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International Business Courts in Europe and Beyond: A Global Competition for Justice?

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1 Introduction

Over the past ten to fifteen years, international commercial courts have been established in Europe and in other parts of the world, including the Middle East and Asia,[1] while new initiatives are underway. Commercial courts as specialised courts within the domestic legal system are not a new phenomenon as such, and stem from a desire and a need on the part of a number of countries to offer tailor-made procedures for business-related disputes. For a number of years, they have featured as an asset contributing to a good business climate in the World Bank's Doing Business reports. The 2019 edition stresses that the 'top 10 ranking economies in the ease of doing business ranking share common features of regulatory efficiency and quality, including (…) specialized commercial courts'.[2]

In contrast to older commercial courts, including London's Commercial Court,[3] recently established courts have been created with the specific purpose of adjudicating and attracting international business disputes. In the last few years, international commercial courts and chambers in Europe, which are to a certain extent inspired by London's internationally successful Commercial Court, have been set up in France, the Netherlands and Germany, while in Belgium and Switzerland the creation of such a court is in preparation.[4] Also at the pan-European level the creation of a European commercial court has been proposed,[5] although, understandably, it is unlikely that this initiative will be followed up in the near future. In Eurasia, Asia and the Middle East, such courts are in place, notably in Kazakhstan, Dubai, Qatar, Singapore, China and India. One of the reasons for the mushrooming of international courts around the globe is the intrinsic need and desire to improve and modernise the justice system. However, it is also clear that increased competition in the international litigation market – fuelled in Europe by Brexit – come into play, opening up a new dimension to civil justice and global commercial litigation.[6]

While the establishment of these courts is generally welcomed, as it ties in with the general idea of labour division and specialisation, which are generally expected to result in a more efficient, better quality and perhaps innovative system of justice, it is also criticised. Apart from the uneasiness that open civil justice competition at the international level triggers, the most prominent point of critique from a domestic justice perspective concerns the fear of a two-tiered justice system. This has led the proposal to set up the Belgium International Business Court, as discussed by Lambrecht and Peetermans in the present issue, to be put on hold after it had been submitted to parliament in May 2018. From the outset, the initiative had encountered opposition from the Belgian judiciary and other stakeholders, and the original proposal had to be revised before it was placed before parliament. When at the end of 2018 the biggest Flemish political party withdrew its support, joining the

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1. See for a broad overview from the litigation market perspective inter alia E. Themeli, *The Great Race of Courts: Civil Justice System Competition in the European Union* (2018); M. Requejo Isidro, 'International Commercial Courts in the Litigation Market', Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, no 2 (2019); P.K. Bookman, 'The Adjudication Business', *Yale Journal of International Law* (2019, forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152.
2. World Bank, 'Doing Business Report 2019', 2019, at 1, available at: https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.
3. Established in 1895; since 1 October 2018 formally under the umbrella term of the Business and Property Courts. See M. Ahmed, 'A Critical Review of the Business and Property Courts of England & Wales', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 21).
4. See for Switzerland E. Lein, 'International Commercial Courts in Switzerland: The Roadmaps for Geneva and Zurich', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 115).
5. See G. Rühl, 'Building Competence in Commercial Law in the Member States', STUDY European Parliament (2018), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf (last visited 11 June 2019) and T. Evas, 'Expedited Settlement of Commercial Disputes in the European Union', available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627120/EPRS_STU(2018)627120_EN.pdf (last visited 11 June 2019). Criticised by E. Themeli, X.E. Kramer & G. Antonopoulou, 'International Commercial Courts: Should the EU Be Next? – EP Study Building Competence in Commercial Law', 23 September 2018, http://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/ (last visited 1 August 2019).
6. See further section 3.

earlier critiques in qualifying the court as a 'caviar court', the proposal was sidetracked.[7] This idea of a two-tiered justice system, where high-value business disputes – for those parties that can afford the higher court fee – seems to receive better treatment than other disputes, was also brought up critically in other countries. It led to debates in the Dutch Senate, particularly in view of the relatively high court fees, which hampered approval of the proposal,[8] while in France, criticism similar to that in Belgium – unlike in the Netherlands – has been raised with reference to the poor state of the judiciary in general.[9] Although the Belgian proposal has not been formally withdrawn, it now appears that it is highly unlikely that an international business court will be established in Belgium in the near future. Nevertheless, the Belgian proposal continues to be of great interest, specifically its hybridity in combining the public court with aspects of arbitration.

This present issue of *Erasmus Law Review* results in part from the seminar 'Innovating International Business Courts: a European Outlook' hosted by the Erasmus School of Law in Rotterdam on 10 July 2018, and co-organised by the Max Planck Institute for Procedural Law in Luxembourg and the Montaigne Centre for Rule of Law and Administration of Justice of Utrecht University. It includes the speaker contributions to that seminar – all but one reworked into an academic peer-reviewed article – complemented by articles resulting from a call for articles focusing on other jurisdictions and horizontal topics. The intense debate between academics, judges, policymakers and lawyers at the seminar not only underlined the topicality of these (new) courts in five European jurisdictions but also revealed divergent views on the desirability of and need for these courts, as well as a certain discomfort – at least for some of the participants – in regard to the competitive elements. Five articles focus on international commercial courts in Europe: England and Wales by Sir Geoffrey Vos (non-peer-reviewed), the Netherlands (Eddy Bauw), France (Alexandre Biard), Germany (Burkhard Hess and Timon Boerner) and Belgium (Philippe Lambrecht and Erik Peetermans). Two articles address horizontal issues from a European perspective: one on forum agreements for the Netherlands and German commercial courts in relation to Brussels I*bis* (Georgia Antonopoulou) and the other on lawyers' preferences in relation to international commercial courts (Erlis Themeli). The other articles focus on the international commercial court in Singapore (Man Yip) and the international enforcement of Singaporean judgments (Drossos Stamboulakis and Blake Crook), and on commercial courts in India (Sai Ramani Garimella and M.Z. Ashraful) and Kazakhstan (Nicolás Zambrana-Tévar).

This article frames the discussion on international business courts and provides explanations for the rise of these courts in Europe and beyond, addresses aspects of justice innovation and international competition, and lastly turns to the effect these new courts may have on globalising commercial court litigation.

2 International Business Courts in Europe and Beyond

Commercial and business courts are not new. For instance, France has had its commercial courts (*tribunaux de commerce*) since 1563.[10] England and Wales has had a dedicated commercial court since the 1890s.[11] Examples can be multiplied. Yet since the turn of the 21st century there has been a sharp growth in Europe in both discussions concerning the establishment of such courts, and subsequently in their creation. Expansion has not stopped there. It can also be seen in the Middle East, in India and in Singapore. It is unlikely to stop there. Given this, what has fuelled this recent expansion? A number of explanations can be given.

The first potential explanation, and one that is Europe-centric, is Brexit: the United Kingdom's scheduled withdrawal from the European Union, which is expected to take place on 31 October 2019 following the UK's June 2016 referendum on the issue. Superficially, this might seem an attractive explanation, as discussions regarding the creation and establishment of new commercial courts in European Union member states accelerated after the UK's decision to withdraw. That they accelerated demonstrates, however, the flaw in Brexit as a general explanation. As Peetermans and Lambrecht point out, in Belgium the idea of creating such a court was first mooted in 2014.[12] Such considerations in France, Germany and the Netherlands pre-date that.[13] At best, then, Brexit brought into sharper focus for some EU member states a perceived need to move beyond discussion, and, perhaps as Lambrecht and Peetermans suggest, accept Brexit as the basis on which they could secure a 'windfall' benefit for their jurisdiction. If, as is assumed by some, Brexit is to have a nega-

7. See G. van Calster, 'The Brussels International Business Court. A Carrot Sunk by Caviar', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 107).
8. H. Schelhaas, 'The Brand New Netherlands Commercial Court: A Positive Development?', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 45), section 3.5; G. Antonopoulou, E. Themeli & X.E. Kramer, 'No Fake News: The Netherlands Commercial Court Proposal Approved!', 11 December 2018, http://conflictoflaws.net/2018/no-fake-news-the-netherlands-commercial-court-proposal-approved/.
9. E. Jeuland, 'The International Chambers of Paris: A Gaul Village', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 65).
10. J.P. Royer, J.P. Jean & B. Durand, *Histoire de la justice en France* (2016), at 717.
11. J. Sorabji, 'The Commercial Court in England and Wales', *Tijdschrift voor Civiele Rechtspleging* 140 (2016).
12. P. Lambrecht and E. Peetermans, 'The Brussels International Business Court: Initial Overview and Analysis', *Erasmus Law Review* 42, at fn. 24 (2019).
13. See A. Biard, 'International Commercial Courts in France: Innovation Without Revolution?', *Erasmus Law Review* 24 (2019); G. Antonopoulou, 'Requirements Upon Agreements in Favour of the NCC and the German Chambers – Clashing with the Brussels Ibis Regulation?' *Erasmus Law Review* 56 (2019).

tive impact on the attractiveness of London's Commercial Court as an international dispute resolution centre, then in view of existing competition – for instance, from Singapore – for EU member states to be able to capitalise on it, there is a need for them to have their own international commercial courts operational by the end of 2019 at the earliest. Irrespective of the veracity of claims concerning the effect on London's Commercial Court post-Brexit, and they are specifically doubted in Sir Geoffrey Vos's article,[14] it appears clear that it has played a part in the expansion of competition for that court and jurisdiction within Europe. If Brexit is no more than an accelerant for European expansion, its ultimate rationale must be found elsewhere. That rationale appears to be fundamentally economic. This can be seen both in Europe and in those other jurisdictions around the world where international business and commercial courts are being or have been established. This rationale has a number of facets.

First, it is apparent that for France and Germany there is a desire to improve their national reputations as centres of commercial law and of commerce generally. For France, as Biard suggests, the focus is on increasing its commercial law reputation. The establishment of new commercial courts in Paris thus runs in tandem with the recent reforms to French contract law, with the latter aimed at improving its attractiveness to international commercial and business parties.[15] In Germany, the absence of a strong international commercial or business court is out of kilter with its well-established reputation in the commercial and business sector. Equally, it does not fit with the skills and reputation of its legal sector, including its judiciary. Establishing a number of strong international commercial courts in, for instance, Frankfurt-am-Main, is a means by which Germany could thus enhance its marketability as a commercial and legal hub.[16]

Second, and to a degree linked to the previous point, is the acceptance that developing a strong international commercial and business court provides a substantial benefit to the national economy – a point underscored by Bauw when he notes the concerns that underpinned the Dutch government's desire to create an international commercial court to counteract decreasing numbers of international commercial disputes being litigated in the Netherlands. Developing the reputation of national commercial law, and of courts able to resolve disputes arising from it, has a number of impacts. The more attractive a specific commercial or contract law is in the global market, the more likely it might be that international actors will choose it as the governing law of their contract. And the more likely they are then to choose as the forum of choice the commercial court in the country from which the governing law is taken. If this is correct, and Themeli's article on focusing on the 'goods' provided by jurisdictions to its potential consumers might suggest that it is likely to be at least an important factor, then the development of such new courts will enhance national economies.

The aim of enhancing national economies by drawing international commercial and business disputes to specific jurisdictions is not limited to Europe. It underpins the growth of international commercial and business courts in Dubai, Qatar, India and Singapore. As Yip puts it in respect of the latter, 'Legal services can be a highly profitable industry'.[17] Of these four, India appears to differ in approach. Garimella and Ashraful's article emphasises that the growth of India's commercial courts has a domestic focus, in that their creation is to a significant degree aimed at improving access to adjudication for domestic commercial disputes.[18] By providing a more efficient and effective forum for litigating such disputes, benefits will flow to domestic businesses, namely through reducing the cost and time of litigation and through providing a stronger 'shadow of the law' effect that would serve to improve contractual compliance and therefore reduce dispute formation and the need for litigation.[19] The establishment of effective domestic commercial courts would thus form, as their article suggests, the first step towards India developing into an international business and commercial dispute hub, thus enabling it at some future time to seek to realise the benefits that such a hub could bring to the Indian economy.

Akin to the approach in India, the development of an international business court in Kazakhstan can also be seen as underpinning the aim of improving its domestic economy, as much as drawing in benefits via developing as an international dispute resolution hub. As Zambrana-Tévar's article argues, the development of the Court of the Astana International Financial Center is one way in which Kazakhstan aims to improve how it is perceived to comply with the rule of law.[20] Increasing both adherence to and a reputation for such adherence to rule of law norms is rightly understood to be central to economic development, a point underscored by the United Nations' sustainable development goals.[21] By promoting the rule of law in a jurisdiction, an international business court can thereby make it a more attractive venue for inward and foreign as well as domestic investment. It can thus play a role in building its national economy as much as it can in building the achievement of wider

14. G. Vos, 'A View from the Business and Property Courts in London', *Erasmus Law Review* 10 (2019).
15. See, for instance, S. Rowan, 'The New French Law of Contract', 66 *International & Comparative Law Quarterly* 805 (2017).
16. B. Hess and T. Boerner, 'Chambers for International Commercial Disputes in Germany', *Erasmus Law Review* 33 (2019).
17. M. Yip, 'The Singapore International Commercial Court: The Future of Litigation?' *Erasmus Law Review* 81, at 82 (2019).
18. S.R. Garimella and M.Z. Ashraful, 'The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business', *Erasmus Law Review* 110 (2019).
19. R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88(5) *The Yale Law Journal* 950 (1979).
20. N. Zambrana-Tévar, 'The Court of the Astana International Financial Center in the Wake of Its Predecessors', *Erasmus Law Review* 121, at 122 (2019).
21. UN General Assembly Resolution 70/1, of 25 September 2015, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

social goals. For Singapore, the focus is at the second stage – that of developing an international court in addition to its domestic courts. Its aim, through integrating its new court with its international arbitral and mediation centres, forms part of a coherent development strategy. That strategy is, as Yip argues, to develop Singapore into 'a premium dispute resolution hub'.[22] It is therefore aimed at producing a broad benefit for its legal profession and associated banking, commercial and support services, through integrating and thereby enhancing all forms of dispute resolution: namely, Singapore as a one-stop shop.

Where, however, there is an increase in jurisdictions seeking to become the 'premium dispute resolution hub', whether regionally or globally, and where the stakes are focused on ultimately improving a country's GDP, competition is inevitable. The increasing growth of international courts in Europe and beyond is unlikely to be an exception here.

3 Competition and Innovation

3.1 Competition between Courts in Commercial Litigation

Competition is well known where international arbitration is concerned. The same has not, historically, been the case where courts are concerned. Courts do not compete with each other. Sir Geoffrey Vos highlights this point in his article right from the outset. As he puts it,

> The first point I want to make is that legal systems are not, and should not be, in competition.[23]

That may well have been the case. It is not as clear now whether that remains the position. Competition between courts, and specifically international business and commercial courts as part of a broader trend towards competition between countries, is an increasingly established fact of life. It is one that was, perhaps a little ironically given Sir Geoffrey's clear view, outlined by a former Lord Chief Justice of England and Wales in 2017. As Lord Thomas put it, jurisdictions across Europe, the Middle East, and Asia were developing their substantive law, reforming their procedure, and developing new and innovative commercial courts in order for their justice systems to play a part in national economic development in a globalising and globalised world.[24]

The greater accuracy of Lord Thomas' assessment of the reality of current developments, notwithstanding the validity of Sir Geoffrey's point that national courts ought not to compete with each other or be perceived to be doing so, is readily borne out in the articles in this volume. From Lambrecht and Peetermans' article on Belgium's attempt to develop an international business court to the creation of the Netherlands Commercial Court, discussed by Bauw, and Zambrana-Tévar's account of Kazakhstan's decision to create an international business court as part of the Astana International Financial Center the direction of travel is clear. That the latter court was born from similar developments in Qatar and Dubai simply underscores the point that countries are taking notice of the creation of international business courts in other jurisdictions to a degree that is historically novel. That they are choosing to respond by developing their own courts in an attempt to attract the same international business that is being targeted by the other international business courts is equally historically novel. Rather than focusing on the delivery of justice as a public good, as the articles in this volume illustrate, the delivery of justice for international commercial and business disputes is becoming one more aspect of a global service sector.

Questions can and ought to be raised about the attempts of national governments and legislators to position their courts and judicial systems as part of a worldwide market in justice, as goods to be promoted and designed to be 'bought' by customers who consider them to provide the best dispute resolution service. Equating the provision of civil justice through a state court with, in effect, international arbitration, as is increasingly likely with the establishment of the Singapore Convention on International Mediation,[25] will undoubtedly play into, and perhaps reinvigorate, debates concerning questions as to whether civil courts provide public goods or no more than private goods.[26] Where jurisdictions such as Singapore have developed their international commercial court on the basis, as is noted in Yip's article, of 'a careful marriage between litigation and arbitration',[27] such debates would seem to become all the more pressing in terms of their continuing contemporary relevance.

For Themeli, the key questions differ in focus from those that look at the role and purpose of civil courts. His analysis focuses on another issue: what factors lead litigants to a specific jurisdiction when they could, in principle, choose from many. The answer to that question, he suggests, is the experience that lawyers, as a form of customer, have of any specific jurisdiction. His analysis poses a problem for the new courts. If customer experience is a leading factor in the choice of court, what can the new international business and commercial courts do to attract business for the first time, and what can established courts do to ensure that their repeat cus-

22. Yip, above n. 17.
23. Vos, above n. 14 at para. 27.
24. Lord Thomas CJ, *Keeping Commercial Law Up-To-Date* (2017), at 8-9, available at: https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-aston-university-speech-8-march-2017.pdf.
25. The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) 2019, available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.
26. See, for instance, H. Genn, *Judging Civil Justice* (2014); W. Landes and R. Posner, 'Adjudication as a Private Good', 8 *Journal of Legal Studies* 235 (1979); P. Carrington, 'Adjudication as a Private Good – a Comment', *Journal of Legal Studies* 303.
27. S. Chong, 'The Singapore International Commercial Court: A New Opening in a Forked Path', cited in Yip, above n. 17 at fn. 55.

tomers do not take their business elsewhere? The answer to that question increasingly seems to be innovation. Unique selling points, such as those that are being developed in England via its creation of the Business and Property Court or Singapore through its linking of arbitral and court proceedings, are examples of competition's consequences.

3.2 Competition and Innovation in Civil Justice

One of the central areas of innovation that the developing competition between business and commercial courts focuses on is language. Use of the English language has been identified as a key selling point by a number of new courts in Europe and further afield. The argument is that with English as a, or *the*, language of international commerce, courts that want to attract such disputes to their jurisdiction then need to ensure that their proceedings can be conducted in English. The major selling point, it is supposed, that London's Commercial Court has long had, albeit other jurisdictions such as Singapore have long operated with English as a court language, has spurred many jurisdictions to move away from their traditional approach: that litigation must be conducted in their national language. Themeli challenges the assumption that the English language is a significant selling point for any specific jurisdiction. For him, the evidence points to the perceived quality and expertise of a country's judiciary, amongst other things, as being among the selling points that attract international litigants to international business courts.[28] Use of the English language might be a factor, but whether it is a genuinely significant one is questionable.

This raises a broader issue for the future. Competition between the international commercial and business courts may be leading to positive innovation, such as novel procedures in England to provide speedier trials.[29] Might some of those innovations, however, be based on a false premise? If so, they will make little to no positive contribution. Equally, they may pose no problems. New courts offering to conduct proceedings in English as an alternative to, for instance, Dutch or German, may pose no real problems either for the courts or for litigants. If it is not a selling point, it will not be taken up. It will not attract new business. If, however, commercial courts start to introduce innovations that are perceived by their administrators as presenting selling points, but which undermine the court's ability to do justice or, more broadly, to have an adverse effect on the jurisdiction's domestic courts or domestic procedure, things may be different. If, for instance, international commercial courts develop new forms of fast-track appeal process, which prioritise appeals from their decisions in domestic appeal courts, enabling them to be heard before domestic appeals, the pursuit of international business could come at the price of a country providing effective access to justice for its own citizens. Equally, if a focus on developing such international courts diverts a state's resources from its own domestic courts, a two-tier system of civil justice may well become entrenched, providing a first-class service for international litigants and a poorer class of service for national litigants, to whom in fact the state is under a duty to secure an effective and efficient justice system. That being said, innovation resulting from international competition could lead to domestic courts benefiting from the development of novel procedures at the international level.

A further point from competition-based innovation could affect substantive law. As Themeli notes, one reason that lawyers and litigants choose specific jurisdictions is their substantive law.[30] Historically, one of England's main selling points as a jurisdiction of choice has been its commercial law. Recently, however, there has been some degree of disquiet in England that there may be a weakening of its 'commercial' advantage in this area, as, amongst others, France has reformed its contract law and Singapore has developed its common-law based contract law. While other such countries have taken positive steps to improve the attractiveness of their substantive law, in England there has been a view that it has weakened the attractiveness of its commercial law due to the promotion of arbitration, reducing the number of disputes being resolved by the Commercial Court. This has, it is said, reduced the flow of new precedent, thereby limiting the English common law's ability to develop, to keep pace with commercial developments and thereby to retain its historic attractiveness.[31] Competition between international courts may well prove a spur to common-law jurisdictions such as England, Singapore and those commercial courts in the Middle East that use the common law to do two things. First, it could, as in England, prove a spur to the creation of innovative new processes, such as its Financial Markets test case procedure, to increase the flow of disputes and new precedent. Second, by prompting a competition between common-law jurisdictions, it may lead them to experiment with new developments in substantive law. In either case, it may be that increasing competition at the international level may provide the means for common-law jurisdictions to improve their substantive law at a quicker pace than civil code-based jurisdictions can. In that way, one possible and unintended consequence of increasing competition may be to reinvigorate those common-law courts and jurisdictions. In turn, this may then lead to innovation within civil code-based jurisdictions to innovate at a greater pace in respect of their substantive law, perhaps then remedying some of the issues that Lehmann has argued as being problematic as regards substantive law in Germany, or,

28. See E. Themeli, 'Matchmaking International Commercial Courts and Lawyers' Preferences in Europe', *Erasmus Law Review* 70 (2019); Themeli, above n. 1.
29. CPR PD57AB.
30. Themeli, above n. 28 at its section 2.2.
31. Lord Thomas CJ, *Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration*, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf; B. Eder, *Does Arbitration Stifle the Development of the Law?*, available at: http://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf.

as he suggests, the need to reform the German judiciary.[32] The consequences of this both for international and domestic markets remain to be seen. It is, however, a potential consequence that could be far-reaching in terms of its effect on the development of law and a consequence that was perhaps entirely unthought of when the increase in competition began but that seems to follow from Themeli's analysis. Irrespective of how innovation may develop, it appears clear that it will. How it develops and whether it brings benefits or not remains to be seen.

4 Globalising Business Litigation

The international commercial courts and chambers that have been established in recent years are available only in international cases or are specifically equipped to deal with these. These courts potentially further access to justice for international business parties and can strengthen the rule of law. Consistent with this aim is the desire expressed in a number of countries to offer business litigants an alternative to commercial arbitration, which has gained a dominant position as a dispute resolution mechanism for commercial disputes. This section turns to the international dimension of the new commercial courts and their position in global litigation.

4.1 Enhancing International Litigation: Expertise, Language and Financing

The rules applicable to the recently set up international commercial courts usually contain a specific 'internationality' provision as part of the competence requirements. Among the jurisdictions covered in this issue, an explicit internationality requirement is in place, notably in the Netherlands, France, Germany, Belgium and Singapore.[33] The definition of what an international dispute is differs from country to country. For instance, in the Netherlands, the Netherlands Commercial Court Rules (NCCR) require that the dispute in question is international; the explanatory memorandum defines it as a dispute where (1) at least of one of the parties is resident outside the Netherlands or is a company (or subsidiary thereof) established abroad or incorporated under foreign law; or (b) a treaty or foreign law is applicable to the dispute or the dispute arises from an agreement prepared in a language other than Dutch.[34] This broad definition assures that it covers all civil and commercial disputes having an international element, while at the same time 'legitimising' the establishment of a special court for this type of dispute.[35] The French Protocol requires that it concerns a dispute relating to international contracts, and, in particular, those to which provisions of European law or foreign law apply.[36] The Belgian proposal bases its internationality criterion largely on the UNCITRAL Model Law.[37] London's Commercial Court was not set up specifically with a view to handling international commercial disputes but has gradually developed as the preferred court in international commercial litigation. Around 70% of the cases it deals with are international, and a substantial number of them concern cases where neither of the parties is from the United Kingdom.[38]

The focus on international commercial disputes makes sense in view of the increase in and the inherent complexity of these cases. The international dimension requires not only profound subject-matter expertise but also in-depth knowledge of international business relations, private international law rules, international conventions and foreign law. The required expertise is embodied in the composition of the bench. Without exception, the judges are highly experienced and have considerable expertise in business law, international commerce and litigation. This secures the required knowledge of important international conventions (for instance the CISG) and private international law rules in Europe, in particular the Rome I and Rome II Regulations.[39] It is noteworthy that the United Kingdom has indicated its intention to continue to apply the latter two regulations despite its withdrawal from the EU, in view of their importance in international cases and for the sake of legal certainty. Interestingly, in some countries, in particular Singapore – as Man illustrates in the present issue – judges are selected not only locally but also from a number of other countries.[40] The Singapore International Commercial Court has judges from Australia, Austria, Canada, France, Hong Kong, Japan, the UK and the US and is therefore a truly international court with a strong common-law background and featuring expertise from civil law countries. This not only makes for a more diverse legal culture but also supports

32. M. Lehmann, 'Law Made in Germany' – The Export Engine Stutters', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 83).
33. In India this is not prominent, whereas in Kazakhstan a link to the financial centre is required.
34. Art. 1.3.1. NCCR. E. Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court', *Erasmus Law Review* p. 18, at section 4 (2019). See for an in-depth analysis of this requirement G. Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal', *Nederlands Internationaal Privaatrecht* 740 (2018).
35. See section 1 in this regard, also in relation to the discussion in Belgium.
36. Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, 21 February 2018, Preamble with further specifications in Art. 1 on Jurisdiction.
37. Art. 576/1, para. 3 of the proposed amendments to the Belgian Judicial Code. See Lambrecht and Peetermans, above n. 12, at section 5.3 (2019).
38. Judiciary of England and Wales, The Commercial Court Report 2017-2018 (2019), available at: https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf. The Portland reports: who uses the commercial courts? indicate an even higher number. Available at: https://portland-communications.com/publications/who-uses-the-commercial-court-2017.
39. See in the private international law context X.E. Kramer, 'A Common Discourse in European Private International Law? A View from the Court System', in J. von Hein, E.M. Kieninger & G. Rühl (eds.), *How European Is European Private International Law: Sources, Court Practice, Academic Discourse* (2019) 211, at 226-229.
40. Yip, above n. 17, at section 3.4.

the application of foreign law. In some countries, including Belgium and France, and in some German international commercial courts, lay judges are also appointed to the international commercial chamber, supporting business and trade expertise.[41]

As addressed in the previous section, one of the primary features of these new courts and court chambers is that they offer parties the possibility of litigating in English. This is considered an asset for international business litigants – though perhaps not a key selling point, as Themeli argues in this issue.[42] It goes without saying that this requires the judge to have appropriate language skills. The starting point usually is that the proceedings will be in the local language, but that parties can opt for the proceedings to take place in English. In some countries, there are exceptions to the use of English: for instance, in the Netherlands when the case proceeds to the Supreme Court, and in France for certain procedural acts. In some countries, the use of English in proceedings, particularly in oral hearings or for submitting written evidence, is not entirely new – in the Netherlands the Rotterdam and Amsterdam District court has already offered this possibility for certain cases – but the acceptance of English for the entire proceedings opens the proceedings and case law more easily to international litigants and foreign lawyers.

The question is how these new courts – with their increased expertise and being put forward as highly efficient and technically well equipped – are to be financed. As discussed above, the Belgian proposal, in particular, has been heavily criticised for creating a two-tiered justice system and absorbing financial resources and judicial expertise and experience that are needed elsewhere in the judiciary. This has been a point of discussion in other countries as well, for instance in the Netherlands and France. A logical consequence of the 'upgrading' required by these specialised courts and the type of disputes adjudicated by them is that court fees are higher, although this is not the case in all countries that have recently introduced such courts. Both in the Netherlands and Belgium the cost-neutrality of the (proposed) court was principally taken as a starting point.[43] For instance, the Netherlands Commercial Court (NCC) has a flat fee of 10,000 EUR (and in appeal 15,000 EUR), while the proportionate fee system applicable to cases resolved by the ordinary district courts results in substantially lower fees.[44] For claims between 25,000 and 100,000 EUR, this is fivefold. While the increased court fees may be desirable from the perspective of a sustainable justice system securing equality of dispute resolution between high-value business cases and other cases, the downside is that for small and medium-sized enterprises (SMEs) the access to the NCC may be limited. This has also been criticised by the Dutch Association for the Judiciary (NVvR),[45] and has led to parliamentary debates, as some political parties feared this would give an advantage to certain litigants.[46] In practice, for high-value claims, court fees seem not to be the decisive factor in bringing a case in a particular court, and other costs – in particular lawyer fees – are generally more substantial than the court fees.

4.2 International Jurisdiction and Enforcement of Judgments

The subject-matter jurisdiction of the international business courts differs from country to country, but the most important cases are international contract disputes. In Kazakhstan, the Astana International Financial Center, modelled on the Dubai International Financial Center, in particular, has a focus on financial disputes but has a broad jurisdiction over related disputes.[47] Some countries, in particular the Netherlands, also have a monetary threshold for bringing claims in the international commercial court or international chamber, where only claims with a value of 25,000 EUR and above can be brought before its international commercial court.

The rules regarding international jurisdiction also differ somewhat among the countries and are interwoven with the special status of the court. The point of departure is that bringing a case before the international commercial court requires a choice of court agreement and the specific consent of the parties. Some countries, in particular Singapore and Kazakhstan, have somewhat complex rules on transfer jurisdiction or require a specific connection with the jurisdiction.[48] While in some countries the ordinary rules on international jurisdiction – in the EU notably the Brussels I*bis* Regulation – can vest jurisdiction, the explicit consent of the parties to litigate before the international commercial court is important because different procedural rules will apply. Bauw stresses this in relation to the NCC, since adjudication by what is technically the international chamber of the Amsterdam District Court also implies substantially higher court fees.[49] In some countries, the rules regarding choice of court agreements are more strict and diverge slightly from the applicable private international law rules, in particular the Brussels I*bis* Regulation and the Hague Choice of Court Convention. Antonopoulou addresses the complexities added by the Dutch and German legislatures to choice of court agreements

41. In France and Belgium the inclusion of lay judges is also common in ordinary commercial courts.
42. See section 3.2 above.
43. Bauw, above n. 34, at section 3, para. 3; Lambrecht and Peetermans, above n. 12.
44. In 2019, the court fees for companies for claims with a value between 25,000 and 100,00 EUR is 1,992 EUR and for claims over 100,000 this is 4,030 EUR.
45. Nederlandse Vereniging voor de Rechtspraak, 'Advies NVvR wetsvoorstel Netherlands Commercial Court' (Dutch Association for the Judiciary, Advice legislative proposal Netherlands Commercial Court), 23 February 2017, available at: https://www.rijksoverheid.nl/documenten/rapporten/2017/07/14/tk-advies-nvvr-inzake-netherlands-commercial-court.
46. Schelhaas, above n. 8, at section 3.5.3; Antonopoulou, Themeli & Kramer, above n. 8.
47. N. Zambrana-Tévar, 'The Court of the Astana International Financial Center in the Wake of its Predecessors', *Erasmus Law Review* 121, at 123 (2019).
48. Yip, above n. 17, at section 3.1.3; Zambrana-Tévar, above n. 47, p. 5-10 in word doc.
49. Bauw, above n. 34, section 4.

under the Brussels I*bis* Regulation.[50] She concludes that these complicate the establishment of jurisdiction. This seems most evident for the NCC. While the stricter requirements, in particular that the agreement be in writing, seem at odds with the formal requirements of Article 25 Brussels I*bis,* this is inherent in the fact that it is not merely a choice for the Amsterdam District Court but also for its international chamber, the NCC procedural rules, and the substantially higher court fees. These rules may need to be crystallised by the court or the legislature.

Another important aspect of global business litigation, which ties in with jurisdictional issue, is the enforceability of court judgments. This aspect is addressed in some of the articles included in this issue and is central in that of Stamboulakis and Crook.[51] They focus on the approach of the Singapore International Commercial Court to jurisdiction and joinder of non-consenting parties and the enforcement of resulting judgments, which may be troublesome. More generally, the enforcement of judgments from international commercial courts is not likely to be very different from the enforcement of any other court, and it should only be easier considering party autonomy and the high standards of adjudication. Encouraging in this respect is the growing number of ratifications of the Hague Convention on Choice of Court Agreements – among others by Singapore, while China has signed this Convention – and, even more so, the adoption of the Hague Judgments Convention on 2 July 2019.

On a practical note, as illustrated by Themeli in the present issue,[52] surveys among businesses and practitioners consistently show that London's Commercial Court has long been the preferred court for international commercial litigation. Although the establishment of international commercial courts that enable litigation in English along with the persisting insecurity involving Brexit and the relocation of businesses may have some effect, it is unlikely that there will be a big shift. The choice in favour of English courts and English law is firmly rooted in transactional and litigation practice. An indication that there may be some effect as a result of Brexit is given by a 2018 Thomson Reuters report on the impact of Brexit on dispute resolution, which found that 35% of the respondents had changed their approach to choice of law and choice of court clauses.[53] This has to do with the uncertainty regarding the legal framework, and, in particular, the fact that the successful Brussels I*bis* Regulation will no longer be mutually applicable to jurisdiction, choice of court agreements and the enforcement of judgments. However, apart from other international instruments – notably, the Hague Conventions – being in place, it seems unlikely that London's Commercial Court will change its practice in regard to issues involved in international litigation or that English judgments will become substantially difficult to enforce in the EU.

4.3 Courts versus Arbitration: Turning the Tides of the Vanishing Trial?

Another question pertains to how far the global dispute resolution market will be affected by the emerging international business courts.[54] Over the past few decades, commercial arbitration has taken over a substantial amount of commercial litigation and has become the primary method of dispute resolution in many areas of commercial law, particularly in high-value disputes. The 2018 White & Case and QMUL arbitration survey found that 97% of the respondents prefer international commercial arbitration.[55] Some legislatures have justified the creation of a specialised international commercial court also with a view to providing parties with an alternative to arbitration, by offering high-quality, efficient and affordable procedures. While the international commercial courts have some attractive features and may well be cheaper – in particular because legal counsel in arbitration is more expensive – one may wonder whether these new courts will really be able to turn the tide of what has been called the vanishing trial.[56] Arbitration and court litigation in part fulfil different functions, and they are complementary. Despite catering to business litigants by enabling litigation in English, increased expertise, more procedural freedom, and, in particular in Belgium, the creation of a more hybrid legislative framework that copies arbitration rules, some of the features of arbitration are difficult or impossible to implement. This includes neutrality in the sense of detachment from a particular national and legal environment, the far-reaching freedom to select the applicable rules of procedure and the possibility of selecting specific arbitrators. The Thomson Reuters study on the effects of Brexit mentioned in the previous subsection also indicates that a substantial portion of the litigation that may be withdrawn from the London Commercial Court may move to arbitration (and often to the London

50. Antonopoulou, above n. 13.
51. D. Stamboulakis and B. Crook, 'Joinder of Non-consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement', *Erasmus Law Review* 97 (2019).
52. Themeli, above n. 28.
53. Thomson Reuters, 'The Impact of Brexit on Dispute Resolution Clauses', 23 July 2018.
54. See on the relationship between international commercial courts and arbitration, S. Wilske, 'International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse', 11 *Contemporary Asia Arbitration Journal* 153 (2018); M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?', 31 *Arbitration International* 193 (2015).
55. White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 1, available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF.
56. See, *e.g.*, in the US: M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 *Journal of Empirical Legal Studies* 459 (2004), and in England & Wales: R. Dingwall and E. Cloatre, 'Vanishing Trials?: An English Perspective', *Journal of Dispute Resolution* 51 (2006). See on concerns about the disappearance of courts, *e.g.*, J. Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights', 124 *Yale Law Journal* 2804 (2015).

Court of International Arbitration) rather than to similar courts in other countries.[57]

Nevertheless, the emerging international commercial courts may prove to have added value and be a good alternative for certain types of disputes. In any case, the bundling of international business expertise in these courts at the local level, the international cross-fertilisation of rules and practice, and the increased flexibility in procedural rules are of value to international commercial litigation. One of the key advantages of arbitration is the enforceability of arbitral awards on the basis of the New York Convention. The adoption of the Hague Judgment Convention in July 2019, following the 2005 Hague Choice of Court Convention, is certainly to be welcomed. Wide ratification of these conventions in the future would finally create a global enforcement mechanism and give a boost to international court litigation.

