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THE HAGUE JUDGMENTS CONVENTION

A View from Singapore

The recognition and enforcement of foreign judgments is one of the most important areas of private international law. Its significance is underscored by the efforts of the Hague Conference on Private International Law to conclude the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("the Convention"), and Singapore's significant reform of its statutory regimes. Through identifying the differences between the Convention and the prevailing Singapore regime, this article evaluates the likely effects of the adoption of the Convention under Singapore law. It seeks to contribute to the burgeoning discourse on foreign judgments rules by examining the options available to Singapore.

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I. Introduction

1 There are two recent developments that are eminently relevant to the Singapore regime on the recognition and enforcement of foreign judgments. On 2 July 2019, the Hague Conference on Private International Law and its delegates concluded the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[2] ("the Convention").[3] The Convention was billed as a "gamechanger for cross-border dispute settlement and an apex stone for global efforts to improve real and effective access to justice".[4] Meanwhile, amendments

1 This article is based on a directed research paper written under the supervision of Prof Yeo Tiong Min SC in the author's final year of study. The author thanks Prof Yeo for his invaluable guidance and support, the anonymous referee for his comments, and Clarice Ting for her meticulous editing. All errors and omissions remain his.

2 For the text of the Convention, see https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (accessed 13 April 2020).

3 As of 13 April 2020, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded 2 July 2019) (hereinafter "the Convention") has not entered into force. It will only enter into force after the ratification, acceptance, approval, or accession of two states: Art 28(1).

4 Christophe Bernasconi, "Gamechanger for Cross-border Litigation in Civil and Commercial Matters to be Finalised in the Hague" *HCCH* (18 June 2019).

were made to streamline the statutory framework governing the registration of foreign judgments in Singapore.[5]

2 This article examines the implications of these developments on Singapore private international law.[6] Part II[7] reviews the current regime for the recognition and enforcement of foreign judgments in Singapore. Only by understanding the prevailing foreign judgments rules, can we adequately appreciate the likely effects of new developments. Part III[8] is where the Convention and its features are considered. Part IV[9] then assesses the issues likely to arise from the scope of the Convention. It will be shown that the Convention addresses areas that would appeal to the Singapore legislator, but at the same time, presents certain novel challenges. Part V[10] will conclude the substantive discussion by analysing the way forward for Singapore. The feasibility of an expansion of the common law rules would be explored here.

II. Current regime

3 Under Singapore law, the recognition and enforcement of foreign judgments in civil and commercial matters is presently governed by four overlapping regimes: (a) the common law rules; (b) the Reciprocal Enforcement of Commonwealth Judgments Act[11] ("RECJA"); (c) the Reciprocal Enforcement of Foreign Judgments Act[12] ("REFJA"); and (d) Pt 3 of the Choice of Court Agreements Act[13] ("CCAA"). However, the law in this regard is in a state of transition. Amendments were

5 Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act (Act 24 of 2019); Reciprocal Enforcement of Foreign Judgments (Amendment) Act (Act 5 of 2019).

6 This article only focuses on *in personam* judgments. *In personam* judgments bind only the parties to the action, as opposed to *in rem* judgments, which purports to bind the whole world: Adeline Chong, "Country Report: Singapore" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong gen ed) (Asian Business Law Institute, 2017) at p 163.

7 See paras 3–20 below.

8 See paras 21–44 below.

9 See paras 45–58 below.

10 See paras 59–69 below.

11 Cap 264, 1985 Rev Ed. The Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) does not deal with the recognition of foreign judgments. In contrast, the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA") contains a single provision which expressly addresses recognition: REFJA s 11.

12 Cap 265, 2001 Rev Ed.

13 Cap 39A, 2017 Rev Ed.

made to repeal the RECJA,[14] and expand the scope of the REFJA.[15] It is nevertheless important to appreciate the relevance of the RECJA and the *unamended* REFJA. The repeal of the RECJA will only take effect on a date stipulated by the Minister for Law, and during this transitional period, the RECJA remains in force.[16] The amendments to the REFJA, on the other hand, came into operation on 3 October 2019.[17] But judgments made before this date, within the respective limitation periods (including extensions), continue to be governed by the unamended REFJA.

4 With this context in mind, this section first canvasses the rules under which foreign judgments are recognised and enforced at common law, and under the RECJA and the unamended REFJA.[18] It then examines the REFJA *as amended*, and the practical significance of the amendments. The CCAA, being a distinct legal regime, would be considered last.

A. Common law rules, Reciprocal Enforcement of Commonwealth Judgments, and unamended Reciprocal Enforcement of Foreign Judgments Act

5 Generally, an *in personam* judgment is *prima facie* recognised if:[19] (a) it is decided by a court of competent jurisdiction; (b) it is final and conclusive under the law of the originating jurisdiction; (c) it is given on the merits of the case; and (d) the foreign court had international jurisdiction over the party sought to be bound. The foreign judgment may *prima facie* be enforced if these requirements are satisfied and the judgment is for a fixed and ascertainable sum of money. Relevant defences may, however, be raised to refuse the recognition and enforcement of a foreign judgment.

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14 Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act (Act 24 of 2019).

15 Reciprocal Enforcement of Foreign Judgments (Amendment) Act (Act 5 of 2019).

16 Reciprocal Enforcement of Commonwealth Judgments (Repeal) (Bill 18 of 2019) cl 1.

17 Reciprocal Enforcement of Foreign Judgments (Amendment) Act 2019 (Commencement) Notification 2019 (S 667/2019).

18 Since the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) are based on the common law rules, and hence largely similar, it makes sense to consider these three regimes together: Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.151.

19 Adeline Chong, "Country Report: Singapore" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong gen ed) (Asian Business Law Institute, 2017) at p 166.

6 The RECJA and the unamended REFJA applies only to foreign judgments from superior courts[20] gazetted under the respective statutes.[21] Whether the courts of a country are gazetted depends on whether the Minister for Law is satisfied with the reciprocity of treatment given to Singapore judgments.[22] A judgment from a gazetted country which is registered under the RECJA or the REFJA would be enforceable in Singapore as if it had been an original judgment.[23] Where the RECJA applies, the plaintiff can choose to enforce the judgment either by registration or through the common law. The caveat is that the judgment creditor will generally be unable to recover for costs if he proceeds on the common law.[24] This is to discourage the common law action. On the other hand, where the REFJA applies, a foreign judgment cannot be enforced through the common law.[25]

7 At common law, an action to enforce a foreign judgment, being a fresh action on an implied debt based on the foreign judgment, must be brought within six years from the date on which the foreign judgment ought to have been satisfied.[26] An application to register a foreign judgment under the RECJA must be made within 12 months of the judgment, unless an extension of time was granted by the Singapore courts.[27] The REFJA, by contrast, stipulates that the registration of a foreign judgment must be commenced within six years of the judgment, or the date of the last judgment if the case was appealed.[28]

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20 There is no requirement at common law that the judgment must emanate from a superior court of the foreign country.

21 While ten jurisdictions including Brunei Darussalam, Malaysia and India (except the State of Jammu and Kashmir) are gazetted under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), only the Hong Kong Special Administrative Region of the People's Republic of China is gazetted under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed).

22 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 5; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 3(1).

23 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(3); Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(4).

24 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(5).

25 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 7(1).

26 Limitation Act (Cap 163, 1996 Rev Ed) s 6(1)(*a*). See also *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [49] and [54].

27 Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) s 3(1). For a list of factors the court considers in deciding whether to grant an extension of time, see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 at [24].

28 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(1)(*a*).

8 Whether the foreign court had international jurisdiction to hear the case is decided pursuant to Singapore private international law rules.[29] It appears to be the Singapore position that international jurisdiction is established at common law if the party was present *or* resident at the time the foreign proceedings was commenced.[30] This is opposed to the position under the RECJA and the REFJA, where presence is not a ground for international jurisdiction.[31] If the judgment debtor is an individual, then international jurisdiction is established under the RECJA if that individual carries on business through an agent or representative.[32] However, such a ground for international jurisdiction does not appear to be recognised at common law.[33] For the REFJA, international jurisdiction is established if the individual has a place of business in the foreign country at the time the proceedings were commenced, provided that the proceedings were in respect of a transaction effected through that place of business.[34] Again, this is not a common law ground for international jurisdiction.[35]

9 If the judgment debtor is a corporation, the test would be whether the corporation is carrying on business from a fixed place of business for more than a minimal period of time through an agent or representative.[36] Residence of a corporation under the RECJA would likely hew to the same

29 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [71]; *Equatorial Marine Fuel Management Services Pte Ltd v The "Bunga Melati 5"* [2010] SGHC 193 at [112]–[113].

30 *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [9], citing *Adams v Cape Industries plc* [1990] Ch 433; [1990] 2 WLR 657. This statement was, however, made in *obiter*, and subsequently thrown into doubt by the UK Supreme Court's decision in *In re New Cap Reinsurance Corp Ltd* [2013] 1 AC 236; [2012] 3 WLR 1019 at [7]–[10]. The Supreme Court did not consider "residence" to be a sufficient basis of international jurisdiction at common law.

31 Residence is required under s 5(2)(*a*)(iv) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed); ordinary residence is required under the Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) s 3(2)(*b*).

