

INTERNATIONAL COMMERCIAL COURTS: THE SINGAPORE EXPERIENCE

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The last decade or so has seen the emergence of international commercial courts in four jurisdictions: the Dubai International Financial Centre Courts, the Qatar International Court, the Abu Dhabi Global Market Courts and the Singapore International Commercial Court. Described as courts that are ‘particularly attuned to the needs and realities of international commerce’, these courts are inspired in part by the London Commercial Court and have some unique features when compared with domestic courts. For example, their judicial bench includes judges from various foreign jurisdictions. In addition, their rules and procedures cater to commercial disputes involving foreign litigants and transnational and cross-border disputes that often have little or no connection to the state within which the court is situated. Further, foreign lawyers have greater rights of audience than in traditional domestic courts with the result that, in some cases, the parties, counsel and judges all come from different jurisdictions. Given the experience of these courts to date and the likelihood that further international commercial courts will be established, it is both useful and timely to examine key issues concerning their institutional design and perceived benefits. This paper uses the Singapore International Commercial Court as the case study for an examination of these key issues.

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I INTRODUCTION

In January 2015, Singapore established a new division of the Singapore High Court that was specifically designed to hear international commercial disputes — the Singapore International Commercial Court (‘SICC’).¹ The SICC only hears claims that are ‘of an international and commercial nature’.² The Chief Justice of Singapore, Sundaresh Menon, has stated that the SICC has features that make it ‘particularly attuned to the needs and realities of international commerce’.³ In particular, the SICC has a panel of judges that includes highly regarded international jurists who are experienced in commercial matters, as well as Singapore Supreme Court judges from both the Court of Appeal and the High Court. Further, where an action being heard in the SICC has ‘no substantial connection to Singapore’, the parties may be represented by foreign lawyers who have registered for this purpose.⁴

The SICC also has its own procedural rules and practice directions that reflect the focus of its jurisdiction. These make provision for various innovations, including the following: court proceedings may be confidential (particularly if the case is an ‘offshore case’); parties may apply for an order to replace Singapore evidential rules with other rules of evidence; a party may apply to have a question of foreign law determined on the basis of submissions rather than proof; parties may contract out of or limit their rights to appeal; and a simplified discovery regime is adopted.

This paper examines key issues concerning the institutional design of the SICC as a case study for identifying the rationale and perceived benefits of international commercial courts generally. Part II considers the structure and rationale of the SICC. Part III outlines the key features of the SICC and the ways in which Singapore’s *Rules of Court* are modified to make the SICC court procedures more attractive to parties to international commercial disputes. Part IV analyses the case experience of the SICC to date. Part V examines the perceived benefits of the SICC and locates it within the context of the other international commercial courts. Part VI concludes by observing that the experience of the SICC to date suggests that it has the potential to operate as a compelling alternative to other courts that operate on an international basis.

II STRUCTURE AND RATIONALE OF THE SICC

The SICC operates as a special division of the Singapore High Court, which is a part of the Singapore Supreme Court.⁵ It is the only division of the High Court

¹ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18A (‘*Supreme Court of Judicature Act*’).

² *Rules of Court* (Singapore, cap 322, 2014 rev ed) O 110 r 7(1)(a) (‘*Rules of Court*’); *ibid* s 18D.

³ Chief Justice Sundaresh Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’ (Speech delivered at the Dubai International Financial Centre (‘DIFC’) Courts Lecture Series 2015, DIFC Conference Centre, Dubai, 19 January 2015) [17] (‘International Commercial Courts’).

⁴ *Supreme Court of Judicature Act* s 18M; *Legal Profession Act* s 36P(1); *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) r 3(2)(b).

⁵ *Supreme Court of Judicature Act* s 18A. Singapore’s Supreme Court consists of the High Court and the Court of Appeal: see s 3.

established under the *Supreme Court of Judicature Act*⁶ however, the High Court does have specialist commercial lists for High Court cases other than those in the SICC.⁷ Accordingly, when we refer to the Singapore High Court, we mean the High Court excluding the SICC division.

Proceedings in the SICC are governed by the Singapore Supreme Court's *Rules of Court* as modified by O 110. The provisions of O 110 are said to 'follow international best practices for commercial dispute resolution'.⁸ SICC litigants have a right of appeal to the Court of Appeal of the Singapore Supreme Court against any SICC judgment or order.⁹ In this respect, the SICC is similar to the Commercial Court subdivision of the Queen's Bench Division of the High Court of Justice (England and Wales) ('London Commercial Court'). The London Commercial Court has its own court procedures under pt 58 of the *Civil Procedure Rules 1998* (UK) and appeals from the Commercial Court go to the Court of Appeal (Civil division) of England and Wales.¹⁰

However, one of the features that makes the SICC unique is that it was specifically created as an international commercial court and only hears claims that are 'of an international and commercial nature'.¹¹ The key premise of the SICC, as articulated by the Singapore International Commercial Court Committee, was to enable Singapore 'to enhance its status as a leading forum for legal services and commercial dispute resolution'¹² and to become 'an Asian dispute resolution hub catering to international disputes with an Asian connection'.¹³ The SICC Committee highlighted that there was a 'need for a freestanding body of international commercial law'¹⁴ and commented that an 'international court' would be better placed to address some of the weaknesses of

⁶ The Family Division of the High Court is established under s 4 of the *Family Justice Act 2014* (Singapore). The *Family Justice Act 2014* (Singapore) s 4(2) provides that the *Supreme Court of Judicature Act* applies to the Family Division of the High Court, subject to the *Family Justice Act 2014* (Singapore).

⁷ Supreme Court Singapore, *Structure of the Courts* <<https://www.supremecourt.gov.sg/about-us/the-supreme-court/structure-of-the-courts>>, archived at <<https://perma.cc/T553-N6RM>>.

⁸ Singapore International Commercial Court, *Rules of Court* (Singapore, cap 322) (18 May 2015) <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=42>>.

⁹ *Supreme Court of Judicature Act* s 29A(1). To provide flexibility for the parties, the right of appeal may be excluded, limited or varied by a written agreement between the parties: *Singapore International Commercial Court Practice Directions 2017* (Singapore) [139(3)].

¹⁰ A party needs permission to appeal to the Court of Appeal: *Civil Procedure Rules 1998* (UK) r 52.3. This may be given only where — (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard: r 52.6(1).

¹¹ *Rules of Court* O 110 r 7(1)(a); *Supreme Court of Judicature Act* s 18D.

¹² Singapore International Commercial Court ('SICC') Committee, '*Report of the Singapore International Commercial Court Committee*' (Report, SICC Committee, November 2013) 5 ('*SICC Committee Report*').

¹³ *Ibid* 10. The SICC would 'draw upon Singapore's traditional strengths to establish new dispute resolution offerings': at 11. The SICC Committee highlights that Singapore has the following advantages, which help give it a trusted dispute resolution hub status: (a) a well-developed and business friendly legal system based on the common law; (b) lawyers who are commercially experienced; (c) sound judges; and (d) an increasingly sophisticated commercial jurisprudence: at 7.

¹⁴ *Ibid* 11.

arbitration as a means of international commercial dispute resolution.¹⁵ Indeed, calls for the creation of international commercial courts are, in part, a response to the perceived shortfalls of international commercial arbitration; they are also an acknowledgement that courts must more readily accommodate the needs of parties to international commercial disputes.

In terms of the perceived shortfalls of arbitration, Chief Justice Menon has noted that arbitration ‘was conceived as an ad hoc, consensual, convenient and confidential method of resolving disputes’ and that it ‘was not designed to provide an authoritative and legitimate superstructure to facilitate global commerce’.¹⁶ By comparison, it has been noted that international commercial courts provide an opportunity for the harmonisation of substantive legal principles and civil procedure.¹⁷ The harmonisation of the procedures and practices used by commercial courts to resolve international disputes is said to increase confidence and reduce uncertainty in the dispute resolution process;¹⁸ more significantly, the harmonisation of substantive commercial laws also reduces the transaction costs of cross border business and encourages trade and investment.¹⁹ According to Chief Justice Menon, courts that specialise in deciding international commercial disputes are ‘particularly well-situated to develop a consistent jurisprudence of international commercial law’:²⁰

We might even envision a future where such a coherent *corpus* of case law has been propagated by commercial courts that it could be looked upon as a source of *lex mercatoria*. An international community of commercial courts will represent a practical solution to multinational businesses which require a reliable, neutral and legitimised mechanism for dispute resolution, and in so doing transform the anxiety over uncommon laws of commerce into an opportunity for further integration between law and commerce. The law has always been part of the infrastructure for international trade, but with some forward thinking by lawyers

¹⁵ The SICC Committee has noted that ‘the coercive jurisdiction of a court may be necessary in a multiple party dispute; the subject matter of the dispute may not be amenable to arbitration (such as special torts arising from contract, international intellectual property or trust disputes); and the *New York Convention*, while wide in its reach, may not be fully effective for enforcement in some countries’: *ibid* 12.

¹⁶ Menon CJ, ‘International Commercial Courts’, above n 3, [14] (emphasis omitted).

¹⁷ See, eg, *ibid* [14]–[15]; Chief Justice Marilyn Warren and Justice Clyde Croft, ‘An International Commercial Court for Australia: Looking beyond the *New York Convention*’ (Paper presented at the Commercial CPD Seminar Series, Melbourne, 13 April 2016) 19; Chief Justice T F Bathurst, ‘The Importance of Developing Convergent Commercial Law Systems, Procedurally and Substantively’ (Speech delivered at the Conference of Chief Justices of Asia and the Pacific, Singapore, 28–30 October 2013) [4]; Chief Justice Michael Hwang, ‘Commercial Courts and International Arbitration—Competitors or Partners?’ (2015) 31 *Arbitration International* 193, 196; *SICC Committee Report*, above n 12, 11 [11].

¹⁸ See, eg, Chief Justice Sundaresh Menon, ‘Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence’ (2013) *Singapore Journal of Legal Studies* 231, 249; Chief Justice Sundaresh Menon, ‘The Somewhat Uncommon Law of Commerce’ (2014) 26 *Singapore Academy of Law Journal* 23, 46.

¹⁹ The existence of different legal systems within a global or regional area means that parties must obtain information about all the relevant local laws and structure their transactions accordingly; they must also factor in the additional risks that accompany the enforcement of cross border contracts when disputes arise: Menon CJ, ‘The Somewhat Uncommon Law of Commerce’, above n 18, 42.

²⁰ *Ibid* 48.

and legal institutions, it might aim to become part of the modern *superstructure* as well.²¹

However, international commercial courts are generally not presented as replacements for, or a real threat to, international commercial arbitration; rather, they are often described as ‘companions’ to, not ‘competitors’ of, arbitration in so far as they add to the range of options available to parties involved in international commerce.²² International commercial courts can draw on the strengths of their municipal court foundations (eg published judgments, rights of appeal and the availability of joinder), while also incorporating desirable features of arbitration. This can make international commercial courts attractive to those parties who find both litigation in national courts and international arbitration unappealing.²³ At the same time, it should be acknowledged that there are significant differences between the international commercial courts that have been established to date and that the design of the courts does not follow a standard model.

III KEY FEATURES OF THE SICC

This Part considers the key features of the SICC and the ways in which Singapore’s *Rules of Court* are modified to make the SICC court procedures more attractive to commercial and foreign litigants involved in international disputes.

A *Appointment of International Judges*

An important ‘international’ element of the SICC that distinguishes this court from most other specialist commercial courts, including the London Commercial Court, is that the court’s judicial bench includes eminent jurists from various foreign jurisdictions. The SICC bench is composed of 22 current Supreme Court judges (21 Judges of the Supreme Court, including four Judges of Appeal and the Chief Justice, and one Senior Judge) and 12 ‘International Judges’.²⁴

Under Singapore’s legal framework, the ‘International Judges’ of the SICC are treated differently from the other Supreme Court judges that sit on the SICC. A person may be appointed as an International Judge if, in the opinion of the Chief Justice, that individual has ‘the necessary qualifications, experience and professional standing to be an International Judge of the Supreme Court’.²⁵ An International Judge is appointed for a specified period to sit in the SICC.²⁶ The

²¹ *Ibid* (emphasis in original).

²² Chief Justice T F Bathurst, ‘Benefits of Courts such as the Singapore International Commercial Court (SICC)’ (Speech delivered at Sydney Arbitration Week, Sydney, 21 November 2016) [6]; Warren and Croft, above n 17, 19.

²³ Hwang CJ, above n 17, 196.

²⁴ SICC, *Judges* (8 March 2017) <<http://www.sicc.gov.sg/Judges.aspx?id=30>>, archived at <<https://perma.cc/EQ7A-7FED>>.

²⁵ *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 95(4)(c) (‘*Singapore Constitution*’).

²⁶ *Ibid* s 95(5)(b); *Supreme Court of Judicature Act* s 9(4)(b).

first cohort of International Judges were appointed for a three-year term.²⁷ The International Judges are assigned to cases on an ad hoc basis,²⁸ and they can only hear and determine SICC cases or sit in appeals from the SICC.²⁹ By comparison, the other SICC judges are all ‘Judges of the Supreme Court’³⁰ (and can therefore hold office until they turn 65)³¹ with the exception of Senior Judge Chan Sek Keong, who has been appointed as a Senior Judge for three years to sit as a Judge of Appeal and a Judge of the SICC.³² Indeed, all the Judges of the Singapore Supreme Court may sit as a Judge of the SICC.³³ The only members of the Supreme Court bench who are not included on the SICC bench are four Senior Judges and the High Court’s Judicial Commissioners.³⁴

The SICC’s International Judges are all current or former judges, with the exception of Justice Yasuhei Taniguchi, a Japanese academic and lawyer in comparative and transnational law, and Justice Simon Thorley QC, a former leading United Kingdom barrister in intellectual property.³⁵ Two of the International Judges are still members of the judiciary in their home jurisdictions: Justice Irmgard Griss is a deputy member of the Austrian Constitutional Court; and Justice Dominique Hascher is a judge of the Supreme Judicial Court in France. The other eight International Judges have retired from their judicial roles in their home jurisdictions.³⁶ Nine of the SICC’s 12 International Judges are from common law jurisdictions (four from the UK, three from Australia, and one each from Hong Kong and the United States) and three are from civil law jurisdictions (Austria, France and Japan).

²⁷ ‘International Judges Take up Their SICC Posts’, *Business Times* (online), 6 January 2015 <<http://www.businesstimes.com.sg/government-economy/international-judges-take-up-their-sicc-posts>>. Sir Henry Bernard Eder was sworn in as an International Judge on 7 May 2015: Claire Huang, ‘Sir Henry Bernard Eder Appointed as International Judge to Singapore International Commercial Court’, *Business Times* (online), 7 May 2015 <<http://www.businesstimes.com.sg/government-economy/sir-henry-bernard-eder-appointed-as-international-judge-to-singapore>>.

²⁸ *Singapore Constitution* s 95(9)(b); *Supreme Court of Judicature Act* s 9(4)(b).

²⁹ *Supreme Court of Judicature Act* ss 5A, 9(4)(b), 29(4).

³⁰ The Chief Justice, the Judges of Appeal and the Judges of the High Court are ‘Judges of the Supreme Court’: *Singapore Constitution* s 95(1).

³¹ *Ibid* s 98(1).

³² Senior Judges are not ‘Judges of the Supreme Court’ and are only appointed for a specified period, like International Judges: *Singapore Constitution* ss 95(4)(b), (5)(b), (9)(a); Supreme Court Singapore, *Senior Judges* <<http://www.supremecourt.gov.sg/about-us/the-supreme-court-bench/senior-judges>>, archived at <<https://perma.cc/VWW4-XH8K>>. Senior Judge Chan Sek Keong has been appointed for three years to sit as a Judge of Appeal and a Judge of the SICC.

³³ SICC, above n 24.

³⁴ Supreme Court Singapore, *Justices* <<http://www.supremecourt.gov.sg/about-us/the-supreme-court-bench>>, archived at <<https://perma.cc/PW95-W7LG>>.

³⁵ SICC, above n 24.