5 Concluding Remarks

The proliferation of international business courts in Europe and beyond has generated considerable discussion at the national political level and has attracted the interest of academics and practitioners alike. The present issue aims to contribute to the debate by presenting and critically analysing the features of these new courts in Europe and in a number of Asian countries. The precise policy aims, institutional design and procedural rules differ among the jurisdictions, but they all centre on facilitating international business dispute resolution by enabling parties to litigate in English and by offering a high level of expertise, more flexible procedural rules and efficient, modern procedures. Some jurisdictions have specifically copied arbitration rules (in particular Belgium), and others aim at creating a more integral dispute resolution system where litigation and arbitration go hand in hand (Singapore and – outside the scope of the present issue – China[58]).

Many discussions evolve around the competition between international commercial courts, fuelled in Europe by Brexit, and between international commercial courts and arbitration. We have doubts as to whether judicial competition is a good reason for a reform of the judicial system, but it is an incentive to modernise the justice system insofar as it concerns business litigation. It has raised an awareness of what is going on in other countries and has resulted in exchanges between policymakers, courts and other stakeholders. This cross-fertilisation is also visible between court litigation and arbitration and may lead to some convergence, while courts can continue to exercise their role in furthering the rule of law. Although the innovation these courts bring about depends greatly on the local circumstances – and it remains to be seen whether the new courts will be able to attract a substantial number of cases – efforts to boost the public justice system and to facilitate business litigation are to be welcomed.

57. Thomson Reuters, above n. 53. It concerns 10% of the 35% of the respondents that had indicated their intention to take a different approach to choice of court clauses.

58. See on China, N. Zhao, 'The CICC: An Endeavour towards the Internationalisation and Modernisation of Chinese Courts' in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 159).

A View from the Business and Property Courts in London

Sir Geoffrey Vos*

Introduction

1. It is an honour for me and Lord Justice Nicholas Hamblen to have been invited to address this distinguished seminar. Lord Justice Hamblen was a judge of the Commercial Court in London that sits now within the Business and Property Courts of England and Wales.
2. I should start by introducing myself, because in Europe, the word "Chancellor" is used rather differently from the way it is used in England. In England & Wales, we have three main Chancellors, excluding the many Chancellors and Vice Chancellors of Universities. They are the Lord Chancellor, who is now our Minister of Justice, but no longer head of our judiciary – a task now undertaken by the Lord Chief Justice. Then there is the Chancellor of the Exchequer, who is the Minister of Finance, and finally there is the Chancellor of the High Court, which is the post I occupy – the senior member of the judiciary, who acts as a Head of one of our three judicial divisions.
3. My role as Chancellor is to lead the Business & Property Courts, where Lord Justice Hamblen sat until he was promoted to the Court of Appeal. Both he and I hear appeals from all kinds of cases in the Business and Property Courts. Those courts include the Commercial Court, but they include also a wider variety of business and property cases including cases involving the financial markets, arbitration, insolvency and company cases, intellectual property cases, competition cases, revenue cases and technology and construction cases.
4. We introduced the Business and Property Courts in 2017 in order to bring together the jurisdictions that I have mentioned that deal with financial, business, and commercial dispute resolution. The Business and Property Courts are housed in the Rolls Building in London where some 40-50 Business & Property Courts judges sit every day. That is one of the biggest dedicated business courts in the world. The Business & Property Courts also sit in 7 regional centres across England & Wales. One of the main purposes of the creation of the Business & Property Courts has been the objective of ensuring that high quality business judges are available across the country, not just in London.
5. In addition to our domestic roles, however, both Lord Justice Hamblen and I have a long history of working with European lawyers and judges in various respects. I was the President of the European Network of Councils for the Judiciary from 2015-2016. As some of you may know the ENCJ is really the only systemic judicial network in Europe. It brings together the Councils for Judiciary and analogous governance bodies of the judiciaries of EU member states, and candidate member states. My work for the ENCJ focused on the independence and accountability of European judiciaries. We undertook a long running project aimed at evaluating the independence of judiciaries, and at enhancing the independence and integrity of judges and judiciaries across the EU and beyond.
6. An independent judiciary, as you will all know, is crucial if businesses are to be persuaded to invest in a particular state. Amongst all the rule of law factors, a reliable judiciary and a functioning justice system are of great importance to investors. Investment is much riskier in countries where the judiciary is corrupt and where commercial people cannot be confident that their disputes will be resolved fairly and within a reasonable timescale.
7. An independent judiciary is also critical because judges decide many disputes between the citizen or business and the state. They must, therefore, be independent from that state if citizens and businesses are to have confidence in the impartiality of the justice system. That is why the Italians in the first place developed the concept of a Council for the Judiciary to provide the necessary barrier or buffer between the judiciary on the one hand and the executive and the legislature on the other.
8. In the time available this afternoon, I would like to address three specific subjects. First, I want to say something about the common law to dispel a number of misconceptions that are continuing to spread in the context of Brexit. Secondly, I would like to say something about recent developments in the Business and Property Courts in England and Wales, and thirdly, I would like to say something about the establishment of new business dispute resolution courts in Europe.

* Chancellor of the High Court of England and Wales. Speech on the occasion of the seminar Innovating International Business Courts: A European Outlook organised by the Erasmus School of law, Rotterdam, the Netherlands, 10 July 2018.

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The Common Law in the Context of Brexit

9. I know the common law is familiar to many, if not all, of you. I want to give just a brief explanation as to how the common law actually works.
10. The common law is a non-statutory system of law. It does not turn on the interpretation of codes or statutes, but rather it relies on cases that have been decided by our court hierarchy in the past. The reason why this is a system that business people have found reliable over many years is because it can accommodate frequent changes in business and commercial practice. We have found that the process of legislating in relation to business contracts is sometimes rather unsatisfactory. Such legislation caters for the problem identified at the time, but not for the problems that may arise in the future. It requires a great deal of effort to be devoted to the interpretation of a written law, which may itself have been introduced some years ago, to find solutions for the different type of problem that is being experienced by the time that the litigation is taking place.
11. The common law aims to set out a system of judge-made principles that can be moulded to meet any business situation that may arise. In a fast-changing commercial and technological environment, we common lawyers think this has some advantages. It also provides guidance, through an established body of precedent, on commonly raised commercial issues, including the interpretation of many standard forms of contract.
12. Let me give one example of where these aspects may be useful. In the case of digital ledger technology (DLT), smart contracts and artificial intelligence (AI), the financial world is about to undergo, if not already undergoing, what is nothing short of a major revolution. Informed opinion suggests that the approximately 3 trillion (I don't claim that the figure is exact) financial deals entered into every year will be undertaken by way of smart contracts and DLT within 5 years, or if not 5, then not many more, years.
13. These smart contracts will all be self-executing and recorded on a digital ledger or blockchain. The theory is that no legal foundation will be required because everything will be written into the computer code that underlies the contracts. But that may not be realistic. I am certainly not assuming that it will be like that. My guess is that a legal basis will be required even for a self-executing smart derivatives contract recorded on a digital ledger across numerous servers. If that is the case, the world's legal systems will need to respond quickly. I would add that our business judges in London are moving swiftly to do so. We are educating ourselves to be ready to deal with the regulatory and other problems that will undoubtedly arise. The agility of the common law should stand us all in good stead in dealing with developments of this kind.
14. What I always say about this in a civil law context is that common law and civil law judges have much more in common than there are differences between them. They are both dedicated to achieving a just outcome in a reasonable timescale at a proportionate cost, for the dispute between the parties. The type of law that they use to do so is merely one of the tools they employ.
15. But it is important also to understand that the common law is not engaged in a number of other legal areas of concern. If we are talking about regulation, whether of banks, financial services, competition or of business sectors such as energy, telecoms, and pharmaceuticals, the common law is not really relevant at all. Regulation, is by definition, imposed by and a function of statute, whether that is European legislation or domestic legislation.
16. This is why European law does not actually have an impact on the common law. European law is almost entirely about mutuality between member states and the regulation of sectors affecting the single market and trade between member states. It is a statutory system governing Member States in order to make the single market function properly. It has nothing specifically to do with the private law that those member states use to resolve disputes between individuals or businesses.
17. It is a commonly held misapprehension about Brexit that the common law is likely to become uncertain after Brexit because there will be two speeds of European law – European law as incorporated into English law on Brexit day and interpreted by our Supreme Court, and European law as determined by the Court of Justice of the European Union after the UK has left the Union. That is not something that is likely much to affect the common law. The common law is, as I have said, a system of judge-made principles that allows any novel commercial dispute situation to be resolved in a predictable manner. Of course, the common law operates against a backdrop of the regulation of the businesses and financial services institutions that are in dispute. But the common law itself will be as certain and predictable, and as able to deal with new situations after Brexit as it was before, because the EU law tapestry is only part of the backdrop to the business environment in which the common law operates to resolve disputes governed by it.
18. So, whilst it is true that English regulatory law may develop slightly differently from European law after Brexit, that will not create uncertainty for the common law or make our jurisdiction any less effective for the purposes of dispute resolution.

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Recent Developments in the Business and Property Courts in England and Wales

19. First and foremost, it is absolutely vital that judges in the UK, and across Europe are not complacent about the systems they operate. Our judiciaries need, I think, to be in the vanguard of reform to the legal process.
20. As I always say, in an era when people can get every kind of service instantly or at worst the next day by calling it up on their smart phones, it is inconceivable that they will accept, in the longer term, the delays that are inherent in almost all justice systems. We will need to move fast to develop Online Dispute Resolution and other forms of speedier alternative dispute resolution, before the millennials lose faith in the way the older generation is content to deliver justice.
21. In England & Wales, we have a major court reform project that is introducing Online Dispute Resolution for small claims up to £10,000, for divorce, for guilty pleas in criminal cases, and for many tribunal claims in relation to social entitlements and other issues. We should not think that commercial disputes will not ultimately follow. We need to get our online dispute resolution processes right, so that they can take their place in the court structure to speed up the delivery of justice and bring our justice systems into the 21st century. The EU introduced its ODR platform last year, and it has had some success, but it is limited by the quality of ADR providers in different member states, and by the degree of acceptance of ADR in different member states.
22. There are other things that we, the judges, need to do if we are to make good the promise to achieve the modernisation of justice. We need to ensure that we understand the smart contracts, the DLT and the AI that I was speaking about earlier. Many observers think that the interest of lawyers and judges in smart contracts will be about regulation, to ensure that the new contractual landscape does not escape the controls that keep the financial services industry safe. But for my part, whilst acknowledging that that is one side of the equation, I want to make sure that our courts can be a part of the solution. Smart contracts will, as I have said, require a legal foundation. You cannot have 3 trillion contracts per year globally without expecting some of them to give rise to a dispute. We need to ensure that our judges are sufficiently educated in the legal basis of them, and in the computer code that underlies them, so that we can deal with these disputes and help to shape the legal environment in which these revolutionary developments will occur. We cannot just pretend that nothing is happening. Otherwise, we would not be serving the commercial community, which should be one of our overriding objectives.
23. There are other developing areas in the legal business world, with which judges need to engage. One of these is the growth in the use of predictive technology to forecast the outcome of disputes. This has been pioneered in the US, but has now very definitely arrived in Europe. My own view is that it is very useful for big business, because it can identify the most likely outcomes of uncertain litigation. It will not mean that litigation becomes a thing of the past, however, because "the" outcome as opposed to "the most likely" outcome cannot be predicted, and anyway not all decision-makers, even in large commercial concerns, are entirely rational. They will still, I am sure, in some situations want to "take their chances", motivated probably by other less measurable factors including human judgment and bare human emotion aroused by the dispute itself.
24. One final criticism that is often made of our common law system is our enthusiasm for the extensive disclosure of documents. Businesses know how time-consuming and expensive that process can be. This point was made to senior judges in England a couple of years ago by some of the leading General Counsel in Europe and the GC100. We listened, and we are now just about to implement the recommendations of a Disclosure Working Group led by Lady Justice Gloster, which will provide an entirely new and less costly process for disclosure of documents. In essence, disclosure will only be required if it is truly necessary to achieve justice and the parties will be able to influence the disclosure regime that will be chosen so that it suits the features of the particular dispute that is being determined. This is a good development that will be piloted in the Business and Property Courts starting early next year.
25. As many of you may also know, we have introduced a Financial List to the Business and Property Courts that deals expeditiously with major market disputes, and has a procedure for determining market test cases when such determinations will assist the financial community. The Financial List has proved very popular for the biggest disputes, and I hope we shall shortly have the first market test case to consider certain important market issues concerned with smart contracts.
26. So, the judiciary in England & Wales is not standing still. I hope it is not seen as complacent. It cannot afford to be. What I want to achieve is that we face up to the challenges that Brexit provides, and work with our European colleagues to achieve solutions that work for UK and European business.

The Establishment of New Business Dispute Resolution Courts in Europe

27. The first point I want to make is that legal systems are not, and should not be, in competition. I have huge respect for my European judicial colleagues and have worked closely with them for many years.
28. I was asked by a group of judges in Wiesbaden last November what I thought of the new English speaking commercial court that is being established in Frankfurt. I answered that I wished it every success.
29. I gave a similar answer when a delegation of French judges and officials from the new international commercial chambers in Paris, visited London last month. They, as you will already know are setting up a court made up of English-speaking judges with a mastery of the common law and who are competent to resolve international disputes. They too asked for my advice, and apart from wishing them well with their project, I advised them to focus on the information technology necessary to make their new courts work. It is crucial for any such system, new or old, to offer state of the art legal technology in terms of electronic filing and electronic case management systems, something to which I want to return in a minute.
30. It is extremely important, I think, that judges in different jurisdictions collaborate and cooperate with each other, and exchange ideas and information about their justice systems. No justice system is superior. We are all trying to offer an excellent service to our domestic and international court users, whether they are businesses or individuals. And collaboration between our judges will assist in this process. That is why I welcome this seminar so strongly, and also the strong attendance from the new European business courts at the Standing International Forum of Commercial Courts this September in New York. As you know, England and Wales has instigated SiFoCC and the next meeting will be attended by the new commercial courts in France, Germany, Ireland and the Netherlands. It will provide an important and ongoing forum for co-operation and mutual understanding.
31. My perspective is that all aspects of dispute resolution entail a balance between three factors, cost, speed and the quality of the outcome. An individual with a small dispute with a utility over €100 will want that dispute resolved quickly at no cost, and will not care much about the outcome. They will just want the matter resolved. But a bank with a €100 million dispute will care less about the cost, and even about the speed of its determination, and more about achieving the correct outcome. Judges and justice systems need to take heed of this balance, because we need to provide a diversity of dispute resolution solutions to our citizens. This is precisely why the new European commercial courts are so much to be welcomed.
32. The question you may well ask is what are the most important things about a successful business court in Europe or perhaps the world today?
33. In my view, the answers are as follows: first and foremost the quality and integrity of the judges in the court and the lawyers who practice within it. The second most important thing is to introduce appropriate IT to make sure that the court's processes are digital from end to end. We are hoping to achieve that in all English and Welsh court systems within 4 years. The third most important thing is to make sure that appeals are limited to those that are given permission, mostly on points of law, and that, as a result, delays in the initial dispute resolution process and in any appeals allowed are limited. One of the things that has blighted commercial dispute resolution in many countries over many years is a system that allows unlimited rights of appeal all the way to the highest court in the jurisdiction. Speed is of the essence.
34. Commercial people the world over want timely effective dispute resolution. It is important also to provide court services that complement and support commercial arbitration. The Business and Property Courts in London and the Arbitration Act in the UK are friendly to the commercial parties that decide to arbitrate in London. The Commercial Court, in particular, has supervisory jurisdiction over London arbitration under the 1996 Act. The links with the arbitration community are, therefore, very strong and beneficial. That will not change when the UK leaves the EU, because we will still be a party to the New York Convention and that will not change. The vast majority of arbitration business (and, indeed, the work of the Business and Property Courts more generally) is international in nature, both European and further afield.
35. Alternative Dispute Resolution (ADR) is another thing that our judges in the UK now support very actively, and it is vital to have a strong ADR offering to support court-based dispute resolution.
36. I want to say something briefly to conclude about the enforcement of judgments, choice of law and choice of jurisdiction after Brexit. The UK Government has made clear that it intends to try to negotiate an arrangement with the EU that perpetuates Brussels Recast. I cannot comment on whether that will be achieved, but what I can say is that I would have thought that it is important to both EU member states and to the UK to have mutual enforcement in place. That applies even more strongly in the context of the new Commercial Courts we have been talking about. It is all a part of the judicial cooperation that I have been speaking about. The UK Government has also said that it intends to legislate to replicate Rome I and Rome II in English law. It has said that it intends to become a party in its own right to both the

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Lugano Convention and the Hague Convention on Choice of Court 2005. The UK Prime Minister said in her Mansion House speech on 2nd March 2018 that the UK would "want our agreement to cover civil judicial cooperation, where the EU has already shown that it can reach agreement with non-member states, such as through the Lugano Convention".

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Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court

Eddy Bauw*

Abstract

The judicial landscape in Europe for commercial litigation is changing rapidly. Many EU countries are establishing international business courts or have done so recently. Unmistakably, the approaching Brexit has had an effect on this development. In the last decades England and Wales – more precise, the Commercial Court in London - has built up a leading position as the most popular jurisdiction for resolving commercial disputes. The central question for the coming years will be what effect the new commercial courts in practice will have on the current dominance of English law and the leading position of the London court. In this article I address this question by focusing on the development of a new commercial court in the Netherlands: the Netherlands Commercial Court (NCC).

Keywords: International business courts, Netherlands Commercial Court, choice of court, recognition and enforcements of judgements

1 Introduction

The judicial landscape in Europe for commercial litigation is changing rapidly. Many European Union (EU) countries are establishing international business courts or have done so recently.[1] Unmistakably, the approaching Brexit has had an effect on this development. In the last decades, England and Wales – more precisely, the Commercial Court in London – has held the leading position as the most popular jurisdiction for resolving commercial disputes.[2] The central question for the coming years is the effect that the new commercial courts in practice will have on the current dominance of English law and on the leading position of the London court. This article addresses this question by focusing on the development of a new commercial court in the Netherlands: the Netherlands Commercial Court (NCC). First, the reasons for the establishment (Section 2), the organisation (Section 3) and the jurisdiction (Section 4) of the NCC are discussed. Then the main features of the Rules of Procedure of the NCC (Section 5) are described. This is followed by consideration of the establishment of the NCC from a broader perspective and an attempt to assess the chances of its success (Section 6) and investigate its possible impact on civil litigation in the Netherlands (Section 7). The discussion closes with a few concluding remarks (Section 8).

2 Why a Netherlands Commercial Court

Plans for the establishment of a Netherlands Commercial Court were initiated long before any discussion cropped up about a Brexit referendum. In fact, the first time the subject was placed on the table was when the Netherlands Scientific Council for Government Policy published the report '*The Netherlands, a trade country, the perspective of transaction costs*' in 2003.[3] One of the recommendations of the council was to make it possible, in the light of the importance of international trade for the country, to litigate in English in Dutch courts. Although there was some discussion on the topic at the time, this recommendation lay dormant for years, until the idea was picked up by the Netherlands Council for

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1. The Chamber for International Commercial Disputes at the Landgericht Frankfurt am Main (from January 2018), in Germany, and la Chambre Commerciale au sein de la Cour d'appel de Paris (from February 2018), in France, have been active since last year. In Belgium, in December 2018, a bill was presented to parliament with the aim of establishing a Brussels international business court (*Parl.St.* Kamer 2018-19, nr. 3072/011). In Germany, also, a bill providing for the setting up of chambers for international commercial disputes within a state's regional court is pending in parliament, *see*www.bundesrat.de/SharedDocs/drucksachen/2018/0001-0100/53-18.pdf?__blob=publicationFile&v=1 (last visited December 2018).

2. As is shown in a number of surveys discussed by E. Themeli, 'The Great Race of Courts, Civil Justice System Competition in the European Union' (PhD thesis, Erasmus University Rotterdam), at 254 et seq. *See also* C.J.E. Brouwer and J.L. Butijn, 'The Netherlands Commercial Court: An International Perspective', in: E. Bauw, H. Koster & S.A. Kruisinga (Eds.), *De kansen voor een Netherlands Commercial Court*, Montaigne Serie nr. 9, (2018), at 155-85.

3. Wetenschappelijke Raad voor het Regeringsbeleid (WRR), Nederland handelsland. Het perspectief van de transactiekosten, The Hague 2003.

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the Judiciary in 2014 in the form of a plan to establish a Netherlands Commercial Court. The Council for the Judiciary had several reasons for this initiative.

The first was that, while international trade by Dutch businesses had *increased*, the number of commercial cases with an international dimension for the Dutch courts had *decreased* considerably in the preceding years. Further analysis showed that the choice of Dutch courts in international business contracts had decreased dramatically as well. This was and is noticeable in all areas of business, including international transport cases where the District Court of Rotterdam traditionally had an excellent reputation. The reason for this decline is that in international business contracts the choice of the London Commercial Court as the competent court has become the default option.[4] Dutch companies are increasingly being forced to agree to this choice, the outcome of which is higher costs. The costs of litigation are considerably higher in the UK, especially in London, than in the Netherlands. For the Dutch courts, it leads to a loss of interesting high-profile and high-impact cases, making the total 'work package' of judges less interesting. This is certainly not an advantage when courts want to attract the best lawyers. Dutch courts already have difficulties recruiting new judges.[5] If this situation continues for long, a point of no return will be reached. The number of judges with knowledge of and experience with these sorts of cases will decrease further every year. The same goes for the legal services sector in the Netherlands. The Council for the Judiciary has foreseen long-term negative consequences for the judiciary and for the Dutch legal sector as a whole if this development is allowed to continue.

The decline in the number of international commercial cases is all the more disturbing in the light of the high quality of the Dutch judiciary, and this is not merely a matter of opinion, as the annual global so-called *Rule of Law Index* of the World Justice Project shows the Netherlands in the overall fifth place and even in the *first place for civil justice* for the past 5 years or more.[6] In the *Global Competitiveness Index*, an authoritative annual international ranking of countries in the field of competitiveness and trade position, of the World Economic Forum, the Netherlands has, for years, scored high on elements that strongly influence the choice of parties in favour of a judicial forum, namely *judicial independence* (fourth place) and *efficiency of legal framework in settling disputes* (sixth place).[7] This stable high ranking is the result of a modern civil procedural law that leads to an efficient procedure and relatively short lead times compared with those of many other countries.[8] Furthermore, the Netherlands has an open economy, a long tradition of trade, a politically neutral profile and a high-level legal sector. The further modernisation of the civil procedure (in short, faster and more digitally) through the recent legislation on 'Quality and Innovation' (KEI), which is currently being implemented, could lead to an even better international ranking. The Netherlands has a long tradition of trade and the settling of trade disputes. The Dutch Bar is of high calibre with a clear international focus, as reflected by the presence of many international law firms, especially in the Amsterdam area. Last but not least, the Netherlands is an EU member state and has many bilateral treaties relating to recognition and enforcement of civil judgments, an issue that will be addressed later in this contribution.

In view of the foregoing merits, the idea grew that there was no reason to passively accept the downward trend.[9] Through the creation of a specialised court with excellent modern facilities and by offering the possibility to litigate in English, the Dutch judiciary should be able to compete with other legal systems in international commercial cases. A plan was drawn up to establish a Netherlands Commercial Court (hereafter referred to as 'the NCC plan') and was published in November 2015 on the website of the judiciary rechtspraak.nl.[10] The plan was based on marketing research and discussion with relevant businesses to gauge their enthusiasm for the idea. The outcome was that such a facility, indeed, has potential. On the basis of this research, a business case was drawn up with a first estimate of the investment needed for the establishment of a Netherlands Commercial Court and the quantum of revenues expected to flow from this investment. The business case helped to convince the minister of justice and spurred him to initiate the necessary legislation.

3 Organisation and Facilities

The groundwork for the design of the NCC is laid down in a bill that was presented to the House of Representatives ('Tweede Kamer') in July 2017.[11] The bill passed the House in March 2018 and was sent to the Senate ('Eerste Kamer').[12] On 11 December 2018, the bill, and thereby the establishment of the Netherlands Commer-

4. As clearly follows from the surveys discussed by Themeli, above n. 2, at 269 et seq.
5. E. Bauw, 'Wat te doen aan het rechterstekort?', 10 *Ars Aequi* 10 (2017), at 850-53.
6. *See*https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf. Last visited December 2018.
7. K. Schwab (red.), 'The Global Competitiveness Report 2018', Geneva: World Economic Forum (2018), available at: https://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf (last visited December 2018).
8. Hence, the high ranking for the efficiency of the legal framework in settling disputes.
9. *See,* for more background information on the establishment, R.A. Boon, 'De Netherlands Commercial Court – van idee tot oprichting,' in: E. Bauw, H. Koster & S.A. Kruisinga (eds.), *De kansen voor een Netherlands Commercial Court*, Montaigne Serie nr. 9 (2018), at 37-47.
10. Waarom een Netherlands Commercial Court? Plan tot oprichting van een Netherlands Commercial Court, inclusief kosten-baten-analyse, Raad voor de rechtspraak, 25 November 2015, available at: www.rechtspraak.nl/SiteCollectionDocuments/20150120-Plan-Netherlands-Commercial-Court.pdf#search=netherlands%20commercial%20court (last visited December 2018).
11. *Kamerstukken II* 2016/17, 34 761, nrs. 1-3.
12. *Kamerstukken I* 2017/18, 34 761, C.

cial Court, received the approval of the Senate.[13] The NCC legislation entered into force on 1 January 2019.[14]

There are two issues that are regulated in the NCC legislation. The first concerns the use of English in the proceedings and the judgments of the NCC. Oddly enough, there is no statutory provision that prescribes that litigation before the Dutch courts should be in Dutch. This was probably considered self-evident. In practice, courts already allow the use of other languages in proceedings, and judges regularly conduct hearings in German or English if required by a case. In fact, the District Court of Rotterdam has experimented with the use of English in proceedings in international transport cases since 2016, having adopted special procedural rules for this.[15] Also, the Enterprise Chamber of the Amsterdam Court of Appeal has had for years a practice of accepting documents in English and of using English during court hearings. However, the possibility of delivering a written judgment in English needs an undisputable legal basis, and there should be no room for doubt with regard to the legality of a judgment. Therefore, the NCC legislation is needed to allow judgment in English by the NCC. For this, a new Article 31r is added to the Dutch Code for Civil Procedure (CCP).

The second point that is addressed in the NCC legislation is the court fees. It is intended that the costs of the NCC can be financed from the proceeds of the court fees. In other words, the NCC must – apart from the initial costs – be financially self-supporting. However, the current court fees for commercial cases are too low to cover these costs, so separate pricing for these cases is necessary. Of course, at the start, there is insufficient data for an exact calculation, and therefore an assessment is made. The court fee for the NCC is based on three elements: the estimates of the number of cases to be expected,[16] the average costs of handling a case[17] and the tariffs of other commercial courts. This leads to a court fee of €15,000 for the court of first instance and €20,000 for the court of appeal. Additionally, interim relief proceedings at the NCC chamber of the Amsterdam District Court will cost €7,500, and interim proceedings at the NCC chamber of the Amsterdam Court of Appeal will cost €10,000.[18] The NCC legislation adds these special court fees to the Act on Court Fees for Civil Cases (‘*Wet griffierecht in burgerlijke zaken*’).

This brings us to the other main features of the Netherlands Commercial Court, namely the organisation and the jurisdiction of the NCC, followed by the rules of procedure, which are dealt with in the next section. In regard to the organisation of the court, it should be noted that the NCC will be a court only in name, but in reality a specialised division or chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal, as there are other specialised chambers of courts. Both chambers will be specialised in dealing with complex international commercial disputes. These ‘Chambers of International Trade Disputes’ are presented externally as ‘Netherlands Commercial Court’ and ‘Netherlands Commercial Court of Appeal’. The two chambers are not filled solely with judges from the Amsterdam courts but from a national pool of judges (‘the NCC-pool’) who have been selected for this on the basis of specialised knowledge and their English language skills, among other things. The judges are given special training, in addition to their existing knowledge and skills. All judges, it should be emphasised, are Dutch judges, as required by Dutch law, and no exception is made for the NCC. This differs from arbitration and other commercial courts, for example in Dubai and Singapore, which have arbitrators and judges of various nationalities.

The court sessions will take place in the building of the Amsterdam Court of Appeal (‘the Palace of Justice’) at the IJdock waterfront. The court and the parties will be able to make use of the modern facilities available in this modern court building. These include the possibility of calling in court reporters, who make a verbatim report of a hearing in the court, if so desired by the parties and at their expense. In line with the new ‘KEI-legislation’ (Article 30n CCP), the judge can also opt to have video and/or sound recordings made to replace the traditional official report. The new NCC procedure is also in line with KEI in regard to digital litigation, although a separate portal for NCC cases has been developed: the eNCC.[19] The aim is to enhance efficiency by direct (electronic) communication between the judge and the parties. Litigation before the court will also be conducted electronically. All submissions, including a claim or defence, exhibits, applications, requests and notifications to the court, will have to be uploaded to the NCC’s portal and will be added to an electronic case file (Article 3.2. NCCR).[20] Finally, the court will be able to make use of teleconference and videoconference facilities if it so desires.

All cases will, in both instances, be heard and decided by a three-judge panel (Article 3.5.1 NCCR), unlike, of course, the practice in the London Commercial Court, where, as befits the common law tradition, cases in the first instance are decided by a single judge. Decisions in the first instance will be open to appeal to the NCC

13. Wet van 12 december 2018 tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam, *Staatsblad* 2018, 474.
14. Royal Decree of 18 December 2018, *Staatblad* 2018, 475.
15. *See*www.rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf (last visited December 2018).
16. The NCC-plan estimates that the average number of cases will be 100 in the first instance and 25 in appeal, NCC-plan, at 16.
17. These costs consist mainly of the time the judges and the support staff spend on a case.
18. The court fees are the same for natural persons and legal persons.
19. *See* in more detail L.S. Frakes, ‘NCCR en eNCC: goede communicatie in internationale handelszaken’, in: E. Bauw, H. Koster & S.A. Kruisinga (Eds.), *De kansen voor een Netherlands Commercial Court*, Montaigne Serie nr. 9 (2018), at 101-111. *See,* however, also n. 22 below.
20. Note that litigation before the NCC will not be conducted electronically at the start of the NCC on 1 January 2019 (*see* the addendum to the NCC Rules of procedure of 20 December 2018, *Staatscourant* 2018, 71575). *See further* n. 22 below.

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division of the Amsterdam Court of Appeal and subsequently in cassation before the Supreme Court of the Netherlands ('*Hoge Raad*'). While proceedings at both divisions of the NCC will be – as already stated – conducted in English, as will delivery of judgments, this will not be the case at the supreme court, where proceedings and judgments will be in Dutch. This has to do with the fact that cassation is limited to questions of law and that the judgments of the supreme court have important precedential effect in Dutch private law and for all Dutch courts. This makes it important to stay close to the terminology that is commonly used in Dutch private law and the precise formulations that the supreme court uses in its rulings.

Parties can, while making a choice for the NCC, exclude the possibility of appeal and cassation. They can also make use of the possibility to begin summary proceedings ('Court in Summary Proceedings in the NCC District Court', CSP, Article 6.3 NCCR) for provisional relief before or during NCC proceedings. These summary proceedings are dealt with by a single NCC judge. And, as in all civil cases in the Netherlands, the NCC will be able to refer questions to the supreme court for a preliminary ruling ('*prejudiciële procedure*').[21] Parties must be represented by a lawyer who is a member of the Dutch Bar (Article 3.1 NCCR). All submissions must be done by this lawyer. Lawyers of other EU member states may act for a party in other ways in cooperation with the Dutch Bar member. Non-EU lawyers may not act for a party, but the court may allow them to speak at any hearing.

4 Jurisdiction

The next question is the types of cases that can be brought before the court. First, the jurisdiction is restricted to civil or commercial matters in connection with a particular legal relationship within the autonomy of the parties and that is not subject to the jurisdiction of the sub-district court or the exclusive jurisdiction of any other chamber or court (Article 1.3.1(a) NCCR). This means that parties cannot opt for the NCC as a forum in *all* civil or commercial matters with an international aspect. Although there is no minimum financial threshold for claims brought before the NCC, disputes that fall under the competence of the sub-district court (the so-called '*kantonrechter*') are left outside its scope. Therefore, financial claims under €25.000 and disputes concerning consumer purchases or consumer credits, rental disputes or labour disputes cannot be brought before the NCC. However, because of the high court fee, even without this restriction it is very unlikely that claims with a low financial value will be brought before the NCC. Another restriction is that disputes falling within the exclusive jurisdiction of other existing specialised courts such as the Enterprise Chamber of the Amsterdam Court of Appeal and the Patent Chamber of the District Court of The Hague are outside the competence of the NCC.

Second, the matter must concern an international dispute (Article 1.3.1 (b)) NCCR). According to the explanatory memorandum to the NCCR, a matter has an international aspect when:

a. At least one of the parties to the proceedings is resident outside the Netherlands or is a company established abroad or incorporated under foreign law, or is a subsidiary of such company.
b. A treaty or foreign law is applicable to the dispute or the dispute arises from an agreement prepared in a language other than Dutch.
c. At least one of the parties to the proceedings is a company or belongs to a group of companies, of which the majority of its worldwide employees work outside the Netherlands.
d. At least one of the parties to the proceedings is a company or belongs to a group of companies, of which more than one half of the consolidated turnover is realised outside the Netherlands.
e. At least one of the parties to the proceedings is a company or belongs to a group of companies, the securities of which are traded on a regulated market, as defined in the Dutch Financial Supervision Act ('*Wet financieel toezicht*', Wft), outside the Netherlands.
f. The dispute contains legal facts or legal acts outside the Netherlands.; or
g. The dispute, otherwise, involves a relevant cross-border interest.

This list of examples is not exhaustive, and the further interpretation is left to the NCC(A) and, in the last resort, to the supreme court.

Third, the parties should have designated the Amsterdam District Court as the forum to hear their case, or the Amsterdam District Court has jurisdiction to hear the action on other grounds (Article 1.3.1 (c) NCCR). Lastly, it is required that both parties have expressly agreed that the proceedings will be in English and will be governed by the Rules of Procedure of the NCC (Article 1.3.1 (d) NCCR). These rules will be revisited later on. Parties thereby also (implicitly) accept to pay the special court fee for the NCC.

5 Rules of Procedure

Although the common Dutch procedural law (the Dutch Code of Civil Procedure, *Wetboek van burgerlijke rechtsvordering*, hereafter referred to as CCP) will apply in full in NCC cases, additional special rules of procedure were drawn up for the proceedings at the NCC: the NCC rules, NCCR).[22] These rules are comparable

21. Art. 392 CCP.

22. Published in *Staatscourant* 2018, nr. 71572, with addendum in *Staatscourant* 2018 71575, available at: www.rechtspraak.nl/SiteCollectionDocuments/concept-procesreglement-ncc_en.pdf (last

to the practice directions of the London Commercial Court.[23] The NCCR partly have the function of providing clarifications of Dutch procedural law. Attached to them is a glossary of translations of Dutch legal terms into English. For practical purposes, the rules give foreign lawyers a short introduction to Dutch procedural law. In addition, the rules deviate somewhat from the rules of procedure for other commercial civil cases, specifically with the aim of promoting efficient and effective handling of large international commercial cases. They are drawn up to lead to litigation that is sufficiently interesting for parties to international commercial contracts to make a choice of the NCC in the forum selection clause in their contract. In addition, the parties can further 'design' the procedure by concluding an agreement as to proceedings. The NCCR highlight the choices that can be made here, for instance with regard to the taking of evidence or the evidential value of certain documents (Article 153 CCP and Article 8.3 NCCR). This offers room – if parties so desire – to bring certain typical Dutch rules, such as the rules governing the evidential value of the party witness's statement (Article 164 para. 2 Dutch Code of Conduct, Section 8.5.5 of the NCCR), more in line with international standards.