32 Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) s 3(2)(*b*). This provision applies to individuals: *United Malayan Banking Corp v Khoo Boo Hor* [1996] 1 SLR 359; *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR 299.

33 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.193. See also *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 14-064.

34 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(v).

35 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.193.

36 *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21 at [30].

test.[37] On the other hand, the REFJA expressly provides for international jurisdiction based simply on the defendant corporation's principal place of business in the foreign country,[38] or the corporation having an office or place of business in the foreign country provided that the transaction in dispute was effected through that office or place.[39]

10 The Singapore court will also adjudge the foreign court to have international jurisdiction if the party against whom the judgment was given had submitted to the jurisdiction of the foreign court. Submission may be by conduct[40] or by an agreement to submit. The REFJA also has an additional requirement: the agreement must be concluded prior to the commencement of proceedings in the foreign court.[41]

11 A foreign judgment satisfying the *prima facie* requirements would be entitled to recognition and enforcement in Singapore, provided that no defences are successfully raised.[42] The commonly raised defences include (a) fraud; (b) public policy;[43] (c) breach of natural justice; and (d) conflict with a Singapore judgment or foreign judgment entitled to recognition under Singapore law. The RECJA and REFJA also contain additional grounds under which registration may be refused. For instance, under the RECJA, the Singapore courts can refuse registration if

37 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.173.

38 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(iv).

39 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(v).

40 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ss 5(2)(*a*)(i) and 5(2)(*a*)(ii). See also *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545; *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088.

41 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(iii).

42 For a general understanding of the defences to recognition or enforcement, see Adeline Chong, "Country Report: Singapore" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong gen ed) (Asian Business Law Institute, 2017) at pp 170–174.

43 In *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 ("*Poh Soon Kiat*") at [73], the Court of Appeal departed from its previous holding in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690. In the latter decision, the Court of Appeal had stated that there was no distinction between the common law and the Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) ("RECJA") public policy defence. However, in *Poh Soon Kiat*, the Court of Appeal acknowledged the distinction between objecting to the *enforcement of the original cause of action* (RECJA) and objecting to the *enforcement of the foreign judgment* (common law, as well as the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed)). See Yeo Tiong Min, "Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments" (2005) 9 SYBIL 133.

it would not be "just and convenient" to do so.[44] Another example would be in the REFJA, where registration would be refused if the bringing of the proceedings in the foreign court had been in breach of an agreement to settle the dispute, provided the defendant had not submitted to the jurisdiction of the foreign court.[45] It has to be noted that the Singapore court will not re-examine the merits of a foreign judgment, regardless of whether the foreign court had made a mistake of law or fact.[46]

B. Amended Reciprocal Enforcement of Foreign Judgments Act

12 One should be careful to note that the amendments to the REFJA do not apply automatically to *all* judgments under the REFJA, but only to the extent gazetted under the statute.[47] In other words, it is possible for Singapore to agree with Country A for the reciprocal enforcement of only a limited category of judgments, whereas with Country B, there could be reciprocal enforcement of the full range of judgments under the REFJA. The amendments simply expand the range of options available for Singapore to negotiate with other countries.

13 Regarding the scope of the judgments that can be recognised and enforced, three main differences between the amended REFJA and its predecessor must be highlighted. First, to the extent gazetted under the statute, the distinction between "superior" courts and "inferior" courts may be abolished.[48] This means that unlike in the unamended REFJA, it is possible for lower court judgments to be recognised and enforced in Singapore.[49]

14 Secondly, to the extent gazetted under the statute, foreign non-money judgments can be registered if the registering court considers

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44 Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) s 3(1). See *Yong Tet Miaw v MBF Finance Bhd* [1992] 2 SLR(R) 549 at [31], adopting *Edwards & Co v Picard* [1909] 2 KB 903 at 907.

45 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(3)(*b*).

46 *Ralli v Anguilla* [1915–1923] XV SSLR 33.

47 *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Edwin Tong Chun Fai, Senior Minister of State for Law).

48 Reciprocal Enforcement of Foreign Judgments (Amendment) Bill 2019 (Bill 19 of 2019) cl 3.

49 The key reason for this change is to open the doors for judgments from the Singapore State Courts to be enforced overseas since the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) is reciprocal in nature: *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Edwin Tong Chun Fai, Senior Minister of State for Law).

enforcement to be "just and convenient".[50] This marks a shift from the unamended REFJA and the common law position, where only foreign money judgments can be enforced.[51] If the Singapore court finds that the enforcement of the judgment would not be "just and convenient", an order can be made for payment of what it considers to be the monetary equivalent of the non-money relief ordered by the foreign judgment.[52]

15 Lastly, to the extent gazetted under the statute, the Singapore courts can recognise and enforce interlocutory judgments made pending the final determination of the cause.[53] Under the common law, interlocutory judgments can be recognised as raising an issue estoppel if there had been express submission of the issue to the foreign court for determination, and the specific issue was then raised and decided by the court in a final determination.[54] However, interlocutory judgments cannot be enforced through the common law because they are not final and conclusive.[55] This creates a problem when it comes to preserving the rights of the litigant since interim measures issued by a foreign court, such as a freezing order targeting the defendant's assets in Singapore, may have little effect. To make matters worse for the claimant, the Singapore court can only grant a Mareva injunction in aid of foreign court proceedings where a local action is commenced if it has *in personam* jurisdiction over the defendant and the plaintiff has a reasonable accrued cause of action against the defendant in Singapore.[56] The amendment is thus aimed at "strengthen[ing] the enforceability of judgments, including by ensuring that assets are not dissipated before a final judgment is obtained so that

50 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(3A)(*a*). The factors that the court can consider include whether there was a delay and whether the delay had caused any prejudice to the judgment debtor; whether the judgment creditor could give a reasonable explanation for the delay in applying to register the judgment; whether the judgment creditor had been reasonably diligent in seeking to enforce it; and the conduct of the judgment debtor as well: *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Edwin Tong Chun Fai, Senior Minister of State for Law).

51 But in *Pattni v Ali* [2006] UKPC 51; [2007] 2 WLR 102, the Privy Council held *obiter* that the courts of the Isle of Man could recognise and enforce a foreign judgment directing the defendant to transfer shares in an Isle of Man company. See Adrian Briggs, "Foreign Judgments: The Common Law Flexes its Muscles" (2011) 17(4) T&T 328.

52 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(3A)(*b*).

53 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 2(1).

54 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [101]; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 at 858, *per* Evans LJ.

55 *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 at 856, *per* Evans LJ, and 863, *per* Stuart-Smith LJ.

56 *Bi Xiaoqiong v China Medical Technologies, Inc* [2019] 2 SLR 595 at [62].

the successful claimants are not left with only a 'paper' judgment".[57] Importantly, through the reciprocity requirement, it is hoped that a Singapore interim judgment will likewise be recognised and enforced, ensuring that the subsequent final Singapore judgment is not rendered nugatory.[58]

16 In terms of international jurisdiction, the amended REFJA includes additional grounds for the judgment debtor to show that it has not submitted to the jurisdiction of the foreign court.[59] It expressly stipulates, for instance, that merely contesting the jurisdiction of the foreign court is not to be construed as voluntary submission to that court's jurisdiction.[60] However, at common law, there is authority in the form of *Henry v Geoprosco International Ltd*[61] ("*Henry v Geoprosco*") which states that an application to a foreign court not to exercise its jurisdiction amounts to voluntary submission.[62] While the High Court in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*[63] did not consider whether the *Henry v Geoprosco* rule should be adopted in Singapore, it did indicate that regard must be had to the reasonable expectations of commercial parties in deciding how to respond to litigation processes.[64]

17 The amended REFJA also stipulates that a judgment may not be registered if and to the extent that the judgment awards punitive or exemplary damages.[65] The registration of a foreign judgment may be set aside if the notice of registration had not been served on the judgment debtor, or if the notice of registration was defective.[66] Notwithstanding, the judgment can be registered once the defects are remediated.[67]

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57 *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Edwin Tong Chun Fai, Senior Minister of State for Law).

58 *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Murali Pillai).

59 Reciprocal Enforcement of Foreign Judgments (Amendment) Bill 2019 (Bill 19 of 2019) cl 5(*d*).

60 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*).

61 [1976] 1 QB 726.

62 *Henry v Geoprosco International Ltd* [1976] 1 QB 726 at 750.

63 [2002] 3 SLR 603.

64 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 at [54].

65 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(3B).

66 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1)(*c*).

67 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1A).

