competitor to arbitration as a mechanism for transnational dispute resolution, it lacks the capacity to promote the ready enforceability of its judgments against compulsorily joined non-consenting parties internationally. We have established that this difficulty arises when the SICC’s flexible mandate to join non-consenting parties (under Singaporean law) meets a lack of transnational obligations to recognise and enforce. This is so under all major transnational recognition-and-enforcement instruments, both extant and proposed, as well as the Commonwealth-inspired recognition-and-enforcement approach (underpinned by the common law). This is because these approaches require the enforcing court to be satisfied that the judgment was rendered under an acceptable jurisdictional base: usually a manifestation of consent or a territorial link to Singapore, the host jurisdiction of the SICC. Consequently, even if a broader recognition-and-enforcement instrument is achieved through the implementation of the Draft Convention on the Recognition and Enforcement of Foreign Judgments, this will do little to promote the enforcement prospects of third-party SICC judgments. Similar issues are also evident under the Commonwealth-inspired Reciprocal Enforcement Acts, where obligations are only imposed upon enforcing courts to give effect to judgments against third parties where that party either consents, or a substantial link between the third party and the jurisdiction of the rendering court exists. Consequently, the SICC’s approach to joinder leads where international recognition-and-enforcement practice has not yet trod. This means that where recourse to foreign recognition and enforcement is likely to be necessary against a non-consenting party compulsorily joined to SICC proceedings, any resulting judgments will be difficult to enforce, and, hence, the SICC is likely to proceed with caution in exercising this power.

Nonetheless, these enforcement difficulties do not necessarily spell the end of the utility of the SICC’s efforts to compulsorily join non-consenting parties. First and foremost, if the non-consenting party has assets within Singapore, a Singaporean court will not go behind the SICC’s exercise of jurisdiction – particularly as the SICC is constituted as a division of the High Court of Singapore. In this sense, third-party joinder can be considered successful if no recourse is needed beyond Singapore. Second, and additionally, the prospect of third-party joinder within Singapore may promote third parties to consent or submit to the jurisdiction of the SICC,

98. Black and Pitel, above n. 7, at 58 (fn 120).

99. Dicey, Collins and Morris, above n. 87, Rule 51.

even absent any territorial links.¹⁰⁰ Of course, the most effective option to promote enforcement prospects would be to receive the consent of any third parties prior to the dispute via the preemptive inclusion of jurisdiction clauses in all agreements between all potential disputing parties.¹⁰¹ Whilst this is certainly possible, it is difficult in practice to draft and secure consistent dispute resolution clauses in a range of contracts than can span numerous contracting parties and many years.¹⁰² Instead, it may be that the SICC's reputation is used once a dispute has arisen to promote to potential third parties the *benefits* (efficiency, expertise and so on) that consenting to SICC proceedings may offer.

Third, and perhaps most importantly, the SICC's mandate to compulsorily join non-consenting parties – and the eventual exercise of this power – will continue to place practical pressure on enforcing courts (and their host jurisdictions) to recognise and enforce any resulting judgment. This is largely because, despite the lack of transnational obligations to do so,¹⁰³ foreign enforcing courts can take a more permissive approach to recognising and enforcing such judgments if they so choose.¹⁰⁴ Thus, domestic approaches may be more permissive in giving effect to a third-party SICC judgment, based upon the extent to which they embody a degree of discretion and are potentially amenable to legal development. That is, where there is greater 'familiarity, trust and confidence' in a particular State or its rendering courts, there is a greater prospect of its judgment being recognised and enforced.¹⁰⁵ In such cases, competing factors in recognition and enforcement – such as the finality of proceedings – may favour giving effect to the SICC judgment against a non-consenting party, to avoid expensive (and potentially unnecessary) re-litigation of the matter.¹⁰⁶ Singapore will be assisted in this sense by

its long-standing efforts to build and maintain its 'brand-name and reputation' in dispute resolution, based on 'trust, neutrality and efficiency'.¹⁰⁷ Such comments are not mere marketing hyperbole.¹⁰⁸ Based on these reputational claims, it may even be that there is some advantage to recognition and enforcement of SICC judgments over arbitral awards. This will be assisted by the fact that considerations of both State and judicial comity and reciprocity are likely to resound more heavily with respect to the emanation of State power contained in a judgment vis a vis an emanation of private decision making in the form of an arbitral award.¹⁰⁹