³⁶ *Ibid*. Justice Carolyn Berger is a former Justice of the Delaware Supreme Court; Justice Patricia Bergin is a former Judge of the Supreme Court of New South Wales; Justice Bernard Eder is a former Judge of the High Court (Queen’s Bench Division) of England and Wales; Justice Roger Giles is a former Judge of the New South Wales Court of Appeal (and is also current judge of the DIFC Courts); Justice Dyson Heydon is a former Justice of the High Court of Australia; Justice Vivian Ramsey is a former Judge of the High Court (Queen’s Bench Division) of England and Wales; Justice Anselmo Reyes is a former Judge of the Court of First Instance in Hong Kong; and Justice Bernard Rix is a former Lord Justice of Appeal of the Court of Appeal of England and Wales.

The International Judges provide the SICC with expertise in foreign commercial law.³⁷ The Chief Justice may select a judge to hear a particular case due to their experience in a foreign jurisdiction or in a particular subject matter.³⁸ Consequently, the presence of an International Judge may influence the SICC's discretion in favour of exercising its jurisdiction instead of staying proceedings (even on a temporary basis).³⁹

B *Jurisdiction of the SICC*

The SICC is a specialist court. It does not have general civil jurisdiction like the Singapore High Court. The SICC has jurisdiction to hear and try an action if it fulfils the following requirements:

- the action is one that the High Court may hear and try in its original civil jurisdiction;⁴⁰
- the claims are of an international⁴¹ and commercial⁴² nature;⁴³

³⁷ See, eg, Denise H Wong, 'The Rise of the International Commercial Court: What Is It and Will It Work?' (2014) 33 *Civil Justice Quarterly* 205, 214; Justice Steven Chong, 'The Singapore International Commercial Court: A New Opening in a Forked Path' (Speech delivered at the British Maritime Law Association Lecture, London, 21 October 2015) [42].

³⁸ Man 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* (Martinus Nijhoff, 2014) vol 32, 155, 160 ('Singapore International Commercial Court'); *Singapore Constitution* s 95(9)(b). For example, the SICC's French International Judge, Justice Dominique Hascher, has been appointed as one of the three SICC judges to hear the proceedings by BNP Paribas Wealth Management against the Agam siblings. Justice Hascher appears to have been selected as a member of this Court due to the French connections with these proceedings. This will be discussed further below in Part IV(B).

³⁹ For example, in the first *BNP Paribas Wealth Management v Jacob Agam* case, the SICC observed that even if the Court were to decide at the trial of this action that French law applies, this factor could not be determinative in the SICC's exercise of its discretion to grant a limited stay of proceedings because 'this court, which is an international commercial court with an International Judge from France, can apply the laws of France to decide the dispute': *BNP Paribas Wealth Management v Jacob Agam* [2017] 3 SLR 27, 44 ('*BNP Paribas 2016*') [47]. This is discussed further in Part IV(C) below.

⁴⁰ *Supreme Court of Judicature Act* s 18D(b). That is, either (a) the defendant is served with a writ of summons or any other originating process; or (b) the defendant submits to the jurisdiction of the High Court: s 16(1). Additionally, Yeo Tiong Min has noted that the SICC will be constrained in the same way that the High Court would be — for example, it would not be able to adjudicate a case that involves title or possessory rights to foreign immovable property, and it may lack jurisdiction to deal with certain types of questions that are regarded as non-justiciable: Yeo Tiong Min, 'Staying Relevant: Exercise of Jurisdiction in the Age of the SICC' (Speech delivered at the Eighth Yong Pung How Professorship of Law Lecture, Singapore Management University, 13 May 2015) [12] ('Staying Relevant').

⁴¹ Under *Rules of Court* O 110 r 1(2)(a), 'a claim is "international" in nature if — (i) the parties to the claim have their places of business in different States; (ii) none of the parties to the claim have their places of business in Singapore; (iii) at least one of the parties to the claim has its place of business in a different State from — (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or (B) the State with which the subject matter of the dispute is most closely connected; or (iv) the parties to the claim have expressly agreed that the subject matter of the claim relates to more than one State.'

- the parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement (pre or post dispute);⁴⁴ and
- the parties do not seek any relief in the form of, or connected with, a prerogative order.⁴⁵

The SICC also has jurisdiction to hear and determine a case transferred to it from the High Court,⁴⁶ as well as an originating summons for leave to commit a person for contempt in respect of any judgment or order made by the SICC.⁴⁷

C Service of Process and Joinder

One way in which the SICC's jurisdictional requirements for actions commenced in the SICC differ from those of proceedings commenced in the Singapore High Court is that a plaintiff does not need the SICC's permission for

⁴² 'A claim is 'commercial' in nature if — (i) the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions: (A) any trade transaction for the supply or exchange of goods or services; (B) a distribution agreement; (C) commercial representation or agency; (D) factoring or leasing; (E) construction works; (F) consulting, engineering or licensing; (G) investment, financing, banking or insurance; (H) an exploitation agreement or a concession; (I) a joint venture or any other form of industrial or business cooperation; (J) a merger of companies or an acquisition of one or more companies; (K) the carriage of goods or passengers by air, sea, rail or road; (ii) the claim relates to an *in personam* intellectual property dispute; or (iii) the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature': *ibid* O 110 r 1(2)(b).

⁴³ *Supreme Court of Judicature Act* s 18D; *Rules of Court* O 110 r 7(1)(a).

⁴⁴ *Rules of Court* O 110 r 7(1)(b). A 'jurisdiction agreement' means an agreement to submit to the exclusive or non-exclusive jurisdiction of the SICC: O 110 r 1(1) (definition of 'jurisdiction agreement'). A jurisdiction agreement is written if its contents are recorded in any form (whether or not the agreement has been concluded orally, by conduct or by other means), including an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference: O 110 r 1(2)(e). Note that the term 'choice of court agreement' is also used in O 110 and, although not defined, this appears to mean an agreement to submit to the exclusive or non-exclusive jurisdiction of the Singapore courts. In addition, under O 110 an 'exclusive choice of court agreement' has the same meaning as in s 3 of the *Choice of Court Agreements Act 2016* (Singapore), and 'chosen court' has the same meaning as in s 2(1) of the *Choice of Court Agreements Act 2016* (Singapore): O 110 r 1(1) (definitions of 'exclusive choice of court agreement' and 'chosen court').

⁴⁵ *Rules of Court* O 110 r 7(1)(c).

⁴⁶ *Ibid* O 110 r 7(2)(a). A case is transferred to the SICC under O 110 r 12.

⁴⁷ *Ibid* O 110 r 7(2)(b).

service of process on a foreign defendant⁴⁸ — leave under O 11 r 1 of the *Rules of Court* ‘is not required for the service of a writ or an originating summons outside of Singapore on a party to a written jurisdiction agreement’.⁴⁹ As ‘each plaintiff and defendant named in the originating process when it was first filed [must have] submitted to the Court’s jurisdiction under a written jurisdiction agreement’,⁵⁰ the conventional rationale underpinning the requirement for leave of the court does not apply.

A party may be joined as a party to an SICC action, including as an additional plaintiff or defendant, or as a third or subsequent party, where the claims by or against the person are ‘appropriate’ to be heard in the SICC.⁵¹ The SICC can join parties without their consent; however, where a party is uncooperative and refuses to take part in proceedings, there may be problems enforcing the

⁴⁸ The Singapore High Court has jurisdiction as of right over a defendant who is within Singapore, whereas jurisdiction over a foreign defendant is discretionary: *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500, 510 [26]. If the foreign defendant has not consented to the jurisdiction of the Singapore courts (ie by a choice of court agreement or taking steps in proceedings), jurisdiction only arises where the defendant has been validly served with an originating process out of the jurisdiction. To obtain the leave of the court for service of process on a foreign defendant, the plaintiff must demonstrate the following: (a) there is ‘a good arguable case’ that the court has jurisdiction under one of the heads under O 11 r 1 of the *Rules of Court*; (b) the claim has a sufficient degree of merit; and (c) Singapore is the proper forum to try the action: at 510 [26]. The test for whether Singapore is the ‘proper’ forum ‘is substantively the same as that applied in considering whether a stay of proceedings on improper forum grounds should be granted’: at 511 [30]. Generally this test is the *forum non conveniens* analysis, as articulated by Lord Goff in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460 (*‘Spiliada’*). However, where the plaintiff brings the action before a Singapore court in breach of an exclusive jurisdiction agreement in favour of a foreign court, the plaintiff must show exceptional circumstances amounting to “strong cause” why the agreement should not be adhered to, in order for Singapore to hear the case (if the *Choice of Court Agreements Act 2016* (Singapore) is inapplicable): *Donohue v Armco Inc* [2002] 1 All ER 749, 759 [24] (Lord Bingham); *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6, 16 [33]; Man Yip, ‘The Resolution of Disputes Before the Singapore International Commercial Court’ (2016) 65 *International and Comparative Law Quarterly* 439, 441 (*‘The Resolution of Disputes’*); Yeo Tiong Min, ‘The Contractual Basis of the Enforcement of Exclusive and Non Exclusive Choice of Court Agreements’ (2005) 17 *Singapore Academy of Law Journal* 306, 323 [35]. Where the jurisdiction agreement confers exclusive jurisdiction in favour of the courts of a contracting state (ie Mexico or an European Union member state other than Denmark), the *Convention on Choice of Court Agreements (‘Hague Convention’)* rules on jurisdiction are now likely to apply: opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) (*‘Hague Convention’*). This means that the Singapore courts must consider their obligations under s 12 of the *Choice of Court Agreements Act 2016* (Singapore) in determining whether Singapore is a ‘proper’ forum.

⁴⁹ *Rules of Court* O 110 r 6(2). However, this does not affect the SICC’s power to consider its jurisdiction under O 110 r 10: O 110 r 6(4).

⁵⁰ *Ibid* O 110 r 7(1)(b).

⁵¹ *Ibid* O 110 r 9(1). The requirements in the *Rules of Court* for joining the person must be met, and the claims by or against the person must not include a claim for any relief in the form of, or connected with, a prerogative order: O 110 rr 9(1)(a), (b)(i). In exercising its discretion to join a party, the SICC must have regard to ‘its international and commercial character’: O 110 r 9(3). Yip has noted that the ‘appropriateness’ test ‘permits considerations of connections of the relevant claims to Singapore’ — by contrast, under the ‘not appropriate’ test in O 110 r 8, the SICC cannot decline jurisdiction ‘solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore’: Yip, ‘The Resolution of Disputes’, above n 48, 456–7, 466. See also, Yeo, ‘Staying Relevant’, above n 40, [45]; Supreme Court Singapore, ‘Singapore International Commercial Court User Guides’ (User Guides, Singapore International Commercial Court, 9 December 2015), [9]–[10] (*‘SICC User Guides’*).

judgment against that party in other jurisdictions, particularly where the joined party is not a party to the agreement between the plaintiff and the defendant conferring jurisdiction on the SICC.⁵²

Where the person to be joined is outside of Singapore (and they are not a party to a relevant written jurisdiction agreement), the SICC will need to give leave for service out of jurisdiction under O 11 r 1(1).⁵³ However, it appears that O 110 modifies the requirements under O 11 with the result that a determination of whether ‘the case is a proper one for service out of Singapore’⁵⁴ no longer requires a *forum conveniens* (or ‘strong cause’) test.⁵⁵ The case will be a ‘proper’ one if it is ‘appropriate’ for the SICC to hear the case, as required by the SICC joinder rules under O 110 r 9.⁵⁶ It has been suggested that ‘the SICC is likely to apply a generous test for granting leave to serve out’ given that O 110 r 9(3) provides that the SICC ‘must have regard to its international and commercial character’ in exercising its discretion to join a party.⁵⁷

⁵² Justice Anselmo Reyes, ‘Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court’ (2015) 2 *Journal of International and Comparative Law* 337, 355–6; Yeo, ‘Staying Relevant’, above n 40, [45]. This is a problem in all courts — this means that while the ability to join third parties is an advantage that the international commercial courts have over arbitration proceedings, this advantage is limited to proceedings where such parties consent to joinder. This is because if the third party submits to the court’s jurisdiction (by entering into the merits of the dispute), the court has in personam jurisdiction over that party and a judgment against the third party may be enforceable in other common law jurisdictions. Justice Reyes has made the following observation: ‘The most effective way to deal with [this difficulty] may be for parties to ensure that, at the outset, corresponding SICC jurisdiction clauses are incorporated into commercial contracts concluded with third parties in related upstream or downstream transactions. Such interlocking jurisdiction clauses would enable the SICC to make orders consolidating relevant proceedings in the interests of saving time and cost’: at 357. For further discussion regarding a court’s jurisdiction over non-parties to a contract that contains a jurisdiction clause, see Yip, ‘The Resolution of Disputes’, above n 48, 446–7; Vaughan Black and Stephen G A Pitel, ‘Forum Selection Clauses: Beyond the Contracting Parties’ (2016) 12 *Journal of Private International Law* 26, 46–51, 54–7.

⁵³ Reyes, above n 52, 355; Yip, ‘The Resolution of Disputes’, above n 48, 465; *SICC Committee Report*, above n 12, 15. Parties are likely to rely on ground (c) of the *Rules of Court* O 11 r 1(1): ‘the claim is brought against a person duly served in or out of Singapore and a person out of Singapore is necessary or proper party thereto’.

⁵⁴ *Rules of Court* O 11 r 2(2).

⁵⁵ In non-SICC cases, a strong cause test would normally apply where a plaintiff brings the action in breach of an exclusive jurisdiction agreement in favour of a foreign court: see *Donohue v Armco Inc* [2002] 1 All ER 749.

⁵⁶ *Rules of Court* O 110 r 9(1)(b)(ii); Yeo, ‘Staying Relevant’, above n 40, [45]. Yeo has argued that the test for international jurisdiction is whether ‘it is “appropriate” for the SICC to assume jurisdiction over the third party, even if the dispute concerning the third party is subject to an exclusive choice of foreign court’ jurisdiction clause: ‘The threshold is that Singapore is an appropriate forum, ie, not that it is a more appropriate forum, not that there is strong cause to exercise jurisdiction in the face of an exclusive choice of foreign court agreement.’ Yeo gave this speech prior to Singapore’s ratification of the *Hague Convention* — if the claims by or against a third party are subject to an exclusive choice of foreign court agreement to which the *Choice of Court Agreements Act 2016* (Singapore) applies, the SICC may need to take into account the factors under s 12 (where Singapore is not chosen court) of this Act in determining whether it would be ‘appropriate’ for the SICC to assume jurisdiction if the chosen court is in another contracting state.

⁵⁷ Reyes, above n 52, 355; *Rules of Court* O 110 r 9(3); Yeo, ‘Staying Relevant’, above n 40, [45] n 68. Yeo highlighted that, unlike the High Court, the SICC should not need to be ‘exceedingly careful’ when allowing service overseas to join a third party to forum proceedings.

D *Transfer from the High Court*

As at the date of writing, all the cases that have been heard by the SICC have been transferred from the High Court. A case may be transferred from the High Court to the SICC if the High Court considers that the following requirements are met:⁵⁸

- the claims are ‘of an international and commercial nature’ and ‘the parties do not seek any relief in the form of, or connected with, a prerogative order’;
- it is ‘more appropriate’ for the case to be heard in the SICC; and
- either (i) a party to the case has applied for the transfer (with the consent of every other party to the case);⁵⁹ or (ii) the High Court, after hearing the parties, orders the transfer on its own motion.

Where a matter involves an exclusive choice of court agreement and the *Choice of Court Agreements Act 2016* (Singapore) is applicable,⁶⁰ there are special rules that apply to the transfer of a case from the High Court to the SICC. First, where an exclusive choice of court agreement designates the High Court as a chosen court for the case, the High Court may only order a transfer to the SICC on its own motion if *every party to the case consents to the transfer*.⁶¹ However,

⁵⁸ *Rules of Court* O 110 r 12(4). Singapore’s Court of Appeal has noted that when the High Court determines whether to transfer a case to the SICC under O 110 r 12(4), questions of private international law are not relevant. The Singapore High Court should decide whether it has ‘international jurisdiction’ before deciding whether the case should be transferred to the SICC: *Rappo v Accent Delight International Ltd* [2017] 2 SLR 265 [118]–[119]. Chng has argued that as well as considering the international and commercial nature of the dispute, the High Court ‘should balance the benefits of a transfer against the inconvenience and possible expense it may cause to the litigants’: Chng Wei Yao Kenny, ‘Exploring a New Frontier in Singapore’s Private International Law: *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6’ (2016) 28 *Singapore Academy of Law Journal* 649, 651.