C. Part 3 of the Choice of Court Agreements Act

18 The CCAA enacts the Hague Convention on Choice of Court Agreements[68] ("HCCCA") into Singapore law.[69] Barring the application of certain exclusions, Pt 3 of the CCAA applies to a foreign judgment from a court of a contracting state to the HCCCA if the court was the chosen court designated in an exclusive choice of court agreement concluded in a civil or commercial matter, provided that the choice of court agreement was concluded after the HCCCA enters into force in that contracting state. Notably, the RECJA and REFJA do not apply whenever the CCAA is applicable.[70] A judgment creditor may, however, seek recognition or enforcement through the common law even if the CCAA is applicable, although the process is simpler through the CCAA regime.[71]

19 The CCAA does not apply to interim measures of protection, such as interlocutory anti-suit injunctions.[72] Further, unlike the RECJA and the REFJA, a foreign judgment falling within the CCAA need not be registered.[73] There is no applicable time limit for the registration of a judgment under the CCAA, although the judgment has to remain effective (for recognition)[74] and enforceable (for enforcement) in the state of origin.[75] Once the requirements of the CCAA are satisfied, the foreign judgment will be recognised and/or enforced in the same manner and to the same extent as a Singapore judgment.[76] The defences found in the CCAA are analogous to that at common law, such as breach of natural justice,[77] fraud[78] and public policy.[79] In addition, the Singapore court may also refuse recognition or enforcement if the choice of court agreement

68 30 June 2005 (hereinafter "HCCCA").

69 The Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) enacted the HCCCA into Singapore law with effect from 1 October 2016.

70 Reciprocal Enforcement of Commonwealth Judgments (Act Cap 264, 1985 Rev Ed) s 2A; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 2A.

71 Adeline Chong, "Country Report: Singapore" in *Recognition and Enforcement of Foreign Judgments in Asia* (Adeline Chong gen ed) (Asian Business Law Institute, 2017) at p 176.

72 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 10.

73 However, the judgment creditor still has to make an *ex parte* application to the High Court for the foreign judgment to be recognised and enforced in the same manner, and to the same extent, as a judgment of the Singapore High Court: Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 13(1), read with Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 111 r 2.

74 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 13(2)(*a*).

75 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 13(2)(*b*).

76 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 13(1).

77 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 14(*a*).

78 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 14(*b*).

79 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 14(*c*).

is null and void under the law of the state of the chosen court,[80] or if the party to the choice of court agreement lacked capacity.[81]

20 Before turning to consider the Convention, three other distinctions between the CCAA and the other three regimes must be elucidated. First, unlike the common law, the RECJA, and the REFJA, the Singapore court cannot challenge a finding of jurisdictional fact by a chosen court under the CCAA unless it was a default judgment.[82] Secondly, under the CCAA, a decision by the chosen court on the validity of a choice of court agreement is binding on the Singapore court, regardless of whether the judgment was given in default or not.[83] This is, again, a departure from the other three regimes. Lastly, the CCAA expressly enjoins the enforcement of monetary judgments to the extent that they are non-compensatory.[84] This is similar to the amended REFJA.[85] However, at common law, it is unclear whether claims awarding exemplary or punitive damages can be enforced.[86] The issue is that allowing such claims may be seen as enforcing a foreign penal law. On one hand, it appears from a reading of several common law authorities that a claim does not enforce a foreign penal law if the monetary award is made to the plaintiff rather than the foreign state.[87] But there is also an Australian authority that suggests otherwise, holding that an award made manifestly for the purpose of punishment would still fall foul of the prohibition even if the payment is ordered for the benefit of the plaintiff and not the State.[88] It remains to be seen how the Singapore courts will treat these conflicting authorities.

80 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 15(1)(*a*).
81 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 15(1)(*b*).
82 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 13(3)(*b*).
83 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 15(1)(*a*).
84 Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) s 16.
85 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(3B).
86 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.210.
87 *Lewis v Eliades* [2004] 1 WLR 692 at [50]; *Securities Exchange Commission v Ong Congqin Bobby* [1999] 1 SLR 310 at [11]–[12]; *Huntington v Attrill* [1893] 1 AC 150 at 157; *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] 1 QB 279 at 299–300.
88 *Schnabel v Lui* [2002] NSWSC 15 at [177]. *Cf Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544; [2005] SASC 194 at [72].

III. The Convention

A. Scope

21 The Convention only applies in "civil and commercial" matters.[89] The phrase "civil or commercial", which is also adopted in the HCCCA,[90] is not defined in the Convention. Instead, it is left to the courts of the requested state to define the concept *autonomously*.[91] The touchstone of a "civil or commercial matter", as opposed to a public law matter, is that neither of the parties should be exercising any form of governmental or sovereign power not enjoyed by ordinary persons.[92]

22 Like the HCCCA,[93] the Convention does not apply to interim measures of protection.[94] The Convention also specifically excludes a range of matters under Art 2. In this regard, there are crucial distinctions between the Convention and the HCCCA. First, *all* intellectual property ("IP") judgments are excluded from the ambit of the Convention.[95] This is a change from the HCCCA, which applies to judgments relating to copyright (and related rights).[96] Secondly, personal injury claims are included within the scope of the Convention. In contrast, the HCCCA specifically excludes claims for personal injury brought by or on behalf of natural persons.[97] Thirdly, unlike the HCCCA,[98] tort and delict claims

89 The Convention, Art 1(1).

90 HCCCA, Art 1(1). This part draws comparisons between the Convention and the HCCCA. It is assumed that the Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) incorporated the HCCCA in full, and any differences in wording are likely to be immaterial.

91 In other words, the concept of "civil or commercial matters" is to be defined by reference to the objectives of the Convention and its international character, and not by reference to national law: Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 26.

92 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at paras 29–31; Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (by Trevor Hartley & Masato Dogauchi) (2013) at para 40.

93 HCCCA, Art 7.

94 The Convention, Art 3(1)(b).

95 However, where a judgment involves a contract relating to intellectual property rights, the Convention may still apply if the decision on the merits was founded on general contract law instead of intellectual property law: Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at paras 29–31.

96 HCCCA, Art 2(2)(n).

97 HCCCA, Art 2(2)(j).

98 HCCCA, Art 2(2)(k).

for damage to tangible property that do not arise from a contractual relationship are not excluded from the scope of the Convention. Fourthly, consumer contracts are included within the scope of the Convention, despite being previously excluded from the HCCCA.[99] However, where recognition or enforcement is sought *against* a consumer, there are certain requirements provided under Art 5(2) with respect to the bases for recognition and enforcement. Finally, defamation is specifically excluded under the Convention,[100] which is again a shift from the HCCCA.

23 Similar to the HCCCA,[101] contracting states can narrow the scope of the Convention further by making declarations to exclude additional matters which it has a "strong interest" in not applying the Convention to.[102] The contracting state will not have to recognise or enforce any judgment pertaining to the specific matter defined in its declaration, and judgments from that contracting state pertaining to the same matter would also not be recognised or enforced by other contracting states.[103]

B. Bases for recognition and enforcement

24 For a judgment to be recognised and enforced in a requested state, it must satisfy at least one of the 13 indirect jurisdictional grounds in Art 5 of the Convention.[104] The Art 5 grounds can be classified into three broad jurisdictional categories: (a) jurisdiction based on connections with the person against whom recognition or enforcement is sought;[105] (b) jurisdiction based on consent; and (c) jurisdiction based on connections between the claim and the State of origin.

99 HCCCA, Art 2(1)(a).
100 The Convention, Art 2(1)(k).
101 HCCCA, Art 21.
102 The Convention, Art 18(1).
103 The Convention, Art 18(2).
104 The grounds are "indirect" as they are considered by the court of the requested State at the point of recognition or enforcement. In contrast, "direct" grounds are applied by the court of the State of origin to hear a case in the first instance.
105 The Explanatory Report to the Draft Convention fixed the first category as "jurisdiction based on connections with the defendant". The "defendant" refers to the defendant in the court of origin and is not necessarily "the person against whom recognition or enforcement is sought". It is possible that the claimant lost the case and the defendant is the one seeking to recognise or enforce that judgment in the requested State. Given this distinction, Arts 5(1)(a) and 5(1)(c) of the Convention do not fit neatly into any of the draft Convention categories. Hence, for conceptual clarity, the author has chosen to adopt a different formulation.

(1) Jurisdiction based on connections with person against whom recognition or enforcement is sought

25 A jurisdictional link is recognised under the Convention if the person against whom recognition or enforcement is sought is *resident* in the State of origin at the time of the proceedings.[106] While the Convention uses the term "habitual residence", it is likely to be similar to the common law test of "residence". For natural persons, this means that mere presence does not suffice under the Convention and a closer connection between them and the State of origin is necessitated. Recognition or enforcement may be sought against them, however, if they had their principal place of business in the State of origin at the time of the proceedings, and the claim on which the judgment is based arose out of the activities of that business.[107] Corporations are considered habitually resident in a State if they have their statutory seats in that State, was formed or incorporated under the law of the State, or have their central administration or principal place of business in that State.[108]

(2) Jurisdiction based on consent

26 The Explanatory Report to the Draft Convention used a single category of "jurisdiction based on consent".[109] However, this category can be bisected to cover two kinds of consent – "consent as in *assent*" and "consent as in *agreement*". The former addresses unilateral express consent during proceedings and implied consent or submission, while the latter deals with the agreement of the parties.