The drafters of the NCCR have strived for a structure that is 'understandable at a glance for lawyers in international business practice', because this is 'of great importance to advise clients on the choice to litigate at the NCC'.[24] The result is that the NCCR, while rooted in Dutch procedural law, contains a number of elements that are derived from the procedure at the London Commercial Court. An example is the 'guarantee' in Article 3.5.2 NCCR that judges and court officials who have been assigned a case will continue to deal with the case until the end ('dedicated judge'). This judge should, for instance, consider preliminary evidence transactions, such as a provisional witness examination (Article 186 CCP) or a preliminary report or hearing of an expert witness (Article 202 CCP). Although the principle of the dedicated judge is also a principle of Dutch procedural law, the practice differs in that a civil case is usually (only) linked to a judge (the 'case judge') after the statement of defence has been received, following which an oral hearing will take place. After this hearing, restrictions and requirements are imposed on possible court changes. However, in the litigation of commercial cases at the Commercial Court in London, case management by the judge starts at an earlier stage in the proceedings, especially with regard to the gathering of evidence in the phase prior to the oral hearing. Since this practice is adopted by the NCC, it is obvious that, for reasons of consistency and efficiency, from this moment on in the procedure the judge who will take charge of the case management should not, subject to (high) exception, be changed.

Important for the choice of forum that parties to an international commercial contract will make is, evidently, the speed of the proceedings of a court. With regard to the latter, the Dutch Code for Civil Procedure contains a general obligation for judges and parties to facilitate the just, fair and speedy disposition of a case and, wherever possible, prevent any unreasonable delay (Article 20 CCP). Apart from this, the special proceedings at the NCC seek to promote the expedience of the procedure in three ways (Article 3.4 NCCR). First, at the beginning of the proceedings the court will order a *case management* conference in which one of the judges discusses with the parties whether a settlement can be reached and, if not, how the case will be handled. This coincides well with the intention of the recent reform of the CCP ('Quality and Innovation', KEI): 'The courts make it possible for a case to be assigned to a judge at an early stage of the proceedings, so that if necessary they also have a hearing aimed at the direction of the case prior to the substantive oral examination, either at the request of the parties or not'.[25] Holding a case management conference is particularly important in the preparatory phase of the procedure in which evidence collection takes place. What kind of pretrial discovery will be allowed, will there be a hearing of witnesses and so on? Thus, the course of the proceedings is adapted to the complexity and value of the case.

Second, the court sets *strict time limits* of between 2 and 6 weeks for the different acts of process (Article 3.4 NCCR). Extensions are granted only for compelling reasons, unless parties make a unanimous request for extension of these limits. And even then the court can dismiss this request if this would cause unreasonable delay. Also, the Dutch inquisitorial trial model that is characteristic of civil law legal systems, as opposed to common law legal systems, adds to the efficiency of the proceedings. The Dutch judge has a more active role at trial than does – for example – the English judge.

Third, the efficiency and speed of the proceedings are favoured by the Dutch rules with regard to *disclosure* that are included in the rules of procedure. In most common law systems – such as that of England and Wales – the obligations for parties to disclose documents at the request of the other party are quite extensive. In commercial cases, the stakes are often very high, as is the importance of factual evidence to win the case. The possibilities under English law to force the other party (or third parties) to submit documents (the so-called 'disclosure') are considerable. These possibilities are much broader than the claim in court for the exhibition of certain documents under Article 843a CCP and

visited December 2018). It is important to note that, because of the delay in the implementation of the aforementioned KEI legislation, this legislation will for the time being not apply to NCC cases. Instead, the current Dutch CCP will remain in force. The most important consequence is that litigation before the NCC will not be conducted electronically. The rules in the NCCR with regard to eNCC will not apply at the start of the NCC. Measures are taken to keep this period as short as possible.

23. The directions can be found on www.justice.gov.uk/courts/procedure-rules/civil/rules. Last visited December 2018.

24. Frakes, above n. 19, at 101-111.

25. *Kamerstukken II* 2014/15, 34059, 3, at 27.

Article 8.4 of the NCCR.[26] This will lead to considerably lower litigation costs compared with, for instance, those of the London Commercial Court. In the 'competition' with other commercial courts, this will be a potential selling point for the NCC.

However, as one might expect, the 'competition' does not sit still. In the UK, there has been an ongoing discussion on disclosure for years before Brexit. It is criticised especially because of the high costs that it creates.[27] For years this discussion had no clear outcome, but a change has recently been detected here. Since 2017 a more restrictive course seems to have been adopted in high court judgments.[28] In 2018, a draft for new rules on disclosure has been drawn up by a working group of the high court and adopted by the Civil Procedure Rule Committee in July.[29] A 2-year 'Disclosure Pilot' for the Business and Property Courts based on these rules will begin on 1 January 2019 with the aim of restricting the current practice at the commercial court and is a breakthrough in the long-running discussion within the court. It is evidently the pressure of the rise of new business courts that helped to steer the discussion in this direction. Of course, the pace at which the change of rules will be able to change practice remains to be seen.

6 Chances of Success

A description of the contours of the NCC and its proceedings having been provided, the following questions must now be asked: What are the prospects of the Netherlands Commercial Court becoming a success? Will it be able to compete with the existing business courts in and outside the EU? Because the establishment of the NCC is without precedent, it is impossible to make a reliable prediction. One can only make a reasoned estimate of the considerations that are likely to determine the choice of potential users of commercial courts.

In this context, the recent PhD thesis of Erlis Themeli is of interest.[30] In his thesis, Themeli first ranks the ability of EU member states to compete in the 'civil justice system competition' using data collected for the EU Justice Scoreboard (2016). The scoreboard is a collection of data on the quality of the judicial system in all the member states. He ranks the Netherlands as the second-best scoring EU member state (behind Luxembourg) in the 'civil justice system competition' and concludes that it 'is well equipped to compete within the EU'.[31] Next, Themeli presents the findings of his survey among lawyers working for the biggest law firms in the EU.[32] The questions in the survey were related to their practical professional experience and their preferences with regard to the choice of court. The survey shows that of paramount importance to this choice are 'quality of judges', 'lack of corruption' and 'neutrality'.[33] These factors can be collectively characterised as the 'quality and integrity of the justice system'. Not very surprisingly, it is fundamental for the trust of lawyers that in the case of a dispute about the contract their clients will have 'a fair trial and decision'. In regard to the position of the NCC on this aspect, the high ranking of the Dutch justice system in the international rankings, referred to in Section 2, is again relevant. In the Global Competitiveness Index 2018, the Netherlands holds the fourth place in the pillar 'institutions'.[34] Apart from the components already mentioned in Section 2, this pillar consists of components that will determine the aforementioned trust, especially 'judicial independence' (4th place) and 'incidence of corruption' (8th place). On all these aspects, the Netherlands (judiciary) ranks among the top ten, securing it an overall fourth place. In the *Rule of Law Index of the World Justice Project*, the Netherlands ranks fifth. It therefore seems safe to say that this factor will at least not work against a choice in favour of the NCC.

The second factor that, according to the findings in the thesis, determines the choice of court is the '*speed of dispute resolution*'. This factor has already been addressed in Section 2 of this article, in the context of the high ranking enjoyed by the Dutch judiciary in the comparative efficiency of the legal framework in settling disputes (eighth place) and the provisions on case management and time limits in the NCCR that aim to promote the speed of the proceedings (Section 5). Of course, the NCC will have to prove in practice what it has to offer in this respect, but since the basic position of the Dutch judiciary with regard to this factor is advantageous and the NCCR seek to further improve this, with regard to this aspect, the starting position seems favourable in comparison with many other European judiciaries that have lower positions in these rankings and longer handling times.

The third factor is the '*predictability of the outcome*'. This predictability connects strongly to the choice parties make in their business contracts with regard to the *applicable law*. Although this is, of course, possible, it is not very likely that parties will opt for English law and

26. Even when the scope of Art. 843a CCP has been somewhat extended by the supreme court, e.g. in HR 26 October 2012, ECLI:NL:HR:2012:BW9244, NJ 2013/220 and HR 10 July 2015, ECLI:NL:HR:2015:1834, NJ 2016/50.
27. *See, e.g.,* recommendation 6.4 in the report 'Review of Civil Litigation Costs: Final Report' of December 2009: 'Disclosure can be an expensive exercise (particularly in higher value, complex cases), and it is therefore necessary that measures be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate.'
28. *Tchenguiz & Anor* v. *Grant Thornton UK LLP & Ors* [2017] EWHC 310 (Comm) (22 February 2017) en *Grosvenor Chemicals Ltd & Ors* v. *UPL Europe Ltd & Ors* [2017] EWHC 1893 (Ch) (26 July 2017).
29. *See*www.judiciary.uk/wp-content/uploads/2018/07/press-annoucement-disclosure-pilot-approved-by-cprc.pdf (last visited December 2018).
30. Themeli, above n. 2, at 269 et seq.
31. Themeli, above n. 2, at 249.
32. He also discusses other similar surveys as the study by the Oxford Institute of European and Comparative Law and Oxford Centre for Socio-Legal Studies on 'Civil Justice Systems in Europe', Themeli, above n. 2, at 270 et seq.
33. *See* Q15 at 295, Q17 at 298 and Q18 at 300 combined.
34. Schwab, above n. 7.

at the same time for the NCC as the forum to adjudicate the disputes arising out of the contract. It is self-evident that both choices in most cases will go together. What has been noted earlier about the choice of court clause, namely that London is the default choice in international business contracts, also applies to the choice of law: The default choice is English law. In recent decades in business circles – or, more precisely, in circles of international business lawyers – the image has become dominant that English law offers *more legal certainty and predictability* to contracting parties than other legal systems, especially, of course, when applied by English judges. A closer look at the matter reveals that the differences between Dutch and English civil law are not as big as they, at first sight, appear to be.[35] A more nuanced image would therefore be more appropriate. However, especially lately, the UK seems to promote more strongly than ever the image that English common law is superior to the laws of other, especially civil law, countries. A recent brochure titled '*English Law, UK Courts and UK Legal Services after Brexit. The view beyond 2019*', lists all the benefits of a choice of English law. The main selling point is that English law is more predictable and therefore offers more business certainty: 'Contracts governed by English Law are interpreted primarily by reference to the language which the parties themselves have agreed. Stringent requirements must be met before terms will be implied into the parties' bargains and the words in a contract will not be given a meaning contrary to business common sense'.[36]

Although Dutch civil law is not very different from what is described here, the UK has very successfully created the impression that the choice of law other than English puts businesses in troubled waters.[37] There are, however, good arguments for parties to choose Dutch law. Dutch civil law has a long commercial tradition and is widely acknowledged as modern and practical. It (also) offers legal certainty and, at the same time, is flexible and non-dogmatic. But, still, the 'image' of Dutch contract law is different. The fear that Tjittes so strikingly called '*fides phobia*' seems to be deeply rooted in the 'hearts and minds' of international business lawyers.[38] In particular, the use of such concepts as 'reasonableness and fairness' and 'good faith' are considered a threat to 'business certainty'. It will not be easy to prove otherwise. It seems to be more a matter of communication and marketing than of legal substance. Of course, this will take years, and the NCC must first attract cases to be able to show how predictable and, at the same time, adaptable Dutch private law can be. Perhaps this is even the biggest challenge for the NCC, namely to convince businesses and their legal counsels and business lawyers that they should not automatically stick to the model choice of law and dispute resolution clauses that they use for their contracts but modify them in the light of new circumstances and developments.

The fourth factor mentioned in the survey as an important element in the choice of court is the *'enforcement possibilities'*. Owing to instruments like the Brussels I Regulation (recast)[39] and the Lugano Convention,[40] Dutch court judgments are enforceable in the EU, Switzerland, Norway and Iceland. And when more countries ratify the Convention on Choice of Court Agreements,[41] the NCC could become even more attractive as a forum that addresses international commercial disputes. As a result of the Brexit, there is uncertainty about the enforceability of the judgments of the London Commercial Court within the EU. In the case of a 'hard Brexit' (the 'no-deal scenario'), the UK will not be part of the EU framework of civil judicial cooperation. The Brussels I Regulation (recast) would no longer apply to the UK. This would also be the case with regard to the Lugano Convention, but the UK could apply to rejoin this convention in its own right. The same applies to the Choice of Court Convention.[42] All this is certainly to the advantage of other commercial courts in member states, like the NCC. In this aspect, arbitration will be a stronger competitor of the NCC than London owing to the worldwide enforcement mechanism of the New York Convention. All in all, and with regard to this aspect, the NCC seems to be competitive enough.

A factor that does not emerge in the survey as an important element of choice, but that should not be underestimated, is the '*costs of the proceedings*'. As with all goods and services, these will, one way or another, play a role in the business decision made in the international contract. Although the *court fees* of the NCC do not seem to be very competitive compared with those of London or Singapore, it would be a mistake to focus on this aspect alone when considering the costs of litigation before a business court. Court fees are only a very small part of the total costs of litigation in international commercial cases. These costs are largely determined by the costs of the legal services that are connected to litigation. In this respect, the NCC is more competitive, as these costs are much lower in the Netherlands than in London and

35. *See* for a comparison R.P.J.L. Tjittes, 'Een Netherlands Commercial Court vereist reclame voor Nederlands recht', *RM Themis* 2014-6, at 61-62, *ibid*., Op de golven van de goede trouw naar Engels contractenrecht, *RM Themis* 2015-5, at 208-18 and *ibid*., Commercieel contractenrecht, Den Haag: Boom juridisch 2018.
36. *See* www.lawsociety.org.uk/Policy-campaigns/documents/uk-legal-services-after-brexit/ (last visited December 2018).
37. Tjittes (2015), above n. 35.
38. *Ibid*.
39. Regulation (EU) 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 PB L 351/1 van 20 December 2012.
40. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21 December 2007, at 3-41.
41. Hague Convention of 30 June 2005 on Choice of Court Agreements. *See* for the status of ratifications, available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last visited December 2018).
42. The UK government published a guidance note on 13 September 2018 on the consequences of a hard Brexit for the handling of civil legal cases, available at: https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal (last visited in December 2018).

Singapore.[43] In the NCC plan of the Dutch Council for the Judiciary that was mentioned earlier, it is estimated that a procedure in London is five times as expensive as in Amsterdam.[44] In addition to this, the efficiency of the proceedings should be taken into consideration. Costs will be lower, as the proceedings are more efficient. The same goes for the costs of disclosure. More restrictive disclosure rules will lead to lower costs; hence the pilot in the London Commercial Court, as mentioned earlier. Considering what has been described earlier about the NCC proceedings, it is safe to say that in these aspects the NCC seems to have a favourable position. Finally, it is important to note that in the Dutch system the winner of the case will not get full restitution of the legal fees, as in the English system, and this can work as an incentive against excessive litigation costs. It can therefore be expected that the NCC will be competitive in regard to costs.

Finally, the survey focuses on the choice between national (business) courts, while it is obvious that not only other business courts form the competitors of the NCC, but even more so the international commercial *arbitration practice*. Without going into a detailed comparison between the two, one element catches the eye. It is often stated that one of the reasons why businesses choose (contractual) arbitration is confidentiality.[45] Businesses attach great importance to this, for reasons such as a concern for their reputation or the potential impact on share prices. Although judges have some possibilities to order that a hearing take place behind closed doors, these are very restricted, and the NCC will not be able to accommodate this confidentiality in the same way as arbitration. I do not think this is a problem for the NCC. The London Commercial Court also does not offer confidentiality. On the contrary, the cases often attract a great deal of interest from investors, and the courtroom is full of financial journalists or bloggers who report 'real-time', with a possible real-time effect on share prices. On the basis of the success of the London Commercial Court, it is fair to state that this practice apparently does not seem to scare parties.

7 Possible Influence on Dutch Civil Litigation

The final question addressed here is whether the establishment of the NCC will have an effect on civil procedural law and practice in the Netherlands. It is likely that this will further strengthen the growing dominance of the Anglo-American legal system. Dutch civil procedure will move further in the direction of common law, more specifically in that of English law. This may sound paradoxical at first hearing; after all, the hegemony of the London Commercial Court and English law in the field of international trade disputes seems to diminish by the establishment of business courts, like the NCC, in other countries, so why should this strengthen the dominance of that same English law? Because these new business courts will have the tendency – at least for the NCC this is the case, as shown earlier – to adopt the successful elements from the London procedure and integrate them into the rules of proceedings or even procedural law. Moreover, English is adopted as the language of communication in these proceedings.

The question is whether this effect will be limited to the business courts. This is not a realistic expectation; after all, why should elements that prove to work well in NCC procedures be withheld from parties in other cases? In addition, the establishment of an NCC seems to fit well with developments in other areas of civil justice. Especially since the turn of the millennium, modernisation of Dutch procedural law has already been heavily influenced by the civil procedural law of England and Wales, prompted mainly by the introduction of the so-called "Woolf reform" of 1999. This reform strongly influenced the thinking about the modernisation of civil litigation and, ultimately, also later legislation in this field.[46] In a recent advice from an expert group on the modernisation of the civil law of evidence, this influence is again recognisable. This time this influence is not derived entirely from English law but equally (or even stronger) from the international arbitration law and the Principles of Transnational Civil Procedure drawn up by Unidroit and the American Law Institute, both of which have a strong common law signature. This concerns, for example, the possibility of witness examination by someone other than the judge and the use and status of written witness statements in Dutch procedural law. This is in line with one of the central themes of the advice, namely to shift the centre of gravity of the procedure and the taking of evidence to the early stages of the proceedings ('the pretrial phase'). With regard to the issue of disclosure outlined earlier, it is noteworthy that the expert group recommends that new rules on this issue be broader than the current Article 843a CCP but clearly more restrictive than current English law. As stated earlier, such rules could become an (extra) selling point when applied by the NCC.

The recommendations have already been put into draft legislation and subjected to Internet consultation in the spring of 2018,[47] and a bill is currently being prepared. When this bill is adopted by parliament, Dutch civil litigation will again move more in the direction of common law.

43. *See* the comparison of the costs of dispute resolution made by Brouwer and Butijn, above n. 2, at 155-85.
44. NCC-Plan, at. 17.
45. *See, e.g.,* the 2018 International Arbitration Survey: The Evolution of International Arbitration conducted by the School of International Arbitration at Queen Mary University of London. The survey shows that 87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature.
46. This influence is clearly recognisable in the reports and recommendations of the Committee on Revision of Dutch Civil Procedural Law of 2003 and 2006.
47. *See* www.internetconsultatie.nl/bewijsrecht (last visited in December 2018).

8 Conclusion

This article has argued that with the establishment of the NCC, Dutch civil litigation will increasingly start to show the characteristics of common law (especially 'English'). Although the special rules in the NCCR and possible agreements as to proceedings in the first instance will be limited to NCC cases, a proven success will lead to a call to implement these adjustments in other cases as well. The article has also argued that these changes fit in with the broader picture of the modernisation of Dutch civil procedural law in (roughly) the past two decades, particularly in respect of case management, term monitoring and direction of the case by the judge. This trend can also be recognised in the recent recommendations of the expert group on civil evidence law and the draft legislation based on these recommendations that is on its way to parliament.

These developments can, in turn, be placed within the broader trend of a growing dominance of the English language in combination with globalisation. This dominance has been visible for a much longer time in areas such as trade, technology, science and culture, and civil law does not stay unaffected by it. The use of English terminology and the concepts of common law has become standard, especially in the field of international trade law and international commercial contracts. The current dominance of English law and the London Commercial Court can therefore be considered to be the result of this broader trend. It is hard to predict whether the upcoming Brexit and the rise of other international business courts will be able to 'bend the trend'. As far as the NCC is concerned, the primary challenge will be to break through the unjustified prejudice against Dutch contract law and to make a flawless start. As the saying goes, 'you never get a second chance to make a first impression'.

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International Commercial Courts in France: Innovation without Revolution?

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Abstract

In 2018, in the wake of Brexit, the French legal profession took several important measures to strengthen the competitiveness of France and the French legal system, and to make Paris an attractive go-to-point for businesses when the latter have to deal with international commercial litigation. When taking a closer look at it, Brexit is only the top of the iceberg, and has mostly served as a catalyst.Reasons explaining the development of international commercial courts in France are manifold. They are consequences of long-standing efforts aimed at boosting the French judicial marketplace to adapt it to the requirements of globalization and to the expectations of multinational corporations.The setting-up of the French international business courts has made several procedural adjustments necessary.Although the latter undoubtedly represent clear innovations, they however do not constitute a full-blown revolution. France has indeed decided to maximize already-existing procedural rules, combined with a new organisational format inspired by the Common Law tradition. If it remains too early to draw clear conclusions on the impact of these new developments, it is essential to keep our ears to the ground, and to be forward-looking. We should carefully consider the possible side-effects on the French justice system considered as a whole, and in particular wonder whether these international commercial courts might in the future open the door to broader far-reaching evolutions within the judicial system.Finally, the multiplication of international business courts across Europe nowadays triggers some questions concerning the role and potential added value of an EU initiative in this domain.

Keywords: international commercial court, dispute resolution, business court, Brexit, judicial system

In 2018, the French legal profession took several important measures to strengthen the competitiveness of France and the French legal system, and to make Paris an attractive go-to point for businesses when confronted with international commercial litigation. In February 2018, the Paris Court of Appeal inaugurated a new specialised chamber dedicated to international commercial disputes (*Chambre commerciale internationale de la Cour d'appel de Paris*, CCIP-CA in French or ICCP-CA in English). Representatives of the Paris Bar and the judiciary signed a protocol setting forth the ICCP-CA's new rules of procedure.[1] The effective launch of the ICCP-CA was relatively smooth and quick. It notably avoided the meanders and delays arising out of lengthy parliamentary discussions and political controversies experienced by other European countries currently engaged in the process of establishing international commercial courts.[2] In parallel, the Paris Commercial Court (*Tribunal de commerce de Paris)* also renewed the rules of procedure of its existing International and European Chamber (*Chambre internationale et européenne*, CIE).[3] Both protocols entered into force on 1 March 2018. The French Ministry of Justice has published on its website a brochure, available in both French and English, presenting the functioning of the two international com-

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1. Protocole relatif à la procédure devant la Chambre Internationale de la Cour d'appel de Paris, available at: www.avocatparis.org/system/files/editos/protocoles_signes_creation_juridiction_commerciale_internationale_1.pdf (last visited January 2019) (hereafter ICCP-CA Protocol). English translation available at: www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_English_Protocole%20barreau%20de%20Paris%20-%20Cour%20d'appel%20de%20Paris_mai2018.pdf (last visited January 2019).
2. *See e.g.* in Belgium: Conseil Superieur de la Justice, 'Avis d'office sur l'avant-projet de loi instaurant la Brussels International Business Court', 14 March 2018, available at: www.hrj.be/sites/default/files/press_publications/avis-bibc-fr.pdf (last visited January 2019); 'Le Brussels International Business Court, le tribunal cinq étoiles qui fait grincer des dents les magistrats', *Le Vif*, 22 August 2018, available at: www.levif.be/actualite/belgique/le-brussels-international-business-court-le-tribunal-5-etoiles-qui-fait-grincer-les-dents-des-magistrats/article-normal-878515.html (last visited January 2019). In the Netherlands, the Netherlands Commercial Court (NCC) was initially expected to start its activities in July 2018, but the adoption of the draft legislation was postponed to the winter of 2018 (G. Antonopoulou, E. Themeli & X. Kramer, 'This One Is Next: The Netherlands Commercial Court!', 8 March 2018, available at: http://conflictoflaws.net/2018/this-one-is-next-the-netherlands-commercial-court/ (last visited January 2019); F. Henke, 'Netherlands Commercial Court: English Proceedings in the Netherlands', 25 October 2018, available at: http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/(last visited January 2019).
3. 'Protocole relatif à la procédure devant la Chambre Internationale du Tribunal de Commerce de Paris', available at: https://www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_Protocole%20barreau%20de%20Paris%20-%20Tribunal%20de%20commerce%20de%20Paris.pdf, (last visited January 2019) (hereafter 'CIE Protocol'). English translation available at: www.foleyhoag.com/-/media/files/foley%20hoag/event/2018/protocol-on-procedural-rules-applicable-to-the-international-chamber-of-the-paris-commercial-court.ashx?la=en (last visited January 2019).

mercial courts.[4] By December 2018, seventeen cases had been filed before the ICCP-CA, and hearings of two of them had taken place.[5]

It is commonly acknowledged today that when dealing with cross-border commercial matters courts not only deliver justice but also act as service providers, competing with each other to be selected by parties as a dispute resolution forum for their contractual arrangements.[6] This competition has materialised in many different ways: from marketing strategies with the publication of brochures advertising the strengths of national courts and legal systems[7] to more structural changes through the creation of new international commercial courts. In recent years, the competition between jurisdictions has significantly accelerated owing to the decision of the UK to leave the European Union (EU) (Brexit). This event has served as a catalyst, and many European countries have regarded Brexit as an invaluable opportunity to promote their national systems. Brexit has thus stirred legal innovations among member states wishing to propose alternative venues to London, the latter being, for long, considered one of the leading international commercial litigation hubs worldwide. As the High Legal Committee for Paris Financial Markets (*Haut Comité Juridique pour la Place Financière de Paris*, HCJP)[8] highlighted, 'there is a worldwide, as well as European, competition between courts …. In order to protect the sovereignty of our judicial system and for economic reasons, … French courts with jurisdiction in various business law matters should [preserve] their authority and attractiveness [through] the quality of the services they provide.'[9]

4. Ministère de la Justice, 'International Commercial Courts of Paris (ICCP),' 2018, available at: https://www.cours-appel.justice.fr/sites/default/files/2018-08/Leaflet_CCIP_180629_V11.pdf (last visited January 2019).
5. As indicated by an ICCP-CA judge.
6. E. Themeli, *Civil Justice System Competition in the European Union – The Great Race of Courts* (2018), at 368; H. Kötz, 'The Jurisdiction of Choice: England and Wales or Germany?', 18 *European Review of Private Law*, at 94-108 (2010).
7. The Law Society of England and Wales and its partners published in 2007 'England and Wales: the Jurisdiction of Choice', available at: www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf (last visited January 2019) followed in 2016 by 'England and Wales: Global Legal Centre', available at: www.lawsociety.org.uk/policy-campaigns/campaigns/global-legal-centre (last visited January 2019), and in 2017 'English Law, UK Courts and UK Legal Services after Brexit – the view beyond 2019', available at: www.chba.org.uk/news/brexit-memo (last visited January 2019), the German legal profession published in 2009 'Law made in Germany', available at: www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf (last visited January 2019), and the *Fondation pour le droit continental/Civil Law initiative* issued in 2011 a document entitled 'Continental Law: Global, Predictable, Flexible, Cost-Effective', available at: www.kontinentalesrecht.de/tl_files/kontinental-base/Broschuere_FR.PDF (last visited January 2019).
8. HCJP was the entity entrusted by the French Ministry of Justice for making propositions for the creation of international commercial courts in France.
9. HCJP, 'Recommendations for the creation of special tribunals for international business disputes', 3 May 2017, available at: https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf (last visited January 2019) (hereafter 'Recommendations').

Brexit is, however, only the tip of the iceberg. This article shows that the drivers of the development of international commercial courts[10] in France are manifold and by no means recent. They are the consequences of long-standing efforts aimed at boosting the French judicial marketplace to adapt it to the requirements of globalisation and to the expectations of multinational corporations (**1**). The setting up of the French international commercial courts has made several procedural adjustments necessary. Although these adjustments undoubtedly represent clear innovations, they do not constitute a full-blown revolution: France has indeed decided to maximise the existing procedural rules, together with developing a new organisational format inspired by the common law tradition (**2**). Although it is too early to clearly assess the impact of these new courts, it is essential to keep our ears to the ground and to be forward-looking. We should carefully consider the possible side effects on the French justice system as a whole and, in particular, reflect on whether these international commercial courts might, in the future, open the door to a broader, far-reaching evolution within the judicial system. Finally, the future role and possible added value of the EU in the context of the multiplication of European business courts should be explored further (**3**). Readers should note that this article does not intend to describe all the procedural technicalities of the French international commercial courts but rather to look at the broader picture. Therefore, it discusses the development of these business courts as essentially a matter of innovative judicial policy.

1 Rationale: Brexit and Beyond

1.1 Contextual Reason: Brexit as Catalyst

Brexit is a source of uncertainty for all stakeholders, as no one has a clear view on the future of the relationship between the EU and the UK.[11] However, it can be predicted that the event will be highly disruptive. Deep changes within the EU as well as a reorganisation of roles and influences between EU member states can be expected in the coming years.[12] As part of a broader research agenda investigating the consequences of Brexit,[13] in December 2016, HCJP launched a working group to examine the potential impact of Brexit on judicial cooperation in civil and commercial matters. The final report was published in January 2017.[14] As the

10. In this article, the term 'international commercial courts' refers to the new international commercial chambers established in pre-existing courts.
11. *Financial Times*, 'Counting the Cost of Brexit Uncertainty', 7 September 2018.
12. H. Eidenmüller, 'Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law', *ZEuP*, 4/2018, at 868-91; O. Patel and A. Renwick, 'Brexit: The Consequences for other EU Member States', 2016, *UCL Constitution Unit Briefing Paper*.
13. HCJP's opinions and reports on Brexit are available at: hcjp.fr/opinions-and-reports-copier/ (last visited January 2019).
14. HCJP, 'Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters', 30 January 2017, available at: https://

report highlighted, the attractiveness of London as a dispute resolution forum for commercial litigation can be explained by various factors pertaining to the peculiarities of the English judicial system and English law as well as to the UK's participation in the European Judicial Cooperation area. The UK is, indeed, commonly regarded as having a clear, solid and predictable dispute resolution system for businesses. The use of the English language as *lingua franca* and the methods applied by courts when interpreting commercial contracts – viewed as being rigorously literal (in contrast to French courts, which are often criticised for interpreting contractual terms) – tend to provide certainty and visibility for businesses. In parallel, English commercial law and the English judiciary are also good incentives for businesses when bringing their disputes to the UK.[15] A 2015 study, commissioned by the UK Ministry of Justice and conducted by the British Institute of International and Comparative Law (BIICL), explored the main reasons why London has become 'a popular and natural jurisdiction for the litigation of high-value cross-border disputes'.[16] The reasons included, notably, the reputation and experience of English judges and the use of English law, described as 'the prevalent choice of applicable law in international commercial transactions due to its quality, certainty and efficiency in commercial disputes'.[17] Other reasons included efficient remedies, procedural effectiveness and forum neutrality. As an observer highlighted in 2017, '… they come here to access the law. They come here to deal with a situation where the courts provide certainty and fairness, and where the judiciary has a very strong reputation for impartiality. We believe very strongly that this is not just about the legal services industry itself but about the underpinning that English law gives the wider economy and business relations'.[18]

In parallel, the UK has benefited from the access to the European judicial area and its associated advantages. Several EU arrangements have facilitated the portability and recognition of UK judgements across the EU and of EU member states' court decisions in the UK. Businesses are assured that their rights and interests will be protected under equivalent conditions before all courts of the other EU member states, and under the supervision of EU institutions.[19] Surely, Brexit will reshuffle the existing framework and affect the attitudes of businesses,[20] albeit the ways by which and the extent to which this will happen is still unclear. Some have taken the view that Brexit will not negatively impact the UK's position as a main venue for the resolution of international commercial disputes.[21] Others, however, tend to consider that Brexit might lead to 'a transfer to the EU of some legal and judicial activities currently centred in the UK'.[22] A UK practitioner, for instance, pointed out that 'the portability of English judgements and having them automatically recognised within the EU is a considerable advantage. There is a risk—it is not clear how high the risk is—that they are no longer going to be recognised and enforced in the same way, at least in some places. It may be a theoretical risk, but commercial parties do not like risks'.[23] Substantiating the second point of view, a study conducted in the summer of 2018 brought evidence of recent shifts in the behaviour of businesses, and revealed that around 35% of businesses are now preferring EU courts over the UK courts owing to the uncertainty associated with Brexit.[24]

Anticipating a possible weakening of London as a go-to litigation centre for international commercial disputes, HCJP investigated possible tools to increase the attractiveness of Paris as an alternative. While contemplating Brexit as 'a unique opportunity' for France, the French Ministry of Justice called on HCJP to make recommendations for 'rapidly setting up judicial tribunal sections, within specifically designated courts, capable of hearing technical disputes, applying foreign law principles, and holding proceedings under the most efficient conditions, in particular with respect to language, with the aim of offering economic operators the possibility, in the event of a dispute, to submit their matter to courts in France able to readily decide cases applying the law they have chosen, in the language of their business relation-

publications.banque-france.fr/sites/default/files/rapport_05_a.pdf (last visited January 2019).

15. G. Hannotin, 'Réforme de la procédure civile : le modèle anglais comme source d'inspiration?', *Recueil Dalloz*, 2018, at 1213.
16. E. Lein, R. Mc Corquodale, L. Mc Namara, H. Kupelyants & J. del Rio, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London-based Courts', 2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf (last visit January 2019).
17. *Ibid.*
18. House of Commons, 'Implications of Brexit for the justice system', 22 March 2017, available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf (last visited January 2019) (hereafter 'House of Commons Report'); M. Requejo, 'Immediate Consequences on the London Judicial Market', Blogpost Conflict of Laws, available at: http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/ (last visited January 2019).
19. HCJP, 'Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters', 30 January 2017 (referred to as HCJP Brexit Report henceforth).
20. R. Aikens and A. Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-border Commercial Disputes: What Are the Legal Consequences of Brexit?', 27 *European Business Law Review* (2016); A. Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws', 12 *Journal of Private International Law*, 195 (2016).
21. Cornerstone Research, *Fighting Strong – The Annual Commercial Dispute Resolution Survey* (2016) 2nd ed., available at: www.cornerstone.com/Publications/Articles/Commercial-Dispute-Resolution-Survey-2016 (last visited January 2019).
22. HCJP Brexit Report, above n. 19 also referring to: Bar Council Brexit Working Group, *the Brexit Papers*, 2016, at 11, available at: www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf (last visited January 2019); Eidenmüller, above n. 12.
23. House of Commons Report, above n. 18, at 15.
24. Thomson Reuters, 'The Impact of Brexit on Dispute Resolution Clauses', July 2018, available at: www.thomsonreuters.com/en/press-releases/2018/july/35-percent-of-businesses-choosing-eu-courts-over-uk-due-to-brexit-uncertainty.html (last visited January 2019); Law Society Gazette, 'Businesses Shun UK Courts in Drove as Brexit Looms', 23 July 2018, available at: www.lawgazette.co.uk/businesses-shun-uk-courts-in-droves-as-brexit-looms/5066997.article (last visited January 2019).

ship'.[25] In May 2017, HCJP published forty-one propositions for the creation of specialised courts for international commercial disputes. These propositions covered many different topics, including appropriate language rules, eligible disputes, judicial organisational rules, revision of procedural standards, as well as material and human resources required for the effective functioning of these new international chambers.[26]

1.2 Structural Reasons: Boosting the French Judicial System

Beyond Brexit, several structural reasons have triggered the creation of the French international commercial chambers. One of them is the necessity to adapt the French legal and judicial system to facilitate the treatment of ever-increasing complex international commercial cases. In 2012, for example, a practitioner argued that foreign companies with experience in litigation in France were often not satisfied and usually unwilling to repeat a similar experience.[27] From the point of view of foreign parties, there may be several reasons for France's limited attractiveness. For example, the role of experts is idiosyncratic in France, when compared with other jurisdictions, where experts are appointed by parties and play significant roles during the resolution of the dispute. As practitioners have explained, 'in French litigation, a court will almost never consider a scientific or other specialised question based only on the parties' submissions and without an opinion from a neutral expert whom the court has appointed to provide views on the issue …. The short of it is that the expertise is only as good as the expert who runs it; the quality of the expert is to a great extent unpredictable (…). While this system is intended to provide assurance that experts are always knowledgeable in the fields for which the court appoint them, reality sometimes falls short of this objective'.[28] Practitioners have also observed that 'in larger cases, it is not uncommon for judges to ignore or even expressly set aside expert reports that they find unconvincing …'.[29] In parallel, the limited implication of the judge before hearings is often puzzling for foreign litigants, and seen as a cause of delays and uncertainty during the proceedings. As a general rule, the pre-trial phase (*mise en état*) is not intended to discuss the merits of the case (even though some issues may occasionally arise with consequences on the merits). Therefore, 'parties should not count on extensive conversations with the court at the procedural conferences that punctuate the pre-trial phase. Except if some of the procedural questions … are raised, parties have very few communications with the judge during the pre-trial phase. During the procedural conferences, and especially commercial conferences, the speaking time of the attorneys is very limited, less than a minute generally'.[30] HCJP also noted that the 'minimalist approach to proceedings, [which] can be explained by the needs to deal with a volume of litigation that exceeds the capacity of the courts, … disconcerts foreign litigants who are used to more detailed case preparation and hearings in Common Law courts, and who may view our judging methods as superficial. In addition, [deadlines] that are not met and erratic hearing dates generate uncertainty about the foreseeable timeframe'.[31]

The rise of the French international commercial courts can also be regarded as an effort to consolidate and boost the existing – albeit incomplete – judicial architecture. In 2010, the Paris Commercial Court officially inaugurated its International and European Chamber (*Chambre internationale et européenne,* CIE). Although the chamber existed well before 2010,[32] foreign litigants were often unaware of its existence. As the former president of the court acknowledged, the official launch of the CIE and its accompanying media coverage aimed at putting the CIE in the limelight.[33] The chamber is composed of judges who have experience in international business law. The use of foreign language is permitted, but, until recently, the conditions under which foreign languages could be used were not precisely described. As the HCJP reported, although the court does not keep statistics, 'the Chief Judge of the Court estimates that hearings are partially held in a foreign language in only a few cases each year'.[34] In 2018, the president of the Paris Commercial Court and representatives of the Paris Bar signed a protocol revising and consolidating the functioning of the CIE. The protocol contains clearer rules on (among other things) the use of English at various

25. HCJP, 'Préconisations sur la mise en place à Paris de chambres spécialisées pour le traitement du contentieux international des affaires', 3 May 2017 (*see* Appendix 1, 'Lettre de saisine adressée par le Garde des Sceaux-Ministre de la Justice au Haut Comité Juridique de la Place Financière de Paris', 7 March 2017, available at: https://publications.banque-france.fr/sites/default/files/rapport_07_f.pdf (last visited January 2019).
26. O. Dufour, 'Justice financière : Paris se rêve place de droit sur fond de Brexit', 109 *Petites Affiches* 4 (2018); O. Akyurek, 'La création de chambres commerciales internationales, outil de renforcement de la place de Paris', 138 *Petites Affiches* 18 (2018); 'Paris juridiction internationale', 9 *Petites Affiches* 3 (2018).
27. T. Baudesson, 'Le contentieux international devant les juridictions françaises', *Recueil Dalloz* 2232 (2012) (in French: 'Les grandes entreprises internationales gèrent des contentieux partout dans le monde et nombreuses sont celles qui, ayant connu l'expérience d'un contentieux en France, sont peu désireuses de renouveler l'expérience. Les décideurs publics ne sont pas véritablement conscients de cette mauvaise perception et ne mesurent pas les conséquences du benchmarking mondial qui est en train de s'opérer entre les grandes places du droit').
28. Brochure prepared by Debevoise and Plimpton, '10 things U.S. Litigators Should Know About Court Litigation in France', 2017, at 21-22, available at: www.debevoise.com/~/media/email/documents/2017/10_things_us_litigators_should_know_about_court_litigation_in_france.pdf (last visited January 2019).
29. *Ibid.*, at 26.
30. *Ibid.*, at 19.
31. HCJP Brexit Report, above n. 19, at 19.
32. The Paris commercial Court created an international Chamber in 1995. In 2015, the international Chamber merged with the European Chamber (created in 1999), available at: www.foleyhoag.com/-/media/files/foley%20hoag/event/2018/protocol-on-procedural-rules-applicable-to-the-international-chamber-of-the-paris-commercial-court.ashx?la=en (last visited January 2019). *See also* E. Vasseur and J. Bouyssou, 'La France et les diverses initiatives de juridictions internationales', *L'Observateur de Bruxelles*, 114 (2018), at 10-12.
33. Fondation pour le droit continental, 'Lettre d'information', December 2010, available at: www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/decembre-2010.pdf (last visited January 2019).
34. HCJP Brexit Report, above n. 19, at 28.

stages of the proceedings, submission of evidence, witness testimony and organisation of oral proceedings.