⁵⁹ Where a choice of court agreement designates the SICC as a court for the case, ‘the High Court is to treat the application for the transfer of the case to the [SICC] as being made with the consent of each party to the agreement’: *Rules of Court* O 110 r 12(4A). That is, if a jurisdiction agreement designates ‘the Singapore courts’ as courts that may hear the case, the High Court will treat each party as consenting to the transfer. Additionally, an agreement to submit to the High Court’s jurisdiction that is concluded on or after 1 October 2016 is to be construed as including an agreement to submit to the SICC’s jurisdiction unless a contrary intention appears in the agreement: O 110 r 1(2)(ca).

⁶⁰ Subject to ss 9 (Certain matters excluded from Act), 10 (Act does not apply to interim measures of protection) and 22 (Regulations), the *Choice of Court Agreements Act 2016* (Singapore) ‘applies in every international case where there is an exclusive choice of court agreement concluded in a civil or commercial matter’: *Choice of Court Agreements Act 2016* (Singapore) s 8. In jurisdictional matters (rather than the recognition and enforcement of foreign judgments), a case is an ‘international case’ unless ‘(a) the parties to the case reside in the same Contracting State; and (b) the relationship of the parties and all other elements relevant to the dispute (other than the location of the chosen court) are connected only with that Contracting State’: s 4(1). Note that under s 9 certain types of civil and commercial matters are excluded from the Act, including ‘the carriage of passengers and goods’, ‘the validity of any intellectual property right (other than copyright and related rights)’ and ‘the infringement of any intellectual property right (other than copyright and related rights) except any infringement proceedings that are or could have been brought for breach of a contract between the parties relating to that intellectual property right’.

⁶¹ *Rules of Court* O 110 r 12(3B)(b)(ii). Note, however, that where the *Choice of Court Agreements Act 2016* (Singapore) applies, and an exclusive choice of court agreement designates the High Court but not the SICC as a chosen court for the case — ‘the High Court may, before transferring the case to the Court, direct every party to the exclusive choice of court agreement to vary that agreement, so as to designate the SICC as a chosen court for the case’: O 110 rr 13A(1), (2).

this is not a problem where the exclusive choice of court agreement designates the SICC, as well as the High Court, as a court for the case. In this situation, the High Court is to treat each party to the agreement as a party who consents to an order for a transfer of the case to the SICC.⁶² Similarly, if a party has applied for the transfer, the High Court is to treat the application as being made with the consent of each party to the agreement where the choice of court agreement designates the SICC as a chosen court.⁶³

Secondly, such a choice of court agreement or clause does not need to explicitly specify the SICC as a chosen court — it may simply specify ‘the courts of Singapore’ or ‘the Singapore High Court’. This is because Singapore’s *Rules of Court* clarify that ‘where an agreement to submit to the High Court’s jurisdiction is concluded on or after 1 October 2016, the agreement is to be construed as including an agreement to submit to the jurisdiction of the [SICC] unless a contrary intention appears in the agreement’.⁶⁴ Additionally, it is important to note that the *Supreme Court of Judicature Act* provides that the parties to an agreement to submit to the SICC’s jurisdiction shall be considered to have agreed to the exclusive jurisdiction of the SICC, unless there is an express provision to the contrary.⁶⁵ Accordingly, now that Singapore’s *Choice of Court Agreements Act 2016* has come into force, implementing the *Hague Convention on Choice of Court Agreements* (‘*Hague Convention*’), parties must be very clear if they only want their case to be determined by the High Court, not the SICC, or if they do not want the matter to fall within the *Hague Convention* regime (which makes judgments in cases involving exclusive choice of court agreements more easily enforceable in contracting states).⁶⁶

E Exercise of Jurisdiction

In an action commenced in the SICC, the SICC may consider whether it has jurisdiction or whether it should decline to assume jurisdiction, on an application by a party or on its own motion at any time (but not before hearing the parties).⁶⁷ By contrast, if an action is commenced in the High Court and the case is

⁶² *Rules of The Court* O 110 r 12(4B).

⁶³ *Ibid* O 110 r 12(4A).

⁶⁴ *Ibid* O 110 r 1(2)(ca). ‘Where an agreement to submit to the jurisdiction of the High Court is concluded before 1 October 2016, the agreement does not of itself constitute an agreement to submit to the jurisdiction of the [SICC]’: O 110 r 1(2)(c).

⁶⁵ *Supreme Court of Judicature Act* s 18F(1)(a).

⁶⁶ The *Choice of Court Agreements Act 2016* (Singapore) s 2(2) provides that ‘[w]here the High Court is designated in an exclusive choice of court agreement, the designation is to be construed as including the Singapore International Commercial Court unless a contrary intention appears in the agreement.’ This provision ‘addresses a situation where an action which is commenced in the High Court pursuant to an exclusive choice of court agreement specifying the Singapore High Court as the forum is subsequently transferred to the SICC. [The provision] makes it clear that the High Court includes the SICC, and removes any doubt that the intention of [the Act] is for the *Convention* regime to apply to the SICC notwithstanding the transfer’: Singapore, *Parliamentary Debates*, 14 April 2016 (Second Reading Speech, Ms Indranee Rajah, Senior Minister of State for Finance and Law) 94 [27].

⁶⁷ *Rules of Court* O 110 r 10(1). ‘The [SICC] must set aside any pre-action certificate certifying that an action is international or commercial in nature if it decides that it has no jurisdiction on the ground that the action is not international or commercial in nature’: O 110 r 10(2).

transferred, the SICC cannot ‘reconsider whether it has jurisdiction’⁶⁸ and arguably it cannot consider whether it should assume jurisdiction.⁶⁹

Where proceedings are commenced in the SICC, the SICC may decline to assume jurisdiction if it is ‘not appropriate’ for the action to be heard in the SICC, having regard to ‘its international and commercial character’.⁷⁰ However, the SICC must not decline to assume jurisdiction in an action ‘solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore’.⁷¹ The *forum non conveniens* doctrine therefore appears to be inapplicable;⁷² that is, the SICC cannot refuse to exercise its jurisdiction on the basis that some forum other than Singapore is the more appropriate forum for the

⁶⁸ Ibid O 110 r 12(5)(a).

⁶⁹ Ibid O 110 r 12(5) provides that where a case is transferred (from the High Court to the SICC or vice versa), ‘the court to which the case is transferred must not reconsider whether it has jurisdiction’. Chng has noted that while it may be argued that O 110 r 12(5)(a) prohibits the SICC from reconsidering the existence of jurisdiction but allows the SICC to consider whether it should exercise its jurisdiction, ‘such an interpretation would frustrate the legislative purpose of this rule, which is ostensibly to prevent a repetition of the battle over jurisdiction in the SICC once it has been concluded in the High Court’: Chng, above n 58, 663. Furthermore, both the rules under O 110 that refer to the SICC’s ability to ‘decline to assume jurisdiction’ only apply to cases commenced in the SICC under O 110 r 7(1), and do not include cases transferred from the High Court: O 110 rr 8(1), 10(1).

⁷⁰ *Rules of Court* O 110 rr 8(1), (3).

⁷¹ Ibid O 110 r 8(2).

⁷² The SICC User Guides suggest that O 110 r 8(2) means that the SICC cannot examine the connecting factors to Singapore in deciding whether to exercise its jurisdiction: above n 51 [4], [9]. The *SICC Committee Report* indicated that the SICC Committee wished to disapply the common law *forum non conveniens* test for non-exclusive SICC jurisdiction agreements, but retain the common law ‘strong cause’ test in relation to exclusive jurisdiction agreements in favour of the SICC: ‘[f]orum non conveniens would not be an issue for consensual cases founded on an exclusive jurisdiction agreement, as the Singapore court would not allow the contesting party to breach its agreement. In such cases, the SICC would ordinarily dismiss the application for a stay unless strong cause can be shown. Consideration should be given to amending the law to deal with cases that are not founded on exclusive jurisdiction agreements’: *SICC Committee Report*, above n 12, 15. Chng has argued that ‘the exercise of the SICC’s international jurisdiction should be governed by a unique test that leans strongly towards the exercise of jurisdiction but has flexibility to decline to exercise jurisdiction in exceptional circumstances in order to take into account the competing policy considerations it has to balance’: Chng, above n 58, 651.

hearing of the dispute.⁷³ Instead, the focus is on whether the action is sufficiently international and commercial in nature.⁷⁴

Where the SICC decides that it has no jurisdiction or it declines to assume jurisdiction, there are two possible consequences: (a) the SICC must transfer the proceedings to the High Court if the SICC considers that the High Court has jurisdiction in the case and all parties consent to the proceedings being heard in the High Court;⁷⁵ or (b) if the proceedings are not transferred to the High Court, the SICC may dismiss or stay the proceedings, or make any other order it sees fit.⁷⁶

Additionally, where proceedings are commenced in the SICC, a case may be transferred to the High Court where a party applies for a transfer (with the consent of all other parties)⁷⁷ and the SICC considers that the High Court has

⁷³ The Singapore courts undertake the English *forum non conveniens* analysis, as articulated by Lord Goff in *Spiliada*, to determine whether Singapore is the appropriate forum: *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500, 524; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391. In *JIO Minerals FZC v Mineral Enterprises Ltd*, the sole issue on appeal was whether the respondent's action could be stayed on the ground of *forum non conveniens*. This Singapore Court of Appeal judgment clearly sets out the *Spiliada* test and the factors that the Singapore courts may consider. The burden of establishing that there is some other available and 'clearly or distinctly more appropriate forum' for the trial of the action rests on the defendant. The factors that the court will take into consideration include factors affecting convenience or expense (such as the availability of witnesses), the law governing the transaction and the places where the parties respectively reside or carry on business. If, at this stage of the inquiry, the court concludes that there is no other available forum which is clearly more appropriate, it will ordinarily refuse a stay. Conversely, if it concludes that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless justice requires that a stay should be refused — the legal burden is on the plaintiff to establish the existence of such special circumstances: *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391, 403–4 [37]–[38].

⁷⁴ Yeo has noted that an action may be 'international and commercial' in nature but 'may be rooted in a non-commercial context or raise public policy issues of a very local nature, such that they are not appropriate for the SICC. For example, a dispute on the ownership of shares of a listed company is on the surface a highly commercial one, but it may have arisen from an agreement on the division of matrimonial assets': Yeo, 'Staying Relevant', above n 40, [29]. The SICC cannot exercise any power that must be exercised through the Family Division of the High Court: *Supreme Court of Judicature Act* s 18I(1)(b). In *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 (18 April 2016), Zhuang AR suggested at [145] that 'O 110 r 8 refers to appropriateness as a matter of private international law and not internal allocation of jurisdiction, because the latter is governed by O 110 r 12 ... The phrase "not appropriate" ostensibly obliges the SICC to apply the clearly inappropriate test of [the High Court of Australia in *Voth v Manildra Flour Mills* (1990) 171 CLR 538], and not the clearly more appropriate test of *Spiliada*'.

⁷⁵ *Rules of Court* O 110 r 10(3)(a): 'Where a choice of court agreement designates the High Court as a court for the case, the Court is to treat each party to the agreement as a party who consents to the proceedings being heard in the High Court': O 110 r 10(3A). Note O 110 r 13A(1): 'Where the Choice of Court Agreements Act 2016 (Act 14 of 2016) applies in any case mentioned in Rule 10(3) or 12(3) by virtue of section 8 of that Act, and an exclusive choice of court agreement designates the Court, but not the High Court, as a chosen court for the case, the Court may, before transferring the proceedings or case (as the case may be) to the High Court, direct every party to the agreement to vary that agreement, so as to designate the High Court as a chosen court for the case.'

⁷⁶ *Ibid* O 110 r 10(3)(b). To avoid doubt, O 110 r 10(3)(b) does not enable the Court to make an order for the transfer of the proceedings to any other court in Singapore: O 110 r 10(3B).

⁷⁷ 'Where a choice of court agreement designates the High Court as a court for the case, the [SICC] is to treat the application for the transfer of the case to the High Court as being made with the consent of each party to the agreement': *ibid* O 110 r 12(3A).

jurisdiction in the case and it is ‘more appropriate’ for the case to be heard in the High Court.⁷⁸

Where an action is commenced in the High Court and transferred to the SICC, the SICC may exercise its discretion to stay proceedings, under s 18(2) of the *Supreme Court of Judicature Act* or its inherent powers of case management.⁷⁹ The SICC may also exercise this discretion in cases commenced in the SICC.⁸⁰

F Enforcement of Judgments

As the SICC is a part of the Supreme Court, SICC judgments are enforceable in the same manner as any other Supreme Court decisions. However, SICC judge Justice Anselmo Reyes has highlighted that while all courts are concerned with the enforceability of their judgments across borders, the problem of enforcement is more acute for international commercial courts as ‘the parties before such courts may have little or no presence and few (if any) assets within the state where the courts are located’.⁸¹ The winning party will need the court’s judgment to be enforceable in the jurisdiction in which the assets of the losing party are located.⁸²

One of the main reasons why arbitration remains a popular way of resolving international commercial disputes is the apparent ease of enforcing an arbitral award under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*⁸³ (‘*New York Convention*’).⁸⁴ There is no equivalent treaty on the recognition and enforcement of court judgments. However, it is thought that

⁷⁸ Ibid O 110 r 12(3)(a)(ii).

⁷⁹ *Supreme Court of Judicature Act* ss 18(2), 18I(1)(a), sch 1 [9]. Section 18(2) of the *Supreme Court of Judicature Act* provides that ‘the High Court shall have the powers set out in the First Schedule’. ‘The [SICC] may exercise such powers as the High Court may exercise in its original civil jurisdiction, except — (a) the power under paragraph 1 of the First Schedule (Prerogative orders); and (b) any power that must be exercised through the Family Division of the High Court’: s 18I. Schedule 1 [9] states that: ‘Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.’ For a discussion of the legal principles governing a limited stay of proceedings before the Singapore courts, see *BNP Paribas 2016* [2017] 3 SLR 27, 38–41 [31]–[37]; see also, *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd* [2017] 4 SLR 1 (‘*Arris*’) [34]–[40]. The SICC’s use of its case management powers is discussed below in Part IVC.

⁸⁰ *Supreme Court of Judicature Act* ss 18(2), 18I(1)(a), sch 1 [9].

⁸¹ Reyes, above n 52, 338. Additionally, in the case of the SICC, ‘the doctrine of forum non conveniens cannot be invoked to reject jurisdiction as inappropriate and send the parties to some other place where a defendant may have a more substantial presence’: at 338.

⁸² Ibid; Zain Al Abdin Sharar and Mohammed Al Khulaifi, ‘The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis’ (2016) 46 *Hong Kong Law Journal* 529, 531.

⁸³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (‘*New York Convention*’).

⁸⁴ Reyes, above n 52, 340. There are currently 157 parties to the *Convention*: United Nations Treaty Collection, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (20 April 2017) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en>, archived at <<https://perma.cc/74L2-MNSS>>. Accordingly, in theory, an arbitral award made in a contracting state should be able to be enforced in most jurisdictions. However, in some *New York Convention* states, arbitral awards may be refused enforcement on trivial or insubstantial grounds: Reyes, above n 52, 340, 343.

eventually the *Hague Convention* will ensure that ‘exclusive choice of court agreements’⁸⁵ in international civil or commercial matters,⁸⁶ and the court judgments that concern them, are enforceable in all major jurisdictions. The current parties to the *Hague Convention* are the European Union (which covers all member states, except Denmark), Mexico and Singapore.⁸⁷ The United States and Ukraine signed the *Hague Convention* but have not ratified it.