(a) Jurisdiction based on assent

27 The jurisdictional requirement is satisfied if the defendant expressly consents to the jurisdiction of the court of origin during the course of proceedings.[110] Whether a defendant consented to the jurisdiction of the court of origin is a question to be decided by the court of the requested state.[111] Unlike the HCCCA,[112] the court of the requested

106 The Convention, Art 5(1)(a).
107 The Convention, Art 5(1)(b).
108 The Convention, Art 3(2).
109 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 146.
110 The Convention, Art 5(1)(e).
111 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 161.
112 HCCCA, Art 8(2).

state is not bound by such findings of fact on which the court of origin assumed jurisdiction, since facts necessary for the application of the Convention can be considered.[113]

28 Under the Convention, consent is implied if the defendant argued on the merits before the court of origin *without* contesting jurisdiction.[114] By failing to object to the existence or exercise of jurisdiction, the defendant is taken to have submitted to the jurisdiction of the court of origin. A defendant who has properly contested jurisdiction but lost can nevertheless still defend on the merits without being considered to have submitted to the court's jurisdiction.[115] To this end, it is a departure from the common law position where a defendant is considered to have submitted to the court's jurisdiction as long as he had argued on the merits.[116]

29 The Convention also applies if the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based.[117] This is understandable since bringing a claim to a court entails acceptance of that court's jurisdiction. With respect to counterclaims, a distinction must be drawn between a successful counterclaim and an unsuccessful counterclaim because the rationale for finding a jurisdictional link is different. If the judgment is given in favour of the counterclaimant, and the original claimant becomes the party sought to be bound, the judgment is eligible for recognition and enforcement under the Convention "provided that the counterclaim *arose out of the same transaction or occurrence as the claim*" [emphasis added].[118] This is because the original claimant, by voluntarily commencing proceedings in the court of origin, is taken to have accepted that court's jurisdiction to rule on any counterclaim in so far as it is derived from the same transaction.[119] On the other hand, if the judgment is given against the counterclaimant, and the counterclaimant is the party sought to be bound, the judgment is treated as though it is an

113 The Convention, Art 4(2). See also *HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Draft Explanatory Report* (2019) at para 115.

114 The Convention, Art 5(1)(f).

115 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 180.

116 *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266.

117 The Convention, Art 5(1)(c).

118 The Convention, Art 5(1)(l)(i).

119 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 217.

original claim.[120] This is because the counterclaimant, by instituting the counterclaim, is taken to have implicitly consented to the jurisdiction of the court of origin.[121]

(b) Jurisdiction based on agreement

30 Where the parties in question had agreed in advance to designate the court of origin as the forum to resolve their disputes, the jurisdictional requirement will be satisfied. The Convention, however, does not deal with the recognition and enforcement of judgments relating to exclusive choice of court agreements.[122] Accordingly, in determining the applicability of Art 5(1)(m), the starting point for any requested court is to consider whether the jurisdiction agreement is a *non-exclusive* choice of court agreement.[123] Whether the word "exclusive" is used or not is by itself not conclusive, and much depends on the construction of the clause.[124]

31 What is the applicable law to determine whether a choice of court agreement is exclusive or non-exclusive? On its face, the Convention does not seem to provide an answer to this question. But it is pertinent to note that the Convention is intended to be *complementary* to the HCCCA.[125] Hence, in determining the issue of exclusivity of a choice of court clause under the Convention, it is arguable that a requested court should take reference from the HCCCA. Two principles become immediately relevant. First, a choice of court agreement is *presumed* to be exclusive unless expressly provided otherwise by the parties.[126] Secondly, while the HCCCA is silent on the law governing the interpretation of the scope of the clause, it refers the issue of validity to the law of the chosen court.[127] Respected commentary has suggested that the same law that

120 The Convention, Art 5(1)(l)(ii).

121 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 219.

122 The Convention, Art 5(1)(m).

123 Even though the existence of an exclusive choice of court agreement between the parties is at least in part an issue of jurisdictional fact, the requested court is not bound by such findings of fact since it can consider issues necessary for the application of the Convention: Art 4(2).

124 *Continental Bank NA v Aeakos Compania Naviera* [1994] 1 WLR 588 at 594; *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588. See also Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 at 316, para 21.

125 Preamble to the Convention.

126 HCCCA, Art 3(b).

127 HCCCA, Art 5(1).

governs validity would also govern interpretation.[128] Accordingly, the private international law determined by the chosen court should likewise be applied to construe a choice of court agreement.

32 In the case of asymmetric clauses, there is some uncertainty as to whether they are exclusive for the purposes of the HCCCA. Asymmetric clauses are agreements under which one party is entitled to bring proceedings only in the chosen court while the other party can bring proceedings in other courts as well. Such clauses are common in international lending transactions.[129] An example of an asymmetric clause is as follows:

> In respect of any dispute arising from or in connection with this contract, A may sue B [whether concurrently or otherwise] in any court in the world and B agrees to submit to such jurisdiction selected by A, but B may only sue A in Singapore.

33 Preliminarily, it should be pointed out that this issue of asymmetric clauses has significant downstream implications. Having adopted the HCCCA, it would be in Singapore's interest to have asymmetric clauses considered as exclusive. If such clauses are considered to be exclusive, they would fall within the ambit of the HCCCA, and consequently outside the Convention. Intuitively, this would be an ideal outcome for Singapore as it endeavours to channel more cases through the HCCCA and encourage commercial parties to select Singapore exclusively as their chosen court. That said, this policy consideration only comes into play when there is ambiguity as to the exclusive nature of asymmetric clauses. But is there ambiguity?

34 While the HCCCA itself does not explicitly exclude asymmetric clauses, the Explanatory Report to the HCCCA states that such clauses are not considered exclusive because "the agreement must be exclusive *irrespective of the party bringing the proceedings*" [emphasis added].[130] Notwithstanding, in the English High Court decision of *Commerzbank*

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128 Yeo Tiong Min, "Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective" (2015) 114(1) *Journal of International Law and Diplomacy* 50 at 63.

129 Ronald Brand & Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (Cambridge University Press, 2008) at p 44.

130 Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (by Trevor Hartley & Masato Dogauchi) (2013) ("Explanatory Report") at paras 105–106. The Explanatory Report is likely to be of great persuasive value to the Singapore courts. In the only case to date to be decided under the Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed), the High Court referred extensively to the Explanatory Report: *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8.

AG v Liquimar Tankers Management Inc[131] ("*Commerzbank*"), Cranston J opined (in *obiter*) that the words of the definition of exclusive jurisdiction clauses under Art 3(a) of the HCCCA do cover asymmetric clauses.[132]

35 The diverging views on asymmetric clauses exemplify the "cultural divide between the common law perspective of the choice of court agreement as a contractual agreement and the civilian perspective of the agreement as a procedural device".[133] At root, civil lawyers view dispute resolution agreements as belonging to the procedural arena and requiring strict curial supervision. On the other hand, common lawyers endeavour to give as much effect as possible to party autonomy.[134] In *TMT Co Ltd v The Royal Bank of Scotland*,[135] the Singapore High Court confirmed that asymmetric clauses are enforceable at common law if they were entered into freely between the parties. The clause in question provided for disputes to be submitted to the jurisdiction of the English courts for the defendants' benefit, and further enabled the defendants to commence legal proceedings in any other competent jurisdiction. Notwithstanding the lack of mutuality, the court held that such clauses are enforceable and that it "would hold the parties to the bargain they entered into".[136] Likewise, in the context of arbitration, the Singapore courts have expressed their willingness to uphold asymmetric arbitration clauses even if only one party has the power to elect for arbitration.[137]

36 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[138] further illustrates the significance that Singapore courts place on giving effect to party autonomy. The Singapore Court of Appeal departed

131 *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] 1 WLR 3479; [2017] EWHC 161

132 *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] 1 WLR 3479; [2017] EWHC 161 at [36]–[39] and [74]. See also *Etihad Airways PJSC v Prof Dr Lucas Flöther* [2020] 2 WLR 333; [2019] EWHC 3107, where the English Commercial Court similarly held that an asymmetric jurisdiction clause was an "exclusive" jurisdiction clause within Art 31(2) of the recast Brussels Regulation (Regulation (EU) No 1215 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

133 Yeo Tiong Min, Yong Pung How Chair Professor of Law, "Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements" 11th Yong Pung How Professorship of Law Lecture (16 May 2018) at para 14.

134 Trevor Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press, 2014) at pp 224–226.

135 [2018] 3 SLR 70.

136 *TMT Co Ltd v The Royal Bank of Scotland plc* [2018] 3 SLR 70 at [74].

137 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [13]; *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 at [24]–[25].

138 [2018] 2 SLR 1271.

from a line of authorities, starting from *The Jian He*,[139] where proceedings had been allowed to continue in the face of an exclusive choice of foreign court agreement because the courts had found that the defence was devoid of merits. In holding that the absence of a meritorious defence did not amount to strong cause to refuse a stay, the court emphasised the paramountcy of giving effect to party autonomy:[140]

> The principle of party autonomy is deeply infused into the law governing the enforcement of exclusive jurisdiction agreements. It underlies the 'strong cause' test, which sets a high threshold for a court to refuse a stay of proceedings commenced in breach of an exclusive jurisdiction agreement. It also explains why our courts readily grant anti-suit injunctions to restrain such proceedings. In our judgment, the rule in *The Jian He* must yield to this fundamental principle.