As the president of the Paris Commercial Court put it, before the creation of the ICCP-CA, the CIE 'felt a bit lonely',[35] as there was no specialised section at the appeal court level. Arguably, if the objective is to establish a fully-fledged architecture for international business litigation, one may also wonder whether a specialised international chamber at the level of the Court of cassation (*Cour de cassation*) would also be needed. This evolution is currently not foreseen. However, some adjustments may be necessary in the practices of the three chambers of the Court of cassation handling cases from the CIE and the ICCP-CA. The future will show how the Court of cassation has adapted its behaviour to the practices of the international commercial courts. Finally, it should be noted that Paris is already an important centre for international arbitration. This is because the International Chamber of Commerce (ICC) is based in Paris and its International Court of Arbitration (ICA) is often chosen by multinational corporations. In 2011, a report suggested several adjustments to reinvigorate Paris as a centre for arbitration.[36] Recent measures promoting specialised business courts can thus be regarded as similar initiatives, although this time they are happening in the judicial arena. All of them aim to further enhance the attractiveness of Paris as a venue for resolving international commercial disputes.

2 Procedural Changes: Innovating Without Revolutionising

2.1 Legal Transplants and Rediscovery of the Wheel

Following the terminology coined by Watson in the 1970s, the setting up of international commercial courts can be a fertile ground for 'legal transplants', which are defined as 'the moving of a rule or a system of law from one country to another'.[37] In January 2017, the HCJP report wondered 'what can be done to increase the attractiveness of Paris as a litigation forum? This would require equipping our courts with the skills and organisational resources that would enable them to adequately meet the needs of business. This evolution would require at least three sets of reforms: (i) [adjusting] the rules of procedure to allow the use of English at the various stages of the proceedings (oral arguments, submissions, decisions) …, (ii) [updating] the rules of procedures to add some evidentiary tools inspired by the Common Law (discovery, cross examination, *etc.*) …, (iii) setting up special courts for cross-border civil and commercial disputes'.[38] The creation of international commercial courts thus tends to revitalise discussions on a convergence between common law and civil law systems for resolving international commercial disputes.[39] To be successful, transplantation requires careful implementation. In particular, transposed rules should fit within the broader French legal culture and tradition. As HCJP pointed out, 'in any event, the goal is not to systematically transpose in France the rules and methods of the Common Law courts, and in particular of the London Commercial Court … but to incorporate, into our legal system, a mechanism adapted to hearing international business law disputes'.[40]

Alternatively, the launch of international business courts can be an opportunity for 'rediscovering the wheel',[41] or, in other words, a chance to revisit existing procedural rules so as to maximise their potential and effectiveness. Ultimately, this is the approach that HCJP has prioritised. As it noted, 'all these objectives must be achieved pragmatically, by paying close attention to the demands on international commerce …, while complying with national procedural principles and rules, and, therefore – at least initially – without amending the laws currently in force, but simply optimising their application'.[42] HCJP noted, indeed, that many rules currently laid down in the French Code of Civil Procedure (*Code de procédure civile*) and dealing with case management, production of evidence or hearings are still, today, 'significantly underused'.[43] Therefore, it suggested that '[in order] to offer a credible judicial system to international litigants, the practice before our courts must be revised by making use of available procedural tools …'.[44]

2.2 Key Adjustments: Language and Procedural Rules

As highlighted previously, either through legal transplants or via a rediscovery of the wheel, adjustments may lead to progressive convergences in the way courts deal with international commercial litigation. The con-

35. 'Inauguration de la chambre commerciale internationale à la Cour d'appel de Paris', 27 February 2018, available at: www.jss.fr/Inauguration_de_la_chambre_commerciale_internationale_a_la_cour_d%E2%80%99appel_de_Paris-1187.awp?AWPID98B8ED7F=C6235494BA513C285A321DF587C7D2D445C5731D (last visited January 2019).
36. M. Prada, 'Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris', March 2011, available at: www.textes.justice.gouv.fr/art_pix/1_Rapport_prada_20110413.pdf (last visited January 2019).
37. A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974), at 106.
38. HCJP Brexit Report, above n. 19, at 29-30.
39. More generally, about the convergence between civil law and common law systems, *see, e.g.,* D. Oto-Peralías and D. Romero-Ávila, 'Legal Change within Legal Traditions and Convergence', in: D. Oto-Peralías and D. Romero-Ávila, *Legal Traditions, Legal Reforms and Economic Performance. Contributions to Economics* (2017), at 57-83; J. Armour, S. Deakin, P. Lele & M. Siems, 'How Legal Norms Evolve: Evidence from a Cross-country Comparison of Shareholder, Creditor and Worker Protection', *American Journal of Comparative Law* 57 (2009), at 579-629.
40. HCP, Recommendations, above n. 9, at 12.
41. U. Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', 14 *International Review of Law and Economics* 14 (1994), at 3-19 (quoting A. Schlesinger).
42. HCJP, Recommendations, above n. 9, at 12.
43. *Ibid.*, at 19
44. *Ibid.*, at 19-20.

vergence between legal systems has been described 'as a movement towards efficiency'.[45] As Mattei noted, 'efficiency' may be defined as 'whatever legal arrangement "they" have that "we" wish to have because by having it they are better off'.[46] International law scholars have also explained the issue of convergence through the notion of 'acculturation', defined as 'the general process by which actors adopt the belief and behavioural patterns of the surrounding culture', and highlighted that 'this mechanism induces behavioural changes through pressures to assimilate …'.[47] International commercial courts in France can be seen as being mainly a 'rediscovery of the wheel' exercise, with some limited legal transplants concerning the way proceedings are organised. In contrast, other EU member states have opted for more far-reaching procedural changes for their international commercial courts. For example, in its draft proposal, the Brussels International Business Court (BIBC) provides that, although the court remains a state court, the procedure will be based on the UNCITRAL Model Law on International Arbitration. Also, unlike ordinary proceedings before Belgian courts, appeal of BIBC decisions will not be possible.[48] In France, key adjustments regard the use of the English language during the proceedings,[49] and some procedural adjustments concerning the collection of evidence and organisation of hearings, the latter being clearly inspired by the common law tradition.

2.2.1 Language

The use of the English language is certainly one of the most innovative features of the French international commercial courts. The use of the English language is, indeed, essential to ensure the access of multinational corporations to the French judicial system. However, the use of English before the French international business courts also faced several issues. According to Article 2 of the French Constitution, the language of the French Republic is French. The Constitutional Council (*Conseil constitutionnel*) has specified that this rule applies to any public entity as well as to private parties entrusted with public service missions.[50] Moreover, the Ordinance of Villers-Cotterêts ordered in 1539 by Francis I (*François 1er*) (and still in force today) requires all court documents to be drafted in French. Initially, the Ordinance intended to make all documents comprehensible to everyone, and promoted linguistic unification within the Kingdom of France (against Latin and other regional languages). In addition, although the French Code of Civil Procedure does not force judges to use interpreters (provided that they are familiar with the language spoken by the parties),[51] courts have often been reluctant to admit foreign languages in practice.[52] As a compromise between the necessity to comply with the above-cited texts and the need to facilitate the use of English at the various stages of the proceedings, new procedural rules of ICCP-CA and CIE now provide that[53] procedural acts are drafted in French; documentary evidence may be submitted in English, without translation; and pleadings are conducted in French. However, parties, experts and third-party witnesses appearing before court, as well as legal counsels who are not French nationals and who are authorised to appear before the court, may use the English language; subject to the court's consent, any party may, at its own expense, arrange for a simultaneous interpretation of oral proceedings held in French; the final judgement is delivered in French but is accompanied by a sworn-English translation to facilitate its immediate enforcement in other jurisdictions.

2.2.2 Procedural Rules on Evidence-Gathering and Hearings

As HCJP noted, the French Code of Civil Procedure 'clearly organises the production of evidence …, but in this area, as in others, their implementation depends on the actions of the parties' and of the courts.[54] CIE and ICCP-CA protocols facilitate the admissibility of evidence.[55] For example, statements by experts and other third parties can now be in typewritten form only. As regards hearings, HCJP highlighted that 'there is no obstacle to taking as much evidence at the hearing as the dispute requires and the parties desire. All that is needed therefore, at this stage as well, is an appropriate application of the rules of civil procedure, which are themselves sufficient'.[56] Inspired by the common law tradition, the format of hearings is likely to change significantly. The hearings will be longer and may extend to several days, as judges may be keener to hear witnesses, parties and experts. Also, inspired by the English cross-examination process,[57] rules provide that the judge submits to witnesses' questions he or she deems relevant to facts that are the subject of legally admissible evidence. Then, the judge can invite witnesses to answer questions from any of the parties.[58] Proceedings will be subject to an imperative timetable detailing

45. Mattei, above n. 41.
46. *Ibid.*
47. R. Goodman and D. Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges', 54 *Duke Law Journal* 983 (2005).
48. Chambre des représentants de Belgique, *Projet de loi instaurant la Brussels International Business Court*, 15 May 2018, available at: www.lachambre.be/FLWB/PDF/54/3072/54K3072001.pdf (last visited January 2019).
49. A. Bailly and X. Haranger, 'Le tribunal de commerce et la Cour d'appel de Paris acceptent désormais les plaidoiries et les productions de pièces en anglais', *AJ Contrat* (2018), at 148.
50. Constitutional Council (*Conseil constitutionnel*), decision 2006-541 DC of 28 September 2006 *relative à l'accord sur l'application de l'article 65 de la convention sur la délivrance de brevets européens.*
51. Article 23 of French Code of Civil Procedure.
52. C. Kern, 'English as a Court Language in Continental Courts', *Erasmus Law Review* (2012), at 187-209.
53. ICCP-CA Protocol, above n. 1 (Arts. 2, 3 and 7) and CIE Protocol, above n. 3 (Arts. 2, 6 and 7).
54. HCJP, Recommendations, above n. 9, at 25.
55. ICCP-CA Protocol, above n. 1 (Arts. 4 and 5) and CIE Protocol, above n. 3 (Arts. 5 and 6).
56. HCJP, Recommendations, above n. 9, at 26.
57. O. Dufour, 'Paris part à la conquête du contentieux commercial international', *Gazette du Palais*, 13 February 2018.
58. ICCP-CA Protocol, above n. 1 (Art. 5.4.4) and CIE Protocol, above n. 3 (Art. 4.4.4).

– among other things – when the parties have to appear in person or when written statements have to be submitted.[59]

3 Looking to the Future While Keeping Our Ears to the Ground

3.1 Will All of This Work?

'Give Paris one more chance', as the song says.[60] The success of these initiatives will rest on several factors, some of which are listed here: CIE and ICCP-CA judges will first need to be able to deal with complex business cases swiftly and in English; they will have to adapt their practices accordingly; foreign litigants will need to be convinced by the added value and quality of the French international courts, in particular vis-à-vis other international commercial courts now mushrooming worldwide but also vis-à-vis arbitration often regarded as a flexible tool for resolving commercial disputes. The fact that – unlike other European specialised business courts – no high court fees apply before the ICCP-CA might be a clear incentive for litigants when bringing their disputes to France. Success of the CIE and ICCP-CA will also depend on their visibility in the international arena. In July 2018, HCJP President Guy Canivet called on all French stakeholders to actively support these initiatives and invited them to promote French international commercial courts vis-à-vis their clients and within companies.[61] The results of these lobbying exercises may become clearer in the years to come.

In the context of an ever-growing competition, French international business courts may also gain by departing from other jurisdictions by developing their own and original expertise. For example, as authors have interestingly pointed out,[62] in the future, one added value (and perhaps a key competitive advantage) of the French international business courts might lie less in their ability to attract common law disputes – one may think that other common law jurisdictions like New York or Singapore will remain preferred litigation centres for international litigants with common law disputes – than in their ability to attract disputes relating to the many civil law systems existing around the world, for example in South America or Africa. Alternatively, French international business courts may benefit from specialisation in a few commercial sectors (such as banking, insurance or others) in which the court could ultimately develop their own knowledge and specific case law.[63]

Finally, one may still doubt that the mere existence of international commercial courts will be sufficient to make Paris an attractive centre for international litigation.[64] Current initiatives should not remain isolated but be accompanied by other reforms. In particular, one stream of measures should seek to strengthen and modernise the French legal profession in the eyes of foreign litigants. For the past several years, for instance, proposals have burgeoned for the creation of a consolidated and renewed French legal profession (the so-called *grande profession du droit*) in which private practitioners (*avocat*) and in-house counsels (*juriste d'entreprise*) would enjoy a similar status and be subject to the same code of professional ethics. Unlike other countries, France still considers these two branches separate. For example, communications from in-house counsels are not protected by legal privilege (*secret professionnel*), as they are for private practitioners. Yet, as a 2011 report pointed out, the existence of a unified legal profession could be a source of international dynamism.[65] The creation of international business courts was therefore certainly a first step, but France still needs to connect the other dots if the overarching objective is to improve the quality of its legal services in the eyes of foreign litigants.

3.2 French International Business Courts: Judicial Labs for High-Quality Judiciary or Symptoms of a Multi-tiered Judicial System?

The functioning of international commercial courts needs to be backed up with a pool of highly trained professionals able to navigate European private law, European civil procedure as well as business law and complex commercial matters. Therefore, side effects on the judiciary can already be foreseen with regard to the training and education of judges. This may notably lead to an upstream specialisation of the education delivered by the French National School for the Judiciary (*Ecole Nationale de la Magistrature*). In parallel, one may wonder whether the procedural innovations now in place before the CIE and ICCP-CA – notably the increasing role given to oral hearings and collection of evidence – will serve as examples for the French judicial system as a whole and trigger an evolution in the attitude of other French courts. One interesting question is whether CIE and ICCP-CA will act as test cases – one may rather say as *judicial labs* – for modernising the French judicial system. Will the new judicial practices before the CIE and ICCP-CA remain an isolated phenomenon strictly

59. ICCP-CA Protocol, above n. 1 (Art. 4.3) and CIE Protocol, above n. 3 (Art. 3).
60. J. Richman, *Give Paris One More Chance* (2001).
61. M. Lartigue, 'Chambres internationales de Paris: appel à la mobilisation des juristes et des avocats français', *Gazette du Palais*, 10 July 2018, at 8.
62. A. Hamelle and C. Jamin, 'Chambres internationales de Paris: encore un effort!', *Semaine jurdique* (19 November 2018), at 2110.
63. *Ibid.*
64. *Ibid.*
65. M. Prada, 'Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris', March 2011, available at: www.textes.justice.gouv.fr/art_pix/1_Rapport_prada_20110413.pdf (last visited January 2019) (in French: 'l'existence d'une grande profession du droit est, en outre, porteuse de dynamisme international et n'est pas étrangère au rayonnement des professions d'origine anglo-saxonnes dans le monde', at 6).

confined to these two courts? Conversely, is this the start of something new and broader with consequences for the French legal profession and the judiciary? Will CIE and ICCP-CA contribute to a more effective judicial system by driving up quality standards for the whole justice system? Or, on the contrary, will they widen the gap between, on the one hand, international commercial courts providing high-quality services for multinational corporations, and, on the other hand, ordinary courts with limited resources in charge of administering justice for citizens? Future developments will need to be carefully monitored to avoid the development of a two-tiered justice system. As of today, it is too early to predict whether these innovative business courts will have positive repercussions for the French judicial system. Yet one may already note an interesting divergence from the perspective of judicial policy between, on the one hand, French international business courts and, on the other hand, other (regular) courts. In particular, the increasing role given to oral hearings before the CIE and ICCP-CA seems somehow paradoxical when considering the shrinking space given to oral hearings before other courts. For example, a legislative proposal reforming the French judicial system went as far as to suggest the removal of hearings before high courts of first instance (*Tribunal de grande instance*), provided that parties agree.[66]

Concerns about the development of a dual-quality judicial system are not limited to France. As the first advocate general of the Belgian court of cassation stressed, in September 2018, concerning the BIBC, one should 'avoid a distortion between, on the one hand, justice for litigants, mostly foreigners, who will choose the BIBC and benefit from an adequate material environment and speedy decisions, and, on the other hand, that of the other citizens, who will have to be content with justice being done on obsolete premises, without adequate human resources to render justice within a reasonable time frame'.[67]

3.3 Beyond Competition: Imagining a Collaborative EU Framework for Resolving International Commercial Litigation

Like France, several EU member states are in the process of setting up international commercial courts. Should all of them be established, they will all compete to attract international disputes and thereby contribute to a fragmentation of the European offer for resolving international disputes; in other words, a patchwork of different rules and practices across jurisdictions will develop. This might impair the visibility and intelligibility of companies. Instead of competing, a solution could be to bring forward a more coherent structure at the EU level. In September 2018, a study for the EU Parliament proposed that a European commercial court (ECC) be established.[68] The ECC could indeed present several advantages: it would be composed of commercial judges from all member states with different legal and cultural backgrounds, the court would operate as a 'truly international forum', and, as the report points out, it would, 'probably better than any national court, signal that it is neutral and impartial'.[69] The ECC could also contribute to the attractiveness of the EU and European businesses. If the objective is ultimately to compete with major dispute resolution centres like New York, Singapore, Hong Kong or Abu Dhabi, one may realistically think that the ECC can be in a better position to compete internationally than any other international commercial courts set up at the level of member states.

Alternatively, another solution could be to imagine a network of European business courts (NEBC), placed under the authority of a General European commercial court (GECC). Under this framework, depending on the sector at stake, disputes would be allocated to a specific European business court. For example, international disputes relating to maritime law and shipping would be allocated to a specialised business court in, say, the Netherlands, with expertise in maritime law; IP or patent issues would be handled by a business court specialising in patent litigation and operating in Germany; disputes relating to banking would be handled by a specialised business court in France or Belgium; and so on. The GECC would act as the single point of entry for litigants and would then be in charge of channelling international disputes to the competent court(s). Since legal issues are often intertwined in complex commercial litigation, the GECC would also be in charge of dealing with cases in which multiple and cross-cutting legal issues are at stake. Surely, the idea of an NEBC will be difficult to implement as several (highly) sensitive legal and political obstacles would have to be resolved. However, it might now be the right time to think and be creative. The development of international business courts in the EU would certainly gain if these courts were no longer considered from the perspective of competition but rather in the light of a collaborative process implemented at the European level.

France has recently boosted its judicial system to make it more attractive in the eyes of multinational companies. It remains to be seen whether these new developments will be sufficient and whether they will respond to the expectations and concerns of foreign litigants. If

66. 'Projet de loi de programmation 2018-2022 et de réforme pour la justice', JUST1806695L, Art.13.
67. Brussels Times, 'Brussels International Business Court May Generate two-speed Justice', 4 September 2018, available at: www.brusselstimes.com/belgium/justice/12423/brussels-international-business-court-may-generate-two-speed-justice (last visited January 2019).
68. 'Building Competence in Commercial Law in the Member States', Study for the JURI Committee on the European Parliament, PE 604.980, September 2018, available at: www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980 (last visited January 2019); *see also* X. Kramer, E. Themeli & G. Antonopoulou, 'International Commercial Courts: Should the EU Be Next?- EP Study Building Competence in Commercial Law', 23 September 2018, available at: http://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/ (last visited January 2019).
69. *Ibid.*

the objective is to compete with major international litigation hubs, one may wonder whether a more sustainable solution does not lie at the European level instead. Finally, the side effects of these innovative business courts on the judicial system as a whole should be anticipated carefully. In the future, international commercial courts may be used as laboratories for modernising procedural rules and judicial practices but, importantly, should not open the door to multi-tiered justice systems, where ordinary citizens would be left behind.

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Chambers for International Commercial Disputes in Germany: The State of Affairs

Burkhard Hess & Timon Boerner*

Abstract

The prospect of attracting foreign commercial litigants to German courts in the wake of Brexit has led to a renaissance of English-language commercial litigation in Germany. Leading the way is the Frankfurt District Court, where – as part of the 'Justizinitiative Frankfurt' – a new specialised Chamber for International Commercial Disputes has been established. Frankfurt's prominent position in the financial sector and its internationally oriented bar support this decision. Borrowing best practices from patent litigation and arbitration, the Chamber offers streamlined and litigant-focused proceedings, with English-language oral hearings, within the current legal framework of the German Code of Civil Procedure (ZPO).[1]

However, to enable the complete litigation process – including the judgment – to proceed in English requires changes to the German Courts Constitution Act[2] (GVG). A legislative initiative in the Bundesrat aims to establish a suitable legal framework by abolishing the mandatory use of German as the language of proceedings. Whereas previous attempts at such comprehensive amendments achieved only limited success, support by several major federal states indicates that this time the proposal will succeed.

With other English-language commercial court initiatives already established or planned in both other EU Member States and Germany, it is difficult to anticipate whether – and how soon – Frankfurt will succeed in attracting English-speaking foreign litigants. Finally, developments such as the 2018 Initiative for Expedited B2B Procedures of the European Parliament or the ELI–UNIDROIT project on Transnational Principles of Civil Procedure may also shape the long-term playing field.

Keywords: Justizinitiative Frankfurt, Law Made in Germany, International Commercial Disputes, Forum Selling, English Language Proceedings

1 Introduction

The international litigation landscape for business disputes is in flux: While the effects on international business litigation resulting from Brexit are unclear,[3] several EU Member States, including Germany, have recently established or are in the process of establishing special courts and chambers for English-language international business litigation.[4] The key question to be addressed in this context is: *What is Germany doing to keep up with growing competition from other judicial hubs in Europe?* Traditionally, German courts and lawmakers have not attached much importance to this question, as they have regarded delivering justice more as a core task of state authority rather than a service to be marketed in the competing world of dispute settlement.[5] Nevertheless, 'forum selling' has become quite common in some areas of law.[6] Equally, some German courts have always excelled in specific cross-border cases: exemplars include the district and appellate courts in Hamburg for transportation and commercial cases or the district and appellate courts in Mannheim, Düsseldorf,[7] and in Munich for patent and IP litigation. While the overwhelming impression within Germany until recently has been that the justice system was performing well and that domestic litigants usually chose German courts, practice revealed a different reality. According to published case law of the High Court of London, a considerable number of German parties have been bringing their disputes before London courts, especially in relation to high-value commercial disputes (six- or seven-digit sums, if not higher).[8]

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1. Zivilprozessordnung (ZPO).
2. Gerichtsverfassungsgesetz (GVG).
3. For a first assessment, *see* B. Hess, 'Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht', *IPRax* 409 (2016); M. Sonnentag, *Die Konsequenzen des Brexit für das Internationale Privat- und Zivilverfahrensrecht* (2017).
4. For a comprehensive overview of International Commercial Courts (including the developments in Asia), *cf.* M. Requejo Isidro, 'International Commercial Courts in the Litigation Market', *MPILux Working Paper* 2019:2, available at: https://ssrn.com/abstract=3327166 or http://doi:10.2139/ssrn.3327166.
5. H. Rösler, 'Die Europäisierung von IZVR und IPR als Herausforderung für die deutsche Gerichtsorganisation', *ZVglRWiss* 533 (2016); E. Themeli, *The Great Race of Courts* (2018).
6. For a comprehensive analysis of 'forum selling' in the areas of patent law, press law and antitrust Germany and a comparison to the practice in the United States, *see* S. Bechtold, J. Frankenreiter & D. Klerman, 'Forum Selling Abroad', *Discussion Papers of the Max Planck Institute for Research on Collective Goods Bonn* 2018:9.
7. The Düsseldorf District Court processes 500 patent and intellectual property cases per year in three chambers, *see* A. Wiese, '80 Jahre Patentgericht – Die Geschichte der Düsseldorfer Gerichte im Patentrecht', in T. Kühnen (ed.), *Festschrift zum 80-jährigen Bestehen des Patentgerichtsstandortes Düsseldorf zum 1.* Oktober 2016 (2016) 597, at 610 ff.
8. Portland Communications, 'Commercial Courts Report 2018' (2018), available at: https://portland-communications.com/pdf/Portland-commercial-courts-report-2018.pdf (last visited 28 January 2019).

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Since the millennium, the general attitude in Germany has changed. When the Law Society of England and Wales published a brochure[9] in 2007, which openly promoted London as an attractive place of litigation, the German Federal Government and the Federal Bar Association reacted with an initiative called 'Law – Made in Germany'.[10] Sponsored by the Federal Ministry of Justice, the Bar Association and the Chambers of Commerce, the initiative aimed to promote the use of German law and the German judicial system, emphasising the widely recognised efficiency of the German legal system and its judiciary in international commercial cases.[11] However, it remains unclear whether this initiative has generated tangible benefits for the German judicial market.[12]

In 2010, in a bid to increase the competitiveness of German courts as preferred fora of choice, the district courts in Aachen, Bonn, and Cologne offered parties the possibility to argue their case in English.[13] While section 184 of the German Courts Constitution Act requires the court to conduct proceedings in German,[14] there are exceptions from this general rule that apply to the hearing.[15] Thus, English could be used only during the oral hearing, leaving the rest of the dispute litigation process to be conducted in German. This first attempt to open the civil courts to international litigants was not particularly successful[16] – perhaps because Aachen and Bonn are not major cross-border commerce hubs in Germany.[17] At the same time, some Federal States started legislative initiatives in the Bundesrat (Second Chamber of Federal Parliament) to change the strict German-language requirement of section 184 of the German Courts Constitution Act.[18]

2 The 'Justizinitiative Frankfurt'

With Brexit looming, however, the discussion has regained momentum: In 2016, shortly after the UK European Membership referendum, the so-called 'Justizinitiative Frankfurt' was launched. The underlying idea was an initiative of the Ministry of Justice of the Federal State of Hesse to attract more litigation to the Frankfurt District Court. As Frankfurt am Main is a leading European financial centre,[19] the initiative should have a greater chance of success given that relevant industries are already there.[20]

2.1 The Basic Idea of the 'Justizinitiative'

Hence, in a joint effort of academia, the bar and the judiciary (including the president of the Frankfurt Court of Appeal), a plan was drawn up to transform Frankfurt am Main into a more service-friendly place for litigation. At present, Frankfurt offers a very interesting environment: In addition to being an important banking and financial sector, other substantial sectors such as pharmaceutical and chemical industries are based there. Frankfurt attracts an internationally oriented bar that is supportive of the 'Justizinitiative',[21] and many major law firms have established branches in Frankfurt. Furthermore, the civil courts in Frankfurt are well experienced in international matters. Due to this background, the Minister of Justice of Hesse decided in March 2017 to proceed with this project. However, instead of changing the pertinent legal framework, the idea was to start bottom-up by setting up a specialised chamber of the Frankfurt District Court that conducts oral hearings in English and simply changing the distribution list of the court accordingly. This provides the benefit that a foreign party who does not speak German but understands English can attend and understand the proceedings of the specialised chamber and does not require a translation.

9. The Law Society, *England and Wales: The jurisdiction of choice* (2007).
10. *See* www.lawmadeingermany.de (last visited 4 October 2018). The slogan borrowed from the quality advertisement of products 'Made in Germany'.
11. The 'battle of brochures' was discussed by S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', 21 *European Review of Private Law* 13 (2013), at 30 ff.
12. For a critical examination of this project, *see* M. von Pommern-Peglow, 'Deutsche Zivilgerichte im internationalen Wettbewerb', *Zeitschrift für Rechtspolitik* 178 (2015).
13. Rösler, above n. 5, at 551.
14. Section 184 GVG reads: 'The language of the court shall be German. […]'.
15. C. Kern, 'English as a Language in Continental Courts', 5 *Erasmus Law Review* 187 (2012), at 195.
16. Bundesrechtsanwaltskammer, Stellungnahme Nr. 23/2014 zum Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG) (2014), at 2 f.
17. It was reported that the District Court Bonn heard only two cases in English.
18. Bundesratsdrucksachen 93/14 and 42/10. These proposals were scrapped due to the end of the legislative period.
19. *See* the report 'Building Bridges – Frankfurt and Europe after Brexit', available at: https://frankfurt-main-finance.com/neuer-finanzstandort bericht-building-bridges-frankfurt-in-zeiten-des-brexit/; Helaba Volkswirtschaft/Research, 'Brexit-Let's go Frankfurt', available at: https://www.helaba.de/blob/helaba/407460/ec93e042e5c3bbd7054e77121d7436d7/finanzplatz-fokus-20161103-data.pdf.
20. Düsseldorf, with its rise to prominence in patent litigation matters, is a good example: After the Second World War, there was a specialised bar for patent litigation in Berlin, but Berlin was no longer a marketplace for patents. Therefore, the law firms contacted different ministries of justice and courts of appeal in Germany – first Munich, then Düsseldorf and Cologne – inquiring whether there would be an opportunity to leave Berlin and move there. In Munich, no major interest was shown at the time, but the reaction was different in Düsseldorf. As a result, the specialised law firms moved from Berlin to Düsseldorf, where they created a service-friendly environment, backed by the judiciary and by the local ministry of justice. Today, Düsseldorf has become a prominent place for patent and intellectual property litigation in Europe; *see* Wiese, above n. 7, at 605 ff.
21. For a collection of predominantly positive reactions by members of the bar, *see* 'Ein richtiger erster Schritt auf einem langen Weg', 4 *Deutscher AnwaltSpiegel* 17, at 18 ff. (2018).

The design of proceedings had to be based on the German Code of Civil Procedure (ZPO), but it also takes up best practices of commercial litigation used in other commercial courts, especially the Düsseldorf District Court.[22] Further strategic elements include actively promoting the new chamber and providing all necessary information to possible litigants. In summary, the justice initiative comprises the following elements: (1) *English as the language of procedure*, (2) *the use of the possibilities of the German Procedural Laws to make proceedings effective*,[23] and (3) a comprehensive *communication strategy*.

However, it is not enough to just set up a new dispute resolution body within the court system and wait for litigants to show up. In international cases, jurisdiction is often based on choice-of-court agreements (Article 25 Brussels Ibis Regulation).[24] Therefore, it will take some time until more English-language disputes (arising from newly concluded contracts providing for court agreements) fill the docket at the District Court.[25]

At the same time, cautious optimism is warranted, with a first case transferred to the Chamber for International Commercial Disputes in December 2018.[26] Additionally, recent experiences in financial litigation demonstrate that already-existing financial instruments, such as the ISDA Master agreement,[27] often contain several (and overlapping) non-exclusive jurisdiction clauses providing not only for London but also for Frankfurt and other courts on the Continent.[28]

Therefore, it can be expected that soon after Brexit, there will be disputes that will simply be brought to Frankfurt rather than to London even under existing agreements. No start from scratch is necessary, in the sense of parties having to agree on new jurisdiction clauses. Rather, the opportunity for an isolated change of the choice-of-court clause already exists, and with a mind towards Brexit-related uncertainties, parties might already prefer to choose a court in Ireland, France, the Netherlands or Germany.[29]

Several specific elements of the justice initiative stand out:[30] Firstly, the Chamber will be composed of justices who possess both extensive experience in commercial litigation and a good command of English. In England, justices are usually recruited from the bar and understand the parties' perspective towards litigation. Similarly, in Frankfurt, some justices have moved from the bar to the bench.[31] Furthermore, the staff of the *Geschäftsstelle* of the Chamber will equally be able to communicate in English and process the respective documents. In addition to this, modern technical equipment and an IT framework will support the desired service-friendly environment. With German courts lagging behind other European countries in this respect, this is an area with much room for improvement.