As Singapore has ratified this *Convention*, SICCC judgments in cases involving exclusive choice of court agreements may be enforceable in other contracting states.⁸⁸ The *Rules of Court* provide that:

Where an exclusive choice of court agreement designates the [Singapore] High Court but not the [SICCC] as a chosen court for the case, the High Court may, before transferring the case to the [SICCC], direct every party to the exclusive choice of court agreement to vary that agreement, so as to designate the [SICCC] as a chosen court for the case.⁸⁹

This may assist in the recognition and enforceability of a judgment by contracting parties to the *Hague Convention* — while the *Convention* rules do ‘apply to a judgment given by a court of a Contracting State pursuant to the transfer of a case from the chosen court, ... recognition or enforcement of the judgment may be refused against a party who objected to the transfer’.⁹⁰

⁸⁵ For the purposes of the *Hague Convention*, an ‘exclusive choice of court agreement’ means an agreement that: (a) is concluded by two or more parties; (b) is concluded or documented in writing or any other means of communication which renders information accessible for subsequent reference; and (c) designates the courts of one contracting state, or one or more specific courts of a contracting state, to the exclusion of the jurisdiction of any other courts: *Hague Convention* arts 3(a)–(c). A choice of court agreement which designates the courts of one contracting state or one or more specific courts of one contracting state shall be deemed to be exclusive unless the parties have expressly provided otherwise: art 3(b).

⁸⁶ Under the *Hague Convention*, for the purposes of the obligations of a contracting state in relation to jurisdictional matters, ‘a case is international unless the parties are resident in the same contracting state, and the relationship of the parties and all other elements relevant to the dispute are connected only with that state’: *ibid* art 1(2). For the purposes of the recognition and enforcement of a judgment given by the court of a contracting state, ‘a case is international where recognition or enforcement of a foreign judgment is sought’: art 1(3).

⁸⁷ Hague Conference on Private International Law, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements* <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>>, archived at <<https://perma.cc/L65L-JBRN>>.

⁸⁸ *Hague Convention* art 8. There are a few elements of the *Hague Convention* that are important to note in terms of enforcement of judgments. First, the *Hague Convention* obligations only apply where the jurisdiction agreement was concluded after the *Hague Convention* came into force in the state in which the chosen court is located: art 16(1). The clause must give exclusive jurisdiction to a court or courts in only one contracting state: art 3(a). It was intended that asymmetric clauses would not fall within the scope of the *Hague Convention* — but such agreements may be subject to the recognition and enforcement rules if the states in question have made declarations under art 22 (Reciprocal declarations on non-exclusive choice of court agreements): Trevor Hartley and Masato Dogauchi, ‘*Convention of 30 June 2005 on Choice of Court Agreements — Explanatory Report*’ (Paper presented at the Hague Conference on Private International Law, The Hague, 8 November 2013) [105]–[106]. Secondly, enforcement proceedings only fall within the scope of the *Convention* if those proceedings commenced after the *Hague Convention* came into force in the state in which the proceedings occur: art 16(2). While there are several grounds on which a court may refuse to enforce judgments made in another contracting state, the enforcing court cannot review the merits of the decision: art 8(2).

⁸⁹ *Rules of Court* O 110 r 13A(2).

⁹⁰ *Hague Convention* art 8(5).

SICC judgments can also be enforced by registration in countries or territories scheduled under the *Reciprocal Enforcement of Commonwealth Judgments Act* (Singapore)⁹¹ or the *Reciprocal Enforcement of Foreign Judgments Act* (Singapore).⁹² Once registered, an SICC judgment can be enforced directly by the foreign court as if it were its own judgment. There are several key jurisdictions where Singapore judgments can only be enforced to the extent permitted by the common law (an SICC money judgment could be used as a basis for a common law action in debt) or other relevant domestic laws.⁹³

Of course, the issue of enforcement will be irrelevant if there is voluntary compliance by the parties with a judgment of the SICC. In this regard, the SICC has noted that as the SICC's jurisdiction is primarily consensual, 'parties who have voluntarily chosen to have their disputes adjudicated by the SICC are not expected to need to resort to enforcement measures'.⁹⁴

G *Standing of Foreign Lawyers*

The general principle is that foreign lawyers do not have a right of audience in the courts of other jurisdictions.⁹⁵ In Singapore, foreign lawyers who are Queen's Counsel or who hold an appointment of equivalent distinction may be admitted to practise in the Supreme Court of Singapore on an ad hoc basis for a specific case.⁹⁶ However, the court must be satisfied that the foreign lawyer has special qualifications or experience relevant to the case,⁹⁷ and that the services of

⁹¹ The *Reciprocal Enforcement of Commonwealth Judgments Act* (Singapore, cap 264, 1985 rev ed) covers Australia (federal jurisdiction of Australia, Australian Capital Territory, New South Wales, Norfolk Island, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia), Brunei Darussalam, India (except the State of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, UK and Windward Islands: Singapore International Commercial Court, *Note on Enforcement of SICC Judgments*, (5 January 2015) [3] <http://www.sicc.gov.sg/documents/docs/SICC_Enforcement_Guide.pdf>, archived at <<https://perma.cc/56VB-YESB>>.

⁹² The *Reciprocal Enforcement of Foreign Judgments Act* covers Hong Kong: *ibid*.

⁹³ *Ibid* [5]–[6]; Hwang CJ, above n 17, 198–9.

⁹⁴ Singapore International Commercial Court, above n 91, [1]. See also Reyes, above n 52, 341–2. Justice Reyes comments that 'compliance with SICC judgments should be the norm with a problem of enforcement only arising in (say) some 10% of cases': at 342. For a discussion on the enforcement problems in relation to parties joined to SICC proceedings that have no connection to Singapore, see above n 52.

⁹⁵ See, eg, Teh Hwee Hwee and Justin Yeo, 'The Singapore International Commercial Court in Action: Illustrations from the First Case' (2016) 28 *Singapore Academy of Law Journal* 692, 708. For example, in England and Wales (including in the London Commercial Court), foreign lawyers generally have no right of audience; practitioners must be certified by a relevant regulatory body in order to appear before and address the Court: *Legal Services Act 2007* (UK) ss 12, 13, sch 5 (authorised persons). In certain circumstances, a European lawyer (an 'ECC lawyer') may represent a party in court proceedings so long as the lawyer acts in conjunction with an advocate, barrister or solicitor who is entitled to practise before the court: *Legal Services Act 2007* (UK) sch 3 [7]; *European Communities (Services of Lawyers) Order 1978* (SI 1978/1910) s 5.

⁹⁶ *Legal Profession Act* (Singapore, cap 161, 2009 rev ed) s 15(1) ('*Legal Profession Act*'); *Re Beloff Michael Jacob QC* [2014] 3 SLR 424, 434 [17].

⁹⁷ *Ibid* s 15(1)(c).

a foreign senior counsel are a ‘necessity’.⁹⁸ By contrast, it is much easier for foreign lawyers to represent parties in the SICC.⁹⁹ The *Supreme Court of Judicature Act* provides that a foreign lawyer who is registered in accordance with pt IVB of the *Legal Profession Act* may represent a party to SICC proceedings (and in appeals from such proceedings) in certain circumstances.¹⁰⁰ Under s 36P of the *Legal Profession Act*, a foreign lawyer may be granted full or restricted registration.¹⁰¹ Foreign lawyers must satisfy various requirements in order to be granted registration, including being sufficiently proficient in the English language and agreeing to abide by a code of ethics.¹⁰² A lawyer must also have at least five years’ experience in advocacy in order to be granted full registration.¹⁰³

A foreign lawyer who obtains full registration may represent a party in an ‘offshore case’,¹⁰⁴ which is an action that ‘has no substantial connection with Singapore, but does not include an action in rem ... under the *High Court*

⁹⁸ *Legal Profession (Ad Hoc Admissions) Notification 2012* (Singapore, cap 161, 132/2012) [3(b)]. In *Re Beloff Michael Jacob QC* [2014] 3 SLR 424, 444–5 [51]–[54], the Singapore Court of Appeal set out the two stages of the test for ad hoc admission. First, the court must be satisfied of the three mandatory requirements in s 15(1) of the *Legal Profession Act*. If those requirements are satisfied, the court then decides whether to exercise its discretion to admit the applicant, having regard to the matters specified in [3] of the *Legal Profession (Ad Hoc Admissions) Notification 2012* (S 132/2012). As Chong J highlighted in *Re Harish Salve* [2017] SGHC 28 (17 February 2017) [34], ‘[t]he overarching principle guiding the exercise of the court’s discretion is that foreign senior counsel should only be admitted on the basis of “need”.’ Following *Re Landau, Toby Thomas QC* [2016] SGHC 258 (28 November 2016), in which Chong J ([78]) concluded that the issues were ‘not sufficiently novel or complex beyond the competence of local counsel’ to justify the admission of the applicant, Morgan, Lewis & Bockius LLC commented that: ‘Parties who wish to engage foreign counsel for Singapore court proceedings may want to consider including a clause in their contract specifying the Singapore International Commercial Court (SICC) as the forum for resolving disputes’: Timothy Cook and Daniel Chia, ‘Admission of QC to Singapore Courts Permitted Only When Necessary’ (30 November 2016) Lewis & Bockius LLC <<https://www.morganlewis.com/pubs/admission-of-qc-to-singapore-courts-permitted-only-when-necessary>>, archived at <<https://perma.cc/6NGD-BZRQ>>.

⁹⁹ *Supreme Court of Judicature Act* s 18M; *Legal Profession Act* pt IVB.

¹⁰⁰ *Supreme Court of Judicature Act* s 18M.

¹⁰¹ Part 2 of the *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) sets out the requirements for registration under s 36P of the *Legal Profession Act*. This registration (and any renewal) is valid for one year: *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore) r 10.

¹⁰² *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) rr 4–6. The Code of Ethics is set out in sch 1.

¹⁰³ *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) r 4(1)(b).

¹⁰⁴ *Legal Profession Act* s 36P(1); *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) r 3(2)(b).

(*Admiralty Jurisdiction*) Act'.¹⁰⁵ This avoids the need for ad hoc admission in the circumstances outlined above. On the other hand, a foreign lawyer that has been granted restricted registration may only appear in proceedings where the SICC (or the Court of Appeal, in an appeal from the SICC) has made an order permitting the foreign lawyer to make submissions on a question of foreign law.¹⁰⁶ It has been said that the SICC's regime of rights of audience is 'a balancing act between reserving litigation work in Singapore to Singapore-qualified lawyers, and opening the system enough to establish an acceptable alternative to international arbitration' as foreign lawyers do not require special admission in order to participate in Singapore arbitration proceedings.¹⁰⁷

H Determination of Foreign Law

Under the common law, foreign law is generally required to be pleaded as an issue of fact and proved by expert evidence.¹⁰⁸ The court will hear expert evidence as to how the law should be interpreted and implemented, and previous decisions as to the content of foreign law are not admissible for the purpose of proving foreign law.¹⁰⁹ In Singapore, foreign law must be proved in one of two ways: '(a) by directly adducing raw sources of foreign law as evidence; or (b) by

¹⁰⁵ *Rules of Court* O 110 r 1(1) (definition of 'offshore case'). Allowing parties to be represented by foreign lawyers in 'offshore cases' means that clients can be represented by counsel with whom they are already familiar: Johannes Landbrecht, 'The Singapore International Commercial Court (SICC) — An Alternative to International Arbitration?' (2016) 34 *ASA Bulletin* 112, 123. Landbrecht has noted that the representation of lawyers from non common law jurisdictions in the 'SICC bar' is very limited: 123 n 72. In March 2017, the SICC website listed 77 foreign lawyers as having been granted registration. Most of these lawyers were from England and Wales (33), Australia (13) and Hong Kong (7), with some from the USA (6), Japan (5), India (4) and Malaysia (2), and one from each of the jurisdictions of Indonesia, Philippines, New Zealand, Switzerland, South Korea, Canada and the DIFC: Singapore International Commercial Court, *Register of Foreign Lawyers* (9 March 2017) Singapore International Commercial Court <<http://www.sicc.gov.sg/ForeignLawyer.aspx?id=102>>.

¹⁰⁶ *Legal Profession Act* s 36P(2); *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) r 3(2)(e). A foreign lawyer who has been granted full registration may also appear in certain proceedings, in accordance with an order under O 110 r 25, solely for the purposes of making submissions on a question of foreign law: *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 851/2014) rr 2 (definition of 'pertinent proceedings'), 4(1)(e).

¹⁰⁷ Landbrecht, above n 105, 123.

¹⁰⁸ See, eg, Yip, 'Singapore International Commercial Court', above n 38, 159; David Foxton, 'Foreign Law in Domestic Courts' (2017) 29 *Singapore Academy of Law Journal* 194, 194, 196; James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400, 427. The court may, with the agreement of the parties, decide issues of foreign law without proof or on the basis of expert reports without cross examination — however, the courts have generally been reluctant to do so other than for issues of interpretation of foreign statutes: David Foxton, 'Foreign Law in Domestic Courts' (2017) 29 *Singapore Academy of Law Journal* 194, 204. See, eg, *Deutsche Bank AG v Sebastian Holdings Inc* [2013] EWHC (Comm) 3463, where various approaches to the judicial determination of issues of foreign law were taken.

¹⁰⁹ Foxton, above n 108, 203–4. In some jurisdictions, this rule is modified by legislation, such as s 4 of the *Civil Evidence Act 1972* (UK), which applies to proceedings in the courts of England and Wales. Under this provision, determinations of foreign law by the Courts of England and Wales, the Supreme Court or the Privy Council are admissible in evidence for the purpose of proving foreign law. The foreign law is taken to be in accordance with the relevant finding or decision unless the contrary is proved, except where there are two conflicting decisions adduced as evidence on the same question of foreign law.

adducing the opinion of an expert in foreign law'.¹¹⁰ However, the Singapore Court of Appeal has held that even if raw sources of foreign law are admissible, 'it does not mean that the courts are obliged to accord these sources any evidentiary weight ... [i]t is preferable that solicitors provide expert opinions on foreign law whenever possible'.¹¹¹ Generally, the written opinion of an expert must be proved by the direct oral evidence of the expert.¹¹²

In SICC proceedings, a party may apply for an order, under O 110 r 25, that any question of foreign law be determined on the basis of submissions (which may be oral or written or both) instead of proof.¹¹³ Before making such an order, the SICC must be satisfied that 'all parties are or will be represented by counsel who are competent to submit on the relevant questions of foreign law'.¹¹⁴ In assessing the counsel's competence, the SICC may consider the experience of counsel in practising the foreign law or subject matter in question, the qualifications of counsel in relation to the foreign law or the subject matter, and their proficiency in the language of the foreign law.¹¹⁵ When determining a question of foreign law on the basis of submissions, the SICC (or the Court of Appeal in an appeal from the SICC) may also have regard to the legislation and decisions of the courts of the foreign country, any judgment of the Singapore Court of Appeal, the Singapore High Court or the SICC relating to similar questions of foreign law, and any other authoritative or persuasive material.¹¹⁶ The Court of Appeal, in an appeal from a judgment or an order of the SICC, may also order that any question of foreign law be determined on the basis of

¹¹⁰ *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, 516 [54]. The Court of Appeal noted that in English courts, raw sources of foreign law can generally be adduced only as part of an expert's evidence and, in this regard, Singapore (like Malaysia and India) differs from the traditional common law position: 516 [55]. In Singapore, foreign court reports and legislation published under the authority of the foreign government may be tendered into court (together with a translation) as evidence of the foreign law: *Evidence Act* (Singapore, cap 97, 1997 rev ed) s 40 (Relevancy of statements as to any law contained in law books); see also *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491, 517–18 [55]–[60].

¹¹¹ *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491, 518 [60].

¹¹² *Evidence Act* (Singapore, cap 97, 1997 rev ed) ss 61–2; *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, 519 [62]; *Ong Jane Rebecca v Lim Lie Hoa* [2003] SGHC 126 (13 June 2003) [36]. Section 62(2) of the *Evidence Act* (Singapore, cap 97, 1997 rev ed) provides an exception to this rule — where the author of a textbook (or any other 'treatise commonly offered for sale') is 'dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable'.

¹¹³ *Supreme Court of Judicature Act* s 18L; *Rules of Court* O 110 r 25(1). The order will specify one or more persons who may make submissions on the relevant questions of foreign law on behalf on each party: *Rules of Court* O 110 r 25(3).

¹¹⁴ *Rules of Court* O 110 r 25(2).

¹¹⁵ SICC, *Singapore International Commercial Court Practice Directions 2017* (Singapore) [110(4)]. The SICC may also take into account 'its own competence in the foreign law or subject matter in question and proficiency in the language in which the foreign law in question is in': [110(5)].