37 In light of this civil-common law divide, a strong argument can be made for regarding asymmetric clauses as *non-exclusive*. As international instruments seeking to promote certainty,[141] the HCCCA and the Convention require that courts, in interpreting its provisions, give regard to "its international character and to the need to promote uniformity in its application".[142] But uniformity can only be achieved when the different legal systems forswear parochial attitudes, and not go against the express language of the Conventions as the English High Court arguably did in *Commerzbank*. Article 3 prescribes that the HCCCA only covers agreements that *designate* "the courts of *one* Contracting State" [emphasis added]. The question is whether the designation has to be made at the time of conclusion of the contract, or whether it can be made at a subsequent point in time following an election by one of the parties. Louise Merrett seems to adopt the latter view and posits that the outcome in *Commerzbank* can be rationalised if asymmetric clauses are not "considered as a whole".[143] Instead, the effect of the clause could be judged by considering the effect of a particular obligation on a particular party. She argues that there is "nothing inherent in the structure or rationale of the Convention to mean that if the claim is made against a borrower who has agreed to be sued in a particular jurisdiction *and only that jurisdiction* that the rules should not engage" [emphasis added].[144]

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139 [1999] 3 SLR(R) 432.

140 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [115].

141 The Convention, Preamble; HCCCA, Preamble.

142 HCCCA, Art 23.

143 Louise Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements" (2018) 67(1) ICLQ 37 at 57–58.

144 Louise Merrett, "The Future Enforcement of Asymmetric Jurisdiction Agreements" (2018) 67(1) ICLQ 37 at 58.

38 However, Merrett's proposal is problematic when seen in light of the HCCCA's object and purpose.[145] A key objective of the HCCCA is to promote certainty of adjudicatory forum.[146] Yet the precise effect of asymmetric clauses is that until the subsequent election, it is unclear to the parties where the adjudicatory forum would be. The better view would thus be to consider that the designation must be made at the time of conclusion of the contract. What this means is that asymmetric clauses would fall outside the ambit of the HCCCA, and consequently within the scope of the Convention.

39 Of course, not all asymmetric clauses are drafted like the example above.[147] Consider another example of an asymmetric clause:

> In respect of any dispute arising from or in connection with this contract, if C sues D in the court of X, the court of X shall have (exclusive) jurisdiction, and if D sues C in the court of Y, the court of Y shall have (exclusive) jurisdiction.

It may be argued that such clauses are exclusive for the purposes of the HCCCA because with the unilateral selection of a court, the clause does give rise to a clear choice of a *single* court. In fact, a similar clause was found to be exclusive in the context of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[148] But as mentioned, certainty of adjudicatory forum is a pillar of the HCCCA. If certainty in this regard is to be assessed at the time of conclusion of the contract, then it should not be hard to see why such clauses were considered non-exclusive in the Explanatory Report.[149]

40 As mentioned, the Convention is intended to be *complementary* to the HCCCA.[150] The main reason why judgments relating to exclusive choice of court agreements are excluded by the Convention is to avoid overlaps between the two instruments.[151] However, there is a gap left

145 Treaties like the HCCCA must be interpreted in light of its object and purpose: Vienna Convention on the Law of Treaties (1155 UNTS 331) (adopted 22 May 1969; entered into force 27 January 1980) Art 31(1).

146 Yeo Tiong Min, Yong Pung How Chair Professor of Law, "Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements" 11th Yong Pung How Professorship of Law Lecture (16 May 2018) at paras 24 and 26.

147 See para 32 above.

148 27 September 1968. See *Meeth v Glacetal Sarl* Case C-23/78, EU:C:1978:198; [1978] ECR 2133.

149 Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (by Trevor Hartley & Masato Dogauchi) (2013) at para 109.

150 The Convention, Preamble.

151 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 222.

unaddressed by both the HCCCA and the Convention.[152] Consider a clause that designates exclusively the court of a state that is a party to the Convention, but not the HCCCA. Judgments relating to such agreements would not be covered under the Convention via Art 5(1)(m), and the party seeking enforcement or recognition would have to rely on other bases of indirect jurisdiction, or national law.[153]

(3) Jurisdiction based on connections between claim and State of origin

41 The Convention sets out bases of indirect jurisdiction based on connections between the claim and the State of origin. For instance, Art 5(1)(k) allows for the recognition and enforcement of judgments concerning the validity, construction, effects, administration or variation of a trust. Specifically, it applies to judgments dealing with internal aspects of a trust, provided that the trust is voluntarily created and evidenced in writing. At the time the proceedings were instituted, the State of origin must also be designated in the trust instrument either as "a State in the courts of which disputes about such matters are to be determined",[154] or as "the State in which the principal place of administration of the trust is situated".[155]

C. Other matters

42 Recognition or enforcement under the Convention may be refused if any of the grounds for refusal in Art 7 are made out. The grounds largely mirror those existing under the common law; hence, regard can be given to the courts' existing interpretation of these grounds.

43 The Convention also allows for the recognition or enforcement of a judgment to the extent that a foreign award for damages is compensatory.[156] As mentioned,[157] while the HCCCA and the amended REFJA are aligned with the Convention in this regard, the common law position is unclear.

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152 Andrea Bonomi, "Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments" (2015/2016) XVII *Yearbook of Private International Law* 1 at 16.

153 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at paras 29–31.

154 The Convention, Art 5(1)(k)(i).

155 The Convention, Art 5(1)(k)(ii).

156 The Convention, Art 10.

157 See para 20 above.

44 A key aspect of the Convention is that it would only have effect between two contracting states if neither had deposited a declaration regarding the other.[158] The bilateralisation clause seeks to engender greater acceptance of the Convention by addressing the apprehension of states that are wary of recognising or enforcing judgments from dubious legal systems.[159] Notwithstanding, the efficacy of Art 29 remains to be seen. The opt-out mechanism means that a contracting state is "stuck" in a treaty relationship with all other contracting states unless it explicitly proclaims its unwillingness to extend the Convention to a particular state. One can imagine this to be a situation of political delicacy, since states making such declarations are essentially professing their distrust in the judicial system of another sovereign state. Further, in the long run, the bilateralisation clause arguably results in a hodgepodge of selective arrangements, inimical to the stated purpose of the Convention to create "a uniform set of core rules".[160]

IV. Issues of scope of the Convention

45 From a practical perspective, adopting the Convention affords an easier route for Singapore judgments to be recognised and enforced in other contracting states. The attractiveness of the Convention arguably lies in its scope. It is wider than the HCCCA in so far as it provides for the circulation of judgments beyond those produced on the basis of an exclusive choice of court agreement. When one compares the Convention (and its 13 bases of international jurisdiction) to the REFJA, it will be seen that the Convention provides a greater *number* of bases to give effect to foreign judgments.[161]

46 However, commentators have raised a valid concern that widening the grounds for the recognition of foreign judgments will increase the potential of Singapore courts having to undertake intrusive review into the circumstances underlying the grant of a foreign

158 The Convention, Art 29. It is noteworthy that in contrast, the Convention on the Recognition and Enforcement of Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (hereinafter "New York Convention") does not have such a bilateralisation clause.

159 Louise Ellen Teitz, "Another Hague Judgments Convention? Bucking the Past to Provide for the Future" (2019) 29 *Duke Journal of Comparative & International Law* 491 at 505–506.

160 David Goddard, "The Judgments Convention – The Current State of Play" (2019) 29 *Duke Journal of Comparative & International Law* 473 at 490.

161 As mentioned, there are only two grounds for international jurisdiction under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) – residence and submission.

judgment.[162] In principle, the defence of public policy may be used to avoid recognising or enforcing judgments from dubious legal systems. But in practice, it rarely succeeds against a foreign judgment.[163] This is because the courts acknowledge that other legal systems are entitled to hold different values.[164] In particular, the Singapore courts tend to apply a higher threshold of public policy to foreign judgments as against domestic judgments.[165] In contrast, the same concern does not apply to the REFJA. The Ministry of Law embarks on a thorough review of foreign legal systems before negotiating reciprocal arrangements. Factors that the ministry would consider include whether the foreign legal system is a "proper legal system", as well as the grounds and principles on which the legal system arrives at its judgments.[166] The benefits attached to the wider enforceability of Singapore judgments through the Convention must therefore be weighed against the risks of enforcing a greater number of incoming judgments. At this point, it is apposite to address certain issues of scope which merit further consideration.

A. Inclusion of consumer judgments

47 As mentioned,[167] unlike the HCCCA,[168] consumer judgments are included to a certain extent within the ambit of the Convention. The inclusion of consumers may be troubling to certain states considering adoption of the Convention. Contracts entered into by a consumer often raise considerations of social policy in that one of the parties thereto, namely the consumer, is regarded to be in a weaker bargaining position.[169] In the domestic context, the inequality faced by consumers typically necessitates that special protection be provided for that party by rules of law which apply irrespective of any inconsistent rules agreed in the contract itself.[170] Courts may even apply its own consumer protection

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162 Yeo Tiong Min, Yong Pung How Professor of Law, "Common Law Developments Relating to Foreign Judgments" Ninth Yong Pung How Professorship of Law Lecture 2016 (18 May 2016) at para 71. See also Kenny Chng, "Singapore" in *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Anselmo Reyes ed) (Hart Publishing, 2019) ch 7 at p 161.