2.2 The Process Design

The process design of civil proceedings for the Frankfurt Chamber of International Commercial Matters has to follow the regulations of the German Code of Civil Procedure in the first instance (sections 253-300 ZPO). However, these provisions permit efficient and speedy management of the proceedings:

Starting with the filing of a written complaint (*Klage*), the plaintiff must specify their claims for relief as well as the facts of the case and the means of evidence supporting the factual allegations. After the filing of the complaint, the judge may conduct a preliminary review of the complaint (if any) to ascertain if the fundamental requirements of admissibility (*Prozessvoraussetzungen*) are met.[32] When the defendant has filed their motion, the judge usually decides whether there will be a discussion at an advance first hearing (*früher erster Termin*)[33] or an exchange of written pleadings and briefs (*schriftliches Vorverfahren*)[34] to prepare the case for disposition in the hearing. At this stage of the proceedings, the court may also require additional documentary evidence or acquiescence in the inspection of evidence both from the par-

22. Best practices in Düsseldorf include the publication of as many decisions as possible to allow for more predictability, as well as limiting expert witnesses to speed up proceedings. For more details, *see* Bechtold, Frankenreiter & Klerman, above n. 6, at 17 ff.
23. This refers to the active application of overarching principles anchored in the ZPO, especially the principle of accelerating the proceedings ('Beschleunigungsgrundsatz').
24. S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', in H. Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (2013), at 227 ff.
25. At the Singapore Commercial Court, the first 'genuine' case based on a choice of court agreement reached the Court in 2018. However, the president of the Singapore Court allocated earlier cases to the Commercial Court.
26. Information provided by Judge Willoughby (sitting judge in the Chamber for International Commercial Disputes) to the author.
27. *See* B. Hess, 'The Private Public Divide in International Dispute Resolution', *Recueil des cours* 388 (2018), 39, paras. 127 f. (2018). Recently, the ISDA has changed the jurisdiction and choice-of-law clauses in the ISDA Master Agreement to Dublin and Paris and to Irish and French law in order to accommodate the legal consequences of Brexit.
28. On the topic of non-exclusivity of choice of court agreements, *see* B. Hess, 'Die Auslegung kollidierender Gerichtsstandsklauseln im europäischen Zivilprozessrecht', in M. Brinkmann et al. (eds.), *Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung: Festschrift für Hanns Prütting* (2018) 337, at 343 f.
29. According to recent estimates of the Law Society for England and Wales, in almost 33 per cent of all commercial transactions concluded after Brexit, choice-of-court clauses have been changed from London to other jurisdictional hubs as Paris, Dublin, Amsterdam and Frankfurt; *see*https://www.lawgazette.co.uk/businesses-shun-uk-courts-in-droves-as-brexit-looms/5066997.article.
30. For further details, *see also* the portrayal of the Justice Initiative Frankfurt at http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/.
31. This is the typical situation in England.
32. This does not include the requirement of jurisdiction. Pursuant to Art. 26 of the Brussels Ibis Regulation, if the plaintiff files the complaint before a court lacking jurisdiction, the defendant may object to the lack of jurisdiction of the court. If the defendant fails to do so, the competence of the court is established by the fact that the defendant makes an appearance.
33. If the court decides on an advance first hearing (section 275 ZPO), it sets a time for the advance first hearing, where the judge discusses the issues argued in the complaint with the parties and their counsel; *see* P. L. Murray and R. Stürner, *German Civil Justice* (2004), at 13.
34. Pursuant to section 276 ZPO, if the court decides not to schedule an advance first hearing, the defendant will be served the complaint and should notify the court about his intention to defend within two weeks; *see* Murray and Stürner, above n. 33, at 12.

ties and even from third parties. Section 273 of the Code of Civil Procedure allows the court to prepare the case by structuring, clarifying and narrowing down factual and legal issues in order to dispose of the case in one single hearing.[35] Before the hearing, the court may schedule a settlement conference with parties and their lawyers in anticipation of amicably settling the case. Having prepared the case, the court may use its knowledge of the parties' respective contentions to propose a suitable settlement.[36] If no settlement is reached, the case immediately goes to the plenary proceedings. At the beginning of the oral hearing, the presiding judge usually summarises the state of the dispute and structures the issues to be addressed. Usually, the parties (and their counsel) will have the opportunity to express their views. If there still are disputed facts, the taking of evidence follows, where the court assesses the means of evidence designated by the parties for any litigious allegation. Beforehand, the court may order the parties to produce relevant documents and tangible evidence to clarify factual assertions (sections 142–144 ZPO).[37] Once all relevant legal and factual issues have been clarified, the court will discuss the disputed issues with the parties before rendering the judgment.

With regard to the process design itself, the Justizinitiative proposed that the Chamber for International Commercial Disputes borrow best practices from patent litigation[38] and international commercial arbitration. As in arbitration, the court should establish a 'road map' with the parties at the beginning of the process; this would structure the course of the litigation. The first hearing would function as a 'Case Management Conference' with the parties. Additionally, best practices of patent litigation should serve as a model for how the court should actively exercise its obligation under section 139 of the German Code of Civil Procedure, to better structure legal and factual allegations made and to engage in a 'discourse' with the parties about open legal and factual issues needing clarification before the hearing.[39] It is undeniable that the length of proceedings largely depends on thorough preparation of the hearing by the court and the parties. Another important procedural tool relates to the increased use of sections 142[40] and 144 ZPO.[41] These provisions enable a (structured) exchange of all pertinent evidence between the parties under the control of the court ('German disclosure'), usually at the preparatory stage of the hearing. In general, it is the parties' duty to provide the court with the relevant evidence for the substantiation of material facts asserted by the parties. However, sections 142 and 144 ZPO permit the court to assist the parties in the production of evidence, complementing section 139 ZPO.[42]

Section 142 (1) ZPO allows the court to direct the parties or a third party[43] to produce records or docu-

35. 'Section 273 – Preparations for the hearing
    1. The court is to initiate the necessary preparatory measures in due time.
    2. By way of preparing for the hearing, the presiding judge or a member of the court hearing the case delegated by the presiding judge may in particular:
        1. Direct the parties to amend their preparatory written pleadings or to provide further information, and may in particular set a deadline for explanations to be submitted regarding certain items in need of clarification;
        2. Request that public authorities or public officials communicate records or provide official information;
        3. Order parties to appear at the hearing in person;
        4. Summon witnesses, to whom a party has referred, and experts to appear at the hearing, he may also issue an order pursuant to section 378;
        5. Issue orders pursuant to section 142 and section 144. […]'
36. O. Jauernig and B. Hess, *Zivilprozessrecht* (2011), at 189 ff.; Murray and Stürner, above n. 33, at 13.
37. Jauernig and Hess, above n. 36, at 208 f.; Murray and Stürner, above n. 33, at 14.
38. For an analysis of the driving factors of court popularity in patent litigation, *see* Bechtold, Frankenreiter & Klerman, above n. 6, at 17 ff.
39. 'Section 139 – Direction in substance of the course of proceedings
    1. To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.
    2. The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do.
    3. The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio. […]'

    The purpose of this provision is to realize numerous principles of the German civil procedure, *e.g.* the right to be heard ('*Anspruch auf rechtliches Gehör*') and the right to a fair hearing ('*Recht auf ein faires Verfahren*'), the achievement of a correct judgment ('*Erzielung eines richtigen Prozessergebnisses*') as well as the principle of accelerating the proceedings ('*Beschleunigungsgrundsatz*'). Following from the duty of the court to accelerate and economise proceedings in consultation with the parties, the court has to give the respective notice at the earliest possible time, either orally or written; *see* J. Fritsche, '§ 139 Materielle Prozessleitung', in T. Rauscher and W. Krüger (eds.), *Münchener Kommentar ZPO* (2016), at paras. 2 and 52 f.
40. 'Section 142 – Order to produce records or documents
    1. The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. The court may set a deadline in this regard and may direct that the material so produced remain with the court registry for a period to be determined by the court. […]'.
41. 'Section 144 – Visual evidence taken on site; experts
    1. The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence. […]'

    These sections allow the judge to clarify incomplete party submissions, thus reducing the risk of delays at later stages of the proceedings. *See* J. Fritsche, '§ 144 Augenschein; Sachverständige', in T. Rauscher and W. Krüger (eds.), *Münchener Kommentar ZPO* (2016), at paras. 1, 20, 23.
42. Fritsche, above n. 41, at para. 1.
43. With regard to third parties, the court has to consider, within its direction, limits of reasonableness, *e.g.* for highly personal materials, as well as rights to refuse to give evidence. *See* A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, '142 Anordnung der Urkundenvorlegung', *Zivilprozessordnung* (2019), at para. 4.

ments,[44] as well as any other material[45] in their possession to which one of the parties has made reference. These orders contribute to the provision of information to the court as well as to the uncovering of evidence to elucidate litigious facts.[46] The court's discretion is, however, limited by the submissions of the parties.[47] Section 144 (1) ZPO aims to clarify litigious facts[48] by allowing the court to direct that an expert take visual evidence on site[49] and prepare a report for the hearing.[50] The court's direction may be issued to the parties and even to third parties.[51]

Prospectively, this set of provisions, which is broadly used in patent litigation and which enables the court to actively direct proceedings, should equally benefit cases before the Chamber for International Commercial Disputes. In addition, borrowing from practices in commercial arbitration, the 'Justizinitiative' proposed the preparation of a full recording of the hearing, along with the transmission of a textual record to the parties as an electronic document (*see* sections 160-164 of the Code of Civil Procedure).[52]

Finally, using English as the language of litigation would reduce costs of litigation and increase effectiveness by eliminating translations – for instance, by hearing witnesses in their mother tongue or the language of international commercial exchange. Judges should prepare the judgments in a manner that allows for their speedy translation into other languages. This issue carries particular weight, since under current legislation, the judgment of a German court must be drafted in German. In addition, even after a change of the legislation, there will always be a need to translate the operative part of a judgment into German for enforcement purposes. Currently, the language and style used in German judgments often make them unfit for resource-efficient translation. Thus, it is crucial to promote the drafting of decisions using translation-friendly wording. Overall, it appears that establishing chambers for international commercial matters mainly requires a practical approach.

44. Section 142 (1) ZPO extends to all records and documents according to sections 415 ff. ZPO.
45. This refers to materials without document character, such as image, data and sound carriers. *See* Baumbach, Lauterbach, Albers & Hartmann, above n. 43, at para. 10.
46. *Bundesgerichtshof*, 16 March 2017 – I ZR 205/15, 45 NJW 3304 (2017); on the limits of section 142 ZPO: *Bundesgerichtshof*, 27 May 2014 – XI ZR 264/13, 45 NJW 3312 (2014).
47. The latter is following from the principle of party control over the cause of action. *See* Fritsche, above n. 41, at paras. 2 and 4.
48. D. von Selle, '§ 144 Augenschein; Sachverständige', in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO* (2018), at para 1; A. Stadler, '§ 144 Augenschein; Sachverständige', in H.-J. Musielak and W. Voit (eds.), *Zivilprozessordnung: ZPO* (2018), at para 1.
49. According to section 371 ZPO, the evidence taken by visual inspection is offered by designating the object to be inspected visually and by citing the facts regarding which evidence is to be provided.
50. According to sections 402 ff. ZPO.
51. The same limits apply to directions issued to third parties under section 144 ZPO as to directions under section 142 ZPO; *see* A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, '144 Augenschein; Sachverständige', *Zivilprozessordnung* (2019), at para. 15.
52. These provisions regulate the protocol of the hearing.

2.3 The Implementation of the Concept

Interested parties can easily follow the implementation of the procedural elements of the 'Justizinitiative': The homepage of the District Court of Frankfurt contains a link to a web page for the 'Chamber for International Commercial Disputes'[53] that contains information about the proceedings before the Chamber and is available in English[54] and in German. The distribution list, also available on the District Court website,[55] contains the names of judges who are responsible for those proceedings. This distribution list also includes a first definition of international commercial affairs:[56]

> Proceedings, which are under the jurisdiction of a Chamber for Commercial Disputes and not under a special jurisdiction of another Chamber of the Court will be referred to the Chamber for International Commercial Disputes, if the lawsuit has a bearing upon an international matter and the parties declare before the end of the deadline for the statement of defence that they would like to plead in the oral hearings in English and waive the right to have an interpreter.

This basic provision permits hearings to be conducted in English. According to the provision, there must be a commercial dispute,[57] which is at the same time an international matter. Even though the distribution list does not define the term 'international matter', the legal proposal to amend the Courts Constitution Act,[58] however, addresses this issue by mentioning some examples covered by this term.[59] Moreover, there must be a declaration of the parties that they want to litigate the dispute before this chamber. Additionally, the distribution list indicates that a panel of three judges constitutes the chamber: either Judge Ulrike Willoughby or Dr. Felix Bergmeister sit as presiding judge along with two commercial lay judges from the business sector who are expert in finance, banking, accounting, insurances,

53. *See* the website of the district court of Frankfurt, available at: https://ordentliche-gerichtsbarkeit.hessen.de/LG-Frankfurt (last visited 5 December 2018).
54. Available at: https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lg-bezirk-frankfurt-m/lg-frankfurt-m/chamber-international-commercial-disputes (last visited 4 October 2018).
55. *See* the distribution list, at 84, available at: https://ordentliche-gerichtsbarkeit.hessen.de/sites/ordentliche-gerichtsbarkeit.hessen.de/files/LG%20FFM%20Gesch%C3%A4ftsverteilung%202018%20Stand%2001.01.2018.pdf.
56. *See* the distribution list, above n. 55, at 35.
57. Corresponding to section 95 GVG.
58. Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), Bundestagsdrucksache 19/1717, 18 April 2018, proposed section 114b GVG.
59. Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), above n. 58, at 14. Regarding the proposed section 114b GVG, the draft states that an 'international matter' is given, *e.g.* if the contractual agreements or contract documents are written in English, if a party is domiciled abroad or if foreign law applies. The same is assumed in internal company disputes if the company's internal contracts and correspondence are in English or if the company is domiciled abroad. It is noteworthy that German law does not give the parties the possibility to agree on qualifying their (domestic) disputes as 'international'.

transportation and so on and often have a strong legal background, too.

The description of the proceedings on the District Court web page simultaneously serves as an advertisement demonstrating that the Frankfurt District Court offers a well-equipped and efficient infrastructure for commercial litigation. This is also reflected in the regulations on the design of the process, which underline the duty (and willingness) of the court to suitably structure and accelerate the proceedings where appropriate.[60] To do this, the chamber will set a time frame in an initial early hearing that serves as a kind of non-technical case management conference, thus enabling the court to manage the proceedings in a clear and transparent way. Key provisions for this are sections 273 ZPO[61] and 275[62] ZPO, which require the court to actively prepare both the advance and, if necessary, the main hearing, e.g. by ordering the parties to appear in person and by requesting missing information from the parties[63] and from public authorities. Additionally, the court will remain active in directing the proceedings, using the leeway granted by a number of key provisions in the German Code of Civil Procedure.[64] Provisional relief is also available when the successful execution of a future civil judgment might be hindered by the lapse of time or intervening events. The German Code of Civil Procedure provides the possibility to initiate special proceedings for prejudgment attachment (*Arrest*)[65] and other preliminary measures (*einstweilige Verfügung*).[66] In both cases, the competent court is the court before which the main action is being pursued,[67] thus ensuring that these proceedings will still be held in English.

3 The (Re-)Current Legislative Proposals to Amend the German Courts Constitution Act (GVG)

Changes to the German Courts Constitution Act are currently under discussion. As described above, the present legal regime provides in section 184 (1) of the German Courts Constitution Act[68] that 'The language of the court shall be German.' Correspondingly, section 185 (1) enables the parties to call for an interpreter when they do not have a sufficient command of the German language.[69] However, section 185 (2) allows for an interpreter to be dispensed with if all persons involved have a sufficient command of the foreign language.[70] Using this slender provision has made it possible to establish English proceedings in German courts. However, strictly verbatim, it only permits the conduct of the hearing in English, although an expansion by analogy to the written phase of the proceedings is possible.[71] Nonetheless, from a legalistic point of view, more clarification is needed, and there are ongoing proposals[72] to reform the German Courts Constitution Act accordingly. Currently, a third attempt to reform the permissible court language has been submitted to the German Parliament as

60. This duty is commonly associated with section 139 ZPO (*see* above n. 35) but permeates all judicial actions. It is important to note that this does not mean that the court will clarify facts of the case out of self-motivation and without regard for the parties. Rather, the duty is understood to be a 'duty to provide hints and feedback' to the parties in order to protect them from surprise and avoid unnecessary delays at later stages of the proceedings. *See* Murray and Stürner, above n. 33, at 166; Jauernig and Hess, above n. 36, at 100 ff., 117.
61. *See* above n. 35.
62. 'Section 275 – Advance first hearing
    1. By way of preparing for the advance first hearing, the presiding judge or a member of the court hearing the case delegated by the presiding judge may set a deadline for the defendant by which he is to submit a written statement of defence. Alternatively, the defendant is to be instructed to have an attorney he is to appoint submit to the court, in a written pleading and without undue delay, any means of defence that are to be brought before the court; section 277 (1), second sentence, shall apply mutatis mutandis.
    2. Should the proceedings not be conclusively dealt with and terminated at the advance first hearing, the court shall issue all orders still required to prepare for the main hearing for oral argument.
    3. At the advance first hearing, the court shall set a deadline for submitting a written statement of defence should the defendant not yet have responded to the complaint at all, or not sufficiently, and wherever no deadline pursuant to subsection (1), first sentence, had been set.
    4. At the advance first hearing, or upon having received the statement of defence, the court may set a deadline for the plaintiff within which he is to state his position in writing as regards the statement of defence. The presiding judge may set such deadline also outside of the hearing.'
63. An increased use of sections 142 and 144 ZPO (above n. 40 and n. 41) in the preparations for the hearing, as explicitly mentioned in section 273 (2) n. 5 ZPO (above n. 35), allows the court to direct a structured exchange of evidence between the parties ('German disclosure') if there is a contested issue of fact. *See* Murray and Stürner, above n. 33, at 225 f.
64. Inter alia this includes the general permission of written preparation statements of witnesses (section 377 (3) ZPO) and the recording of the hearing and preparation of a textual record (sections 160-164 ZPO), as an electronic document. Patent litigation chambers serve as an example regarding the use of these provisions, as described by Bechtold, Frankenreiter & Klerman, above at n. 6.
65. Sections 916 ff. ZPO; *see* Murray and Stürner, above n. 33, at 434 ff.
66. Sections 890, 935 ff., 940 ZPO; *see* Murray and Stürner, above n. 33, at 437 ff.
67. Pursuant to section 919 ZPO (in the case of prejudgment attachments; the local *Amtsgericht* is also responsible) and section 937 ZPO (in the case of other preliminary measures).
68. *See* the wording supra at fn. 14.
69. Section 185 GVG reads as follows: '(1) If persons are participating in the hearing who do not have a command of the German language, an interpreter shall be called in. No additional record shall be made in the foreign language; however, testimony and declarations given in the foreign language should also be included in the record or appended thereto in the foreign language if and to the extent that the judge deems this necessary in view of the importance of the case. Where appropriate, a translation to be certified by the interpreter should be annexed to the record. […] (2) An interpreter may be dispensed with if all the persons involved have a command of the foreign language. […]'.
70. However, written pleadings and court records must be drafted in German. On the (limited) scope of section 185 (2) GVG, *see* J. Riedel, 'Englisch als Verhandlungssprache vor Gericht', in M. Habersack et al. (eds.), *Festschrift für Eberhard Stilz zum 65. Geburtstag* (2014) 501, at 502 f.
71. *I.e.* on initiative of the court or the parties, parties might renounce the translation of documents that are submitted as evidence to the court.
72. Bundesratsdrucksache 53/18 (Beschluss) = Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), above n. 58.

a legislative proposal. While the previous lack of success attests to a certain resistance in the German Parliament to using a foreign language in court proceedings,[73] it warrants mentioning that this time several major Federal States, including Bavaria, Hesse, North Rhine-Westphalia, Lower Saxony and Hamburg, are backing the initiative. Moreover, various administrative arms are supporting the project, including the Federal Ministry of Justice. As the current term of the Federal Parliament has started relatively recently, there are good prospects that this time, the proposal will be successful.
Inter alia, the proposal provides for the amendment of section 184 (2) and (3) of the German Courts Constitution Act and reads as follows:

> (2) Before the International Chambers for Commercial Disputes and the Higher Regional Courts competent for appeals and complaints against these decisions the proceedings shall be conducted in English. In these proceedings, the minutes and the decisions of the Court shall also be drawn in English. The operative parts of judgments and resolutions must be translated into German when they have an enforceable content (…).
> (3) In international commercial matters, the proceedings before the Federal Court of Justice may be conducted in English.

Once the amendment enters into force, courts of the first and second instance will conduct not only the oral hearings but the whole proceedings in English, based on the parties' consent. The situation will be different at the Federal Civil Court (*Bundesgerichtshof*), where the proceedings *may* be conducted in English at the discretion of the court.[74] However, it is worth noting that if foreign law is applicable on the substance, e.g. English law or Irish law, the Federal Civil Court does not have jurisdiction to review appeals based on the violation of foreign law.[75] Ending up with only two instances and reducing appeal by limitation to 'two shots' might also speed up the proceedings, although it is doubtful whether this would serve the interest of the parties.[76]

Additionally, a definition of 'international commercial matters' will be included in section 114b of the German Courts Constitution Act.[77] Furthermore, there will be a provision in section 95 of the German Courts Constitution Act empowering the Federal States, which are responsible for the administration of justice to establish international chambers for commercial matters.
There is also an interesting provision concerning situations when a third-party notice is filed. In this constellation, the third party might contest proceedings conducted in English and the obligation to participate in those proceedings and has a right to request that the proceedings are continued in German.
Nevertheless, one issue remains in the legislative project: If the proceedings are conducted in English, this has to apply also to the complaint, which is the first step to start court litigation.
Therefore, to achieve the desired results, the German Courts Constitution Act must be amended in three respects: to allow the complaint also to be filed in English, to include the possibility for the defendant to lodge an appeal and to give the third party the right to request for German-language proceedings.
Such a mechanism is already envisaged in the proposed amendment of section 73 of the Code of Civil Procedure, which takes up the provisions of Article 8 of the Service Regulation[78] dealing with foreign languages and the right of the addressee to refuse the acceptation of a document drawn up in a language the addressee does not understand. A similar provision should apply to section 253 of the Code of Civil Procedure, which addresses the content of the lawsuit: The plaintiff should be allowed to draft the complaint in English, but the defendant will have two weeks from the acceptance of such a complaint to contest the conduct of proceedings in English. Furthermore, this amendment would ensure a level playing field for the service of documents both at the European level and in domestic cases.

4 Similar Initiatives at Other Courts in Germany

It remains to be mentioned that Frankfurt is not the only place in the sixteen Federal States in Germany

73. The lack of success of the previous proposals (*see* above n. 18) can also be attributed to the end of the respective legislative periods, although a project of higher political priority (at the time) might not have fallen victim to parliamentary scheduling issues.
74. This provision demonstrates an ongoing reluctance within the Bundesgerichtshof with regard to the project.
75. The Federal Court does not review the application of foreign law, *Bundesgerichtshof*, 4 July 2013 – V ZB 197/12, 50 NJW 3656 (2013); *see also* W. Krüger, '§ 545 Revisionsgründe', in T. Rauscher and W. Krüger (eds.), *Münchener Kommentar ZPO* (2016), at para. 11 f. However, this principle has been called into question in the wake of a 2009 reform; *see* B. Hess and R. Hübner, 'Die Revisibilität ausländischen Rechts nach der Neufassung des § 545 ZPO', 43 *NJW* 3132 (2009). Additionally, a review appeal may still be based on incorrect application of evidentiary rules when ascertaining the contents of foreign law, *see* Murray and Stürner, above n. 33, at 392 f.
76. This has, however, also attracted criticism based on the notion that if the parties choose a German forum, they should also be able to access the 'full range' of the German judicial system, *i.e.*, including a possible review appeal. Ideally, this would be accompanied by a choice of substantive German law, as argued by M. Siegmann, 'Ein richtiger erster Schritt auf einem langen Weg', 4 *Deutscher AnwaltSpiegel* 17, at 23 (2018).
77. Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), above n. 58.
78. Regulation (EC) No 1393/2007, OJ L 324. 'Article 8 reads as follows: (1) The receiving agency shall inform the addressee, using the standard form set out in Annex II, that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into, either of the following languages:
    a. a language which the addressee understands; or
    b. the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected. […]'.

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where initiatives have popped up. Similar initiatives are found in Hamburg and in Düsseldorf:

> A press release[79] on the website of the Hamburg judiciary states that, as of May 2018, proceedings can also be conducted in English, at least in oral hearings. Unfortunately, the website is only in German. In the distribution list of the District Court,[80] however, no link to the chamber for international commercial affairs has been included so far. At present, it remains unclear whether the chamber has already been established.

Similar developments are happening in Düsseldorf,[81] where debates about the establishment of international chambers for commercial matters have already been launched.

5 The 2018 Initiative for Expedited B2B Procedures of the EU-Parliament: Is an Additional European Initiative Needed?

Developments on the European level are also progressing: An expert hearing by the Committee on Legal Affairs of the European Parliament took place on 9 July 2018, addressing the issue whether the European Union should introduce expedited procedures for international commercial disputes.[82] Even if the eventual conclusion is that there is no need for an additional European procedure for commercial disputes, the Parliament could still encourage the Member States to establish commercial courts, as it did in the case of collective redress.

Another idea could be to enlarge the scope of application of the Small Claims Regulation again to include more cross-border cases, even if the Small Claims Regulation might not be the best instrument for handling cross-border disputes. Other interesting ongoing projects include a model code of civil procedure, which is being prepared by the European Law Institute and UNIDROIT[83] and supported by the most eminent proceduralists in Europe. This project might also provide some inspiration for improvements to national proceedings.

The most ambitious proposal relates to the establishment of a genuine European Commercial Court, similar to the European patent litigation system.[84] This proposal was originally made by Professor Thomas Pfeiffer[85] and has been recently taken up again by Professor Giesela Rühl.[86] They propose that the court should be composed of judges from different EU Member States and provide for two instances. Giesela Rühl sees the main added value to be in its character as a 'truly international forum'.[87] Yet, it remains to be seen whether the court will act truly internationally as it shall apply the EU private international law instruments, which eventually refer to national law. If national law applies to the merits, at least two members of an international bench composed of three judges might not be familiar with it.[88] In addition, there is a considerable legal impediment as the European Union has no legislative competence to establish a supranational civil court outside of the system of the CJEU.[89] Nevertheless, this proposal demonstrates that the recent developments have triggered a lively debate.

6 Conclusions/Outlook

Overall, the ongoing expansion of cross-border dispute settlement will perhaps not entail the establishment of a European Commercial Court. However, if it results in several international commercial courts in the European Member States, this might also be considered a successful outcome. There will be, of course, more competition, but in a positive sense of the term: learning the best from other countries, improving one's own procedures by adapting the old procedures and taking up the best practices from abroad. In the end, the reforms may also help to improve the national procedural systems in general, e.g. by transferring best practices to domestic civil litigation. In this case, not only commercial parties

79. Available at: https://justiz.hamburg.de/pressemitteilungen/10983386/pressemitteilung-2018-04-30-olg-01/.
80. The distribution list of 2018 is available at: https://justiz.hamburg.de/contentblob/10958882/bf3019196ec6c143e66325b4263bc793/data/geschaeftsverteilungsplan-2018-stand-02-01-2018.pdf.
81. *See* R. Podszun and T. Rohner, *Staatliche Gerichte für wirtschaftsrechtliche Streitigkeiten stärken: Ein „Düsseldorf Commercial Court" als Antwort auf den Brexit* (2017), available at: http://www.jura.hhu.de/fileadmin/redaktion/Fakultaeten/Juristische_Fakultaet/Podszun/Podszun_Rohner_Paper_Staatliche_Gerichte_staerken.pdf; *see also* the press release of the Minister of Justice in North Rhine-Westphalia, Peter Biesenbach, on the topic of strengthening commercial courts in North Rhine-Westphalia (such as the district court Düsseldorf), available at: https://www.justiz.nrw/JM//Presse/reden/archiv/2018_01_Archiv/2018_03_28_Sprechzettel_Minister_Pressefruehstueck/index.php.
82. The hearing was prepared by a study for the European Parliament, *cf.* G. Rühl, *Building Competence in Commercial Law in the Member States* (PE 604.980).
83. *See* https://www.unidroit.org/work-in-progress-eli-unidroit-european-rules, for more details on the history and regular updates on the state of the project (last visited 4 October 2018).
84. A similar proposal was made by G. Wagner with regard to the creation of 'true German Commercial Court' as a common court of all or several Federal States, *cf.* Wagner, *Rechtsstandort Deutschland im Wettbewerb* (2017), at 232 ff. Yet, the federal structure of the justice system in Germany does not really permit the establishment of one centralised court (which eventually should be conceived as a federal court).
85. T. Pfeiffer, 'Ein europäischer Handelsgerichtshof und die Entwicklung des europäischen Privatrechts', *ZEuP* 795, at 797 ff. (2016).
86. Rühl, above n. 82, at 58-64.
87. Rühl, above n. 82, at 58.
88. As a result, there might be even less expertise in the court compared to a commercial court applying its own law.
89. The problems are described by Rühl, above n. 82, at 59 f. (discussing Arts. 257 and 81 TFEU). However, Art. 81 TFEU does not open up a competence of the EU for the establishment of a genuine supranational court; contrary opinion, Rühl, above n. 82, at 60.

but all litigants would eventually profit from improvements and reforms that are triggered by the practices developed in the chambers for international commercial disputes.

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The Brussels International Business Court: Initial Overview and Analysis

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Abstract

In establishing the Brussels International Business Court (BIBC), Belgium is following an international trend to attract international business disputes to English-speaking state courts. The BIBC will be an autonomous business court with the competence to settle, in English, disputes between companies throughout Belgium. This article focuses on the BIBC's constitutionality, composition, competence, proceedings and funding, providing a brief analysis and critical assessment of each of these points. At the time of writing, the Belgian Federal Parliament has not yet definitively passed the Bill establishing the BIBC, meaning that amendments are still possible.

Keywords: international jurisdiction, English, court language, Belgium, business court

1 Introduction

The planned establishment of the Brussels International Business Court (BIBC), an English-speaking business court, represents a first for Belgium, although similar courts already exist or are in the process of being set up in other jurisdictions.

This article briefly presents a few key aspects of the BIBC. Following a brief discussion of the reasons why the Belgian legislature decided to establish an English-speaking business court (Section 2), the article considers the constitutional issues arising from the creation of the BIBC (Section 3). There then follows a more detailed examination of the court's composition (Section 4), competence (Section 5), procedural rules (Section 6) and, last but not least, funding (Section 7).

At the time of writing, the Belgian Federal Parliament had not yet had a final vote on the Bill establishing the Brussels International Business Court, meaning that amendments are still possible. This article is based primarily on the text of the Bill submitted by the Federal Government to the Belgian House of Representatives on 15 May 2018 as well as subsequent debates in the House Justice Committee.[1]

The aim is for the BIBC to be operational by 1 January 2020 at the latest.[2]

2 Motivation

Business activities can give rise to disputes. As more business is carried out transnationally, disputes too are becoming more international. Private international law provides a framework for resolving such international business disputes.[3] It allows parties to freely choose

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1. Bill establishing the Brussels International Business Court, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001; 'Verslag van de eerste lezing namens de commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007; 'Verslag van de tweede lezing namens de commissie voor de Justitie'/'Rapport de la deuxième lecture fait au nom de la commission de la Justice' (Report on the second reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/010. For the ease of the reader, the article mostly refers to the proposed modifications to the Belgian Judicial Code instead of the articles of the Bill establishing the Brussels International Business Court.
2. Art. 63 of the Bill establishing the Brussels International Business Court, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001.
3. J. Hoeben, A.L.M. Keirse & M.D. Reijneveld, 'Opteren voor de Netherlands Commercial Court', 2017/2 *Contracteren – Tijdschrift voor de Contractspraktijk* 37 (2017). Belgian private international law (PIL) is enshrined in the Code of Private International Law, whose Art. 2 reaffirms the precedence of European and international PIL rules. Act of 16 July 2004 holding the Code of Private International Law, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 27 July 2004.

their preferred jurisdiction[4] and the legal rules they deem applicable should a dispute arise.[5,6]

Companies can choose from a number of dispute resolution mechanisms. There are a wide range of legal and paralegal solutions on offer – especially to companies operating internationally.[7] As well as conventional legal proceedings, conciliation, mediation and arbitration, other options include specialist state courts and commercial courts such as the BIBC. A company will seek the most suitable means of settling a dispute. For example, it may be that arbitration is not always the right choice for small and medium-sized enterprises with international operations.[8]

One key factor here is the use of English in state courts. There are various initiatives in this area, differing significantly in manner and extent[9] but all aiming to provide greater scope for the use of English in state courts, in addition to the official language(s) of the country concerned.[10]

In short, the following reasons are cited for establishing the BIBC:

– *Firstly*, Belgium is not the only country to establish an English-speaking business court handling international trade disputes. Such courts already exist in London,[11] Singapore[12] and Dubai.[13] Closer to home, the process of establishing the Netherlands Commercial Court has recently come to an end.[14] In France, the International Chamber of the Paris Court of Appeal has been hearing cases in English since 1 March 2018.[15] By setting up the BIBC, Belgium aims to compete with these courts in other countries.
– *Secondly*, an effective BIBC will enhance Brussels' international standing, complementing the Belgian capital's status as the de facto capital of the European Union and home to many international companies, institutions and universities. International players will no longer have to go abroad to settle disputes in English. In addition, the BIBC will tap into the legal and other know-how present in Brussels by allowing specialists from various branches of law and business to sit as BIBC lay judges (see Section 4 below), thereby making their expertise available to the wider business community.[16]
– *Thirdly*, there are also important economic benefits to be gained. Attracting to or keeping in Belgium international trade disputes that would otherwise be settled by a foreign court will generate economic added value. In addition to high-quality and knowledge-intensive jobs in the legal sector, there will also be knock-on benefits for other parts of the economy such as the hotel sector. In the UK, for example, the legal sector contributed an estimated £25.7 billion overall to the economy in 2017.[17] Once up and running, it is estimated that the Netherlands Commercial Court will generate revenues of between €60 million and €75 million per annum.[18] Understandably, Bel-

4. For European Union (EU) Member States, in terms of applicable law, see (i) Council Regulation 593/2008, OJ 2008 L 177/6 ('Rome I'), and (ii) Council Regulation 864/2007, OJ 2007 L 199/40 ('Rome II'). For non-EU Member States (third countries), see the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.
5. For EU Member States, in terms of choice of jurisdiction, see (i) Council Regulation 1215/2012, OJ 2012 L 351/1 ('Brussels Ia'), which entered into force on 10 January 2015, (ii) the Hague Convention of 30 June 2005 on Choice of Court Agreements, ratified by the European Union and also Mexico and Singapore, and (iii) the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters for Denmark, Iceland, Norway and Switzerland.
6. E. Dirix, 'Procederen in het Engels', 81/2 *Rechtskundig Weekblad* 42 (2017).
7. This freedom of choice results in a global market in terms of applicable jurisdiction and law in certain legal domains. For an analysis of this international regulatory competition, see H. Eidenmuller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporations', 18(2) *Indiana Journal of Global Legal Studies* 707 (2011); M. Neekilappillai, 'Netherlands Commercial Court: regelgevingsconcurrentie op de markt voor geschilbeslechting', 23 *Nederlands Juristenblad* 1594 (2017).
8. Queen Mary University of London (2018), *2018 International Arbitration Survey – The Evolution of International Arbitration*, at 8.
9. A comparative analysis of these projects is beyond the scope of this article. For this we refer to Haut Comité Juridique de la Place Financière de Paris (Legal High Committee for Financial Markets of Paris), 'Les chambres spécialisées "business friendly" (Allemagne, Dubaï, Espagne, Pays-Bas, Qatar, Singapour) – Étude réalisée par le bureau de droit comparé du SAEI', Annex 3 to Haut Comité Juridique de la Place Financière de Paris, *Préconisation sur la mise en place à Paris de Chambres spécialisées pour le traitement du contentieux international des affaires* (2017), available at: http://hcjp.fr/avis-et-rapports-copier (an English version of this report (Legal High Committee for Financial Markets of Paris, *Recommendations for the creation of special tribunals for international business disputes* (2017)) is available at: http://hcjp.fr/opinions-and-reports-copier (last visited on 1 December 2018) but does not include this annex).
10. C.A. Kern, 'English as a court language in continental courts', 5(3) *Erasmus Law Review* 187 (2012).
11. In 2017, the London Commercial Court was merged into the Business and Property Courts of England and Wales comprising specialist jurisdictions.
12. Singapore International Commercial Court.
13. Dubai International Finance Centre (DIFC) Courts.
14. Amendment of the Code of Civil Procedure and the Act on Court Fees in Civil Proceedings to make it possible for cases to be handled in English by the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal. The establishment of the Netherlands Commercial Court was approved by the Dutch Parliament on 11 December 2018.
15. *Protocole relatif à la procedure devant la chambre internationale du tribunal de commerce de Paris (Protocol relating to proceedings before the International Chamber of the Paris Commercial Court)* and *Protocole relatif à la procedure devant la Chambre Internationale de la Cour d'appel de Paris (Protocol relating to proceedings before the International Chamber of the Paris Court of Appeal).*
16. These are referred to as the 'BIBC judges' (corresponding to the *'judges in the BIBC'* in the legislation).
17. The legal services sector accounted for 370,000 jobs. See for example (i) https://www.thecityuk.com/research/legal-excellence-internationally-renowned-uk-legal-services-2017 (last visited on 1 December 2018) and also (ii) *The Lord Chief Justice's Report 2017*, at 29 (2017). The international appeal of the UK commercial courts is clear from the fact that in more than 70 per cent of the cases at least one of the parties was registered abroad. In 45 per cent of cases, both parties were based outside the UK. TheCityUK, *Legal excellence internationally renowned – UK Legal Services 2017*, at 27 (2017).
18. Raad voor de rechtspraak (Council for the Judiciary), *Plan tot oprichting van de Netherlands Commercial Court*, at 14 (2015). These social benefits are based on an assumption of around 125 cases per year, including 25 appeal cases.

gium is keen to share in the anticipated economic rewards.