¹¹⁶ *Rules of Court* O 110 rr 26(4), 29(1).

submissions. Unlike in the SICC, the Court of Appeal may make such an order on its own motion (not only on the application of a party).¹¹⁷

I *Other Procedural Matters*

There are some other key differences between the SICC procedural rules and those that apply in other High Court cases: court proceedings may be confidential (particularly if the case is an ‘offshore case’); parties may apply for an order to replace Singapore evidential rules with other rules of evidence; there is a simplified discovery regime; and parties to SICC proceedings may contract out of or limit their rights to appeal. This procedural flexibility provides parties with greater autonomy and allows them to shape the court rules to the needs of their particular case and to reflect their own legal traditions.¹¹⁸

Transnational businesses often choose arbitration over court proceedings due to confidentiality concerns.¹¹⁹ In many jurisdictions, confidentiality of court proceedings is considered to be justified only in exceptional circumstances.¹²⁰ In Singapore, Supreme Court proceedings will generally be ‘open and public’;¹²¹ however, the court may ‘hear any matter or proceedings or any part thereof in camera if the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so’.¹²² To address confidentiality concerns, the *Rules of Court* give the SICC an express power to make confidentiality orders on the application of a party.¹²³ These confidentiality orders include (a) that the case be heard in camera; and (b) that no person must reveal or publish any information or document relating to the case.¹²⁴ In deciding whether to make these kinds of orders, the SICC may have regard to whether the case is an ‘offshore case’¹²⁵ as well as any agreement between the parties on the making of such an order.¹²⁶ That is, it appears that ‘a deviation from the principle of open justice can be justified more readily in

¹¹⁷ The Court of Appeal may determine any question of foreign law on the basis of submissions if the question of foreign law has been ordered by: (a) the SICC to be determined on the basis of submissions, or (b) the Court of Appeal, on its own motion or on an application by a party, to be determined on the basis of submissions: *ibid* O 110 r 29(1). If the Court of Appeal makes such an order, the same rules regarding the competency of counsel apply: O 110 r 29(3). In an appeal from the SICC, the Court of Appeal may also remit any question of foreign law to the SICC for that Court’s decision: O 110 r 29(2).

¹¹⁸ Indraneel Rajah, ‘Keynote Address’ (Paper presented at Litigation Conference 2015, Singapore, 16 March 2015) [37].

¹¹⁹ Landbrecht, above n 105, 121.

¹²⁰ *Ibid*.

¹²¹ *Supreme Court of Judicature Act* s 8(1).

¹²² *Ibid* s 8(2). The court may also make orders regarding the protection of the identity of a witness: ss 8(2A)–(3).

¹²³ *Rules of Court* O 110 r 30(1).

¹²⁴ *Ibid*.

¹²⁵ The treatment of an action as an ‘offshore case’ will be discussed in Part IV(E).

¹²⁶ *Rules of Court* O 110 r 30(2).

matters with no connection to Singapore¹²⁷ or where all the parties consent to a confidentiality order.¹²⁸

However, despite any confidentiality order, the SICC must direct that a judgment be published in law reports if it is ‘of major legal interest’.¹²⁹ Publication is necessary for the SICC’s decisions to develop Singapore’s commercial law jurisprudence and to contribute towards the development of a body of international commercial law that could provide a source of *lex mercatoria*, as envisaged by Chief Justice Menon.¹³⁰ Nevertheless, a party may inform the SICC of any matter that the party wishes to remain confidential (including the fact that the party was involved in the proceedings) and the SICC may direct that those matters be concealed or, if it is not possible or practicable for the judgment of the SICC to be published without revealing those matters, the SICC may give directions for the judgment not to be published for up to 10 years after the date of the judgment.¹³¹

Three further important procedural elements of the SICC are that the SICC is not bound to apply Singapore rules of evidence,¹³² the traditional rules of discovery generally do not apply in SICC proceedings,¹³³ and the parties in SICC cases may contract out of their right to appeal.¹³⁴ The *Rules of Court* allow the parties to choose the evidential rules applicable to their case where all parties agree on the Singapore rules of evidence that shall not apply, as well as any rules of evidence that shall apply instead.¹³⁵ The *Rules of Court* also set out a special,

¹²⁷ Landbrecht, above n 105, 121. Yip has argued that where a case has few or no connections with Singapore, or where the case is not governed by Singapore law, the public interest in maintaining open court proceedings and ensuring that the evidence and judgment are publicly available is less critical than in other cases: Yip, ‘Singapore International Commercial Court’, above n 38, 161.

¹²⁸ Indeed, in the SICC’s first case, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1, the parties by mutual consent applied for and obtained confidentiality orders before the commencement of trial proceedings. These included orders that certain financial documents and technical drawings be sealed and that, if necessary, any cross examination relating to the contents of those documents be heard in camera: Teh and Yeo, above n 95, 711–12.

¹²⁹ *Rules of Court* O 110 r 31(1).

¹³⁰ Teh and Yeo, above n 95, 710–13. See also Chief Justice Menon’s comments on international commercial law as a source of *lex mercatoria*, noted above n 20 and the accompanying text; on the application of transnational law in domestic courts, see also Markus Petsche, ‘The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts’ (2014) 10 *Journal of Private International Law* 489.

¹³¹ *Rules of Court* O 110 rr 31(2)–(3).

¹³² *Supreme Court of Judicature Act* s 18K.

¹³³ The rules on discovery and inspection of documents that normally apply in High Court proceedings (under O 24 of the *Rules of Court*) do not apply to SICC proceedings, unless the SICC orders otherwise, or the High Court orders otherwise when ordering the transfer of a case to the SICC: *Rules of Court* O 110 r 21.

¹³⁴ SICC, *Singapore International Commercial Court Practice Directions 2017* (Singapore) [139(3)].

¹³⁵ The Court may, on the application of a party, order that (a) any rule of evidence found in Singapore law shall not apply, and (b) such other rules of evidence (if any) shall apply instead: *Rules of Court* O 110 r 23(1). However, an application under r 23(1) can only be made if all parties agree on — (a) these rules of evidence that shall not apply, and (b) any rules of evidence that shall apply instead: O 110 r 23(2). Additionally, the Court may, ‘for the just, expeditious and economical disposal of the proceedings’ modify the parties’ agreement on the rules of evidence (but only with the parties’ consent) and may stipulate such further conditions that supplement (and are consistent with) the parties’ agreement as the Court sees fit: O 110 r 23(3).

simplified discovery regime applicable to SICC cases, which is limited to documents relied upon and requested.¹³⁶ This document production process is largely based on the International Bar Association's *IBA Rules on Taking of Evidence in International Arbitration 2010*.¹³⁷ It has been suggested that this makes the process more manageable and 'acceptable to the parties and lawyers from different legal traditions'; it also facilitates a 'quicker and more cost efficient resolution of disputes'.¹³⁸ Finally, as the SICC is a division of the Singapore High Court, SICC judgments and orders are enforceable as such, and parties have a right to appeal to the Court of Appeal against any judgment or order of the SICC.¹³⁹ However, the right of appeal may be excluded, limited or varied by a written agreement between the parties.¹⁴⁰

IV EXPERIENCE OF THE SICC

In this Part we consider what the recent SICC cases (and relevant Court of Appeal cases) reveal about the operation and impact of the SICC. The analysis covers the cases that the SICC has heard and how they have contributed to Singapore's jurisprudence; the way in which the SICC has assigned judges to particular cases; how the SICC has approached its discretionary case management powers (and how the existence of the SICC impacts the High Court's assumption of jurisdiction); and the way in which the SICC has applied its power under O 110 r 25 and interpreted the 'offshore case' requirements.

A Cases Heard by the SICC

As previously noted, as at the date of writing, all the cases that have been heard by the SICC so far have been transferred from the High Court.¹⁴¹ The High Court may order a transfer at any stage in the proceedings, so long as the

¹³⁶ The SICC discovery regime is set out in *Rules of Court* O 110 rr 14–20; it is limited to documents relied upon and requested. This means that, unlike under O 24 r 1 (which sets out the rules of general discovery), there is no need for a party to disclose the documents which could adversely affect their own case, adversely affect another party's case, or support another party's case. Under O 110 r 14(1) of the *Rules of Court*, each party must only provide to the SICC and to the other parties all documents available to it on which it relies, within the time and in the manner ordered by the Court. A party may also serve a request to produce on any person (whether or not such person is a party to the proceedings): O 110 r 15(1). For a further discussion on the SICC rules of discovery, see Teh and Yeo, above n 95, 700–2.

¹³⁷ Teh and Yeo, above n 95, 701.

¹³⁸ *Ibid.*

¹³⁹ *Supreme Court of Judicature Act* s 29A(1).

¹⁴⁰ SICC, *Singapore International Commercial Court Practice Directions 2017* (Singapore) [139(3)].

¹⁴¹ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1, 6 [6], 23 [81]; Teh and Yeo, above n 95, 698; *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] 4 SLR 75, 77 [1] ('*Teras Offshore 2016*'); *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2016] SGHC(I) 03 (30 June 2016) [159]; *CPIT Investments Limited v Qilin World Capital Ltd* [2017] 3 SLR 1, 3 [1]; Supreme Court of Singapore, 'Media Summary: *BNP Paribas Wealth Management v Jacob Agam and Another*' (28 October 2016) [2]; *Arris* [2017] 4 SLR 1, 4 [7]. For recent judgments, see Singapore International Commercial Court, *Recent Judgments*, Singapore International Court <<http://www.sicc.gov.sg/HearingsJudgments.aspx?id=72>>.

transfer requirements are satisfied.¹⁴² Only one case appears to have been transferred at the initiative of the parties, rather than on the High Court's own motion.¹⁴³ No judgments have related to proceedings in which the SICC has obtained jurisdiction via a choice of court agreement; however, it may be another year or two before opt in cases come before the SICC.¹⁴⁴

Between May 2016 and May 2017, the SICC published 10 judgments that relate to six separate actions;¹⁴⁵ the Court of Appeal also dismissed an appeal from an SICC decision.¹⁴⁶ The SICC's first case, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*,¹⁴⁷ involved a S\$1.1 billion (US\$800 million) cross border dispute arising from a joint venture to apply a patented technology to produce and sell upgraded coal from Indonesia.¹⁴⁸ Other cases that have involved substantial claims and counterclaims include the S\$57.8 million (US\$43 million) dispute in the 2017 *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* ('*Teras Offshore 2017*') case.¹⁴⁹ Many of the SICC decisions have concerned civil procedure matters, rather than substantive commercial law issues. However, some decisions have contributed to the development of Singapore's law on contractual liability.

¹⁴² In *Accent Delight International Ltd v Bouvier* [2016] 2 SLR 841, 869, the first and third defendant opposed the transfer of the suit to the SICC on the basis that it was premature, arguing that 'the possibility of transfer can only arise for consideration after arguments had been tendered and after [the High Court] had decided the Summonses against the defendants'. Lai SJ disagreed with the defendants' position and urged all parties to agree to a transfer of the proceedings to the SICC.

¹⁴³ On 15 April 2015, the *Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd* proceedings were consensually transferred from the High Court to the SICC: [2016] SGHC(I) 03 (30 June 2016) [159]. Only paras [163]–[229] and [367]–[545] are reported in the Singapore Law Reports. The full text of the judgment is only available in the unreported version.

¹⁴⁴ In 2015, Chief Justice of the Dubai International Financial Centre ('DIFC') Courts Michael Hwang noted that it would take at least a year or two before parties would start writing SICC jurisdiction clauses into their contracts, and then the SICC would have to wait for disputes under those agreements to arise a year or two after the date of entry into those agreements — 'hence we are looking at a timeline of perhaps three to four years after [a serious campaign of overseas] marketing begins (or even longer) before any new cases are filed': Hwang CJ, above n 18, 197. Despite the jurisdiction of the DIFC Court of First Instance being extended in 2011, it was not until February 2014 that the Court heard its first case in which the Court's jurisdiction was due to the contracting parties' election to opt in to the jurisdiction of the DIFC Courts: *SPX Middle East FZE (formerly Invensys Middle East FZE (APV Division)) v Judi for Food Industries* [2013] DIFC CFI 002 (25 March 2014).

¹⁴⁵ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1; *Teras Offshore 2016* [2016] 4 SLR 75; *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2017] 4 SLR 38; *Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2016] 5 SLR 1; [2016] SGHC(I) 03 (30 June 2016); *Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2017] 3 SLR 47; *Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2017] 4 SLR 26; *CPIT Investments Limited v Qilin World Capital Ltd* [2017] 3 SLR 1; *BNP Paribas 2016* [2017] 3 SLR 27; *BNP Paribas Wealth Management v Jacob Agam* [2017] 4 SLR 14; *Arris* [2017] 4 SLR 1.

¹⁴⁶ *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1.

¹⁴⁷ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1.

¹⁴⁸ KC Vijayan, '\$1.1b Dispute is First Case Heard: Successful Resolution of Spat between Aussie and Indonesian Firms Could Draw More Cases', *Strait Times* (online), 21 November 2015 <<http://www.straitstimes.com/singapore/11b-dispute-is-first-case-heard>>, archived at <<https://perma.cc/3BE5-PLS6>>.

¹⁴⁹ KC Vijayan, '\$58m Spat is "Offshore" Case, Rules Commercial Court Here', *Strait Times* (online), 5 July 2016 <<http://www.straitstimes.com/singapore/courts-crime/58m-spat-is-offshore-case-rules-commercial-court-here>>, archived at <<https://perma.cc/72TQ-H7EY>>.

The first *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd* decision (involving claims and counterclaims regarding a joint venture) contributes to the legal jurisprudence on the interpretation of non-recourse loan agreements, which are not yet common in Singapore.¹⁵⁰ The *Teras Offshore 2017* case involved a consideration of how a ‘pay when paid’ clause affects contractual obligations and which party bears the burden of proof in relation to such a clause.¹⁵¹ Also, the 2017 *BNP Paribas Wealth Management v Jacob Agam* case (‘*BNP Paribas 2017*’) clarified that following a merger that is effective under its foreign law of incorporation, a foreign incorporated bank does not need to apply for the approval of the Singapore courts before it can validly transfer a part of its business under the *Banking Act* (Singapore).¹⁵² Additionally, it has been suggested that the SICC’s detailed consideration of the pricing mechanisms in coal supply agreements and a related side letter in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*¹⁵³ may prove useful in similar commercial settings.¹⁵⁴

The following Table 1 outlines the nationality of the parties, the nature of the disputes and the outcomes of SICC cases.

Table 1: Nationality of the Parties, Nature of the Disputes and Outcomes of SICC Cases

<i>BCBC Singapore Pte Ltd v PT Bayan Resources TBK</i>
<p>Plaintiffs: An Australian company and an associated Singaporean company. Defendants: An Indonesian company and an associated Singaporean company.</p> <p>The dispute concerned the contractual obligations and liabilities of the parties involved in a joint venture to upgrade and sell coal from certain mines in Indonesia.</p> <p>[2016] 4 SLR 1: The SICC determined the first tranche of issues in dispute, which</p>

¹⁵⁰ Rajah & Tann Asia, *SICC Releases First Full Judgment on Liability, Client Update: Singapore* (July 2016) <<http://eoasis.rajahtann.com/eoasis/lu/pdf/2016-07-SICC-Releases.pdf>>, archived at <<https://perma.cc/X3PE-NL5B>>.

¹⁵¹ *Teras Offshore 2017* [2017] 4 SLR 38, 60–65 [48]–[60]. In *Teras Offshore 2017*, the defendant had entered into a series of contracts with two companies (Bechtel International Inc and Bechtel Oil Gas and Chemicals, Inc) for the provision of services and the supply of equipment in relation to those projects, and had then subcontracted the work to the plaintiff on ‘back to back’ terms. This case was ‘somewhat unusual’ given that there was an ‘absence of any proper disclosure’ by the defendant in relation to their dealings with the Bechtel companies (with whom they had entered into the main contracts) and the fact that the defendant decided not to call any of their witnesses so there was ‘simply no evidence at all as to what payments were received’ by the defendant from the Bechtel companies or what steps were taken to obtain payment from those companies: 64 [58]. Eder IJ held that the burden of proof lies on the party seeking to rely on a ‘pay when paid’ clause to show that payment has not been received and, if necessary, to show that such non receipt is not due to any breach or fault on its part: 64–5 [59]. In this case, the defence based on the clause failed as the burden of proof was on the defendant and it could not satisfy that burden.