163 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.210.

164 *Loucks v Standard Oil Co of New York* 224 NY 99 at 111 (2018).

165 *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690 at [32].

166 *Singapore Parliamentary Debates, Official Report* (2 September 2019) vol 94 "Reciprocal Enforcement of Foreign Judgments (Amendment) Bill" (Edwin Tong Chun Fai, Senior Minister of State for Law).

167 See para 22 above.

168 HCCCA, Art 2(1)(a).

169 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 33-126.

170 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

legislation as an international mandatory rule required to be applied irrespective of the foreign elements in the case.[171] There is thus a real concern about the inequality faced by consumers, which also explains the total exclusion of consumer-related disputes from the HCCCA,[172] and the United Nations Convention on International Settlement Agreements Resulting from Mediation[173] ("Singapore Convention"). It is true that in many cases, consumer disputes are not worth litigating,[174] but in the odd case that arises which does raise these issues, consumer protection under the Convention may be called into question.

48 That said, there are safeguards in place within the Convention to protect consumers. The use of certain bases of jurisdiction to seek recognition or enforcement against a consumer is circumscribed.[175] For instance, if recognition and enforcement is sought against a consumer under Art 5(1), consent must be given before the court.[176] However, these limitations do not apply to consumer-related disputes sought *against a trader*.

B. Inclusion of trust judgments

49 Another notable feature of the Convention, as earlier stated,[177] is that it facilitates the recognition and enforcement of judgments relating to the internal aspects of a trust.[178] This feature would be of great interest to Singapore. To enhance Singapore's reputation as a major wealth management hub, the Government has already, *inter alia*, made legislative changes to its tax and trust laws.[179] But does the Convention represent a significant upgrade to the current suite of options available to litigants in Singapore? To answer this question, it is germane to consider whether judgments relating to trusts can be recognised and enforced under the common law, the REFJA and the HCCCA.

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171 *English v Donnelly* 1959 SLT 2.

172 HCCCA, Art 2(1)(a). See Ronald Brand & Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (Cambridge University Press, 2008) at p 55.

173 7 August 2019; entry into force 12 September 2020 (hereinafter "Singapore Convention") Art 1(2)(A). See Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer, 2019) at para 1.22.

174 Dan Svantesson, *Private International Law and the Internet* (Wolters Kluwer, 2nd Ed, 2012) at pp 14–15.

175 The Convention, Art 5(2).

176 The Convention, Art 5(2)(a).

177 See para 41 above.

178 The Convention, Art 5(1)(k).

179 Tang Hang Wu, "From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore" (2018) 103 Iowa L Rev 2263 at 2283–2284. See also Wayne Arnold, "Singapore Makes a Pitch to Draw the Wealthy" *The New York Times* (26 April 2007).

50 At common law, it is somewhat uncertain whether an *in personam* trust judgment between a trustee and a beneficiary can be recognised or enforced by arguing that the beneficiary has *agreed to submit* to the jurisdiction of a foreign court.[180] Fundamentally, a trust involves a settlor transferring property to a trustee for the benefit of the beneficiary. Any contractual agreement is therefore strictly only between the settlor and the trustee, and the beneficiary is not a party to any bargain.[181] But when the beneficiary asserts a beneficiary interest against the trustee, is it possible to consider that he has thus *impliedly* agreed to submit to the jurisdiction of a foreign court?

51 A number of common law authorities have suggested that an agreement to submit must be made *expressly*, usually through a choice of court agreement.[182] This position was, however, thrown into doubt by the UK Privy Council in *Vizcaya Partners Ltd v Picard*.[183] Lord Collins, who gave the judgment for the board, stated that the crucial question is whether the judgment debtor actually contractually agreed or consented in advance to the jurisdiction of the foreign court.[184] This agreement or consent can be implied or inferred, either as a matter of fact or law.[185] In fact, Lord Collins went as far as to say that it is not necessary for the judgment debtor to "have bound himself contractually or in formal terms so to do".[186] The board's broad formulation of consent has now left the possibility of finding implied consent open. Of course, it may be pointed out that *Vizcaya Partners Ltd v Picard* involved a contract, and not a trust. But one must also consider that in determining whether forum jurisdiction can be exercised, it is already an accepted proposition that beneficiaries are bound by choice of court clauses and can be taken to have agreed to it.[187] In *Crociani v Crociani*,[188] the Privy Council held that a beneficiary who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, although "it is not

180 Of course, a foreign court may still be regarded as being jurisdictionally competent if there is presence, residence or submission in the course of proceedings.

181 Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2019) at p 318.

182 *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR(R) 275 at [17]; *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985–1986] SLR(R) 695 at [23]; *Vogel v R & A Kohnstamm Ltd* [1973] QB 133 at 145; [1971] 2 All ER 1428 at 1439; *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 14-078.

183 [2016] UKPC 5 at [59].

184 *Vizcaya Partners Ltd v Picard* [2016] UKPC 5 at [56].

185 *Vizcaya Partners Ltd v Picard* [2016] UKPC 5 at [59]–[61].

186 *Vizcaya Partners Ltd v Picard* [2016] UKPC 5 at [56], citing *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279 at 303, *per* Goff LJ.

187 *Koonmen v Bender* [2002] JCA 218.

188 [2014] UKPC 40.

a commitment of the same order as a contracting party being bound by the terms of a commercial contract".[189] Therefore, a beneficiary seeking to avoid an exclusive choice of court agreement would similarly have to demonstrate strong cause, albeit at a lower threshold as compared to in the context of contractual agreement. Reading *Vizcaya Partners Ltd v Picard* and *Crociani v Crociani* together, "it would follow that a non-contractual consent to submit in a trust instrument which binds a beneficiary would be equally effective as a ground of international jurisdiction".[190] The Singapore courts have not had the opportunity to consider the persuasiveness of these cases, and it also remains to be seen whether foreign courts would recognise a Singapore trust judgment on this basis.

52 The REFJA, being largely a codification of the common law, would likely suffer from the same uncertainty on the possibility of implied consent. An additional point to note is that while there is nothing in the REFJA suggesting that matters relating to trusts are excluded, there is an express exclusion of matters that are in connection with the "administration of the estates of deceased persons".[191] This means that the consideration of certain trust disputes, such as matters involving testamentary trusts, is precluded. Conversely, although matters relating to "wills and succession" are excluded from the ambit of the Convention,[192] this preclusion only applies to preliminary issues such as questions as to the validity of the will and its interpretation.[193] Other issues arising in the course of the administration of a testamentary trust which has been validly created are still covered by the Convention.

53 What about the HCCCA? There is no express exclusion of trust judgments from the ambit of the HCCCA. Whether a trust judgment falls within the HCCCA would depend on whether it can be said that there is an *agreement* concluded by two or more parties in a trust instrument.[194]

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189 *Crociani v Crociani* [2014] UKPC 40 at [36].

190 Yeo Tiong Min, Yong Pung How Professor of Law "Common Law Developments Relating to Foreign Judgments" Ninth Yong Pung How Professorship of Law Lecture 2016 (18 May 2016) at para 27.

191 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 2(2)(*b*).

192 The Convention, Art 2(1)(d).

193 Hague Conference on Private International Law, *Judgments Convention: Revised Draft Explanatory Report* (by Francisco Garcimartín & Geneviève Saumier) (Prel Doc No 1 of December 2018) at para 210.

194 HCCCA, Art 3(a). An exclusive choice of court agreement is defined as:

> … an *agreement* concluded by two or more parties that … designates, for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts. [emphasis added]

As between the settlor and trustee, when the trust was set up unilaterally by the settlor, it may be argued that there is no trustee who has agreed to act at the time the trust instrument is drawn up. However, when a trustee does agree to act, he is understandably subjected to the terms of the trust instrument, including the choice of court clause. This in turn raises the question of *when* the agreement must be made and whether the consent of both parties must be *contemporaneous*. On this issue, David Hayton J posits:[195]

> Although the Convention does not make the matter clear, its focus is clearly essentially upon contractual agreements and it does not obviously contemplate the circumstance where there is no 'meeting of minds' at a particular point. The Convention throughout refers to a choice of court 'agreement', rather than simply a choice of law 'clause'. The conclusion that the Convention applies as between settlor and trustee might also lead to rather bizarre results, since the declaration by the settlor of himself as trustee would remain excluded from the Convention, as it is in no sense a bilateral process. There is no policy reason why declarations of trust should fall outside the Convention whereas transfers to a trustee should fall within it.

54 Two points will be made in response. First, while the focus of the HCCCA may be on contractual agreements, it does not mean that all non-contractual agreements which are not strictly contemporaneous are thereby excluded. The HCCCA is "first and foremost concerned with validating party autonomy through upholding exclusive choice of court agreements and enforcing judgments resulting from them".[196] As long as the trustee has agreed to be bound by the choice of court, the non-contemporaneity of the agreement should not affect the applicability of the HCCCA. Instead, the courts should interpret the HCCCA to give effect to this intention. This could be why there is no express exclusion of trust judgments, even though an earlier draft report on the preliminary draft HCCCA had contained a footnote stating that the HCCCA does not apply to a choice of court made by a settlor in a trust instrument because it does not involve an "agreement".[197] Secondly, the objection relating to declarations of trust is unpersuasive. The HCCCA operates on a foundation of international consensus to enforce foreign judgments and awards based *only* on a dispute resolution process that has been agreed to by the parties. It is thus logical for unilateral declarations of trust to fall outside the HCCCA.