– *Fourthly*, by handing down fast, expert and final judgments, the BIBC should help to expand the expertise of the Belgian judiciary both nationally and internationally. The fact that all international business disputes will be handled by the BIBC should lead to specialisation. The idea is that companies will take their disputes to the BIBC not just because it is an English-speaking court but also owing to its general quality, speed and specialisation and the ease of enforcement. In this way the BIBC will help to achieve the overarching goal of enhancing the overall quality and attractiveness of the Belgian legal system for (in particular, foreign) investors.[19,20]
– *Lastly*, Brexit is also cited as a factor behind the timing of the court's creation. While the idea of an English-speaking business court predates the process of the UK leaving the European Union,[21] the Belgian legislature expects this to result in an increase in the number of disputes.[22] Whether Brexit will dent the popularity of UK courts and English law for resolving international business disputes will depend on the future arrangements for the recognition and enforcement of civil court judgments in the European Union.[23]

However, not everyone is convinced by these arguments. The establishment of the BIBC has provoked some controversy, with dissenting voices heard particularly among the Belgian judiciary.[24] For example, an opinion issued by the High Council of Justice was highly critical of the Bill.[25] The Council of State too published a very extensive opinion regarding the legislation.

Where appropriate, the criticism that has been levelled at the Bill will be addressed later in this article.

3 The BIBC and the Belgian Constitution

In contrast to the initiatives taken in the Netherlands[26] and France, the Belgian legislature has decided not to establish an English-speaking chamber at an existing court. Having the BIBC as a stand-alone business court thus involves a more radical change to Belgium's legal architecture than was needed in those countries.[27]

19. The positive impact of an effective judiciary on the attractiveness of the investment climate has been extensively demonstrated in the literature. See for example (i) International Monetary Fund, *Fostering Growth in Europe* (2012); (ii) World Bank, *World Development Report 2017: Governance and the Law*, available at: http://www.worldbank.org/en/publication/wdr2017 (last visited on 1 December 2018); (iii) OECD, 'What makes civil justice effective?', *Economics Department Policy Notes*, no. 18 (2013) and G. Palumbo, G. Giupponi, L. Nunziata & J.S. Mora Sanguinetti, 'The Economics of Civil Justice: New Cross-Country Data and Empirics', *OECD Economics Department Working Papers*, no. 1060 (2013); and (iv) European Commission, *The 2018 EU Justice Scoreboard* (2018). Also see H. Eidenmuller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporations', 18/2 *Indiana Journal of Global Legal Studies* 707, at 714 (2011).
20. During the parliamentary debate on the Netherlands Commercial Court, reference was made to an undesirable reduction in social and legal standards, *i.e.* a 'race to the bottom', to attract international disputes. However, merely establishing an English-speaking business court does not prejudice substantive law. It can even be argued that, in fact, this leads to an improvement in the quality of substantive law by means of a 'race to the top'. Tweede Kamer der Staten Generaal (House of Representatives of the Dutch Parliament), '34761 Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam', 6:3 (2017).
21. The French-speaking Bar (Avocats.be) advocated the establishment of an English-speaking chamber of the Brussels Commercial Court in an election memorandum in 2014. Presentation by Jean-Pierre Buyle, 'Verslag van de eerste lezing namens de commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 59.
22. *'"Brexit" and the resulting difficulties will lead to an exponential increase in the number of international trade disputes', Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 5.
23. To emphasise the leading position of the UK courts and English law, the Lord Chief Justice stated that these would be unaffected by Brexit. *The Lord Chief Justice's Report 2017*, at 36, available at: https://www.judiciary.uk/publications/the-lord-chief-justices-report-2017 (last visited on 1 December 2018). Various other publications have also appeared underlining this: (i) *The strength of English law and the UK jurisdiction and English law*, available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf (last visited on 1 December 2018), and (ii) *UK courts and UK legal services after Brexit – the view beyond 2019*, available at: http://www.chba.org.uk/news/brexit-memo (last visited on 1 December 2018); as regards the broad thrust of a future cooperation framework, see the UK government's position paper of 22 August 2017, HM Government, *Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership* (2017), available at: https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper (last visited on 1 December 2018).
24. 'Lettre ouverte des magistrats de la cour d'appel de Bruxelles', 1 December 2018, available at: o0.llb.be/file/5a218368cd7095d1cd315c1b.pdf (last visited on 1 December 2018); 'Des magistrats de la cour d'appel de Bruxelles critiquent le projet de tribunal anglophone', *La Libre* (2017); A. Henkes, 'Over grensoverschrijdende fiscaliteit, andere internationale economische vraagstukken en de bijdrage van het Hof van Cassatie', Plechtige openingszitting van het Hof van Cassatie van België (Solemn opening session of the Belgian Supreme Court) 29 (2018), available at: https://justitie.belgium.be/sites/default/files/downloads/mercuriale2018_nl_site.pdf (last visited on 1 December 2018); P. Havaux, 'Tribunal Cinq Étoiles', 33 *Le Vif* 22 (2018). The Minister of Justice was also asked various parliamentary questions in the months leading up to the establishment of the BIBC, specifically (i) Question no. 2438 from member of parliament Jean-Jacques Flahaux on 2 February 2018 (Fr.) to the Minister of Justice) and the Minister's answer, 54:149 *Questions Réponses – Vragen Antwoorden* 310, 21 March 2018; (ii) Question no. 25437 from member of parliament Georges Gilkinet to the Minister of Justice regarding 'the Bill establishing the Brussels International Business Court', 55:COM 897 *Compte Rendu Intégral – Integraal Verslag* 21, 16 May 2018.
25. Hoge Raad voor de Justitie/Conseil supérieur de la Justice (Belgian High Council of Justice), 'Avis d'office : Avant-projet de loi instaurant la Brussels International Business Court' (2018), available at: http://www.csj.be/fr/search/apachesolr_search?filters=type%3Apublication (last visited on 1 December 2018).
26. This involves using English in the international commercial chambers of the existing Amsterdam District Court and the Amsterdam Court of Appeal, and therefore does not entail the establishment of a new court.
27. The name *rechtbank van koophandel/tribunal de commerce ('commercial court')* was abolished by the Act of 15 April 2018 on company law reform, published in the *Belgisch Staatsblad/Moniteur belge (Belgian*

The BIBC must comply with the relevant provisions of the Belgian Constitution. In its opinion, the Council of State essentially applies a three-pronged test. The *first* constitutional test relates to the designation of the BIBC as a state court. The *second* concerns its compliance with the rules on language use. *Thirdly*, the Council examines compliance with the principle of equality.

3.1 State Court

To assess whether the BIBC complies with Belgium's constitutional provisions, the *first* aspect to consider is the *nature of the disputes*. This is a key factor in the division of labour between the judiciary and the administrative courts.[28] The BIBC will settle disputes surrounding civil, subjective rights. As these are the sole responsibility of the judiciary,[29] the BIBC must comply with the relevant constitutional provisions applicable to the judiciary, not those covering administrative courts.

The *second* factor is *how the BIBC is established*. The establishment of a new court requires the promulgation of a law: this legal principle is met in so far as the creation of the BIBC is enshrined in legislation.[30] The legislature also reserves the right to regulate the organisation and competence of (business) courts, as under the Belgian Constitution it is possible to set up various types of business court with their own specific rules relating to, for example, the language of the proceedings, territorial jurisdiction[31] and composition.

Finally, the *ban on occasional courts* must be respected. To avoid arbitrariness and discrimination, it is not permitted to establish ad hoc courts to rule on individual cases.[32] Given its clear delimitation of competences (see Section 5 below), applicable to an unspecified number of cases, the Council of State concludes that the BIBC is not in breach of this ban.[33]

Official Gazette) of 27 April 2018, which largely came into force on 1 November 2018, and replaced by *ondernemingsrechtbank/tribunal de l'entreprise ('business court')*. Art. 157 of the Belgian Constitution continues to use the term *rechtbank van koophandel/tribunal de commerce ('commercial court')* in the generic sense. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl.: Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 54. For the reader's convenience, the term *business court* is used systematically below.

28. This relates to the distinction, within the category of subjective rights, between civil and political rights. Disputes about civil rights fall within the exclusive competence of the courts, whereas disputes regarding political rights can be assigned to administrative courts. W. Verrijdt, 'Commentaar bij artikel 144 GW', 39 *OAPR* (2015), at 85; A. Alen and K. Muylle, *Compendium van het Belgisch Staatsrecht – syllabusuitgave* (2012), at 294-8.
29. Art. 144(1) of the Belgian Constitution.
30. C. Berx, 'Commentaar bij artikel 146 GW', 9 *OAPR* (1999), at 27.
31. The BIBC will be based in Brussels. Under the proposed Art. 1385*quaterdecies*/10 of the Belgian Judicial Code, the BIBC may convene wherever it deems appropriate for its members to deliberate; for witnesses, experts or the parties to be heard; or for goods, other objects or documents to be examined.
32. B. Dalle, D. Keynaerts, W. Pas, J. Theunis & W. Verrijdt, *Duiding Federale Staatsstructuur* (2018), at 187.
33. Proposed Art. 73(3) of the Belgian Judicial Code. This means it is not a 'temporary or ad hoc court to which specific individual disputes are referred.' Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 103.

3.2 Language Use

The *second test* relates to the constitutional provisions on language use. Belgian case law tends to adopt a pragmatic stance towards the use of English.[34] In this light, without recognising English as an official language, the Council of State tolerates public services – and therefore also the judiciary, of which BIBC forms part – using English 'in so far as the use of the official language or official languages proves impossible due to the nature of the case or in so far as the services' needs or general interest requirements make the use of other languages necessary.'[35]

Accordingly, the Council of State considers the following requirements to apply: (i) sufficient objective elements in a dispute indicate the use of English, and (ii) this does not affect the priority of the languages of the respective language area. Now that its competences have been clearly delimited, the BIBC meets the first requirement.[36] The condition establishing the priority of the language or languages of the respective language area is also unaffected given that users of the official languages are not obliged to conduct English-speaking proceedings before the BIBC. The parties' consent is always required (see Section 5 below).[37]

However, problems could potentially arise with regard to third parties, as they would not have agreed to English-language proceedings. Third-party opposition proceedings will therefore still be possible in Dutch, French or German.[38] This will avoid a situation where-

34. Since the entry into force of the Act of 25 May 2018 on the reduction and redistribution of the workload within the judicial system, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 30 May 2018, language use in court cases is no longer a matter of public policy. Arts. 794, 861 and 864 of the Belgian Judicial Code are now rules prescribed on pain of nullity. This pragmatic change makes the system more flexible, allowing the court to prevent the annulment of an irregular act by making good the disadvantage incurred by a party. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 2827, at 27-8; K. Wagner, 'De sanctieregeling in de taalwet van 1935: Quousque tandem abutere patientia nostra?', 2010(3) *Revue de Droit Commercial Belge – Tijdschrift voor Belgisch Handelsrecht (RDC – TBH)* 234 (2010).
35. Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 107-8 and also footnote 34.
36. The preliminary draft stated that a dispute was international 'if the parties have explicitly agreed that the subject of the dispute relates to more than one country'. Therefore, all the parties needed to do for the BIBC to be competent was classify a dispute as international. Such a general formulation provided an insufficiently objective description of the BIBC's competence.
37. Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 110.
38. Third-party opposition is an extraordinary legal remedy whereby a person who is not party to a dispute and who considers himself prejudiced by a judgment can file an objection to this ruling. It owes its existence to the need for a third party to have a legal remedy at his disposal to challenge a judgment that adversely affects his rights. In this light, the Bill (Art. 20) makes the common law procedure set out in Arts. 1122-1131 of the Belgian Judicial Code applicable; K. Wagner, 'Derdenverzet', *Algemene Praktische Rechtsverzameling* (2004), at 1. This is different from arbitration, where on the basis of Art. 1686 of the Belgian Judicial Code no third-party opposition is possible. Wagner (2004), at 59.

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by third parties who do not speak English do not correctly understand the scope of a BIBC judgment and would therefore be unable to actually exercise their right to third-party opposition.[39] The possibility of filing the third-party opposition in Dutch, French or German only applies to the opposing party, whose documents will be translated into English and for whose benefit the documents of the other parties to the proceedings will be translated from English. Apart from this, the proceedings will remain completely in English.[40] Given the anticipated exceptional nature of third-party opposition, this pragmatic solution seems admissible and does not appear, *a priori*, to represent a violation of the Belgian Constitution.

3.3 Equality Principle

The *third* factor is that proceedings before the BIBC must comply with the equality principle.[41] Where different procedural rules are applied, there must be reasonable justification. Proceedings in English before the BIBC must not offer benefits that are disproportionate to those enjoyed by parties who submit an international business dispute to a conventional business court for resolution. Parties not opting for such proceedings must not be disadvantaged.[42]

Differences in treatment as a result of differing court procedures are, of course, commonplace. However, if parties intentionally choose a specific court in advance, there is no breach of the equality principle.[43] Moreover, the legislature has some room for manoeuvre in regulating the actual organisation and the competence of business courts.[44] The procedural differentiation applying to the BIBC is based on an objective delimitation of competences, meaning that it also passes this test *a priori*.[45]

39. The legislature considers it highly unlikely that an interested third party would not have a command of English, given the nature of the disputes on which the BIBC will be ruling, but the abolition of third-party opposition proceedings against a BIBC judgment would be in direct breach of Arts. 10 and 11 of the Belgian Constitution, according to the Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 137.
40. This restriction is justified by the proportionality principle. The opposing party may also use his own language at any hearings. In that case simultaneous interpretation will be arranged. The interpretation costs will be borne by the Belgian State and will not be included in the increased registration fee paid by the parties. See the proposed Art. 2/1(2) of the Belgian Act of 15 June 1935 on the use of languages in judicial proceedings.
41. Arts. 10 and 11 of the Belgian Constitution.
42. On this point, the Bill has been amended from the preliminary draft examined by the Belgian Council of State.
43. The Belgian Constitutional Court has confirmed that this does not constitute a breach of the equality principle, while the same applies to the differences between state court case law and arbitration. Belgian Constitutional Court of 16 February 2017, Case no. 21/2017.
44. The constitutional provision merely prevents commercial courts from being abolished or being deprived of their essential powers.
45. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 8.

4 Composition

A panel will be formed for every case brought before the BIBC.[46] To properly understand its composition, the three-way distinction between the Chairman, the panel chairman and the judges must always be borne in mind.

4.1 Chairman/Chairmen of the BIBC

4.1.1 Role and Tasks

The BIBC will be headed by a Chairman.[47] The Chairman will always be a professional judge from the Brussels Court of Appeal who sits in the Market Court.[48] The Market Court has exclusive jurisdiction over various matters and is the central forum for appeals against the decisions of administrative authorities such as the Belgian Competition Authority and the Financial Services and Markets Authority.

Like the chiefs of staff at other business courts, the Chairman will be appointed by the King (i.e. the government) based on a reasoned nomination by the High Council of Justice, an independent body charged with selecting judges.[49,50] The BIBC chairmanship will not be a full-time position, being combined with the role of a judge at the Market Court.[51]

46. For each case registered on the roll, the Chairman will establish a panel as soon as possible, and, in any case, within a month. The panel's composition is then communicated to the parties. The one-month period starts with the registration on the roll. Proposed Art. 85/1(3) of the Belgian Judicial Code.
47. Like the Belgian Constitutional Court, the BIBC will have two Chairmen, one from the Dutch-speaking register and the other from its French-speaking counterpart, who hold the presidency for alternating one-year periods. Where the 'Chairman' is referred to in the rest of this article, the serving Chairman at the time is meant.
48. The Market Court is not a stand-alone court but a section of the Brussels Court of Appeal. Art. 59 of the Belgian Act of 25 December 2016 to amend the legal status of prisoners and the supervision of prisons, and containing various provisions related to the judicial authorities, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 30 December 2016: 'At the Brussels Court of Appeal there are also chambers for market affairs, whose competence is established by law. These chambers form a section called the "Market Court".' Also see M. Bosmans, 'Het Marktenhof blies zijn eerste verjaardagskaarsje uit …', 13/1 *Competitio – Belgian Competition Quarterly* 66 (2018).
49. In a preliminary draft, the Chairman of the BIBC was to be 'appointed by the Minister of Justice'. After severe criticism from the High Council of Justice, the Bill was amended. Accordingly, the proposed Art. 58*bis*(2) of the Belgian Judicial Code was amended to also regard the BIBC Chairmanship as a chief of staff (*korpschef/chef de corps*) mandate. Hoge Raad voor de Justitie/Conseil supérieur de la Justice (Belgian High Council of Justice), 'Avis d'office : Avant-projet de loi instaurant la Brussels International Business Court' (2018), available at: http://www.csj.be/fr/search/apachesolr_search?filters=type%3Apublication (last visited on 1 December 2018). This adjustment ensures compliance with Art. 151 of the Belgian Constitution.
50. Under this Article, the Chairmen will be appointed by a two-thirds majority of votes following a reasoned nomination by the High Council of Justice's Nomination and Appointment Committee in accordance with the detailed rules laid down by law and after considering the qualifications and aptitude of the candidates.
51. The holding of multiple judicial offices is generally not allowed in Belgium. Exceptions are possible where laid down by law, as in the case of the Bill establishing the BIBC. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 16.

The Chairman's main task is to establish the panel for every new case. Unlike in arbitration, parties will not be able to choose their judge,[52] nor will they know the panel's composition in advance. In line with European and international legal practice, when assigning cases, the Chairman will consider objective criteria such as (i) internal administrative requirements, (ii) the fair allocation of cases, (iii) judges' availability, and (iv) judges' special expertise.[53]

In addition, the Chairman will be responsible for disciplinary action against BIBC judges,[54] will deal with substitution requests[55] and perform financial oversight of expense statements.[56]

The disciplinary options for these judges will differ from those for lay judges at a conventional business court.[57] Specifically, for BIBC judges only one disciplinary sanction is available, namely the early termination of their duties.[58] This is justified by the fact that some of the judges may be specialists from outside Belgium, making a more complex disciplinary procedure inappropriate.[59] In the case of professional judges/panel chairmen, the Chairman will be able to launch conventional disciplinary proceedings for offences committed in the performance of their duties at the BIBC.[60]

Special arrangements will also apply to the substitution of panel members. Specifically, if the member whose substitution has been requested does not withdraw from the panel, the request will be assessed by the Chairman and the other BIBC panel member(s) whose substitution has not been requested.[61, 62] The Council of State has warned that this closeness between the panel member facing such a request and the other members may give rise to doubts about the independence and impartiality of the decision reached.[63] The legislature does not share this concern, believing that the judge(s) sitting on the BIBC panel will be able to form a completely objective judgment regarding a fellow member's substitution. An additional safeguard is provided by the fact that the request is assessed by a college that includes the Chairman.[64]

4.1.2 Observations

The Chairman's role and tasks are those of a *chef de corps* (chief of staff) with responsibility for administrative matters. This prompts a number of observations.

Firstly, the Market Court, unlike the BIBC, is not a stand-alone court. Established in 2016, it forms a separate section of the Brussels Court of Appeal. However, it is currently having trouble filling all its vacancies.[65] Under these circumstances, the question arises whether it is wise to assign an additional workload to its members. In the initial period, the Chairman may well have to spend a considerable amount of time getting the BIBC onto the international radar.[66]

Secondly, it is not clear why Market Court judges would necessarily be more familiar with (international) trade law than a business court judge. The legislature justifies this privileged relationship on the grounds of a need for continuity and a central location in Brussels – given the varying composition of panels and the fact that lay judges may also come from abroad – as well as the special expertise in economic law *sensu lato* that Market Court judges possess.[67] This justification seems questionable from the perspective of the principle of equality of all candidate Chairmen.[68]

52. This would be a violation of Art. 13 of the Belgian Constitution.
53. Proposed Art. 85/2(3) of the Belgian Judicial Code. After severe criticism from both the Council of State and the High Council of Justice, it is now expressly stated that the Chairman must explicitly take objective criteria into account when establishing the panel. See Hoge Raad voor de Justitie/Conseil supérieur de la Justice (High Council of Justice), *n.* *, at 4, and Opinion of the Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 126, alluding to case law from the European Court of Human Rights and reports from the Venice Commission.
54. Proposed Art. 85/3(3) of the Belgian Judicial Code.
55. Proposed Art. 1385*quaterdecies*/7(3) of the Belgian Judicial Code.
56. Proposed Art. 1385*quaterdecies*/22(2) of the Belgian Judicial Code.
57. Business court judges who neglect their official duties or whose conduct does not befit the dignity of their office are liable to disciplinary sanctions under Arts. 404 to 427 of the Belgian Judicial Code. Under Art. 412(1)e of the Belgian Judicial Code, the disciplinary authority for business court judges is the Chairman of the relevant commercial court. The proposed Art. 85/3 of the Belgian Judicial Code states that any BIBC judges neglecting their official duties or whose conduct does not befit the dignity of their office may be removed from office by the disciplinary court at the request of the serving Chairman of the BIBC. The disciplinary proceedings will be held in Dutch and French, but the disciplinary board may, at the request of the individual concerned, order that interpreters be used and that the ruling or judgment be translated into English.
58. Proposed Art. 85/3(3) of the Belgian Judicial Code.
59. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 19.
60. The proposed Art. 412(1)(1)h of the Belgian Judicial Code enables the serving Chairman of the BIBC to launch disciplinary proceedings against panel chairmen.
61. Proposed Art. 1385*quaterdecies*/7(2) of the Belgian Judicial Code. At an arbitral tribunal, the parties can agree on the procedure for substituting an arbitrator. In the absence of such agreement and if an arbiter does not voluntarily withdraw from his/her role following a substitution request, under Art. 1687(2) of the Belgian Judicial Code the case will be referred to the court of first instance for non-institutional arbitration with the possibility of appeal. The substitution procedure for conventional judges is set forth in Art. 828ff. of the Belgian Judicial Code. Additional grounds for substitution for business court judges are provided for in Art. 829 of the Belgian Judicial Code.
62. The fifteen-day period within which the parties can request that the judges be replaced starts upon notification of the establishment of the panel.
63. Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 146.
64. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 30. In the case of international arbitration too, the arbitral tribunal itself will decide.
65. M. Bosmans, 'Het Marktenhof blies zijn eerste verjaardagskaarsje uit …', 13(1) *Competitio – Belgian Competition Quarterly* 66 (2018).
66. Is external representation a task for the Chairman, or is this the responsibility of the chief of staff of the Brussels Court of Appeal?
67. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 15.
68. Presentation by Magali Clavie, President of the High Council of Justice, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chamber (Bel-*

Thirdly, the question arises as to how useful 'special expertise' is as an assignment criterion. A high level of specialisation is a prerequisite for being included in the pool of potential BIBC panel chairmen and judges.[69] Even the Belgian High Council of Justice seems unconvinced by the proposed clarifications regarding case distribution. It advocates that cases be assigned according to a special set of rules from which the Chairman may deviate only on the basis of objective criteria.[70]

Finally, it remains unclear why the formal language requirements are deemed superfluous for the Chairman but not for the judges and panel chairmen. The legislature points to the position as belonging to the domain of internal administrative law and believes that knowledge of the field is also implicit proof of a knowledge of English.[71] Obviously, any Chairman must be fluent in English; otherwise how could he or she promote the BIBC to the international business community or communicate easily with English-speaking judges? Due consideration should be given to this issue when assessing candidate Chairmen.

4.2 Panel Chairman

4.2.1 Role and Tasks

The chairman of a BIBC panel must not be confused with the Chairman of the BIBC. In the legislation this distinction is made explicit in French, for example by writing the former without an initial capital and the latter with one: *président* as opposed to *Président*.[72]

For every case that is brought before the BIBC, a panel chaired by a Belgian professional judge will be established.[73] He or she will be selected by the Chairman from those Belgian judges with the appropriate fluency in English and knowledge of international trade law.[74] This setup will enable expertise to be mobilised from throughout Belgium and brought together at the BIBC. The justices at the *Hof van Cassatie/Cour de Cassation* (Supreme Court) cannot apply. This is justified by the fact that parties could decide to appeal to the Supreme Court against BIBC judgments.

The successful candidates for the panel chairmanship will be added to a list 'after publication of the vacancy, submission of their applications and the performance of an aptitude test by a selection committee'. This will establish a pool of specialist, experienced professional judges who can then be used for the BIBC. This list will be valid for five years and may be renewed.[75]

The panel chairman's main task is to chair the BIBC panel.[76] He or she will be responsible for steering the session along the right lines. Decisions of the panel will be taken by a simple majority vote of its members. The panel chairman will decide on the procedure alone only if authorised to do so by all the panel members.[77] This is a limited exception to the collegiality rule that otherwise applies to the panel.

4.2.2 Observations

The panel chairman's role and competences give rise to the following observations.

First, criticism has been levelled at the selection method adopted. Instead of nomination by the High Council of Justice, the recruitment, selection and reasoned nomination of panel chairmen will be undertaken by a selection committee, prompting the High Council of Justice to question their independence. To address this criticism, the Bill further clarifies the composition of the selection committee.[78] Reference is also made to the fact that the panel chairmanship is an occasional assignment that is

gian House of Representatives) 54, 3072/007:4, which says that the preparatory works provide inadequate justification for why Chairmen can come only from the Market Court. Interestingly, the preparatory works speak of the economic expertise of *some* Market Court judges. Art. 207(3)(4) of the Belgian Judicial Code states that: '[…] judges at the Brussels Court of Appeal, who have priority for the Market Court, shall have at least fifteen years' useful professional experience that demonstrates specialist knowledge of economic, financial or market law.'

69. The Council of State had also pointed this out in its opinion.
70. Presentation by Magali Clavie, President of the High Council of Justice, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 5.
71. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 16.
72. However, this is not always systematically followed. See, for example, the proposed Art. 58*bis*(2) of the Belgian Judicial Code, where 'président de la BIBC' ('chairman of the BIBC') is used, without an initial capital, although it is clear that the Chairman is meant rather than the panel chairman.
73. Proposed Art. 85/1(1) of the Belgian Judicial Code.
74. Taking into account the objective criteria in the proposed Art. 85/2(3) of the Belgian Judicial Code.
75. Proposed Art. 85/2 of the Belgian Judicial Code.
76. For this reason, the chairmanship of the panel is equated with a special mandate within the meaning of the proposed Art. 58*bis*(4) of the Belgian Judicial Code. Examples include the mandates of investigating judge, family and juvenile court judge and judge at the sentence enforcement court. No mention is made of the consent of the individual concerned to his or her actual appointment by the Chairman.
77. Proposed Art. 1385*quaterdecies*/18 of the Belgian Judicial Code.
78. The choice of a selection committee has been heavily criticised, owing to fears that it could compromise the judges' independence. To address this, the Bill clarifies the composition of the selection committee. Thus, under the proposed Art. 85/3(4) of the Belgian Judicial Code, the selection committee would consist of: (i) the Chairmen of the BIBC, (ii) two judges or emeritus judges from courts of appeal, one from the Dutch-speaking register and the other from the French-speaking register, appointed by the Belgian College of Courts and Tribunals, and (iii) two professors teaching international trade law at university level, one in the Flemish Community and the other in the French Community, appointed by the Belgian Federal Minister of Justice. The committee would be chaired by the serving Chairman of the BIBC and would make decisions by an absolute majority of members present. The Belgian High Council of Justice deems this inadequate and considers that the appointment of the professors by the Minister of Justice instead of the High Council is unjustifiable. It would also prefer that judges be appointed by the High Council rather than by the College of Courts and Tribunals. Presentation by Magali Clavie, President of the High Council of Justice, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 58. The adoption of Amendment no. 5 tabled by Sonja Becq and others (*Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/002, at 7) means that emeritus judges can also sit on the selection committee. Furthermore, the professors will be appointed by the King,

open only to professional judges who have already been appointed following nomination by the High Council of Justice. As a result, the High Council of Justice does not have to step in (again) when it comes to exercising a special mandate of this kind.[79]

Secondly, there have been warnings about the negative impact on the work of other courts. The exact number of potential panel chairmen is not known, and the legislation provides no clarification on this. As judges will be taken away from ongoing cases to serve as panel chairmen, there are fears about the impact on the work of other courts. This is a particularly pertinent issue in the case of panel chairmen from the Brussels Court of Appeal, which already has Belgium's longest case processing times.[80] The Bill envisages financial compensation for the entity supplying the panel chairman (see Section 7.1 below). Whether this will be enough to neutralise the impact on the work of other courts and tribunals and their processing times remains to be seen.

4.3 BIBC Judges

4.3.1 Role and Tasks

The lay judges, or 'judges in the BIBC', as the legislation calls them, are the third category in the BIBC's composition.[81] They are chosen from a list of international trade law specialists from Belgium and abroad who can demonstrate sufficient knowledge of English. There is no requirement for candidates to hold a law degree. The required level of knowledge of the judges, who must be *specialists*, will be higher than for the panel chairman, who needs to have *sufficient knowledge* of international trade law. For these judges, the legislature is seeking top experts in international trade law with English-language skills. Lawyers, academics and company legal advisers from both Belgium and abroad will be eligible, and no age limit will apply.

As with the panel chairmen, the list of judges will be valid for a five-year period. They will form a pool of qualified lay judges for the BIBC, on which the Chairman can draw. The exact length of the lists is not specified. As it is difficult to accurately estimate how many cases the BIBC will handle in an average year, the preparatory works refer to 'a sufficient but not unduly large' number of individuals. The legislature wants there to be enough flexibility to meet unpredictable and fluctuating demand.[82]

The names of the panel chairmen and judges with their titles and capacities will be published in the *Belgian Official Gazette*.[83] They may even be published internationally, with a view to promoting the BIBC's image and reputation outside Belgium.

The judges will not be required to sit a standardised language test. The legislature is confident that possessing the required expertise in international trade law presupposes a good command of English and that the selection committee will monitor this. It is true that subjecting native speakers from abroad to a Belgian standardised language test does seem excessive. There are other ways in which judges can prove their language skills, such as submitting a diploma from an educational institution in which English is the language of instruction.[84]

4.3.2 Observations

The following reservations arise concerning the role and tasks of judges.

Firstly, in terms of the appointment method for judges, a parallel may be drawn with the appointment of lay judges at conventional business courts. These lay judges, or 'business court judges', are nominated for appointment by the organisations representing employers, employees and the self-employed for renewable five-year terms.[85] Here too, there is no involvement by the High Council of Justice.

Secondly, it is only right and proper that lay judges, by the nature of their role, should not have the guarantee of an appointment for life. However, this should not prejudice their independence. During their term of office, the constitutional guarantees preventing the removal or transfer of judges will continue to apply.[86] Furthermore, their independence arises from the fact that they hold other independent positions and the role of judge is not their main professional activity. As a result, they need not fear any negative consequences of their decisions because such consequences will, as a rule, have no effect on their professional and material status.[87]

by a decree enacted following deliberation in the Federal Council of Ministers, and not by the Minister of Justice, as previously envisaged.

79. This is in contrast to the Chairmen who, because they are being appointed as chiefs of staff, do indeed have to be nominated by the High Council of Justice: 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 18.
80. The average period between registration and final judgment is 885 days, according to College van de hoven en rechtbanken/Collège des cours et tribunaux (College of Courts and Tribunals), 'Les statistiques annuelles des cours et tribunaux : Données 2017' (2018), at 37, available at: https://www.rechtbanken-tribunaux.be/fr/telechargements/cours-dappel-affaires-civiles-2017-0 (last visited on 1 December 2018).
81. The legislature explicitly wanted to use the English term 'judge in the BIBC' in the authentic Dutch and French versions of the Bill: 'Verslag van de tweede lezing namens de Commissie voor de Justitie'/'Rapport de la deuxième lecture fait au nom de la commission de la Justice' (Report on the second reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/010, at 4.
82. Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 118. Nor is the number of lay judges at conventional business courts laid down by law.
83. Proposed Art. 85/2(6) of the Belgian Judicial Code.
84. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 18.
85. Arts. 202, 204 and 216 of the Belgian Judicial Code.
86. Arts. 152(2) and (3) of the Belgian Constitution set forth the key safeguards for judges' independence, namely that they cannot be removed from their posts except by a court decision and cannot be transferred except by their appointment to a new position by the High Council of Justice and with their consent. The authors of the Constitution thereby aimed to ensure that forced transfers could not be used as a means of pressure.
87. Opinion of Advocate General Szpunar delivered on 8 April 2014, C-377/13, *Ascendi*, ECLI:EU:C:2014:246, point 47.

Thirdly, the BIBC will also apply foreign law when requested to do so. It is therefore an advantage to have a good mix of experts and lawyers with common and civil law backgrounds.[88] In this regard the BIBC will enjoy a comparative advantage over, for example, the Netherlands Commercial Court, which is open only to Dutch professional judges. As there is no requirement for lay judges to have Belgian citizenship, it will be possible to attract high-quality profiles from a range of legal traditions and very specific sectors of activity, such as energy and financial services.

Fourthly, as the judges are not required to know Dutch or French, the key Belgian legislation must also be available in English. Thus, a certified English translation of, for instance, the new Belgian Companies and Associations Code, commercial law or other key economic and financial legislation may enhance its international appeal.[89] By the same token, it is self-evident that there should be an original English translation of the Act establishing the BIBC.[90]

4.4 Registry

Owing to expected fluctuations in its workload, the BIBC will initially not have its own registry and will use the registry of the Brussels Court of Appeal instead.

A pool of registrars with a sufficient, formally attested knowledge of English will be established within the Brussels Court of Appeal.[91] Such registrars will need to be used only for necessary tasks such as preparing and checking legislation or correspondence. Other registry tasks may also be performed by registrars with little or no command of English.[92]

Depending on the workload, a permanent registry may be established in the longer term. In the current architecture, two court chiefs of staff will have to share a registry without any mechanism for determining priority. When the Council of State pointed this out, the legislature explained that 'there is no doubt that the First Chairman of the Brussels Court of Appeal and the President [Chairman] will come to an understanding.' There is some concern among the Brussels Bar that the establishment of the BIBC will aggravate the very difficult staffing situation at the Brussels Court of Appeal, to the detriment of court users.[93]

Will the registry also be responsible for the international publication of BIBC judgments and their availability online? The legislation provides no clarification regarding this task, or how and when it should be performed. It is vital that BIBC decisions are made available quickly and electronically if the court is to build up an international reputation.

5 Competence

Based in Brussels, the BIBC will be competent for the whole of Belgium.[94] This distinguishes it from other business courts whose territorial jurisdiction is limited to a specific judicial district.

The BIBC will hear international disputes at first and last instance between companies that do not fall under the exclusive jurisdiction of other courts. Bankruptcy proceedings, for example, will continue to fall within the exclusive competence of Belgium's conventional business courts. They cannot be brought before the BIBC.[95]

The BIBC will be competent for private law disputes arising from both contractual and non-contractual relationships. There will be no quantitative threshold for the value of disputes that can be brought before the BIBC.[96] In case of dispute, the BIBC itself will decide whether it is competent.[97]

Three cumulative conditions must be fulfilled for the BIBC to be competent.

5.1 Consent

All proceedings will be brought before the BIBC on a voluntary basis. The consent of all parties must be based on a previously concluded choice of court clause or a

88. This is in contrast to the Singapore International Commercial Court (SICC), where most of the judges have a background in common law.
89. Translations of France's main legislative codes are provided for information purposes, available at: https://www.legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance (last visited on 1 December 2018).
90. An official English translation is planned: Amendment no. 13 by Sonja Becq and others, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/002, at 18. However, the Belgian Council of State emphasised in its supplementary opinion on Amendment nos. 1-14 that such English translations have no official status: Opinion of the Belgian Council of State, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/003, at 8.
91. Proposed Art. 164 of the Belgian Judicial Code. This makes reference to the Common European Framework of Reference (CEFR) and the required level.
92. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 20.
93. Presentation by Jean-Pierre Buyle (President of Avocats.be), 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 61.
94. Although the BIBC will be based in Brussels, it will not form part of the Brussels judicial district. This is an important point because, pursuant to Art. 157*bis* of the Belgian Constitution, any changes to the language used in judicial matters in the Brussels judicial district are subject to the special majority requirements: Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 13.
95. Proposed Art. 576/1 of the Belgian Judicial Code. A very broad description of the nature of disputes is in line with the broad interpretation of the arbitration of disputes by an arbitral tribunal. G. Keutgen and G.-A. Dal, *L'arbitrage en droit belge et international – Tome I – Le droit belge* (*3e édition revue et augmentée*) (2015), at 115-16.
96. By contrast, the draft text establishing the Netherlands Commercial Court stipulates that the value of the dispute must exceed €25,000. (Draft) Amendment of the Code of Civil Procedure and the Act on Court Fees in Civil Proceedings to make it possible for cases to be handled in English by the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal, which introduces a new Art. 30r(1) into the Dutch Code of Civil Procedure.
97. Proposed Art. 643/1(1) of the Belgian Judicial Code.

reciprocal referral agreement after the emergence of a dispute.[98] The parties may also agree to refer to the BIBC a dispute that is already pending before another court, subject, of course, to the other competence criteria being met.[99]

There is no nationality requirement whereby at least one of the parties has to have Belgian nationality. The BIBC complies with Belgian and European private international law on this point.[100]

The question is whether referral to a Belgian business court is, by itself, enough to bring a dispute before the BIBC. The Concept Netherlands Commercial Court Rules of Procedure, on which a public consultation is ongoing at the time of writing, require explicit referral to the Netherlands Commercial Court.[101]

5.2 Businesses

Ratione personae, there must always be a dispute between businesses.[102] The Belgian concept of a business has recently been updated.[103] The functional concept that used to apply has in certain cases been replaced by a purely formal concept.