¹⁵² *BNP Paribas 2017* [2017] 4 SLR 14; Rajah & Tann Asia, *SICC Upholds Legality of Merger Effected by Way of Universal Succession under French Law Client Update: Singapore* (February 2017) <http://eoasis.rajahtann.com/eoasis/lu/pdf/2017-02-SICC_Upholds_Legality.pdf>, archived at <<https://perma.cc/52PK-68TR>>.

¹⁵³ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1.

¹⁵⁴ Corrs Chambers Westgarth, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] *SGHC(I) 01* (21 June 2016) <<http://www.corrs.com.au/publications/corrs-in-brief/bcbc-singapore-pte-ltd-v-pt-bayan-resources-tbk-2016-sghci-01/>>, archived at <<https://perma.cc/LVP4-4TZZ>>.

concerned the contractual obligations of the parties under various agreements, including the funding of the joint venture, the supply of coal and counterclaim issues on implied terms of the joint venture agreement.

Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC

Plaintiff: Singaporean company. **Defendant:** US company.

The dispute involved various claims and counterclaims in relation to payment for work and services provided by the plaintiff for the construction of three liquefied natural gas projects on Curtis Island, Queensland, Australia. The defendant had entered into a series of contracts with two companies and had then subcontracted the work to the plaintiff on 'back-to-back' terms.

[2016] 4 SLR 75: Civil procedure — The SICC made a determination under O 110 r 36 of the *Rules of Court* that the action had 'no substantial connection with Singapore' and was therefore an 'offshore case'. The SICC also dismissed the defendant's application for summary judgment in relation to one of the defendant's counterclaims regarding the payment of freight tax.

[2017] 4 SLR 38: The SICC held that the plaintiff's claims succeeded in full.

Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd

Plaintiffs: A British Virgin Islands company and a Hong Kong Special Administrative Region citizen. **Defendants:** A British Virgin Islands company and a Chinese resident.

The dispute concerned whether the defendants had disposed of a large number of shares that were pledged as security for loans obtained for a joint venture between two individuals (and their respective companies), in breach of contract and in breach of fiduciary obligations.

[2016] 5 SLR 1;¹⁵⁵ **[2016] SGHC(I) 03 (30 June 2016):** The SICC held that the defendants sold the shares in breach of the relevant agreements and in breach of the defendants' fiduciary duties. The plaintiffs were entitled to damages for these breaches and for the conversion of the shares.

[2017] 3 SLR 47: Civil procedure — Final orders on damages and costs.

[2017] 4 SLR 26: Civil procedure — The SICC denied the defendants' application for a stay of execution of parts of the judgments dated 30 June 2016 and 7 December 2016 pending the determination of the defendants' appeal from those judgments: the defendants failed to establish that their appeal would be rendered nugatory if the stay was not granted.

CPIT Investments Limited v Qilin World Capital Ltd

Plaintiff: British Virgin Islands company. **Defendants:** A Hong Kong company and a British Virgin Islands company.

The dispute concerned whether the relevant defendant company had unlawfully transferred, sold or disposed of shares that the plaintiff had provided as collateral for a loan from that company of HK\$31,250,000.

[2017] 3 SLR 1: Civil procedure — The SICC dismissed two applications made by the defendants, one for the variation of a consent order and another for the variation of an injunction.

¹⁵⁵ See above n 143.

BNP Paribas Wealth Management v Jacob Agam

Plaintiff: French multinational bank. **Defendants:** Two Israeli nationals.

The plaintiff commenced an action against the defendants under two joint personal guarantees for outstanding loans owed by two of the defendants' companies.

***BNP Paribas Wealth Management v Jacob Agam* [2017] 3 SLR 27:** Civil procedure — The SICC refused the defendants' application for a limited stay of the Singapore proceedings pending the conclusion of related proceedings in France.

***BNP Paribas Wealth Management v Jacob Agam* [2017] 2 SLR 14:** Civil procedure — The SICC allowed BNP Paribas SA to be substituted for BNP Paribas Wealth Management as plaintiff, due to a merger whereby it succeeded to the assets and liabilities of BNP Paribas Wealth Management.

***Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1:** The Court of Appeal dismissed the defendants' appeal against the SICC orders for the substitution of BNP Paribas SA as plaintiff.

Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd

Plaintiffs: Three companies that were affiliates of a US company, Arris Group Inc. **Defendant:** A Malaysian company.

The dispute was about whether the plaintiffs were the parties that were entitled to be paid the sums owed by the defendant for equipment and services provided pursuant to agreements with a US company, General Instrument Corporation, and an agreement with a Malaysian subsidiary of that company.

[2017] 4 SLR 1: The SICC refused the defendant's application for a stay of proceedings pending the determination of Malaysian insolvency proceedings; the SICC granted judgment to the second and third plaintiffs and dismissed the first plaintiff's claims; the SICC also ordered a stay of execution pending the outcome of the defendant's application under the *Companies Act 1965* (Malaysia) to effect a scheme of arrangement between the defendant and its creditors.

The above outline indicates that to date the SICC has heard cases involving parties from a broad range of jurisdictions and disputes that are primarily contractual or financial in nature. When read with the information in Table 2 below, it appears that two thirds of the cases have had a Singapore connection in terms of the parties involved or the governing law.

B *Assignment of Judges to SICC Cases*

In the SICC, every proceeding will be heard by a single judge or three judges.¹⁵⁶ Although SICC proceedings will generally be presided over by a single judge,¹⁵⁷ the Chief Justice may direct that certain proceedings be heard before three judges; additionally, proceedings must be heard by three judges if the parties so agree (unless the Chief Justice directs otherwise).¹⁵⁸ Similarly, the

¹⁵⁶ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18G.

¹⁵⁷ SICC, *Singapore International Commercial Court Practice Directions 2017* (Singapore) [23(1)].

¹⁵⁸ *Rules of Court* O 110 r 53(1). Where three judges are appointed to hear SICC proceedings, any one of those three judges may hear any interlocutory application or case management conference in those proceedings: O 110 r 53(1A).

Chief Justice may direct, or the parties may agree, that an appeal from the SICC to the Court of Appeal be heard by five judges rather than three.¹⁵⁹ It is unusual for Singapore Court of Appeal cases to be heard by five judges; however, in recent years this practice has become more common and may become more frequent due to the SICC cases.¹⁶⁰ Any of the local SICC judges or International Judges may be chosen by the Chief Justice to sit in the Court of Appeal in an appeal from a judgment or order of the SICC,¹⁶¹ unless the appeal is from a judge's own judgment or order.¹⁶² The ability of the Chief Justice to direct that an SICC case be heard by three judges rather than one, or that an appeal be heard by five judges rather than three, means that the composition of the court can be adjusted according to the complexity of a SICC case.

In the SICC cases, the governing law of most of the relevant contracts has been Singapore. However, two actions have come before the SICC that have involved the determination (or potential determination) of foreign law: *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* and *BNP Paribas Wealth Management v Jacob Agam*. Each of these actions is currently being heard by three judges — one local Supreme Court judge and two International Judges. Additionally, the *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd* proceedings were also heard by three judges (likewise, one local Supreme Court judge and two International Judges).¹⁶³ The SICC actions that have not involved the determination (or potential determination) of foreign law or

¹⁵⁹ Ibid O 110 r 53(2). Of course, as in non SICC matters, there are certain situations in which the Court of Appeal is 'duly constituted' if it consists of two Judges of Appeal: for example, for the purpose of hearing and determining an application for leave to appeal to the Court of Appeal, an application to extend the time for filing and serving a notice of appeal, or an appeal against an interlocutory judgment: *Supreme Court of Judicature Act* s 30(2).

¹⁶⁰ The *Supreme Court of Judicature Act* s 30(1) provides that the civil and criminal jurisdiction of the Court of Appeal shall be exercised by three or any greater uneven number of Judges of Appeal. In January 2015, Chief Justice Sundaresh Menon announced that '5- Judge panels have been commenced to hear selected cases of jurisprudential significance' at the Court of Appeal: Chief Justice Sundaresh Menon, 'Response by Chief Justice Sundaresh Menon' (Speech delivered at the Singapore Family Justice Courts, Opening of the Legal Year 2015, 5 January 2015) [42]. For example, a five judge bench was appointed to hear *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312, an appeal that gave the Court of Appeal the chance to revisit the question of the arbitrability of minority oppression claims. A five judge bench was also appointed to hear *TMO v TMP* [2017] 1 SLR 585, an appeal that considered whether parties to a Muslim marriage whose marriage had been dissolved by an order of a foreign court could seek financial relief from the Singapore Court following the divorce.

¹⁶¹ Under the *Supreme Court of Judicature Act*, a Judge of the High Court or a Senior Judge of the Supreme Court may, if the Chief Justice so requires, sit in the Court of Appeal: *Supreme Court of Judicature Act* s 29(3). Also, International Judges of the Supreme Court may sit in the Court of Appeal in an appeal from any judgment or order of the SICC: s 29(4).

¹⁶² Ibid s 30(3)(a).

¹⁶³ In *Arris*, three SICC judges were allocated to the case before the related Malaysian proceedings were raised. The plaintiffs claimed that they were owed sums by the defendant for equipment and services provided pursuant to several agreements. The defendant argued that the plaintiffs were not the parties that were entitled to be paid those amounts: *Arris* [2017] 4 SLR 1, 4 [10]. It was not until several months after the proceedings had been transferred to the SICC that the defendant attempted to file an Originating Summons seeking to invoke the SICC's discretion to recognise a Restraining Order, made under s 176(10) of the *Companies Act 1965* (Malaysia), pending a meeting of creditors to consider a proposed scheme of arrangement: 4 [7], 6 [23], 7–8 [26]–[30]. The Singapore Chief Justice may have allocated three judges (rather than one) to hear this case due to the complexity of the case or the parties may have requested that three judges hear the case.

involved related foreign proceedings have each been allocated one judge — an International Judge.¹⁶⁴ This can be seen in Table 2.

The Chief Justice may select a judge to hear a particular case due to their experience in foreign law.¹⁶⁵ For example, the SICC's French International Judge, Justice Hascher, has been appointed as one of the three SICC judges to hear the *BNP Paribas Wealth Management v Jacob Agam* proceedings. Justice Hascher appears to have been selected as a member of this court due to the French connections with this action — before BNP Paribas Wealth Management commenced its action against the defendants in Singapore, it had already applied for conservatory orders in France over the defendants' shares in the relevant companies.¹⁶⁶

In May 2017, the Court of Appeal published its first judgment in an appeal from the SICC. The appeal was in relation to the SICC allowing BNP Paribas SA to be substituted as plaintiff in place of BNP Paribas Wealth Management in the *BNP Paribas Wealth Management v Jacob Agam* action. The appellants argued that the SICC had erred in its interpretation of the *Banking Act* (Singapore).¹⁶⁷ The appeal was heard by three SICC judges — Chief Justice Sundaresh Menon, Justice Judith Prakash (Judge of Appeal) and Justice Dyson Heydon (International Judge, Australia).¹⁶⁸ Appeals on more complex, substantive issues of commercial law may be more likely to be heard by five judges.

The following Table 2 outlines the selection of judges in SICC cases and the relevance of foreign law and foreign proceedings.

Table 2: Selection of Judges in SICC Cases and the Relevance of Foreign Law and Foreign Proceedings

Action	Judges	Governing law	Pleading of foreign law? Related foreign proceedings?	
<i>BCBC Singapore Pte Ltd v PT Bayan Resources TBK</i>	Justice Loh (High Court Judge, Singapore); Justice Ramsey (International Judge, UK); Justice Reyes (International Judge, Hong Kong).	Various contracts governed by Singapore law; two agreements governed by Indonesian law.	✓	Indonesian law was pleaded.
			✗	

¹⁶⁴ See, eg, *Teras Offshore 2016* [2016] 4 SLR 75; *Telemidia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2016] 5 SLR 1 and *CPIT Investments Limited v Qilin World Capital Ltd* [2017] 3 SLR 1.

¹⁶⁵ Yip, above n 38, 160; *Singapore Constitution* s 95(9)(b).

¹⁶⁶ *BNP Paribas 2016* [2017] 3 SLR 27, 34–5 [17]–[18].

¹⁶⁷ *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1, 3 [2].

¹⁶⁸ *Ibid* 1.

<i>Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC</i>	Justice Eder (International Judge, UK).	Singapore law.	✗	
			✗	
<i>Telemedia Pacific Group Limited v Yuanta Asset Management International Limited</i>	Justice Bergin (International Judge, Australia).	The laws of the Bahamas — but the parties proceeded on the basis that there was no relevant difference with the laws of Singapore.	✗	
			✗	
<i>CPIT Investments Limited v Qilin World Capital Ltd</i>	Justice Ramsey (International Judge, UK).	Unclear from the judgment.	✗	
			✗	
<i>BNP Paribas Wealth Management v Jacob Agam</i>	Justice Chong (High Court Judge, Singapore); Justice Giles (International Judge, Australia); Justice Hascher (International Judge, France).	The personal guarantees were expressly governed by Singapore law; however, the defendants contended that the choice of law agreement was not <i>bona fide</i> .	✓	French law was pleaded.
			✓	Related French proceedings.
<i>Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd</i>	Justice Loh (High Court Judge, Singapore); Justice Taniguchi (International Judge, Japan); Justice Thorley (International Judge, UK).	Singapore law.	✗	
			✓	Related Malaysian insolvency proceedings.

As reflected in the above table, International Judges have been assigned to all the cases heard by the SICC to date. Further, International Judges have been assigned to the three cases heard by a single judge and two out of three judges have been International Judges in the cases heard by three judges.

C Exercise of Jurisdiction

In the *BNP Paribas 2016* case, the defendants made an application for a temporary stay of the SICC action pending the determination of related

proceedings in France.¹⁶⁹ The SICC action was commenced by the plaintiff, a French multinational bank, under two joint personal guarantees for outstanding loans owed by two of the defendants' companies. The SICC held that the French foreclosure proceedings by the plaintiff in France — to enforce the mortgages over two properties which belonged to two companies of the defendants — were 'not likely to have a material impact' on the SICC action.¹⁷⁰ By contrast, there was a clear overlap between the SICC action and the defendants' French counteraction (in which the defendants were seeking a declaration that the relevant facility agreements and personal guarantees were invalid and 'non-existent' under French law).¹⁷¹

Indeed, the French counter action substantially mirrored the SICC action; there was therefore a multiplicity of proceedings with the risk of conflicting judgments if both the SICC action and the French counter action were to proceed concurrently.¹⁷² This multiplicity of proceedings triggered the SICC's discretion to exercise its case management powers. However, the SICC noted that 'the risk of conflicting judgments is not by itself a sufficient reason for the grant of a limited stay of proceedings' and that in exercising its discretion, the SICC needs to consider 'all the circumstances of the case, and keep in mind the need to ensure the efficient and fair resolution of the dispute as a whole'.¹⁷³ The SICC considered various factors, including the governing law of the dispute, and the bona fides of both the stay application and the defendants' counter action.¹⁷⁴

In this case, the personal guarantees expressly provided that the governing law was Singapore law,¹⁷⁵ but the defendants argued that the choice of law was not bona fide and, accordingly, the French and Singapore courts needed to apply French law.¹⁷⁶ The SICC determined that the choice of Singapore law was prima facie valid.¹⁷⁷ However, the SICC observed that even if it were to decide at the trial of this action that French law applies, this factor could not be determinative in the SICC's exercise of its discretion to grant a limited stay of proceedings because 'this court, which is an international commercial court with an International Judge from France, can apply the laws of France to decide the dispute'.¹⁷⁸ That is, the expertise of the International Judges, and the SICC's

¹⁶⁹ *BNP Paribas 2016* [2017] 3 SLR 27. There were four sets of related proceedings in France; however, the defendants clarified that only two sets of proceedings were relevant for the purpose of their stay application: at 36 [24].

¹⁷⁰ *Ibid* 43 [44].

¹⁷¹ *Ibid* 43 [45].

¹⁷² *Ibid*.

¹⁷³ *Ibid* 44 [46].