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195 David Hayton, *The International Trust* (Jordan Publishing, 3rd Ed, 2011) at p 61.

196 Louis Ellen Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) 53 *The American Journal of Comparative Law* 543 at 547.

197 Hague Conference for Private International Law, *Preliminary Draft Convention on Exclusive Choice of Court Agreements: Explanatory Report* (by Trevor Hartley & Masato Dogauchi) (Prel Doc No 26 of December 2004) at p 17.

55 As seen from the preceding discussion, parties wishing to recognise and enforce a trust judgment through the common law, the REFJA or the HCCCA risk opening a Pandora's Box of recondite issues which could go in favour of or against them. This is in itself a powerful argument for adopting the Convention, which faces no such uncertainty in regard to trust judgments. The Convention thus provides Singapore with a unique opportunity to further establish itself as the choice trust jurisdiction. More importantly, this consideration is not limited to the common law jurisdictions but also extends to civil law jurisdictions that may not otherwise recognise the institution of the trust.[198] By signing the Convention, these civil law jurisdictions are bound to recognise and enforce a trust judgment unless they make a declaration under Art 18.[199] As a result, the Convention allows Singapore to benefit greatly from its judgments being enforced by countries who would not otherwise recognise a Singapore trust judgment.

C. Exclusion of intellectual property judgments

56 What Singapore will not be able to achieve through the Convention, however, is its ambition of becoming the premier venue for IP dispute resolution in Asia. The Government has expressed keen interest for Singapore to play a leading role in the adjudication of IP disputes.[200] This goal can be facilitated by the wider enforceability of Singapore's IP judgments. If Singapore's IP judgments become more easily enforced overseas, parties will have greater reason to choose Singapore to resolve the dispute. As more cases are heard in Singapore, its jurisprudence will develop. With more established jurisprudence and greater familiarity with Singapore IP law, contracting parties would be more inclined to choose Singapore as the place with exclusive jurisdiction to hear their disputes. This explains why Singapore was one of the key proponents for the inclusion of IP matters in the Convention.[201]

198 Only a limited number of civil law jurisdictions are parties to Hague Convention on the Law Applicable to Trusts and on Their Recognition (1 July 1985; entry into force 1 January 1992). This includes Italy, Liechtenstein, Luxembourg, the Netherlands, and Switzerland.

199 The civil law jurisdictions may also refuse to recognise or enforce a trust judgment based on reasons of public policy or procedural inability, but the invocation of such reasons may be frowned upon by the international community.

200 Intellectual Property Steering Committee, *Intellectual Property (IP) Hub Master Plan* (April 2013) at pp 47–53. This was echoed by the Chief Justice in 2016: Sundaresh Menon CJ, "Opening of the Legal Year 2016" (11 January 2016) at paras 40–42.

201 Michael Douglas *et al*, "The HCCH Judgments Convention in Australian Law" (2019) 47(3) Federal L Rev at 433.

57 However, as mentioned,[202] the Convention excludes *all* IP matters.[203] In this regard, it is a step back from the HCCCA, which includes copyright (and related matters).[204] The principle of territoriality is often cited as the reason against the cross-border recognition and enforcement of IP judgments,[205] but this argument is not as convincing in this digital age. Before the advent of the Internet, traders could hardly conduct business and have the potential to infringe IP rights in another country if it did not have some physical presence in that country against which a local judgment could be enforced. But today, the Internet allows traders to conduct business and infringe IP rights in another country without the need to maintain any physical presence there.[206] Traders can thus market and sell their goods directly to consumers in other countries. Therefore, to ensure greater protection of IP rights, there is a legitimate need to recognise and enforce judgments handed down by the country of protection/ registration.

58 Unlike the Convention, the REFJA does not expressly exclude IP matters. While a foreign court may similarly raise the principle of territoriality to refuse recognition of a Singapore IP judgment, it is still better for a litigant to be able to argue for a possible inclusion of IP matters than face certain failure under the Convention. The inclusion of interlocutory judgments within the ambit of the REFJA further strengthens the position of litigants, especially where parties are only concerned with seeking an injunction against future infringements of their IP rights or an order to destroy infringing materials.[207]

V. Moving forward

A. Policy considerations

59 Despite the Law Reform Committee recommending a wait-and-see approach to the adoption of the HCCCA, Singapore signed on shortly after and became the first state to implement the obligations under the

202 See para 22 above.
203 The Convention, Art 2(1)(m).
204 HCCCA, Art 2(2)(n).
205 See, *eg*, American Chamber of Commerce to the European Union, "The Hague Convention on the Recognition and Enforcement of Foreign Judgments: Impact of the Potential Inclusion of Intellectual Property in the Scope" (15 April 2019) at p 3.
206 Lydia Lundstedt, "The Newly Adopted Hague Judgments Convention: A Missed Opportunity for Intellectual Property" (2019) 50(8) *International Review of Intellectual Property and Competition Law* 933 at 935.
207 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Enforcement of Foreign Judgments* (June 2005) at para 79.

HCCCA by way of a dedicated piece of legislation. It has therefore been suggested that, given Singapore's enthusiastic reception of the HCCCA, it will ratify the Convention in the near future.[208] Is it, however, useful to draw such comparisons?

60 There is an important difference between the Convention and the HCCCA, as well as the Convention on the Recognition and Enforcement of Arbitral Awards[209] ("New York Convention") and the Singapore Convention – the latter three treaties are fundamentally concerned with the parties' *bilateral choice of a dispute resolution forum*. The HCCCA gives effect to party autonomy in the selection of forum for litigation by basing the only ground of direct and indirect jurisdiction on the agreement of the parties.[210] The New York Convention is premised on the parties' agreement to submit their disputes to arbitration.[211] As for the Singapore Convention, there is a need for the parties' consent to participate in the mediation and resolve their commercial dispute.[212] On the other hand, consent to the jurisdiction of the foreign court is but one of the many bases of indirect jurisdiction available under the Convention. This difference is significant when one carefully observes the trend behind Singapore's efforts to promote itself as a dispute resolution hub. Singapore's strategy is largely focused on influencing the parties' choice of the dispute resolution forum. It has developed an entire suite of options to entice commercial parties to choose it as the dispute resolution forum,[213] as can be seen from the establishing of the Singapore International Commercial Court,[214] the Singapore Arbitration Centre, and the Singapore Mediation Centre. The reason for this strategy is simple – where the settlement is the product of a dispute resolution forum agreed upon by both parties, recognition and enforceability would be far less controversial.[215]

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208 Kenny Chng, "Singapore" in *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Anselmo Reyes ed) (Hart Publishing, 2019) ch 7 at p 161.

209 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

210 HCCCA, Art 1(1).

211 New York Convention, Art 1(1). See Christian Schulze, "The 2005 Hague Convention on Choice of Court Agreements" (2007) 19 S Afr Mercantile LJ 140 at 149.

212 Singapore Convention, Art 1(1). Article 5(1)(d) allows parties to an international mediated settlement agreement to expressly opt-out of the enforceability regime under the Singapore Convention.

213 Sundaresh Menon CJ, Response at the Opening of the Legal Year 2016 (11 January 2016) at para 15.

214 See Adeline Chong & Yip Man, "Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore" (2019) 15 *Journal of Private International Law* 97.

215 Yeo Tiong Min, "Common Law Developments Relating to Foreign Judgments" Ninth Yong Pung How Professorship of Law Lecture 2016 (18 May 2016) at para 72. See also Adrian Briggs, "Crossing the Rivers by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1 at 5–6.

61 Given this distinction, it is possible for Singapore to adopt a more pragmatic approach towards the ratification of the Convention. Ultimately, it is a political question whether Singapore chooses to be an early adopter of the Convention. The direct costs would largely be similar to those involved in the adoption of the HCCCA:[216] the costs of educating lawyers on the dissimilarities between the Convention and the current regime, complexity costs in maintaining an additional regime, as well as the interpretive uncertainties associated with a freshly promulgated treaty.[217] Currently, the only signatories to the Convention are Uruguay and Ukraine. Given the aforementioned costs, it may be prudent to wait and see whether Singapore's trading partners adopt the Convention, so that a proper assessment on the potential gains on international trade can be made.

B. Alternatives to the Convention

62 Assuming that Singapore does not adopt the Convention, how else can it move forward with respect to the recognition and enforcement of foreign judgments? For one, it may consider amplifying the role of the common law instead. Canada has taken such a step through a bold reform of its grounds of international jurisdiction. In *Beals v Saldanha*,[218] the Supreme Court enlarged the scope of jurisdictional competence. Major J, who delivered the majority opinion, stated:[219]

> There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court … must determine whether the foreign court had a *real and substantial connection* to the action or the parties … A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. [emphasis added]

The decision fomented a level of uncertainty over the Canadian formulation of international jurisdiction. The Supreme Court appeared to suggest that

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216 See Yeo Tiong Min, "Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective" (2015) 114 (1) *Journal of International Law and Diplomacy* 50 at 68.