In the context of the BIBC's competence, a business may be any of the following:

a. any individual performing a professional activity on a self-employed basis;
b. any legal person;
c. any other organisation that does not have legal personality.

Notwithstanding the foregoing, the following are not businesses […]:

a. any organisation not having legal personality for which making payments is not part of its purpose and which in practice does not make payments to its members or to persons exercising a decisive influence on the organisation's policy;
b. any legal person under public law that does not offer goods or services on a market;
c. the Federal State, the regions, the communities, the provinces, the emergency services zones, the preliminary emergency services zones ('prezones'), the Brussels Agglomeration, the municipalities/communes, the multi-municipality/commune zones, the intra-municipal territorial bodies, the French Community Commission, the Flemish Community Commission, the Joint Community Commission and the public social welfare centres.

The applied definition of a business implies that individuals performing a professional activity on a self-employed basis – and therefore not in subordination – can bring proceedings before the BIBC.[104] The same applies to all legal persons under private law regardless of whether they offer goods or services on the market, for example non-profit organisations or foundations.[105]

Legal persons under public law that do not offer goods or services on a market are excluded from the concept of a business. De facto associations, in so far as they make no payments to their members, fall outside the applied concept of a business.[106]

A question then arises about foreign businesses that wish to bring a case before the BIBC but are not covered by the Belgian definition of a business. Under the Bill as it stands at the time of writing, they will not be entitled to bring disputes before the BIBC.[107]

5.3 Extraneity

Ratione materiae, the BIBC will be competent if an international element is involved. The interpretation of the notion of extraneity is based on the UNCITRAL Model Law. A dispute is referred to as *international* if it meets any of the following criteria:[108]

– the parties have their places of business in different States;
– a substantial part of the obligations of the commercial relationship or the place with which the subject-matter of the dispute is most closely connected is or are situated outside the State where the parties have their place of business;

98. The proposed Art. 576/1(2) of the Belgian Judicial Code states that 'the parties' consent is demonstrated by an agreement or a provision of an agreement in which the parties resolve to submit to the BIBC all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, or by the referral by another Belgian, foreign or international court or tribunal, including an arbitral tribunal, in which the parties' consent to the referral is declared.' This formulation is based on the simplest option provided for in Art. 7 of the UNCITRAL Model Law. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 23.
99. Proposed Art. 566 of the Belgian Judicial Code. A referral from another court or tribunal requires the consent of all the parties to the dispute.
100. Proposed Art. 1385*quaterdecies*/17 of the Belgian Judicial Code.
101. Concept Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (Netherlands Commercial Court) and the Amsterdam Court of Appeal (Netherlands Commercial Court of Appeal), available at: https://www.rechtspraak.nl/English/NCC (last visited on 18 July 2018).
102. Within the meaning of Art. I.1(1) of the Belgian Code of Economic Law (*Wetboek van economisch recht/Code de droit économique*).
103. Act of 15 April 2018 on company law reform, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 27 April 2018.
104. The legislation does not clarify the term 'professional activity'. However, it does stipulate that an activity forming part of the normal management of an individual's personal property is not a professional activity. Long-term activities within the sharing economy are also covered by this definition of a business. J. Vananroye and R. Verheyden, 'Het toepassingsgebied van insolventieprocedures in Boek XX: focus op het nieuwe ondernemingsbegrip en de maatschap', in VGR Alumni (ed.) *Recht in beweging – 25ste VRG Alumnidag* (2018) 79, at 83.
105. S. De Dier and M. Wyckaert, 'De VZW herboren als onderneming', in VGR Alumni (ed.), *Recht in beweging – 25ste VRG Alumnidag* (2018) 53.
106. For further discussion of the formal concept of a business, see J. Stuyck, 'De begrafenis van de koopman: enkele inleidende beschouwingen over de nieuwe wet tot hervorming van het ondernemingsrecht', 2018/4 *Revue de Droit Commercial Belge – Tijdschrift voor Belgisch Handelsrecht (RDC – TBH)* 315 (2018), and E. Pieters, 'La loi du 15 avril 2018 portant réforme du droit de l'entreprise – présentation générale et regard critique', 59 *Tax, Audit & Accountancy* 81 (2018).
107. Presentation by Prof. Geert Van Calster, KU Leuven, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 64.
108. Proposed Art. 576/1(3) of the Belgian Judicial Code.

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– the information required to resolve a dispute is located abroad.

The *ratione materiae* competence gave rise to a disagreement between the Belgian Council of State and the legislature. The former held that to comply with the Belgian Constitution, access to the BIBC must be restricted to disputes (i) which actually relate to international business and (ii) for which the use of English is necessary.[109] This led to an additional criterion for the exercise of jurisdiction being integrated into the Bill, stating that 'the legal relationship between the parties shall provide sufficient objective evidence that a language other than Dutch, French or German has been customarily used'.

An unintended side effect of this extra criterion was pointed out during the hearing.[110] For example, in instances where prior to an international trade dispute the foreign parties did not use English but only French, Dutch or German with their Belgian partners, this would rule out bringing a case before the BIBC.

As well as arguments concerning the existence of such *sufficient objective evidence* justifying the use of English, this would result in a difference in treatment. For example, an Italian company and a Chinese counterpart who use English or any language other than Dutch, French or German to communicate with each other would be perfectly entitled to bring a dispute before the BIBC. To avoid such a scenario, the legislature decided to scrap this additional criterion.[111]

6 Rules of Procedure

6.1 UNCITRAL as a Reference Framework

One of the most eye-catching innovations is the special set of procedural rules for the BIBC.[112] The provisions of the Belgian Judicial Code do not in principle apply unless this is expressly provided.[113] As a result, the Belgian Judicial Code will no longer provide a supplementary framework if the BIBC procedural framework makes no mention of it. The BIBC itself will resolve and plug procedural gaps when these emerge.[114] The legislature assumes that this will only happen to a very limited extent.[115]

The rules of procedure for the BIBC are largely based on and taken from the UNCITRAL Model Law.[116] UNCITRAL was chosen out of a desire to strike a balance between the continental and Anglo-Saxon legal systems, particularly with regard to evidence rules.[117] Moreover, the international business community is already familiar with these procedural rules. There are currently 111 jurisdictions worldwide, including Belgium,[118] with an arbitration law inspired by the UNCITRAL Model Law.[119]

6.2 Exceptions

To facilitate its application and to better fit the procedure into common Belgian procedural law, a number of adjustments and additions have been made to the UNCITRAL Model Law.[120] Thus, the elimination of common procedural law applies only to the BIBC's organisation, competence and operation.[121]

The fact that the interaction between the BIBC and other state courts falls outside this specific procedural framework can be illustrated in *two* ways.

The *first illustration* relates to the issue of preliminary questions. Unlike an arbitral tribunal, the BIBC can ask preliminary questions.[122] Rather than relaxing the lan-

109. Opinion of the Belgian Council of State on this amendment, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)54,* 3072/003, at 3-6.
110. Presentation by Prof. Geert Van Calster, KU Leuven, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 63.
111. Amendment no. 8 by Sonja Becq and others, *Parl. St./Doc.parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/002, at 13 and also the Opinion of the Belgian Council of State on this amendment, *Parl. St./Doc.parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/003, at 3-6. This issue is also addressed in detail by the report on the first reading on behalf of the Justice Committee: *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 39-41.
112. Included in Chapter XXV*bis* – Proceedings before the Brussels International Business Court (BIBC)
113. Art. 2 of the Bill establishing the Brussels International Business Court, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001.
114. Proposed Art. 1385*quaterdecies*/1 of the Belgian Judicial Code and Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 28. This also arises from the ban on the denial of justice. The legislature rejects criticism of the broad delegation, as it assumes that this will only occur to a limited extent in practice and always under the supervision of the Belgian Supreme Court.
115. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 11.
116. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited on 1 December 2018).
117. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 11.
118. Act of 24 June 2013 amending the sixth part of the Judicial Code relating to arbitration, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 28 June 2013 and the (limited) amendments made by the Act of 25 December 2016 to amend the legal status of prisoners and the supervision of prisons, and containing various provisions related to the judicial authorities, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 30 December 2016.
119. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited on 1 December 2018).
120. The Belgian Council of State had doubts about this. According to this principle, only the explicit provision of the Act establishing the BIBC will apply. This risked certain general rules of law not applying to the BIBC.
121. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 13-14. Amendment no. 24 by Sonja Becq and others, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/009, at 2 here clarifies the legislation.
122. Presentation by Prof. Geert Van Calster, KU Leuven, 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la pre-

guage requirements for other courts so that they can receive preliminary questions in English, the legislature has opted for a translation-based system. Thus, the BIBC will refer a preliminary question to the Belgian Supreme Court or the Belgian Constitutional Court in one of the official languages in which they are able to receive such questions.[123]

Preliminary questions to the Constitutional Court will be submitted in either Dutch or French, as chosen by the panel chairman.[124,125] For preliminary questions to the Supreme Court, the same language arrangements will apply as for German.[126]

The BIBC may also refer a preliminary question to the European Court of Justice (CJEU) in Luxembourg. As a business court, the BIBC meets the CJEU's requirements.[127] It can, of course, do this in English.[128] Doubts concerning the permanent nature of the BIBC seem unfounded here. While the composition ends after it has handed down its judgment, the BIBC overall constitutes a permanent legal structure.[129]

The *second illustration* lies in the possibility for parties to appeal to the Supreme Court.[130] They will be able to do this in Dutch, French, German and English.[131] If a party chooses Dutch or French, the entire proceedings will take place in that language. If a party opts for German or English, the Chairman will decide in which language (Dutch or French) the proceedings will be heard before the Supreme Court.[132] The legislation does not specify what criteria the Chairman must take into account when choosing the language. As appeals to the Supreme Court in civil cases in Belgium must use a lawyer at the Supreme Court, the lawyer in question will be responsible for informing the plaintiff of any advantages and disadvantages of the language chosen.[133] Consequently, the Supreme Court will not respond in English to an appeal brought before it against a BIBC judgment.

In other respects, a Supreme Court appeal will follow the usual course. If a judgment is overturned, the case will be referred back to the BIBC but with a different composition. If the facts do not need to be assessed, the Supreme Court itself will hand down a final judgment in the case.[134] As the Act on the use of languages in judicial proceedings has not been amended, the Supreme Court judgment will only be translated into French or Dutch, depending on the language of the proceedings. It would make sense that where the disputed ruling was handed down in English, the judgment should also be translated into that language, as happens with German. However, in the absence of an explicit legal basis, this seems unlikely.[135]

This issue needs to be addressed as the possibility of appealing to the Supreme Court is a major advantage of the BIBC: it makes up for the absence of other forms of appeal and represents a key difference from an arbitration ruling, where an appeal for annulment is possible only in limited cases.[136,137]

mière lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 64.

123. Namely Dutch, French or German. The BIBC will not be able to ask a question in English. In this regard, see the proposed Art. 2/1(3) of the Act of 15 June 1935 on the use of languages in judicial proceedings.
124. The procedure applying before the Belgian Constitutional Court is contained in Arts. 62 and 64 of the Special Act of 6 January 1989 on the Constitutional Court, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 7 January 1989. Therefore, the exclusion in Art. 73(4) of the Belgian Judicial Code does not apply. This choice was motivated by a pragmatic consideration, namely the wish to leave untouched a special act that can be amended only by special majority.
125. The legislature does not specify what factors the panel chairman must take into account when choosing the language. Art. 2/1, last paragraph of the Belgian Act of 15 June 1935 on the use of languages in judicial proceedings, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 22 June 1935. The cost of translating the judgment where the preliminary question is asked will be borne by the Belgian Treasury.
126. Proposed Art. 27*bis* of the Belgian Act of 15 June 1935 on the use of languages in judicial proceedings, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 22 June 1935.
127. In case of doubt, the Court of Justice takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, *OJ* 2016 C 439/1, point 4; K. Lenaerts and P. Van Nuffel, *Europees recht* (2011), at 644, and the case law cited there.
128. In the case of questions referred for a preliminary ruling, the language of the case is that of the national court applying to the Court of Justice. Art. 37(3), *Rules of Procedure of the Court of Justice of the European Union*, 19 July 2016. In this case, it can be expected that the BIBC will ask preliminary questions in English.
129. Case C-539/13 Judgment of the Court of 13 February 2014, *Merck Canada Inc.*, C-555/13, EU:C:2014:92, point 24; Judgment of the Court of 12 June 2014, C-377/13, *Ascendi*, EU:C:2014:1754 and also the conclusion of the Opinion of Advocate General Szpunar delivered on 8 April 2014, Case C-377/13, *Ascendi*, EU:C:2014:246, in particular points 35-40, providing a detailed analysis of the permanent nature as a prerequisite to be appointed as a *'court or tribunal of a Member State'*.
130. Proposed Art. 609 of the Belgian Judicial Code.
131. The right to appeal to the Supreme Court is provided for in Art. 147 of the Belgian Constitution. There are no exceptions. The proposed Art. 609 of the Belgian Judicial Code makes appeals to the Supreme Court, and the common law procedure from Arts. 1073 to 1121 of the Judicial Code, applicable to BIBC judgments.
132. The legislation refers to the *'premier président'* (*'First Chairman'*), which in the case of the BIBC would mean the serving Chairman rather than the panel chairman.
133. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 16.
134. As a result of a recent amendment to Arts. 1109/1 and 1110 of the Belgian Judicial Code, this has become common law in Belgium. See Arts. 148 and 149 of the Act of 6 July 2017 on the simplification, harmonisation, computerisation and modernisation of provisions of civil law and civil procedural law as well as of the notarial profession, and containing various provisions related to the judicial authorities, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 24 July 2017.
135. For this purpose, Art. 28 of the Belgian Act of 15 June 1935 on the use of languages in judicial proceedings, published in the *Belgisch Staatsblad/Moniteur belge (Belgian Official Gazette)* of 22 June 1935, needs to be updated.
136. A comprehensive list of grounds for overturning judgments is given in Art. 1717 of the Belgian Judicial Code. G. Keutgen and G.-A. Dal, *L'arbitrage en droit belge et international – Tome I – Le droit belge* (*3e édition revue et augmentée*) (2015), at 529-30.
137. The possibility of appealing to the Supreme Court has been criticised on the grounds that (i) the Supreme Court will only be able to exercise limited oversight of the application of foreign legislation, (ii) the possibility of appealing to the Supreme Court may delay proceedings and

Three reasons are cited for retaining the possibility of appealing to the Supreme Court. *Firstly*, this appears to be a constitutional requirement for state courts.[138] *Secondly*, the particular procedural law governing the BIBC's organisation, competence and proceedings is a purely Belgian law, with the Supreme Court exercising oversight of the correct application of these legal provisions. *Thirdly*, in terms of the substantive law applied by the BIBC, the Supreme Court can check whether the choice of law is in accordance with Belgian PIL. If Belgian PIL provisions stipulate that Belgian law is applicable, the conventional test will be used, whereas if foreign law applies, the Supreme Court will use a less stringent test.[139,140]

7 Funding

7.1 General Remarks

The requirement that the BIBC be budget neutral is crucial.[141] As regards the criticism that the establishment of the BIBC will be at the expense of the conventional courts, which are already under budgetary pressure, two points need to be made.[142]

Firstly, the Chairman and the panel chairman will come from other courts and tribunals. While these professional judges are sitting at the BIBC (in the case of the panel chairman) or overseeing administrative matters (in the case of the Chairman), they will not be sitting at these other courts. Courts that temporarily have to do without one of their judges will therefore be paid financial compensation.[143] Financial compensation will also be paid for the registry of the Brussels Court of Appeal.[144]

It could further be argued that an international trade dispute could just as easily be brought before a conventional business court. However, given the complexity and international nature of such disputes, trying to have the matter settled by a court that is less conversant with international business law would also require a substantial commitment of both time and resources, and the parties would not be paying a higher registration fee to cover the costs.

The BIBC's impact on the work of other courts and tribunals will be limited as (i) the conventional courts will be partially or fully relieved of the burden of the time-consuming and complex work of resolving international trade disputes, and (ii) the parties, by paying a higher registration fee, will in principle cover all the costs themselves.[145]

As the number of cases is difficult to gauge in advance, estimating how much revenue will be generated is not easy. The legislature is working on the assumption that a maximum of twenty-five cases will be initiated per year in the initial period.[146] However, it is unfortunate that there has been no quantified economic and financial impact assessment along the lines of the one conducted ahead of the establishment of the Netherlands Commercial Court.[147]

7.2 Costs

In principle, the costs of the BIBC's intervention will be borne by the unsuccessful parties. Unnecessary costs will be paid by the party that erroneously incurred

(iii) translation issues may arise because the BIBC's working language, English, is not a working language of the Supreme Court. An amendment has been tabled to rule out the possibility of appealing to the Supreme Court in the case of BIBC judgments: *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/012. A further Council of State opinion has been sought in this regard. At the time of writing, this (third) opinion is not yet available.

138. Art. 147 of the Belgian Constitution; 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 19.
139. *La Générale des Carrières et des Mines* v. *R.L. & Umicore, Hof van Cassatie/Cour de Cassation* (Belgian Supreme Court), 18 March 2013, C.12.0031.F; J. Verhellen, 'Buitenlands recht in Belgische rechtbanken: roeien met korte riemen', 2018/1 *Revue de Droit Commercial Belge – Tijdschrift voor Belgisch Handelsrecht (RDC – TBH)* 23 (2018); P. Wautelet, 'Foreign Law in Belgian Courts – From Theory to Practice', in Y. Nishitani (ed.), Treatment of Foreign Law – Dynamics towards Convergence?, (2017) at 85, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2521332 (last visited on 1 December 2018).
140. 'Verslag van de eerste lezing namens de Commissie voor de Justitie'/'Rapport de la première lecture fait au nom de la commission de la Justice' (Report on the first reading on behalf of the Justice Committee), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/007, at 19.
141. Policy Statement of the Minister of Justice – 8 November 2017, *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 2708/029, at 49. This budget-neutrality has been questioned as the public authorities still have to pay certain costs, for example for accommodation and some salaries and translation costs.
142. Data from the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) shows that only 4 per cent of the costs of Belgium's judicial system are covered by court fees, well below the European average of 18 per cent (CEPEJ, *European Judicial Systems: Efficiency and Quality of Justice* (2016), at 11). The 2018 edition of the CEPEJ report on the efficiency and quality of European judicial systems confirms this trend as according to 2016 data, 5% of the costs of Belgium's judicial system are covered by court fees. CEPEJ, *European Judicial Systems: Efficiency and Quality of Justice* (2018), at 69.
143. This amounts to €4,747 per case for the court supplying the panel chairman.
144. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 34. In this respect, the Bill responds to the criticism of the High Council of Justice, 'Avis d'office : Avant-projet de loi instaurant la *Brussels International Business Court*', at 6-7.
145. E. Dirix, 'Gezocht: een statisticus voor het grondwettelijk Hof', 81/14 *Rechtskundig Weekblad* 522 (2017), which asserts the following: 'In many European countries, there is a noticeable trend away from endlessly funding the costs of accessing justice from the general budget, towards passing on these costs to those who use the judicial system. In some countries, efforts are even being made to ensure that court fees cover all the costs. This is far from the case in Belgium. In general, it is noted that the data from the Council of Europe (CEPEJ) indicate that in our country [Belgium] only 4% of the costs of the judicial system are covered by court fees, whereas the European average is 18%.'
146. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 33.
147. The Dutch legislature is working on the basis of a launch phase with start-up costs of €3.8 million for the Netherlands Commercial Court: Raad voor de rechtspraak (Council for the Judiciary), 'Plan tot oprichting van de Netherlands Commercial Court' (2015), at 14.

them.[148] Parties are expected to reach agreement on this issue, either before or after a dispute arises.

As well as the standard 'roll fees' for entering the case on the court roll, the parties will be required to pay a higher registration fee,[149] of around €20,000, as a *'retributie'/'rétribution'*.[150] In Belgium, this term refers to a charge for a specific service performed by the public authorities for the benefit of the person liable for payment. The sum charged must always be in reasonable proportion to the service provided.[151] The level of the registration fee is therefore directly related to the self-financing nature of the BIBC. Accordingly, the preparatory works explain in detail how the amount of €20,000 came about.[152] The exact amount that parties pay will vary on a case-by-case basis as some costs, for example the judges' travel expenses, are not known in advance.[153] Concerns have been raised, justifiably, about whether the amount of the registration fee will be a barrier to the use of the BIBC by smaller businesses. At any rate, compared with arbitration, the registration fee does not seem prohibitively high.[154] It is also similar to the sums charged elsewhere for similar courts. In the Netherlands, the registration fee for the Netherlands Commercial Court is budgeted at €15,000 at first instance and €20,000 for appeals. However, the BIBC will rule at first and last instance.

It should not be forgotten that submitting a complex dispute to a conventional business court is a costly matter. If various relevant documents also have to be translated into Dutch or French, it may be more efficient and economical to bring the dispute before the BIBC. This is a decision for the individual business to make.

7.3 Remuneration

As the court's chief of staff, the Chairman can expect to receive an annual salary supplement of €3,000. The panel chairman will receive a salary supplement of €450 per case.[155] The lay judges will, given the BIBC's prestige and the reputational benefits of working for this court, receive a lump-sum remuneration of €5,500 per case. It is important that it is a lump sum as lay judges will not submit invoices for services rendered. Remarkably, this amount was based on judges being available for one working week per case,[156] which seems highly optimistic.

8 Conclusion

Clearly, by establishing the BIBC, Belgium is seeking to acquire a share of the global market for resolving international trade disputes. As the capital of Belgium and the de facto capital of Europe, Brussels is the epitome of an international city. It is also home to many European and international institutions and company headquarters, making it a hub for international business. Belgium's open, export-driven economy means that companies often do business across national borders and disputes quickly acquire an international dimension.

Although the BIBC is still work in progress, an effective English-speaking business court has the potential to deliver substantial benefits for business while also consolidating Brussels' status as an international litigation hub.

The BIBC's legal architecture will give it some major advantages, enabling international expertise to be mobilised and brought together in one court. The challenge for the BIBC now is to win over the business community. English-language case handling must go hand in hand with efficient procedures and high-quality judgments, meaning that modern premises and high-tech facilities are a must.

Finally, the establishment of the BIBC must be accompanied by a professional PR campaign targeting interested parties in Belgium and beyond, so that the business community is aware of the new court and can incorporate it into dispute resolution strategies.[157]

148. Proposed Art. 1385*quaterdecies*/21 of the Belgian Judicial Code. This Art. is taken from Arts. 1017-1021 of the Belgian Judicial Code with the additional specification that the expenses statements must be approved by the Chairman of the BIBC before they can be considered. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 38.
149. This is the registration fee as referred to in the proposed Art. 1385*quaterdecies*/11 of the Belgian Judicial Code. The registration fee will cover (i) the various court and registration fees, (ii) the price and remuneration and wages for the judicial documents, (iii) the price of issuing the judgment, (iv) the expenses involved in any investigative measures, (v) the expenses statements of the judges and registrars, approved by the serving Chairman of the BIBC, and the costs of documents when these have been drawn up solely for the purposes of the proceedings. In case of referral to the BIBC by a Belgian court, only the registration fee will be payable.
150. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 34. Pursuant to the proposed Art. 1385*quaterdecies*/11 of the Belgian Judicial Code, the exact amount will be laid down in a subsequent implementing decree.
151. If they are not in reasonable proportion, it is a tax rather than a *'retributie'/'rétribution'*. Thus, roll fees, as they only make a very modest contribution to the actual costs of proceedings, are regarded as taxes.
152. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 34.
153. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 129.
154. The high cost of arbitration remains one of the main hurdles for parties. Queen Mary University of London (2018), *2018 International Arbitration Survey – The Evolution of International Arbitration*, at 8.
155. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 21.
156. Memorie van Toelichting/Exposé des motifs (Explanatory Memorandum), *Parl. St./Doc. parl. (Parliamentary Documents): Kamer/Chambre (Belgian House of Representatives)* 54, 3072/001, at 32-3.
157. Text concluded on 1 January 2019.

Requirements upon Agreements in Favour of the NCC and the German Chambers – Clashing with the Brussels *Ibis* Regulation?

Georgia Antonopoulou*

Abstract

In recent years, the Netherlands and Germany have added themselves to the ever-growing number of countries opting for the creation of an international commercial court. The Netherlands Commercial Court (NCC) and the German Chambers for International Commercial Disputes (Kammern für internationale Handelssachen, KfiH) will conduct proceedings entirely in English and follow their own, diverging rules of civil procedure. Aspiring to become the future venues of choice in international commercial disputes, the NCC law and the legislative proposal for the establishment of the KfiH allow parties to agree on their jurisdiction and entail detailed provisions regulating such agreements. In particular, the NCC requires the parties' express and in writing agreement to litigate before it. In a similar vein, the KfiH legislative proposal requires in some instances an express and in writing agreement. Although such strict formal requirements are justified by the need to safeguard the procedural rights of weaker parties such as small enterprises and protect them from the peculiarities of the NCC and the KfiH, this article questions their compliance with the requirements upon choice of court agreements under Article 25 (1) Brussels Ibis Regulation. By qualifying agreements in favour of the NCC and the KfiH first as functional jurisdiction agreements and then as procedural or court language agreements this article concludes that the formal requirements set by the NCC law and the KfiH proposal undermine the effectiveness of the Brussels Ibis Regulation, complicate the establishment of these courts' jurisdiction and may thus threaten their attractiveness as future litigation destinations.

Keywords: international commercial courts, the Netherlands Commercial Court (NCC), Chambers for International Commercial Disputes (Kammern für internationale Handelssachen), Brussels Ibis Regulation, choice of court agreements, formal requirements

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1 Introduction

In recent years, the Netherlands and Germany have added themselves to the ever-growing number of countries opting for the creation of an international commercial court.[1] The Netherlands Commercial Court[2] (NCC) and the German Chambers for International Commercial Disputes[3] (*Kammern für internationale Handelssachen*, KfiH) allow for a wholesale trial, including the pronouncement of the judgment in English and recast of civil procedure by adopting their own, diverging rules. In this way, the NCC and the KfiH aspire to attract international commercial disputes and thus gradually become the future venues of choice.

The NCC law and the legislative proposal for the establishment of the KfiH provide that parties should agree on the jurisdiction of these courts and entail detailed provisions regulating such agreements. Yet, a glance at the respective provisions reveals that the formal requirements set upon agreements in favour of the NCC and the KfiH are multiple and stricter when compared to

1. For the similar initiatives in other EU Member States, *see* Ministry of Justice (Ministère de la Justice), Inauguration of the International Chamber of Commerce (Inauguration de la chambre commerciale internationale), 12 February 2018 available at: www.justice.gouv.fr/la-garde-des-sceaux-10016/inauguration-de-la-chambre-commerciale-internationale-31291.html (last visited 14 July 2018); Belgian Chamber of Representatives (Belgische Kamer van Volksvertegenwoordigers), Legislative Proposal for the establishment of the Brussels International Business Court (Wetsontwerp houdende oprichting van het Brussels International Business Court), 10 December 2018 available at: http://www.dekamer.be/FLWB/PDF/54/3072/54K3072011.pdf (last visited 20 December 2018); G. Rühl, 'Auf dem Weg zu einem europäischen Handelsgericht?', *Juristen Zeitung* 1073 (2018); M. Requejo Isidro, 'International Commercial Courts in the Litigation Market', *Max Planck Institute Luxembourg for Procedural Law, Research Paper Series* (2019). *See also* the articles on different jurisdictions in this issue of *Erasmus Law Review*.
2. Parliamentary Papers II 2016/17 (Kamerstukken II 2016/17), 34 761, nr. 3 Explanatory Memorandum (Memorie van Toelichting) (hereinafter Explanatory Memorandum 2017) available at: https://zoek.officielebekendmakingen.nl/kst-34761-3.html (last visited 14 July 2018).
3. German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen), Drucksache 19/1717 of 18 April 2018 available at: http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf (last visited 14 July 2018) (hereinafter Legislative proposal 2018);

the Brussels I*bis* Regulation,[4] the key European instrument regulating choice-of-court agreements in cross-border civil and commercial disputes. The rationale of these formal requirements could be partly traced in the various concerns and objections that have accompanied the emergence of the NCC and the KfiH. Whereas the NCC law has mainly attracted criticism for its high court fees,[5] the proposal for the establishment of the KfiH has attracted attention for the use of English before court.[6] It is, in particular, feared that procedurally weaker parties, such as small enterprises, may unwillingly find themselves caught in an expensive trial in a foreign and incomprehensible language. So as to allay the fears of unfair trial, the provisions pertaining to jurisdiction agreements in favour of the NCC and the KfiH are replete with procedural safety valves, ensuring the will of the parties to litigate before a court with higher court fees and in a language that does not sound all 'Greek' to them.

This article analyses the provisions regulating agreements in favour of the NCC and KfiH and aims to assess their compatibility with the Brussels I*bis* Regulation. The choice for the NCC and the KfiH is based upon the consideration that both courts reflect the concerns associated with the creation of international commercial courts and, therefore, strictly regulate agreements in their favour. Furthermore, while both proposals were until recently awaiting their approval by the national parliaments, it appears that the international commercial courts in the Netherlands and Germany share not only a present but a future as prospective rivals too.[7]

Sections 2 and 3 discuss the provisions regulating the jurisdiction of the NCC and the KfiH. Having demonstrated that the NCC law and the KfiH proposal set various formal requirements on agreements in favour of these courts, Section 4 explores whether, and to what extent, these requirements contradict the formal requirements on choice-of-court agreements as provided in Article 25 (1) Brussels I*bis* Regulation. By alluding to the origins of Article 25 (1) and the related case law of the European Court of Justice (ECJ), this article demonstrates that the proposed restrictions clash with the wording and the underlying rationale of the Brussels I*bis* Regulation. Section 5 explores the consequences of such a clash by qualifying agreements in favour of the NCC and the KfiH, first, as functional jurisdiction agreements and, then, as procedural or court-language agreements. Based on this analysis, Section 6 concludes that the formal requirements set by the NCC law and the KfiH proposal undermine the effectiveness of Article 25 (1) Brussels I*bis* Regulation, complicate the establishment of these courts' jurisdictions and may thus threaten their attractiveness as future venues for international commercial disputes.

2 The Jurisdiction of the NCC

2.1 Agreements in Favour of the NCC

On 1 January 2019, the NCC opened its doors to prospective litigants[8] after the Dutch Senate finally voted in favour of the respective legislative proposal.[9] The idea for the creation of an English-language court specialised in international commercial disputes took root in 2014, when Frits Bakker, chairman of the Dutch Council for the Judiciary, first heralded the NCC.[10] A mere year later, the Council for the Judiciary published its plan for

4. Regulation (EU) 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 (recast), [2012] OJ L 351/1.
5. Senate (Eerste Kamer), Report of the meeting of 4 December 2018 (Verslag van de vergadering van 4 december 2018) (2018/2019 nr. 10); Parliamentary Papers I 2017/18 (Kamerstukken I 2017/18), 34 761, B Reply to the Statement of Objections (Memorie van Antwoord), at 3-5; Parliamentary Papers I 2017/18 (Kamerstukken I 2017/18), 34 761, C Detailed Report from the first Commission for Justice and Security (Nader voorlopig verslag van de vaste commissie voor Justitie en Veiligheid), at 2-3; Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 3-5. All available at: https://www.eerstekamer.nl/wetsvoorstel/34761_engelstalige_rechtspraak (last visited 20 December 2018).
6. Inter alia T. Handschell, 'English als Gerichtssprache?', *Zeitschrift für Rechtspolitik* 103 (2010); A. Piekenbrock, 'Englisch als Gerichtssprache in Deutschland?', *Europäisches Wirtschafts- und Steuerrecht* 1 (2010); C. Stubbe, 'English als Gerichtssprache?', *Zeitschrift für Rechtspolitik* 195 (2010); A. Flessner, 'Deutscher Zivilprozess auf English – Der Gesetzentwurf des Bundesrats im Lichte von Staatsrecht, Grundrechten und Europarecht', *Neue Juristische Online-Zeitschrift* 1913 (2011); C. Bisping, 'Conquering the Legal World: The Use of English in Foreign Courts', *European Review of Private Law* 541 (2012); W. Hau, 'Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte', in R. Michaels and D. Solomon (eds.), *Liber Amicorum Klaus Schurig* (2012) 49, at 61-62; H. Roth, 'Modernisierung des Zivilprozesses', *Juristenzeitung* (2014) 801, at 805.
7. G. Dalitz, 'Justizinitiative Frankfurt – too little too late?', *Zeitschrift für Rechtspolitik* 248 (2017). *See also* the high ranking of both countries in civil justice in World Justice Project, Rule of Law Index 2017-2018 available at: http://data.worldjusticeproject.org/#table (last visited 14 July 2018).
8. Official Gazette of the Kingdom of the Netherlands (Staatsblad van het Koninkrijk der Nederlanden), 475 Decree of 18 December 2018 determining the date of entry into force of the Act of 12 December 2018 amending the Code of Civil Procedure and the Act on court fees for civil cases in connection with making English-language jurisprudence possible at the international trade chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (475 Besluit van 18 december 2018 tot vaststelling van het tijdstip van inwerkingtreding van de Wet van 12 december 2018 houdende wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam) available at: https://www.eerstekamer.nl/behandeling/20181220/publicatie_inwerkingtreding/document3/f=/vkuf4m88czxa.pdf (last visited 20 December 2018).
9. Senate (Eerste Kamer), Senate approves the Netherlands Commercial Court (Eerste Kammer steunt Netherlands Commercial Court) available at: https://www.eerstekamer.nl/nieuws/20181211/eerste_kamer_steunt_netherlands (last visited 20 December 2018).
10. Council for the Judiciary (Raad voor de Rechtspraak), Plan for the establishment of the Netherlands Commercial Court (Plan tot oprichting van de Netherlands commercial court, Inclusief kosten-batenanalyse), November 2015, at 4 available at: https://www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf (last visited 14 July 2018).

the establishment of the NCC and lend to the court its basic contours. According to the judiciary's plan, high-value and complex international commercial matters are increasingly decided by foreign courts, such as the London Commercial Court, or arbitral tribunals. As a result, Dutch courts deal less and less with complex international cases, despite their knowledge and expertise.[11] It is, therefore, the NCC's aim to attract commercial litigants that often flee abroad or resort to arbitration for the resolution of their disputes.

The provisions regulating the NCC's jurisdiction are geared towards this aim to attract international commercial disputes. According to the new Article 30r of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*,[12] Rv) and the NCC Rules,[13] an action can be brought before the NCC as long as it concerns a civil or commercial matter with an international aspect.[14] Unlike its name suggests, the NCC is only a chamber of the Amsterdam District Court,[15] and, therefore, its jurisdiction cannot be larger than the jurisdiction of the latter. This means that the NCC does not judge cases falling within the jurisdiction of the Subdistrict Court, such as cases with a claim of up to 25,000 Euros, disputes related to employment, tenancy and consumer matters.[16] In addition, the NCC does not hear cases falling within the exclusive jurisdiction of other courts such as the Enterprise Chamber of the Amsterdam Court of Appeal, the Patent Chamber of the District Court of the Hague and the Maritime Chamber of the Rotterdam District Court.[17]

Furthermore, the NCC is competent when the parties have designated the Amsterdam District Court as the competent forum or the Amsterdam District Court has jurisdiction on another ground.[18] Since English is the language of proceedings before the NCC and since the NCC applies its own set of procedural rules, the parties should, moreover, have expressly agreed in writing on the use of the English language and the application of the NCC Rules.[19] By agreeing on the NCC Rules, the parties also implicitly agree on bearing the higher NCC court fees, amounting to 15,000 Euros in first instance and 20,000 Euros on appeal.[20,21] Lastly, the agreement of the parties to litigate before the NCC shall be included in the originating document.[22]

The legislative proposal and subsequent parliamentary papers highlighted that since the NCC is only a specialised chamber, the parties' agreement to litigate before it is not a choice-of-court agreement. An agreement in favour of the NCC is merely a procedural agreement, where parties agree to litigate in English and in accordance with the NCC Rules.[23]

Consequently, a choice-of-forum clause indicating as a competent court, the Amsterdam District Court should not be interpreted as a choice in favour of the NCC, even if the dispute is a civil and commercial matter with an international character.[24] However, since a request for referral of the case to the NCC is possible, the parties may request the Amsterdam District Court to refer their case to the NCC.[25]

Article 30r Rv and the NCC Rules pertaining to the jurisdiction of the NCC reflect its international commercial focus and, in addition, stress the importance of the parties' agreement to litigate before it. The NCC distinguishes itself from the rest of the Dutch courts since it conducts trials in English and applies its own rules of civil procedure. The parties' agreement justifies such a deviation and safeguards that these will not get unwillingly caught in an expensive trial in English. Hence, the NCC draws and owes its competence to the parties' agreement.