¹⁷⁴ The SICC also briefly discussed *forum non conveniens* and international comity principles — the SICC noted that the defendants had conceded that Singapore was an appropriate forum for the resolution of the dispute, and that the principle of international comity 'work[ed] both ways' so 'the French court [could] take cognisance of any Singapore judgment': *ibid* 45 [53]–[54].

¹⁷⁵ *Ibid* 31 [3].

¹⁷⁶ *Ibid* 38 [30].

¹⁷⁷ *Ibid* 42 [42].

¹⁷⁸ *Ibid* 44 [47].

ability to apply foreign law, may influence the SICC's discretion against staying proceedings on case management grounds.¹⁷⁹

Ultimately, the SICC dismissed the application as it determined that the defendants had commenced the French action to 'deliberately stifle' the expeditious resolution of the Singapore proceedings¹⁸⁰ and that granting the defendants' stay application would have been 'the very antithesis of case management'.¹⁸¹

It is also interesting to note that the qualities and capabilities of the SICC may also play a role in the High Court's exercise of its own jurisdiction (prior to its determination of whether a case should be transferred to the SICC). In the 2017 *Rappo v Accent Delight International Ltd* case, the Court of Appeal stated that the presence of the SICC, and the possibility of a transfer of the case to it, is a factor for the High Court to consider when undertaking a *forum non conveniens* analysis.¹⁸²

For example, under O 110 r 25 of the *Rules of Court*, the SICC may, on the application of a party, order that any question of foreign law be determined on the basis of submissions instead of proof. This would obviate the need (and correlative expense) for experts to give evidence on foreign law. More fundamentally — leaving aside issues of cost — the reason why the applicable law to a dispute is considered a relevant connection under [*Spiliada Maritime Corporation v Cansulex*] is that a court which is called on to apply its own law is better equipped to do so and less likely to err in its application. Thus, the fact that a law other than Singapore law applies to the dispute at hand should carry less weight in the *forum non conveniens* analysis if the Singapore courts, through their International Judges in the SICC, are familiar with and adept at applying that foreign law.¹⁸³

This means that some 'cases that may otherwise be heard in foreign forums could be transferred to the SICC instead'.¹⁸⁴ However, the Court of Appeal emphasised that 'the qualities and capabilities of the SICC are but *one* factor, albeit an often important one, within the broader *forum non conveniens* analysis.

¹⁷⁹ Of course, the unique features of the SICC may play no role in the Court's refusal to stay proceedings in accordance with its case management powers. For example, in *Arris*, the SICC declined to exercise the Court's discretion to stay the proceedings, on the basis that an order for a stay would not assist the Malaysian proceedings to implement a scheme of arrangement, when the issue of whether the plaintiffs were creditors of the defendant was still disputed: *Arris* [2017] 4 SLR 1, 10 [40].

¹⁸⁰ *BNP Paribas Wealth Management* [2017] 3 SLR 27, 44 [49], 46 [55].

¹⁸¹ *Ibid* 32 [5].

¹⁸² *Rappo v Accent Delight International Ltd* [2017] 2 SLR 265, 305–7 [121]–[124].

¹⁸³ *Ibid* 305–6 [122].

¹⁸⁴ Chng, above n 58, 655 [16]. David Foxton QC has commented that '[i]t remains to be seen whether the argument that the SICC has moved the *forum non conveniens* dial firmly in Singapore's favour gains traction. In an age of increasing rivalry between the major trial centres, it seems safe to predict that it is likely to find more favour as a reason why Singapore courts will retain cases than a reason why foreign courts will disclaim jurisdiction in Singapore's favour': Foxton, above n 108, 221 [46].

... Thus, the presence of the SICC and the possibility of a transfer of the case to it may well not be determinative'.¹⁸⁵

D *Determination of Foreign Law*

There has been one SICC case in which an issue of foreign law has been determined by the SICC. In *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*,¹⁸⁶ the governing law of two of the relevant agreements was Indonesian law (with Singapore as the governing law of the other agreements).¹⁸⁷ To determine an issue of Indonesian law, the SICC considered expert reports and also heard oral submissions by one of the defendants' experts and witness evidence by one of the plaintiffs' experts.¹⁸⁸ The expert chosen by the defendants to make oral submissions was a member of the Indonesian Bar and was allowed to make oral submissions under O 110 r 25 of the *Rules of Court*, which allows a question of foreign law be determined on the basis of submissions instead of proof.¹⁸⁹ However, the expert chosen by the plaintiffs to make submissions, Professor Hikmahanto Juwana, was an academic and not a member of the Indonesian Bar.¹⁹⁰ The SICC determined that he did not qualify under O 110 r 25 to make oral submissions before the SICC, but the parties agreed that he was allowed to provide oral evidence as a witness without being subject to cross-examination, on the basis that not everything he submitted was necessarily accepted by the defendants.¹⁹¹

In *BNP Paribas 2016*, foreign law was also pleaded.¹⁹² The parties adduced substantial evidence on French law using expert reports.¹⁹³ However, in this case, the SICC noted that the evidence on French law was only relevant to the defendants' stay application in so far as it touched on any overlap between the

¹⁸⁵ *Rappo v Accent Delight International Ltd* [2017] 2 SLR 265, 306 [123]. The Court of Appeal also highlighted that 'the possibility of a transfer to the SICC should not be considered by plaintiffs as a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore. Like all arguments on *forum non conveniens*, a submission that the possibility of a transfer to the SICC weighs in favour of an exercise of jurisdiction by the Singapore courts must be grounded in specificity of argument and proof by evidence. A plaintiff must articulate the particular quality or feature of the SICC that would make it more appropriate for the dispute to be heard in Singapore by the SICC, as well as prove that the dispute is of a nature that lends itself to the SICC's capabilities. It is also relevant for the court to consider whether the Transfer Requirements are likely to be satisfied. ... The court does not, however, need to make a conclusive determination at this stage of the analysis on the susceptibility of the dispute to a transfer': at 306–7 [124].

¹⁸⁶ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1.

¹⁸⁷ *Ibid* 28 [99], 48–49 [180].

¹⁸⁸ *Ibid* 49–53 [184]–[194].

¹⁸⁹ *Ibid* 49–50 [184].

¹⁹⁰ *Ibid* 50–1 [187].

¹⁹¹ *Ibid*. Teh and Yeo noted that '[t]his approach of dispensation with cross examination would presumably have helped to streamline the process of determining issues of foreign law while reserving to the parties the ability to take issue with the positions taken by the expert witnesses in court': above n 95, 704 [29].

¹⁹² See *BNP Paribas Wealth Management v Jacob Agam* [2017] 3 SLR 27, 37–8 [26]–[30] ('*BNP Paribas 2016*').

¹⁹³ *Ibid* 37 [26].

SICC action and the related French proceedings.¹⁹⁴ The SICC held that it was not necessary for the SICC to make any finding on the enforceability of the relevant facility agreements and personal guarantees under French law at that stage of the proceedings:¹⁹⁵ the choice of Singapore law was *prima facie* valid and, even if the SICC were to decide at trial that French law applies, once it was determined that there was a risk of conflicting judgments, there was no need to make any findings on the merits of the case under French law.¹⁹⁶

E Offshore Cases

The treatment of an action as an ‘offshore case’¹⁹⁷ has two implications: parties may be represented by foreign lawyers;¹⁹⁸ and the SICC is more likely to make a confidentiality order.¹⁹⁹ As previously mentioned, an ‘offshore case’ is an action that has ‘no substantial connection with Singapore’.²⁰⁰ Order 110 r 1(2)(f) of the *Rules of Court* provides that an action has ‘no substantial connection to Singapore’ where:

- Singapore law is not the law applicable to the dispute, and the subject matter of the dispute is not regulated by or otherwise subject to Singapore law;²⁰¹ or
- the only connections between the dispute and Singapore are the parties’ choice of Singapore law as the law applicable to the dispute and the parties’ submission to the jurisdiction of the Court.

Eder J’s judgment in *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* (*‘Teras Offshore 2016’*) made it clear that it is not necessary for an action to fall within these two categories in order to be an ‘offshore case’ and that these are simply examples of situations in which an action has ‘no substantial connection to Singapore’.²⁰² Indeed, in *Teras Offshore 2016*, it was common ground that the dispute did not fall within either of the categories set

¹⁹⁴ See *ibid* 38 [30], 44 [48]. At a case management conference, counsel had indicated to the SICC that the defendants would only adduce evidence of French law to explain the nature of related proceedings in France; instead, the parties adduced substantial evidence relating to the merits of the case under the laws of France, using French law expert reports: 37 [26].

¹⁹⁵ *Ibid* 42 [42].

¹⁹⁶ *Ibid* 44 [48].

¹⁹⁷ Singapore’s *Rules of Court* O 110 r 34 states that an action is to be treated as an ‘offshore case’ in any of the following circumstances, unless the SICC subsequently decides that the action is not or is no longer an offshore case: (a) there is exhibited, in accordance with O 110 r 43(1), a pre action certificate stating that an intended action is an offshore case; (b) a party has filed an offshore case declaration; or (c) the SICC decides under O 110 r 36 that the action is an offshore case.

¹⁹⁸ *Legal Profession Act* s 36P(1); *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore) r 3(2)(b).

¹⁹⁹ In deciding whether to make a confidentiality order under *Rules of Court* O 110 r 30(1), the SICC may have regard to (a) whether the case is an offshore case; and (b) any agreement between the parties on the making of such an order: O 110 r 30(2).

²⁰⁰ *Ibid* O 110 r 1(1) (definition of ‘offshore case’). An ‘offshore case’ does not include an action in rem (against a ship or any other property) under the *High Court (Admiralty Jurisdiction) Act* (Singapore, cap 123, 2001 rev ed).

²⁰¹ The SICC *Practice Directions* provide examples of circumstances in which ‘the subject matter of the dispute is regulated by or otherwise subject to Singapore law’ for the purposes of *Rules of Court* O 110 r 1(2)(f)(i): SICC, *Singapore International Commercial Court Practice Directions 2017* (Singapore) [29(2)].

²⁰² *Teras Offshore 2016* [2016] 4 SLR 75.

out in O 110 r 1(2)(f).²⁰³ By contrast, para 29(3) of the *SICC Practice Directions* lists certain factors that may indicate ‘a substantial connection’ between the dispute and Singapore.²⁰⁴ Eder IJ proceeded on the assumption that the existence of more than one of these stipulated factors, ‘taken either on their own or with other factors, is at least capable of justifying a conclusion that the action has a substantial connection with Singapore’.²⁰⁵ Nevertheless, while all the factors listed in para 29(3) were present, Eder IJ did not believe that the action had a ‘substantial’ connection.²⁰⁶ It was therefore an ‘offshore case’.

Eder IJ emphasised that the various claims and counterclaims in these proceedings all concerned the provision of services in connection with three liquefied natural gas projects in Queensland, Australia:

The vast majority of these services and the issues relating thereto have nothing whatsoever to do with Singapore. ... [It] would seem that the court will be concerned to evaluate the factual bases of these claims; that this will be the focus of the relevant evidence (whether factual or expert); and that such exercise which is at the heart of this ‘action’ has no substantial connection with Singapore.²⁰⁷

This decision suggests that where the substantive dispute concerns commercial activities outside of Singapore, an action may be an ‘offshore case’ despite the existence of various procedural and administrative factors connecting the action to Singapore.²⁰⁸

²⁰³ Ibid 79 [9].

²⁰⁴ *Singapore International Commercial Court Practice Directions 2017 (Singapore)* [29(3)] provides that for the purposes of O 110 r 1(2)(f)(ii) of the *Rules of Court*, ‘the existence of each of the following factors will not, by itself, constitute a substantial connection between the dispute and Singapore: (a) any of the witnesses in the case may be found in Singapore; (b) any of the documents that are relevant to the dispute may be located in Singapore; (c) funds connected with the dispute have passed through Singapore or are located in bank accounts in Singapore; (d) one of the parties to the dispute has properties or assets in Singapore that are not the subject matter of the dispute; (e) where one of the parties is a Singapore party, or where a party is not a Singapore party, but has Singapore shareholders’.

²⁰⁵ *Teras Offshore 2016* [2016] 4 SLR 75, 81 [13].

²⁰⁶ Ibid 81–2 [16]. His Honour noted that: ‘it seems to me that the fact that the Plaintiff is a Singapore company and the fact that it has assets in Singapore which are not the subject matter of the dispute are, in this context, irrelevant or, at best, makeweight so far as the “action” is concerned. Equally, the fact that the sum of US\$3.5m advanced to the Defendant by the Plaintiff which forms part of the Plaintiff’s present claim was paid through the Plaintiff’s bank account in Singapore to the Defendant’s bank account in the USA is, at best, peripheral. That leaves the first two factors, ie, the presence of the Plaintiff’s witnesses and documents as well as the Defendant’s servers in Singapore. I agree that these factors indicate some connection of the “action” with Singapore in a procedural or administrative sense; but, even taken together with other factors, they do not persuade me that such connection is “substantial”’.

²⁰⁷ Ibid 82 [17].

²⁰⁸ In *Teras Offshore 2016*, it was submitted that ‘given the role of the SICC to provide a dispute resolution framework for the resolution of international commercial disputes, a “parochial” insistence that parties appoint Singapore qualified lawyers (even when there are only a handful of coincidental or procedural connections with Singapore) would be anomalous and self-defeating’: *ibid* 79 [10]. As noted above, the fact that parties can appoint foreign qualified lawyers to represent them in court where the action is an ‘offshore case’ means that parties are provided greater autonomy to choose counsel of their choice; they can be represented by lawyers with experience in the issues relating to the substance of the dispute, rather than being restricted to being represented by Singapore qualified counsel.

V THE SICC'S PERCEIVED BENEFITS

Justice Reyes has noted that eventually 'it is hoped that the SICC will compete with the English Commercial Court for a share of the international commercial cases now drawn to London'.²⁰⁹ Research conducted by the British Institute of International and Comparative Law suggests that this would occur if the SICC were to replicate the high quality of services provided by the English courts and English lawyers and the costs were competitive.²¹⁰ The experience of the SICC to date suggests that the SICC has the potential to operate as a compelling alternative to other courts that operate on an international basis.

First, the SICC bench includes former English judges and other eminent foreign jurists experienced in commercial law, and at least one International Judge has been assigned to each SICC case.

Secondly, the SICC gives foreign lawyers greater rights of audience than other Singapore courts (and the London Commercial Court), including the right to represent parties in cases that have 'no substantial connection with Singapore'. The SICC has refused to interpret this requirement narrowly, which led to the defendant in *Teras Offshore 2017* being represented by a foreign lawyer.²¹¹

Thirdly, the SICC has already utilised another of its innovative features, namely, the right of a party to apply for an order that a question of foreign law be determined according to submissions, rather than proof. This can save the parties' time and costs by removing the need for cross-examination (and re-examination) of foreign law experts. The SICC has also demonstrated that it will modify the traditional common law approach, with the consent of the parties, where a foreign law expert appointed to make submissions fails to satisfy the requirements of O 110 r 25; as noted above, in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*, Professor Hikmahanto was allowed to provide oral evidence as a witness without being subject to cross-examination.²¹²

Fourthly, the SICC has produced high-quality judgments, including some that have developed Singapore's law on contractual liability and the SICC is likely to further develop its substantive commercial law jurisprudence as it hears more cases. These factors provide an incentive for parties to write SICC jurisdiction clauses into their contracts, particularly if SICC judgments are enforceable in the country in which enforcement is likely to be sought.

There is no indication that the Singapore Government intended that the SICC would compete directly with the other common law 'international commercial courts' — the Dubai International Financial Centre Courts ('DIFC Courts'), the Civil and Commercial Court of the Qatar Financial Centre (also referred to as the

²⁰⁹ Reyes, above n 52, 339.

²¹⁰ See Eva Lein et al, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts' (Report, UK Ministry of Justice, 2015) 28: 'Singapore could indeed be a serious alternative to England, at least for parties with links to Asia, and especially India or Indonesia. ... Direct competition between the English and Singaporean Commercial Court depends on Singapore being able to deliver the same quality of law, lawyers and judgments as London, but for a lower price, and if the Singaporean Commercial Court judgments were enforceable in the country in which enforcement is sought, ... parties [may] move away from litigation in London.'

²¹¹ *Teras Offshore 2017* [2017] 4 SLR 38; Supreme Court of Singapore, '*Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*' (Media Summary, 4 April 2017) [4].