217 Concerns on interpretive difficulties have already been raised in an in-depth study of the Convention, requested by the Committee on Legal Affairs of the European Union Parliament: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL_STU(2018)604954_EN.pdf (accessed 13 April 2020).

218 [2003] SCC 72.

219 *Beals v Saldanha* [2003] SCC 72 at [37]. This approach was first applied in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, albeit in the context of interprovincial enforcement.

even submission, which is "the most secure and uncontroversial ground of international jurisdiction", is no longer conclusive.[220] Subsequently, the Supreme Court clarified that the "real and substantial connection" test is an *alternative* to the traditional grounds and does not replace or subsume them.[221]

63 Is the Canadian approach the way forward? Notwithstanding the Supreme Court's clarification, the modern Canadian test was roundly criticised by academics. It was observed that the new Canadian position rendered the law "less certain than the traditional" position, thereby requiring the defendants "to assess, at the outset of the litigation, whether or not a court called upon to enforce the judgment will eventually conclude that the connection [with the original court] was sufficient".[222] The discretionary nature of the Canadian test made it an unenviable task for lawyers to advise clients whether to defend foreign proceedings or to ignore them.[223]

64 The Canadian approach was also rejected by the Irish Supreme Court,[224] and the UK Supreme Court. In *Rubin v Eurofinance SA*,[225] Lord Collins explained why the UK Supreme Court was not persuaded by counsel's arguments to follow the Canadian approach:[226]

> A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489.

220 Yeo Tiong Min, "Common Law Developments Relating to Foreign Judgments" Ninth Yong Pung How Professorship of Law Lecture 2016 (18 May 2016) at para 33.
221 *Chevron Corp v Yaiguaje* [2015] SCC 42 at [27].
222 Stephen Pitel, "A Modern Approach to Enforcing Foreign Judgments" [2004] LMCLQ 289 at 291.
223 Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1 at 13–14.
224 [2012] IESC 12.
225 [2012] UKSC 46.
226 *Rubin v Eurofinance SA* [2012] UKSC 46 at [129].

The Chief Justice of Singapore has expressed his support for Lord Collin's view, citing his *dicta* in an extrajudicial speech.[227] It is thus unlikely that such a far-reaching reform of the common law rules in Singapore will be seen anytime soon.

65 But perhaps more importantly, when one considers the rationale for recognition and enforcement of foreign judgments, the common law presents itself as the least promising route forward. In the past decades, a number of conceptual bases have been proffered as to understand why states recognise and enforce foreign judgments.[228] Comity and sovereignty are examples of such conceptual bases, but they have long been decried as a base for cross-border enforcement of foreign judgments being nebulous and hollow in content.[229] The predominant theory that has been held out as the conceptual basis for recognition and enforcement of foreign judgments in Singapore is the "obligation" theory.[230] It espouses the principle that "the judgment of a [foreign] court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the [domestic] courts are bound to enforce".[231] The idea of foreign judgments creating "obligations" is, however, subject to trenchant criticism. It has been argued, for instance, that the obligation theory is circular in that it merely says that there is an obligation without explaining why such an obligation arose.[232]

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227 Chief Justice Sundaresh Menon, "Finance, Property and Business Litigation in a Changing World", keynote address at the Singapore Academy of Law and Chancery Bar Conference 2013 (25–26 April 2013) at paras 29–31.

228 The policy considerations behind the cross-border enforcement of judgments eludes simple review, and it is not the province of this article to engage in a more thorough elucidation. For a good understanding of the relevant issues, see Ho Hock Lai, "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 ICLQ 443.

229 Arthur von Mehren & Donald Trautman, "Recognition of Foreign Adjudications: A Survey and a Suggested Approach" (1968) 81 Harv L Rev 1601 at 1603.

230 *Alberto Justo Rodriguez Licea v Curacao Drydock Co, Inc* [2015] 4 SLR 172 at [21]; *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [17]; *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [42].

231 *Schibsby v Westenholz* (1870) LR 6 QB 155. See also *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129, where the Court of Appeal explained that foreign judgments can be seen as creating an obligation to pay a debt specified in the judgment.

232 At common law, the writ *indebitatus assumpsit* is historically used as a matter of procedure to enforce a foreign judgment. *Indebitatus assumpsit* is grounded on the theory of an implied obligation to pay money. This does not, of course explain how the obligation arose: Yeo Tiong Min, "Common Law Developments Relating to Foreign Judgments" Ninth Yong Pung How Professorship of Law Lecture 2016 (18 May 2016) at fn 5. See also Kenny Chng, "A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws'" (2018) 14(1) *Journal of Private International Law* 130 at 147–148.

66 In defence of the obligation theory, Adrian Briggs posits that, where international jurisdiction is founded on the concept of presence, this obligation may be justified on the basis of the voluntary presence, or on "the common law understanding of international law principles of territoriality, comity and sovereignty".[233] Where international jurisdiction is founded on the concept of submission, the obligation is one arising from agreement.[234] However, to the extent that Briggs suggests that consent may be invoked as a justification for the obligation theory even where international jurisdiction is founded on presence, he does not explain the connection between consent and presence. He also does not justify *why* consent to the foreign court's jurisdiction is sufficient to create a binding obligation on the defendant within the forum to obey the foreign judgment.[235] The difficulty in identifying the rationales for judgments recognition is therefore palpable, at least in the common law realm.

67 The difficulty with any reform of the common law rules lies in the lack of control that a state has over the fate of its outgoing judgments. As much as the courts of a state have control over incoming judgments, they are powerless to affect *how* and *when* other states recognise or enforce its judgments. As Frederik Juenger aptly stated:

> Mere compliance with basic tenets of justice and procedural decency will not satisfy those who believe that deference to a foreign adjudication amounts to an encroachment on the forum's prerogatives. To anyone who shares this belief it must appear entirely proper either to insist on the power to review the foreign judgment's merits, or to use sovereignty as a bargaining chip, *exacting reciprocity as a precondition to recognition*. Indeed, if recognition is considered to entail a surrender of forum sovereignty, the temptation looms large to impose any number of additional conditions for such sacrifice … [emphasis added]

68 This brings us to our final landing point – the amended REFJA. The amendments to the REFJA affords Singapore more leverage to negotiate reciprocal enforcement arrangements with foreign countries. It rests on the conceptual basis of "reciprocity" – states requite when others agree to enforce their foreign judgments domestically.[236] This also explains why instruments that rely on trust and not agreements of reciprocity, such as the UK Commonwealth Secretariat's Model Law on

233 Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 LQR 87 at 93–94.

234 Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013)129 LQR 87 at 93.

235 Kenny Chng, "Singapore" in *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Anselmo Reyes ed) (Hart Publishing, 2019) ch 7 at p 160.

236 Ho Hock Lai, "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 ICLQ 443 at 453–457.

the Recognition and Enforcement of Foreign Judgments,[237] will probably not garner fervent international support. After all, in a political arena where unconditional trust is but a scarce commodity, it is hard to see why states would be inclined to consider such meretricious instruments favourably.

69 The concept of reciprocity finds even greater traction in a globalised world. With booming international trade comes an attendant need to ensure the effective settlement of international commercial disputes. It has been said that "there is nothing more frustrating to the ends of transnational commerce than for a business actor to obtain a judgment in one jurisdiction and then find that it is in fact worth nothing more than the paper on which it is printed in another".[238] To further their own economic interests, states are thus motivated to enter into reciprocal arrangements like the REFJA.[239] It is therefore submitted that the amended REFJA, with its promises of reciprocity, appears to be our best bet.

VI. Concluding remarks

70 The Convention raises interesting questions for Singapore. Given its ambitious scope, it promises to bring serious change to this area of private international law. By eliminating differences arising from countries applying their own national laws, the Convention aims to provide predictability and a mechanism to streamline the recognition and enforcement of foreign judgments on an unprecedented scale. It is in line with Singapore's ambition to become a global player in commerce and as demonstrated, facilitates its efforts to become a choice trust jurisdiction. Yet, at the same time, the Convention brings with it certain costs, and issues on recognising and enforcing incoming judgments from dubious legal systems. The success of the Convention will hinge on the number of States that adopt the Convention, and only time will tell *which* States will go on to adopt the Convention. As an early adopter of this international instrument, Singapore could build up a wealth of jurisprudence on the interpretation of the Convention, similar to what it has done with the

237 For the text of the Model Law, see https://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_1_GPD_ROL_Model_Law_Rec_Enf_Foreign_Judgements.pdf (accessed 13 April 2020).

238 Chief Justice Sundaresh Menon, address at the Doing Business Across Asia: Legal Convergence in an Asian Century Conference (21 January 2016).

239 Ho Hock Lai, "Policies Underlying the Enforcement of Foreign Commercial Judgments" (1997) 46 ICLQ 443 at 457–458. But see Béligh Elbalti, "Reciprocity and The Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite" 13 *Journal of Private International Law* 184. Elbalti describes reciprocity as "a toothless principle that should not pose serious concern".

New York Convention. But given the risks discussed, there is really no hurry for Singapore to adopt the Convention now.