For now, the SICC has done all that it can unilaterally do to promote an approach to joinder of non-consenting parties that is both novel internationally and designed to be commercially flexible for international disputants. The true success of these measures, however, can only be measured when such a judgment is rendered, and it comes for recognition and enforcement in a foreign State. Until then, focus will increasingly be placed upon how legislatures and enforcing courts around the world would treat such a judgment and whether they might – or should – adopt similar procedures or give SICC judgments against non-consenting parties ultimate efficacy beyond Singapore.

100. Bettoni, cited at footnote 13, above, provides an overview of the kinds of pressures that a third party may face, even where they may not have assets in a particular jurisdiction.

101. As Black and Pitel note, it is now 'widely accepted' that forum-selection clauses should be presumptively enforced: Black and Pitel, above n. 7, at 26.

102. Hwang, above n. 1, at 195; Reyes, above n. 26, at 357.

103. Indeed, this is likely to be one of the key ways that legal development occurs with respect to transnational recognition-and-enforcement instruments, as the legal ordering surrounding recognition and enforcement (in both the 2005 Convention and the advanced Draft Convention) is unlikely to substantially change or update, given the 'incrementalist' nature of transnational private law-making: see, further, S. Block-Lieb and T. Halliday, 'Incrementalisms in Global Lawmaking' 32(3) *Brooklyn Journal of International Law* (2007).

104. This option remains open to enforcing courts, as transnational recognition-and-enforcement instruments allow residual recourse to more permissive domestic (municipal) recognition-and-enforcement approaches. That is, enforcing courts can never violate any transnational obligations by giving effect to foreign decisions; instead, 'only by failing to do so': Paulsson, above n. 72, at 124.

105. This suggests only that the 'greater the familiarity, trust and confidence, the greater the willingness to enforce: conversely, the greater the ignorance and suspicion, the more reluctant we would be to grant enforcement': Ho, above n. 81, at 448. It should not be taken to suggest that Singaporean judgments are likely to be treated in a similar way to other mutual recognition schemes that have a mandatory nature (e.g., the approach in the Brussels I system).

106. *Ibid.*, 60.

107. Singapore Minister for Law (Kasisviswanathan Shanmugam), 'Opening Address' (SIAC Congress 2016, 27 May 2016) [8], available at: <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-minister-for-law--k-shanmugam--at-siac-congre.html> (accessed 22 December 2018). This reputation is not solely tied to one institution – like the SICC – but instead reflects a combination of perceptions about Singaporean institutions generally. Perhaps most prominently for international commercial disputants, these are the existing national courts of Singapore, the Singapore International Arbitral Centre (SIAC), the Singapore International Mediation Centre. The SICC also attempts to market not just its own prowess but Singapore's overall 'legal infrastructure', by reference to its well-developed and respected institutions and its 'efficient, competent and honest judiciary', allowing it to serve as a 'neutral third party venue', thereby making it the right choice to provide effective decision-making services: Singapore International Commercial Court Committee, above n. 5, at 10,15.

108. Singapore is widely recognised as an efficient jurisdiction for resolving commercial disputes, with one of the lowest 'congestion rates' globally (caseload divided by resolved cases) and high user- and academic perceptions of effectiveness and efficiency: Dakolias, 'Court Performance around the World: A Comparative Perspective' 2(1) *Yale Human Rights and Development Journal* 87, at 103, 131-4 (1999). Recent indicators remain in line with this image: see, e.g., the 2017 IMD World Competitiveness Yearbook. The Yearbook, which combines statistical and survey data, regularly places Singapore in the top ranking of nations from the perspective of business, legal and regulatory competitiveness (Singapore comes in third globally in 2017).

109. Ho, above n. 81, at 453-4.