²¹² *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1, 50–51 [187]. See discussion above nn 187–92 and the accompanying text.

Qatar International Court ('QIC')²¹³ and the Abu Dhabi Global Market Courts ('ADGM Courts').²¹⁴ These 'Financial Centre Courts' are specialist civil and commercial courts that have features that make them attractive to international litigants, including international judges, liberal rights of audience for foreign

²¹³ The Qatar International Court and Dispute Resolution Centre website refers to the Civil and Commercial Court of the Qatar Financial Centre, which was established under art 8(3) of the *Qatar Financial Centre Law No 7 of 2005* (Qatar) as amended by *Law No 2 of 2009 on Amending Some Rules of the Qatar Financial Center Law Issued by Law No 7 of 2005* (Qatar), as the 'Qatar International Court': Qatar International Court and Dispute Resolution Centre, *The Court Overview* <<http://www.qicdrc.com.qa/court-overview-0>>, archived at <<https://perma.cc/7NLV-SX7R>>. However, there has been no legislative amendment to alter the name of this court and its judgments are published as those of the Civil and Commercial Court of the Qatar Financial Centre.

²¹⁴ Chief Justice Warren and Justice Croft have also classified the Commercial Court subdivision of the Queen's Bench Division of the High Court of Justice (England and Wales) ('London Commercial Court') as an 'international commercial court'. Their Honours identified it as such because the London Commercial Court attracts 'an enormous amount of international commercial litigation, including in circumstances where neither the parties nor the subject matter of the disputes have any real or significant connection with the United Kingdom': Warren CJ and Croft J, above n 17, 16–17. In contrast, Chief Justice Menon has suggested that the London Commercial Court is a municipal commercial court, despite the fact that (unlike other municipal courts) a significant proportion of its caseload derives from the consent of the parties: Menon CJ, 'International Commercial Courts', above n 3, [34].

lawyers, and flexible court procedures.²¹⁵ As in cases commenced in the SICC, service on a defendant outside the jurisdiction does not require the court's permission and can be effected anywhere in the world, provided that the claim falls within one of the courts' specified jurisdictional gateways.²¹⁶ The DIFC Courts and the ADGM Courts also have express opt in jurisdiction, which (like the SICC) allows them to hear cases in which the dispute has no connection to the territorial jurisdiction within which the court is situated (ie the Dubai

²¹⁵ For example, the DIFC Courts have seven international judges and three Emirati judges; the QIC has nine international judges and two Qatari judges; and the ADGM Courts have eight international judges. By contrast with the SICC, the Financial Centre Courts do not appear to distinguish between local and foreign lawyers: Chief Justice Michael Hwang, 'DRA Order No 1 of 2016 in Respect of Rights of Audience and Registration in Part II of the Academy of Law's Register of Practitioners' (20 September 2016) [4]; *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 29.1; *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) reg 219. Like the SICC's requirements for foreign lawyers to be granted full registration, in the DIFC Courts and the ADGM Courts lawyers must have at least five years' experience to represent parties: *Rights of Audience and Registration in Part II of the Academy of Law's Register of Practitioners, DRA Order No 1 of 2016* (20 September 2016) [4]; *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) reg 219. In the DIFC and ADGM Courts, a hearing (or any part of it) may be in private if it involves confidential information, and the QIC also may allow all or part of a hearing to be in private 'where there is good reason to do so': *The Rules of the Dubai International Financial Centre Courts 2014* (DIFC) r 35.4; *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) regs 98(1)–(4); *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 28.3. The Financial Centre Courts all have restricted document discovery regimes: Hwang CJ, above n 17, 201; *ADGM Court Procedure Rules 2016* (Abu Dhabi) r 87(1); *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) arts 26.1–26.4. Additionally, the DIFC Courts have some flexibility in terms of the application of rules of evidence: *DIFC Court Law, DIFC Law No 10 of 2004* (Dubai) art 50. In particular, the DIFC Courts are not bound to treat foreign law as a fact to be proved as such, as 'they possess a discretion under Art 50(c) of the *DIFC Court Law* to apply such rules of evidence they may consider appropriate in the circumstances': *Fidel v Felecia* [2015] DIFC CA 002 (22 November 2015) [47] (Hwang CJ, with Al Muhairi and Field JJ concurring). In the 2015 case of *Fidel v Felecia*, the DIFC Court of Appeal held that the DIFC Courts should take an 'International Approach' to the determination of all questions of non DIFC law. The court stated that, generally, all non DIFC law should be treated as 'law' rather than fact, 'with Counsel making legal submissions on disputed areas of the applicable (or relevant) law, appending expert opinions if necessary, and ... the court being allowed to take judicial notice of the foreign law in question': at [67]. However, this is only a presumptive rule: 'the trial judge should always have the discretion to proceed in the manner in which he considers most beneficial for his education – in a system of law with which he is not confidently familiar': at [73].

²¹⁶ *Corinth Pipeworks SA v Barclays Bank PLC* [2011] DIFC CA 002 (22 January 2012) [18] (Hwang CJ); *Corinth Pipeworks SA v Barclays Bank Plc* [2010] DIFC CFI 024 (8 February 2011) [31] (Colman DCJ); *Rules of the Dubai International Financial Centre Courts 2014* (DIFC) r 9.53; *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 18.2; *ADGM Court Procedure Rules 2016* (ADGM) r 23; *ADGM Courts, Practice Direction 2: Making and Answering a Claim* (30 May 2016) [2.8]–[2.9] <<https://www.adgm.com/media/74467/practice-direction-2-making-and-answering-a-claim.pdf>>, archived at <<https://perma.cc/YNQ2-N34P>>. The claim must fall within one of the jurisdictional gateways specified under arts 5(A)(1)–(2) of *Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre* (Dubai), art 8(3)(c) of the *Qatar Financial Centre Law No 7 of 2005* (Qatar), art 13(6) of the *Law No 4 of 2013 concerning Abu Dhabi Global Market* (Abu Dhabi) or reg 16(2)(e) of the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM).

International Financial Centre or the Abu Dhabi Global Market);²¹⁷ it is still uncertain whether the QIC has such ‘opt in’ jurisdiction.²¹⁸

These courts were primarily set up to provide a common law framework to determine civil and commercial disputes occurring in their respective financial centres.²¹⁹ It was thought that ‘a world class international financial centre’ needed an independent,²²⁰ English language²²¹ court that had an appeals process, adhered to ‘international standards in dispute resolution’ and had ‘internationally renowned, independent judges’.²²² The Financial Centre Courts adopt procedures

²¹⁷ *Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre* (Dubai) art 5(A)(2), as amended by *Law No 16 of 2011 Amending Some Provisions of Law No 12 of 2004 concerning the Dubai International Financial Centre Courts* (Dubai); *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) reg 16(2)(e).

²¹⁸ The *QIC Regulations* provide that ‘in accordance with fundamental international principles and international best practice, the court will take into account the expressed accord of the parties that the court shall have jurisdiction’: *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 9.2. Comments made by the former CEO of the Qatar International Court and Dispute Resolution Centre suggest that this provision was intended to be an opt in jurisdiction clause: see, eg, Bradley Hope, ‘Qatar to Widen Civil Dispute Net’, *The National* (online), 8 November 2010 <<http://www.thenational.ae/business/banking/qatar-to-widen-civil-dispute-net>>, archived at <<https://perma.cc/U86S-TLFA>>; Shane McGinley, ‘Robert Musgrove Interview: Rule of Law’, *Arabian Business* (online), 7 October 2012 <<http://m.arabianbusiness.com/robert-musgrove-interview-rule-of-law-475243.html?page=1>>, archived at <<https://perma.cc/7CXT-Z6WB>>. Nevertheless, given that the QIC has heard no opt in cases despite being in operation since 2009, there appears to be a need for legislative amendment to clarify whether the court does have jurisdiction in circumstances other than those clearly set out under the QFC Law.

²¹⁹ See *Law No 4 of 2013 concerning Abu Dhabi Global Market* (Abu Dhabi) art 13(6); *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) regs 16(2)(a)–(d); *Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre* (Dubai) art 5(A)(1), as amended by *Law No 16 of 2011 Amending Some Provisions of Law No 12 of 2004 concerning the Dubai International Financial Centre Courts* (Dubai); *Qatar Financial Centre Law No 7 of 2005* (Qatar) art 8(3)(c).

²²⁰ The Financial Centre Courts operate independently from their local courts (ie the Dubai courts, the Qatar courts and the Abu Dhabi courts) — each of the Financial Centre Courts may be described as operating as a ‘common law island’ in a ‘civil law ocean’. The Chief Justice of the DIFC Courts, Michael Hwang, described the DIFC Courts as “‘a common law island in a civil law ocean’” because UAE laws are based on the civil law while the governing laws of the DIFC are laws enacted specifically for the DIFC and based on common law’: Hwang CJ, above n 17, 201. See also Deputy Chief Justice Michael Hwang, ‘The Courts of the Dubai International Finance Centre — A Common Law Island in a Civil Law Ocean’ (Lawasia Conference, Kuala Lumpur, 1 November 2008).

²²¹ Proceedings before the DIFC Courts and the ADGM Courts are conducted in English: *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (ADGM) reg 99; *DIFC Court Law, DIFC Law No 10 of 2004* (Dubai) art 13(1); *The Rules of the Dubai International Financial Centre Courts 2014* (DIFC) r 2.2. Although QIC proceedings will usually be conducted in English, parties may conduct proceedings in Arabic if they wish to do so: *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 3.2.

²²² See, eg, Qatar International Court and Dispute Resolution Centre, ‘About Us: History — The Origins of the Court’ <<http://www.qicdrc.com.qa/about-us>>, archived at <<https://perma.cc/QET6-XG35>>; Malik R Dahlan and Khalid El Sherif, ‘Qatar: A Hybrid of Legal Traditions’ (2008–2009) 14 *Yearbook of Islamic and Middle Eastern Law* 203, 203.

that are broadly modelled on the procedures of the London Commercial Court,²²³ and the substantive civil and commercial laws of each of the financial centres are based on the common law and are written in English.²²⁴

While the experience of the Financial Centre Courts may provide an insight into how other specialist commercial courts could adapt their features to make themselves more attractive to foreign litigants, the consensual jurisdictions of the DIFC Courts and the ADGM Courts are most likely to attract parties doing business in the United Arab Emirates ('UAE') or perhaps the wider Gulf region. The UAE is a party to the *Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996* as well as the *Riyadh Arab Agreement for Judicial Cooperation 1983*, and various bilateral agreements on judicial enforcement, including with China, France and India.²²⁵ However, unlike Singapore, the UAE is not a party to the *Hague Convention*. Additionally, Singapore has a more established legal system — the DIFC Courts were officially established in 2004 but did not come into operation until 2006,²²⁶ and the ADGM Courts became operational in May 2016 but are yet to issue their

²²³ See, eg, Hwang CJ, above n 17, 202; Gerald Lebovits and Delphine Miller, 'Litigating in the Qatar International Court' (2015) 28(1) *International Law Practicum* 54, 54; Barnabas Reynolds, 'The Abu Dhabi Global Market — Legislative Framework, Approach and Methodology' (2017) 32 *Journal of International Banking Law and Regulation* 181, 197. Indeed, the Rules of the DIFC Courts provide that 'if no provision is made or no appropriate form is provided by the Rules or any law in force in the DIFC', in certain circumstances relevant rules of practice and procedure in the *Civil Procedural Rules 1998* (UK) may be followed and adopted together with any prescribed forms 'with such changes as the Court considers appropriate': *The Rules of the Dubai International Financial Centre Courts 2014* (DIFC) rr 2.10(3)–(4).

²²⁴ By contrast, the official version of the *Qatar Financial Centre Law No 7 of 2005* (Qatar) is in Arabic. Although the English and Arabic versions of the *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) are authoritative, the Arabic will prevail in the event of a conflict: *Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules* (Qatar) art 3.1. While the DIFC laws and QFC regulations codify common law concepts, the English common law directly applies in the ADGM so far as it is applicable to the circumstances of the ADGM and where there is no conflict with ADGM legislation: *Application of English Law Regulations 2015* (ADGM) s 1(1).

²²⁵ See Jayanth K Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2014) 25 *American Review of International Arbitration* 497, 510. The DIFC Courts also allow the 'conversion' of a DIFC judgment into an arbitration award: DIFC Courts, *Amended Practice Direction No 2 of 2015 — Referral of Judgment Payment Disputes to Arbitration*, 27 May 2015. Chief Justice Michael Hwang has noted that the process enables a judgment creditor to have an additional option for enforcement of its judgment without losing its rights under the judgment in any way — it is not a 'conversion' in a strict sense: Hwang CJ, above n 17, 205. *Practice Direction 2 of 2015* provides as follows: 'If parties who have submitted (or have agreed to submit) to (or are bound by) the jurisdiction of the DIFC Courts wish further to agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor ... be referred to arbitration under the Arbitration Rules of the DIFC LCIA Arbitration Centre, they may to that end adopt an arbitration clause in the terms of the recommended arbitration agreement.' For further discussion, see Hwang CJ, above n 17, 203–12; Reyes, above n 52, 344–8; Dalma R Demeter and Kayleigh M Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 *Journal of International Arbitration* 441, 453–66.

²²⁶ *Law No 12 of 2004 in respect of the Law of the Judicial Authority at Dubai International Financial Centre* (Dubai) art 3(1). The Court of First Instance did not hear its first full trial until 2007: *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* [2006] DIFC CFI 001 (24 July 2007).

first judgment.²²⁷ Furthermore, and most significantly, the DIFC and ADGM Courts have not been established for the specific purpose of hearing opt in jurisdiction cases,²²⁸ so commercial disputes that have little or no connection to the relevant financial centre may only constitute a small part of the respective court's caseload; by contrast, the SICC only determines international commercial matters and will develop specialist expertise in this area.

VI CONCLUSION

In the cases that it has heard to date, the SICC has utilised several of its unique features to facilitate its objective of drawing international commercial cases to Singapore, such as a bench that includes distinguished jurists from foreign jurisdictions and the ability for registered foreign lawyers to make submissions on questions of foreign law and to represent parties in SICC cases that are 'offshore cases'. The SICC has also produced some judgments that develop Singapore's law on contractual liability and is likely to further develop its substantive commercial law jurisprudence as it hears more cases. As previously noted, the experience of the SICC to date suggests that it has the potential to operate as a compelling alternative to other courts that operate on an international basis.

As the SICC has only been in operation for a short period, and all the cases to date have been transferred from the High Court, there are many questions that remain unanswered, including the following: what types of opt in cases will come before the SICC? And, what will the Court take into account when determining whether an action is 'not appropriate' to be heard by the SICC or whether the claims by or against a third party are 'appropriate' for the SICC to determine? Nevertheless, the early experience of the SICC provides useful insights into how other jurisdictions may adapt their own specialist commercial courts or establish new 'international commercial courts' to accommodate the needs of parties to international commercial disputes, particularly foreign litigants.

²²⁷ See Abu Dhabi Global Market Courts, 'ADGM Courts' <<https://www.adgm.com/doing-business/adgm-courts/home/>>, archived at <<https://perma.cc/4RHA-33T7>>. The *ADGM Court Procedure Rules 2016* (ADGM) came into force on 30 May 2016, as did the Practice Directions for the ADGM Courts: see, eg, *ADGM Court Procedure Rules 2016* (ADGM) r 1; ADGM Courts, *Practice Direction 1: General* (30 May 2016) <<https://www.adgm.com/media/164944/pd-1-general.pdf>>. The Board of Directors of ADGM determined the fees of ADGM Courts on 16 May 2016: ADGM Courts, *Schedule of Fees* (16 May 2016) <<https://www.adgm.com/media/73080/adgm-courts-schedule-of-fees.pdf>>.

²²⁸ As yet, the DIFC Court of First Instance only appears to have heard two cases where jurisdiction has been founded solely on the basis of an opt in clause: *SPX Middle East FZE (formerly Invensys Middle East FZE (APV Division)) v Judi for Food Industries* [2013] DIFC CFI 002 (25 March 2014); *Sky News Arabia FZ-LLC v Kassab Media FZ (LLC)* [2016] DIFC CFI 007 (20 June 2016) [24]. Low value opt in cases may also be heard by the Small Claims Tribunal.