2.2 The Requirement of an Explicit Agreement in Writing and Its Rationale

So as to ensure the parties' will, Article 30r Rv and the NCC Rules do not suffice to require an agreement. They additionally introduce the requirement of an explicit and in writing agreement.[26] Similarly, the explanatory notes to the NCC Rules repeat the explicitness requirement and clarify that when, for instance, an agreement in favour of the NCC is included in a party's general terms and conditions, it is without legal effect unless the other party has expressly and in writing accepted the clause. In support of the requirement for an explicit agreement in writing, the notes subsequently refer to the Explanatory Memorandum to the NCC law.[27]

11. *Ibid.*, at 5; Explanatory Memorandum 2017, at 1-3.
12. Available in English in A. Burrough, S. Machon, D. Oranje, L. Frakes & W. Visser (eds.), *Code of Civil Procedure, Selected Sections and the NCC Rules* (2018).
13. Council for the Judiciary (Raad voor de Rechtspraak), Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), NCC Rules/NCCR, December 2018, available at: https://www.rechtspraak.nl/English/NCC/Pages/rules.aspx (last visited 20 December 2018).
14. Art. 30r (1) Rv; Art. 1.3.1. (a) and (b) NCC Rules.
15. Art. 30r (1) Rv; Art. 1.1.1. NCC Rules.
16. Art. 30r (1) Rv in combination with Art. 93 Rv; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules.
17. Explanatory Memorandum 2017, at 14; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules. *See also* Council for the Judiciary, Plan, above n. 9, at 12.
18. Art. 30r (1) Rv; Art. 1.3.1. (c) NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules.
19. Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.
20. Art. 9a Act on court fees for civil cases (Wet griffierechten in burgerlijke zaken); Explanatory Memorandum 2017, at 17.
21. *See* the article of E. Bauw in this issue of *Erasmus Law Review*.
22. Art. 4.1.2. (b) NCC Rules.
23. Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 6. See also Explanatory Memorandum 2017, at 5-6; D. J. Oranje, 'The Coming into Being of the Netherlands Commercial Court', Tijdschrift voor Civiele Rechtspleging 122, at 123-24 (2016).
24. *See also* P. E. Ernste and F. E. Vermeulen, 'The Netherlands Commercial Court – an Attractive Venue for International Commercial Disputes?' *Tijdschrift voor Civiele Rechtspleging* 127, at 127-28 (2016).
25. Art. 4.1.5. NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules. *See also* Ernste and Vermeulen, above n. 24, at 127-29.
26. Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.
27. Explanatory notes to Art. 1.3.1 (d) NCC Rules.

According to the Explanatory Memorandum, three conditions are set so as to safeguard that procedurally weaker parties, such as consumers and small enterprises, will not be unexpectedly sued before the NCC. The first condition is that the NCC only hears cases with an international element.[28] Second, an explicit agreement is required. Therefore, the Explanatory Memorandum underlines that an agreement to litigate before the NCC shall not be included in general terms and conditions. Third, as noted above, cases falling under the jurisdiction of the Subdistrict Court (*e.g.*, claims up to 25,000 Euros or consumer matters) are excluded from the NCC's subject-matter jurisdiction. The Explanatory Memorandum further clarifies that the NCC law applies without prejudice to provisions of the Dutch civil procedure law or other international instruments setting additional restrictions for the protection of weaker parties. If despite these restrictions, a consumer or a small enterprise, nevertheless, finds itself before the NCC, it can question the jurisdiction of this court in Dutch and will be charged with the regular lower court fees.[29] Hence, the NCC law provides for multiple safeguards that, as the Explanatory Memorandum explains, ensure that consumers and small enterprises will not unexpectedly litigate in English before an expensive court.[30]

3 The Jurisdiction of the KfiH

3.1 Agreements in Favour of the KfiH

The NCC is not the only international commercial court currently established or about to be established in Europe. In April 2018, a legislative proposal for the establishment of the KfiH was submitted to the German parliament.[31] It is the third time the proposal is being submitted to the parliament, succeeding two previous unsuccessful attempts.[32] The proposal authorizes the governments of the Federal States to create a chamber focusing on international commercial cases within the lower State Courts (*Landgerichte*). Alternatively, more States may agree on the creation of common and, therefore, centralised KfiH.[33]

The use of English as a court language and its importance for the jurisdictional appeal of the German courts is highlighted throughout the legislative proposal. The proposal underlines that the conduct of trials in English aims to attract international parties that usually, so as to avoid litigation in German, are driven to litigate abroad or before arbitral tribunals.[34] That the use of English as court language is the 'selling' feature of the KfiH becomes, moreover, apparent in the subsequent sections of the proposal, where a lot of ink is spent on the principle of the publicity of trials and how this is maintained despite the use of English in court.[35]

A dispute can be brought before the KfiH as long as it falls under the jurisdiction of the lower State Courts.[36] Hence, just as the NCC, the jurisdiction of the upcoming chambers cannot be larger than the jurisdiction of the court they form a part of. Subsequently, additional requirements are set to determine which cases are eligible to be heard by the chambers. Since the KfiH are an alternative – English – version of the already-existing Chambers for Commercial Disputes (*Kammern für Handelssachen*), the same provisions apply.[37] In consequence, the first condition is that the dispute should be a commercial dispute in the sense of Article 95 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG[38]). Second, the dispute should have an international element. Since, as remarked, the use of English as court language is the most prominent feature of the upcoming chambers, the agreement of the parties to litigate in English constitutes the third and most important condition for the establishment of their jurisdiction. Accordingly, draft Article 253 (3a) of the German Code of Civil Procedure (*Zivilprozessordnung*,[39] ZPO) pro-

28. For the definition of an international dispute in the NCC Rules *see* G. Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal', *Nederlands Internationaal Privaatrecht* 740 (2018).
29. Explanatory Memorandum 2017, at 6, 14, 16; Art. 30r (4) Rv; Arts. 1.3.4, 6.2 and 10.1 NCC Rules.
30. Explanatory Memorandum 2017, at 10-11, 14. *See also* Oranje, above n. 23, at 124-25.
31. Legislative Proposal 2018.
32. German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen), Drucksache 17/2163 of 16 June 2010 available at: dipbt.bundestag.de/dip21/btd/17/021/1702163.pdf (last visited 14 July 2018); German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für international Handelssachen), Drucksache 18/1287 of 30 April 2014 available at: dipbt.bundestag.de/dip21/btd/18/012/1801287.pdf (last visited 14 July 2018).
33. Legislative Proposal 2018, Explanatory Statement (Begründung), at 13-14.
34. *Ibid.*, Problem and aim (Problem und Ziel), at 1; Explanatory Statement (Begründung), at 15. *See also* G.-P. Calliess and H. Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel', *Zeitschrift für Rechtspolitik* 1 (2009); H. Hoffmann, *Kammern für internationale Handelssachen* (2011), at 105-9; M. Pika, 'Die Kammer für internationale Handelssachen', *Zeitschrift für Internationales Wirtschaftsrecht* 206 (2016); G. Wagner, *Rechtsstandort Deutschland im Wettbewerb* (2017), at 224-26; H. Hoffmann, '"Von Law – Made in Germany" zu "Commercial Litigation in Germany", Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht', *Zeitschrift für internationales Wirtschaftsrecht* 58, at 61 (2018).
35. Legislative Proposal 2018, Explanatory Statement (Begründung), at 8-10.
36. *See also* for Art. 93 GVG W. Zimmermann, in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung* (2017) Art. 93 GVG, at margin no. 1; Art. 94 GVG, at margin no. 2.
37. Draft Art. 114c GVG; Legislative Proposal 2018, Explanatory Statement (Begründung), at 15-16; C. Hoppe, 'English als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda', *Praxis des Internationalen Privat-und Verfahrensrechts* 373, at 376 (2010).
38. *Gerichtsverfassungsgesetz*, Official Journal of the Federal Republic of Germany (Bundesgesetzblatt, hereinafter BGBl.) I, at 1077. Available in English at: http://www.gesetze-im-internet.de/englisch_gvg/ (last visited 14 July 2018).
39. Zivilprozessordnung BGBl. I, at 3202; 2006 I, at 431; 2007 I, at 1781; BGBl. I, at 1151. Available in English at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last visited 14 July 2018).

vides that the parties should attach their agreement to litigate in English or the defendant's written declaration of consent to the statement of claim.[40]

As opposed to the NCC legislative documents, which characterise agreements in favour of it as procedural agreements, the German proposal employs a different term. In particular, the proposal qualifies agreements to litigate before the KfiH as court-language agreements where parties merely agree to litigate in English. Subsequently, the proposal draws a parallel between court-language agreements and choice-of-court agreements. It stresses the proximity of a court-language agreement to a choice-of-court agreement and points towards the need to limit the parties' freedom to choose the court language just as the freedom to choose a court is limited under German law. The underlying rationale of such a limitation is once again the need to protect weaker parties, such as consumers.[41] As a result, draft Article 114b GVG repeats in part Article 38 ZPO, which sets various restrictions upon choice-of-court agreements. More specifically, draft Article 114b GVG distinguishes between agreements concluded before and agreements concluded after the dispute has arisen. Agreements to litigate in English concluded before the dispute has arisen are permissible under the condition that the parties to the agreement are merchants, legal persons under public law or special assets (*Sondervermögen*) under public law. Agreements to litigate in English concluded after the dispute has arisen are permissible irrespective of the identity of the parties as long as they are explicit and in writing.

3.2 Requirements upon Agreements in Favour of the KfiH and Their Rationale

It becomes apparent that as opposed to the single obligation to conclude an explicit and in writing agreement in the NCC provisions, the German proposal sets a bundle of limitations. In particular, the requirement for an explicit and in writing agreement depends upon the time the agreement was concluded and the identity of the parties.

Since merchants are considered parties experienced in commercial and legal matters, the second sentence of draft Article 114b GVG grants them the freedom to agree on the use of English as court language and thus litigate before the KfiH without the obligation to abide by a specific form.[42] Whether a party is a merchant depends on the *lex fori*, including its conflict-of-laws rules.[43] The German proposal, and its more liberal handling of commercial parties, is driven by the consideration that these are familiar with legal matters and thus fully aware of the implications of an agreement to litigate in English. In addition, the freedom to conclude ex ante agreements, before the dispute has arisen, serves the predictability of the competent forum and, thus, in turn, enhances legal certainty[44] – something that is highly regarded in international commercial relationships.[45]

In contrast, the third sentence of draft Article 114b GVG refers to agreements to litigate in English concluded after the dispute has arisen and declares these permissible irrespective of the parties' identity under the condition that they are express and in writing. Hence, consumers may also bring their disputes before the KfiH as long as they have concluded the respective agreement after the dispute has arisen and have additionally abided by the stricter form requirements. The German proposal for the establishment of the KfiH opens up the upcoming chambers to consumers based on the consideration that when parties enter an ex post agreement, they are more conscious of the implications of such an agreement and thus less in need of legal protection.[46] However, it should be borne in mind that since the KfiH will exclusively handle cases that qualify as commercial under Article 95 GVG,[47] only a few consumer cases will meet the requirements set in this provision and thus hit trial before the specialised chambers.

Nevertheless, a literal reading of the German proposal may give the misleading impression that after the dispute has arisen, merchants should also conclude an explicit and in writing agreement. Drawing from Article 38 ZPO, upon which draft Article 114b GVG is based, it should be noted that merchants are free to conclude their agreement to litigate in English without abiding by any form requirement irrespective of the point in time such an agreement was concluded.[48] If specific parties enjoy the freedom to conclude a formless agreement even before the dispute arose, it would make all the more sense to retain this freedom after the dispute arose.

40. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15.
41. *Ibid*., at 16.
42. R. Bork, in R. Bork and H. Roth (eds.), *Stein/ Jonas Kommentar zur Zivilprozessordnung* (2014) Art. 38 ZPO, at margin no. 9, 19; R. Patzina, in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung* (2016) Art. 38 ZPO, at margin no. 1, 5; C. Heinrich, in H.-J. Musielak and W. Voit (eds.), *Zivilprozessordnung Kommentar* (2018) Art. 38 ZPO, at margin no. 1.
43. P. Mankowski, in T. Rauscher (ed.), *Europäisches Zivilprozess-und Kollisionsrecht* (2016) Art. 25 Brussels I*bis* Regulation, at margin no. 76, 84.
44. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15.
45. Inter alia R. Fentiman, 'Theory and Practice in International Commercial Litigation', *International Journal of Procedural Law* 235, at 238 (2012).
46. Bork, above n. 42, Art. 38 ZPO, at margin no. 37; Patzina, above n. 42, Art. 38 ZPO, at margin no. 7; for the similar provision of Art. 19 Brussels I*bis* Regulation, *see* P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation* (2016) Art. 19 Brussels I*bis* Regulation, at margin no. 12.
47. Draft Art. 114b and 114c (1) GVG; Legislative Proposal 2018, Explanatory Statement (Begründung), at 14, 15.
48. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15. For Art. 38 ZPO, *see also* Bork, above n. 42, Art. 38 ZPO, at margin no. 65; Heinrich, above n. 42, Art. 38 ZPO, at margin no. 13, 22.

4 Clashing with the Brussels I*bis* Regulation

4.1 Choice-of-Court Agreements under the Brussels I*bis* Regulation

The formal requirements set by the NCC provisions and the German proposal on agreements in favour of the NCC and the KfiH give us pause. They catch and direct our attention to the Brussels I*bis* Regulation, the leading instrument under which choice-of-court agreements in international civil and commercial matters are determined. The subsequent sections get into the nitty-gritty of Article 25 (1) Brussels I*bis* Regulation and Articles 30r (1) Rv, 1.3.1. (d) NCC Rules and 114b GVG. They demonstrate that the formal requirements the latter provisions pose on agreements in favour of the NCC and the KfiH are stricter and, therefore, clashing with the wording and the underlying policy of Article 25 (1) Brussels I*bis* Regulation. The final section of this article explores the consequences of such a clash.

According to Article 25 (1) Brussels I*bis* Regulation, if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are competent to settle any disputes that have arisen, or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Agreements under Article 25 found the exclusive jurisdiction of the chosen courts or court unless the parties have agreed otherwise.[49] In addition, Article 25 (1) Brussels I*bis* Regulation sets a series of formal requirements a jurisdiction agreement should comply with so as to be valid. The jurisdiction agreement should be either: (a) in writing or evidenced in writing, (b) in a form which accords with the practices between the parties or (c) in a form which accords with international trade or commerce usages. These formal requirements evidence the consensus between the parties and ensure that the jurisdiction agreement does not go unread.[50] It, thus, becomes apparent that Article 25 (1) Brussels I*bis* Regulation does not merely regulate the formal validity of an international jurisdiction agreement. On the contrary, the parties' consensus is intertwined with the formal validity of the agreement.[51]

In its *Elefanten Schuh* ruling, the ECJ stated that Article 17 Brussels Convention, today Article 25 (1) Brussels I*bis* Regulation, is intended to exclusively lay down the formal requirements that jurisdiction agreements must meet.[52] In consequence, the formal requirements set in Article 25 (1) Brussels I*bis* Regulation cannot be nullified by national provisions requiring compliance with additional conditions as to form.[53] By barring the Member States from setting additional requirements, Article 25 (1) establishes unified standards throughout Europe, thereby enhancing the predictability of the chosen court and achieving legal certainty.[54] National provisions remain inapplicable even if their aim is, just as Article 25 (1) Brussels I*bis* Regulation, to achieve legal certainty and ensure the actual agreement of the parties.[55]

In this context, the question rises whether the additional requirements set by the NCC provisions and the German proposal collide with Article 25 (1) Brussels I*bis* Regulation. If, as remarked, the Brussels I*bis* Regulation exclusively lays down the formal requirements that jurisdiction agreements must meet, negating any recourse to national law, then any additional requirements, such as the ones prescribed in the NCC provisions and the German proposal, would clash with the Brussels I*bis* Regulation.

4.2 The NCC Rules versus the Brussels I*bis* Regulation

As mentioned, Articles 30r (1) Rv and 1.3.1. (d) NCC Rules require an explicit and in writing agreement in favour of the NCC. In addition, the Explanatory Memorandum to the NCC proposal and the NCC provisions

49. Art. 25 (1) Brussels I*bis* Regulation.

50. P. Jenard, *Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters*, OJ 1979 C 59/8, Commentary on the sections of Title II, Section 6, Prorogation of jurisdiction, Art. 17; Case 24/76, *Estasis Salotti Di Colzani Aimo E Gianmario Colzani* v. *Rüwa Polstereimaschinen GmbH*, [1976] ECR 1831, at Para. 7; Case 25/76, *Galeries Segoura SPRL* v. *Société Rahim Bonakdarian*, [1976] ECR 1851, at Para. 6; Case 150/80, *Elefanten Schuh GmbH* v. *Pierre Jacqmain*, [1981] ECR 1671, at Paras. 24-25; Case 71/83, *Partenreederei Ms Tilly Russ, Ernest Russ* v. *NV Haven- & Vervoerbedrijf Nova, NV Goeminne Hout*, [1984] ECR 2417, at Paras. 14, 24; Case 221/84, *F. Berghoefer GmbH & Co. KG* v. *ASA SA*, [1985] ECR-2699, at Para. 13; Case 313/85, *Iveco Fiat SpA* v. *Van Hool NV*, [1986] ECR-3337, at Para. 5; Case 106/95, *Mainschiffahrts-Genossenschaft eG* (MSG) v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 15; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597, at Paras. 19, 34; Case 387/98, *Coreck Maritime GmbH* v. *Handelsveem BV and Others*, [2000] ECR I-9337, at Para. 13; Case 222/15 *Hőszig Kft* v. *Alstom Power Thermal Services*, [2016] ECLI:EU:C:2016:525, at Paras. 37-38; Case 436/16 *Georgios Leventis, Nikolaos Vafeias* v. *Malcon Navigation Co. ltd., Brave Bulk Transport ltd.*, [2017] ECLI:EU:C:2017:497, at Para. 34; Case 64/17 *Saey Home & Garden NV/SA* v. *Lusavouga-Máquinas e Acessórios Industriais SA*, [2018] ECLI:EU:C:2018:173, at Para. 25.

51. J. von Hein, in J. Kropholler and J. von Hein (eds.), *Europäisches Zivilprozessrecht* (2009) Art. 23 Brussels I Regulation, at margin no. 27; F. Garcimartin, in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast* (2015) Art. 25 Brussels I*bis* Regulation, at margin no. 9.35; Mankowski, above n. 43, Art. 25 Brussels I*bis* Regulation, at margin no. 134. *See also* P. Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, OJ 1979, C 59/71, at margin no. 179. Contra P. Gottwald, in T. Rauscher (ed.), *Münchener Kommentar zur Zivilprozessordnung* (2017) Art. 25 Brussels I*bis* Regulation, at margin no. 15.

52. Case 150/80, *Elefanten Schuh GmbH* v. *Pierre Jacqmain*, [1981] ECR 1671, at Para. 26.

53. Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597, at Para. 38.

54. Case 150/80, *Elefanten Schuh GmbH* v. *Pierre Jacqmain*, [1981] ECR 1671, at Paras. 24-29; Case 269/95 *Francesco Benincasa* v. *Dentalkit* Srl, [1997] ECR I-3788, at Paras. 28-29; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597, at Paras. 35-39, 48-52; von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 17, 21; U. Magnus, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation* (2016), Art. 25 Brussels I*bis* Regulation, at margin no. 88-90. For employment contracts, *see* Case 25/79, *Sanicentral GmbH* v. *René Collin*, [1979] ECR 3423, at Para. 5.

55. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 21.

exclude the insertion of an NCC clause in general terms and conditions since this would run counter to the explicitness requirement. Although the Explanatory Memorandum and the NCC provisions only refer to the exclusion of an NCC clause in general terms and conditions, such an exclusion gives away that the requirement for an explicit and in writing agreement stands in the way of other forms of jurisdiction agreements too.

4.2.1 Implicit Agreements

The requirement for an explicit NCC clause contrasts with Article 25 (1) Brussels I*bis* Regulation. Although Article 25 (1) aims to ensure that the consensus between the parties on the chosen court is, in fact, established and requires that such a consensus must be clearly and precisely demonstrated,[56] it does not depend the validity of jurisdiction agreements on an explicit agreement. As a result, as long as the form requirements set in Article 25 (1) Brussels I*bis* Regulation are fulfilled, an implicit choice-of-court clause would suffice.[57] The following examples constitute implicit choice-of-court clauses that have been deemed valid by the ECJ despite lacking the parties' explicit consent.

4.2.2 Agreements in General Terms and Conditions

First, the exclusion of inserting an agreement in favour of the NCC in general terms and conditions comes at odds with the established case law of the ECJ.[58] Indeed, as early as 1976, the ECJ ruled that where a jurisdiction clause is included in the general conditions printed on the back of a contract, the writing requirement is fulfilled if the contract signed by both parties expressly refers to those general conditions. Two further requirements should be fulfilled so as to validly incorporate a jurisdiction clause, contained in general terms, into a contract. The jurisdiction agreement is valid only if a party exercising reasonable care could check the express reference to the general terms and conditions and only if the latter have, in fact, been communicated to the party.[59]

The ECJ's case law on jurisdiction agreements in general terms and conditions reveals that the court managed to strike a balance between two competing interests. On the one hand, the provisions regulating jurisdiction agreements in commercial matters should not excessively overburden the parties with formalistic requirements that are practically difficult to follow. On the other hand, the provisions regulating jurisdiction agreements should protect the parties from clauses that have been smuggled into a contract against their will.[60]

4.2.3 Agreements According to the Parties' Practices or International Trade Usages

Nevertheless, a jurisdiction agreement contained in general terms and conditions could still comply with the formal requirements under the Brussels I*bis* Regulation even if an express contractual reference is lacking. This is the case when, for instance, the general terms and conditions containing the choice-of-court clause are used in the parties' continuing commercial relationships and thus constitute an established practice between them in the sense of Article 25 (1) (b) Brussels I*bis* Regulation. Alternatively, these general terms and conditions could reflect an international trade and commerce usage, in the sense of Article 25 (1) (c) Brussels I*bis* Regulation.[61]

However, the persistence of the NCC provisions on an explicit and in writing agreement leaves no room for the selection of the NCC in a form that accords with the practices established between the parties or, alternatively, international trade and commerce usages.

Letter (b) was initially inserted in Article 17 Brussels Convention in 1989. It aimed at codifying the ECJ's case law, which had acknowledged that the parties' long-standing business practices may, under circumstances, overcome the prescribed writing requirement.[62] The

56. Case 24/76, *Estasis Salotti Di Colzani Aimo E Gianmario Colzani* v. *Rüwa Polstereimaschinen GmbH*, [1976] ECR 1831, at Para. 7; Case 25/76, *Galeries Segoura SPRL* v. *Société Rahim Bonakdarian*, [1976] ECR 1851, at Para. 6; Case 150/80, *Elefanten Schuh GmbH* v. *Pierre Jacqmain*, [1981] ECR 1671, at Paras. 24-25; Case 71/83, *Partenreederei Ms Tilly Russ, Ernest Russ* v. *NV Haven- & Vervoerbedrijf Nova, NV Goeminne Hout*, [1984] ECR 2417, at Paras. 14, 24; Case 221/84, *F. Berghoefer GmbH & Co. KG* v. *ASA SA*, [1985] ECR-2699, at Para. 13; Case 313/85, *Iveco Fiat SpA* v. *Van Hool NV*, [1986] ECR-3337, at Para. 5; Case 106/95, *Mainschiffahrts-Genossenschaft eG* (MSG) v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 15; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597, at Paras. 19, 34; Case 387/98, *Coreck Maritime GmbH* v. *Handelsveem BV and Others*, [2000] ECR I-9337, at Para. 13; Case 222/15 *Hőszig Kft* v. *Alstom Power Thermal Services*, [2016] ECLI:EU:C:2016:525, at Paras. 37-38; Case 436/16 *Georgios Leventis, Nikolaos Vafeias* v. *Malcon Navigation Co. ltd., Brave Bulk Transport ltd.*, [2017] ECLI:EU:C:2017:497, at Para. 34; Case 64/17 *Saey Home & Garden NV/SA* v. *Lusavouga-Máquinas e Acessórios Industriais SA*, [2018] ECLI:EU:C:2018:173, at Para. 25.

57. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 25, 42; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 78.

58. Dutch Bar Association (Nederlandse Orde van Advocaten), Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Netherlands Commercial Court), 1 February 2017 available at: https://www.internetconsultatie.nl/ncc/reactie/6cc7700f-31e5-44b1-862a-9d192256867a (last visited 14 July 2018); S. Vlaar, 'IPR-aspecten van het NCC-wetsvoorstel', *Nederlands Internationaal Privaatrecht* 195, at 200-1 (2017).

59. Case 24/76, *Estasis Salotti Di Colzani Aimo E Gianmario Colzani* v. *Rüwa Polstereimaschinen GmbH*, [1976] ECR 1831, at Paras. 9-12; Case 64/17 *Saey Home & Garden NV/SA* v. *Lusavouga-Máquinas e Acessórios Industriais SA*, [2018] ECLI:EU:C:2018:173, at Paras. 27-29.

60. Jenard, Report, above n. 50, Commentary on the sections of Title II, Section 6, Prorogation of jurisdiction, Art. 17.

61. Case 71/83, *Partenreederei Ms Tilly Russ, Ernest Russ* v. *NV Haven- & Vervoerbedrijf Nova, NV Goeminne Hout*, [1984] ECR 2417, at Para. 18; Case 106/95, *Mainschiffahrts-Genossenschaft eG* (MSG) v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597; Case 64/17 *Saey Home & Garden NV/SA* v. *Lusavouga-Máquinas e Acessórios Industriais SA*, [2018] ECLI:EU:C:2018:173, at Para. 31; von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 35; Garcimartin, above n. 51, Art. 25 Brussels I*bis* Regulation, at margin no. 9.42; P. Schlosser, in P. Schlosser and B. Hess, *EU-Zivilprozessrecht* (2015), Art. 25 Brussels I*bis* Regulation, at margin no. 3; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 96, 98; Mankowski, above n. 43, Art. 25 Brussels I*bis* Regulation, at margin no. 109, 122.

62. Case 25/76, *Galeries Segoura SPRL* v. *Société Rahim Bonakdarian*, [1976] ECR 1851, at Para. 12.

subsequent letter (c), allowing for jurisdiction agreements in a form that accords with international trade and commerce usages, dates back even earlier to 1978 and is aimed at relaxing the formal requirements set for jurisdiction agreements. The rationale underpinning this amendment was to adequately cater for the customs and requirements of international trade. The international commercial 'flair' of the letters (b) and (c) becomes all the more apparent when taking into consideration that their wording was based on Article 9 (1) and (2), respectively, of the 1980 Vienna Convention on International Contracts for the Sale of Goods (CISG).[63, 64]

In light of the above, the NCC jurisdictional requirements clash with Article 25 (1) (b) and (c) Brussels I*bis* Regulation and the underlying considerations that lead to the provision's present wording. The strict requirement for an express and written agreement disregards the requirements of non-formalism, simplicity and speed in international commercial relationships[65] and complicates the establishment of the NCC's jurisdiction.

4.2.4 Third Parties

Furthermore, the requirement for an explicit jurisdiction clause hinders the involvement of third parties in trial before the NCC. Indeed, according to the Explanatory Memorandum, the provision on an express agreement was not solely driven by the need to protect consumers and small enterprises. It was additionally prompted by the need to secure the procedural rights of third parties who have not expressly agreed to litigate before the NCC in English and according to its rules.[66]

The ECJ has been more than once called to interpret the agreement requirement set in Article 25 (1) Brussels I*bis* Regulation in respect of third parties that neither were a party nor had expressly consented to the jurisdiction agreement. Despite the absence of an express consent, the court extended the effects of jurisdiction agreements on third parties under specific conditions.

In its very first decision on the matter, the court was called upon to examine whether a jurisdiction clause inserted in the statute of a company constitutes an agreement between the company and its shareholders within the meaning of Article 17 Brussels Convention.[67] The ECJ answered this question in the affirmative, regardless of the fact that a shareholder may have opposed the adoption of the clause or may have become a shareholder after the clause was adopted.[68] The formal requirements set in Article 17 Brussels Convention are satisfied if the jurisdiction clause is contained in the statutes and those are lodged in a place accessible by the shareholders or contained in a public register.[69] The ECJ based its ruling in the *Powell Duffryn* case on the principle of legal certainty. Any other interpretation would lead to a multiplication of fora for disputes between the company and its shareholders, even though they arise from the same factual and legal relationship.[70] Contrary to the ECJ's ruling in the *Powell Duffryn* case, the NCC provisions' requirement for an explicit jurisdiction clause and the exclusion of the insertion of such a clause in general terms and conditions suggests that an NCC jurisdiction clause could not be validly inserted in the statute of a company.[71]

Another prominent example among the court's case law concerning the third-party effect of jurisdiction agreements are the ECJ's rulings on bills of lading. The ECJ extended the effects of jurisdiction agreements in bills of lading on third parties under the double condition that the jurisdiction clause is valid pursuant to Article 25 (1) Brussels I*bis* Regulation between the initial parties and that the third party, by acquiring the bill of lading, has succeeded to the shipper's rights and obligations under the relevant national law.[72] The ECJ's rulings on bills of lading and the conditions set therein for the third-party effect of jurisdiction agreements are equally applied in every situation involving third parties that succeed one of the initial parties to a jurisdiction agreement.[73]

63. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) UN Treaty Series 1489, 3.
64. M. de Almeida Cruz, M. Desantes Real and P. Jenard, *Report on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britian and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic* (1990), at Para. 26; P. Jenard and G. Möller, *Report on the Convention on jurisdiction and enforcement of judgements in civil and commercial matters done at Lugano on 16 September 1988* (1990), at Paras. 56-58; Schlosser, Report, above n. 50, at Para. 179; Case 106/95, *Mainschiffahrts-Genossenschaft eG* (MSG) v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 16. *See also* Art. 1:105 The Principles on European Contract Law available at: www.trans-lex.org/400200/_/pecl/#head_1 (last visited 14 July 2018).
65. *See* Case 106/95, *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 18.
66. Explanatory Memorandum 2017, at 10.
67. Case 214/89, *Powell Duffryn* plc v. *Wolfgang Petereit*, [1992] ECR I-1745.
68. *Ibid.*, at Paras. 17-19.
69. *Ibid.*, at Paras. 26-29.
70. *See also* Case 34/82, *Martin Peters Bauunternehmung GmbH* v. *Zuid Nederlandse Aannemers Vereniging*, [1983] ECR I-987, at Paras. 13-15.
71. Dutch Bar Association (Nederlandse Orde van Advocaten), Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Netherlands Commercial Court), 1 February 2017 available at: https://www.internetconsultatie.nl/ncc/reactie/6cc7700f-31e5-44b1-862a-9d192256867a (last visited 14 July 2018); Vlaar, above n. 58, at 202. *See also* De Brauw Blackstone Westbroek N.V., Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Netherlands Commercial Court), 31 January 2017 available at: https://www.internetconsultatie.nl/ncc/reactie/efabc64e-d6c6-4254-b2a9-72dd8026478c (last visited 14 July 2018).
72. Case 71/83, *Partenreederei Ms Tilly Russ, Ernest Russ* v. *NV Haven- & Vervoerbedrijf Nova, NV Goeminne Hout*, [1984] ECR 2417, at Para. 24; Case 387/98, *Coreck Maritime GmbH* v. *Handelsveem BV and Others*, [2000] ECR I-9337, at Para. 23; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA* v. *Hugo Trumphy SpA*, [1999] ECR I-1597, at Para. 41.
73. Case 352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* v. *Akzo Nobel NV, Solvay SA/NV, Kemira Oyj, FMC Foret SA, Evonik Degussa GmbH, Chemoxal SA, Edison SpA*, [2015] ECLI:EU:C:2015:335, at Para. 65; von Hein, above n. 51, Art. 23 Brussels I Regula-

However, the NCC's jurisdictional requirements contradict Article 25 (1) Brussels I*bis* Regulation and the ECJ's rulings on the third-party effect of jurisdiction agreements. By excluding third parties from the NCC's jurisdictional reach, the NCC provisions disregard that legal and, in particular, commercial relationships frequently 'change hands'.

4.2.5 Submission by Appearance

Lastly, the requirement for an express NCC clause stands in the way of a submission by appearance. According to Article 26 (1) Brussels I*bis* Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction, unless the appearance was entered to contest the jurisdiction or where another court has exclusive jurisdiction pursuant to Article 24. Just as Article 25, Article 26 (1) Brussels I*bis* Regulation establishes the jurisdiction of a court based on the parties' implicit agreement to litigate before it.[74] The claimant brings his lawsuit before this court, and the defendant appears before it, leaving the court's lack of jurisdiction unchallenged and willing to contest the lawsuit on the merits.[75] However, contrary to jurisdiction agreements, a submission by appearance takes place at a later stage, during the trial.[76] The fact that a submission by appearance is one more form of an implicit jurisdiction agreement hints at the conclusion that the mere appearance of the parties before the NCC would not suffice to establish the jurisdiction of the latter.

This section has shown that the requirement for an explicit agreement in writing clogs up the way to the NCC to various forms of agreements, such as agreements in the statute of a company or agreements concluded in a form that accords with the parties' practices or international commercial usages. In consequence, the NCC provisions come at odds with Article 25 (1) Brussels I*bis* Regulation and the rationale underpinning the provision's present wording. The NCC's jurisdiction appears, thus, enmeshed in formal requirements that do not reckon with the realities of commercial transactions.

4.3 The German Proposal versus the Brussels Ibis Regulation

Just as the NCC provisions, the requirements set on agreements in favour of the KfiH by the German proposal barely reconcile with the formal requirements laid down in Article 25 (1) Brussels I*bis* Regulation. Unlike draft Article 114b GVG, Article 25 (1) depends the validity of a choice-of-court agreement upon a series of alternatively listed formal requirements, regardless of the identity of the parties. In consequence, commercial parties are also bound by the formal requirements prescribed in Article 25 (1) Brussels I*bis* Regulation.[77] Therefore, it appears that the second sentence of draft Article 114b GVG is more liberal than the Brussels I*bis* Regulation, granting commercially and legally informed parties the freedom to conclude an agreement to litigate before the KfiH without the obligation to abide by any form requirement. However, draft Article 253 (3a) ZPO seems to put a strain on this freedom. In particular, Article 253 (3a) ZPO requires the claimant to attach the agreement or the defendant's declaration of consent to litigate in English to the statement of claim. This obligation runs counter to draft Article 114b GVG and, in effect, cancels the freedom to conclude a formless agreement.[78]

Let us now turn to the third sentence of draft Article 114b GVG, allowing agreements in favour of the KfiH after the dispute has arisen as long as they are express and in writing. As pointed out, the requirement for an express and in writing agreement does not apply to merchants, legal persons under public law and special assets under public law that enjoy the freedom of drafting a formless agreement, regardless of whether the dispute has or has not yet arisen. Hence, the third sentence of draft Article 114b GVG is left to regulate agreements in consumer contracts. Although it is highly unlikely that consumer cases will find their way before the German chambers, since the Brussels I*bis* Regulation hardly allows for choice-of-court agreements in consumer contracts and Article 95 GVG sets various requirements on disputes so as to be eligible to be heard by the KfiH, a comparison between the Regulation and draft Article 114b GVG reveals once again how far they stand.

Article 19 (1) Brussels I*bis* Regulation permits choice-of-court agreements in consumer contracts as long as they are concluded after the dispute has arisen. In addition, Article 19 (2) permits choice-of-court agreements even before the dispute has arisen as long as they widen the consumer's choice of courts.[79] However, Article 19 Brussels I*bis* Regulation omits any additional form requirements than the ones prescribed in Article 25 (1) Brussels I*bis* Regulation. As a result, a choice-of-court agreement in consumer contracts should, just as every other choice-of-court agreement, meet the formal

tion, at margin no. 64; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 161; Mankowski, above n. 43, Art. 25 Brussels I*bis* Regulation, at margin no. 151-52.

74. On the equivalence of submission by appearance to an implicit jurisdiction agreement: Case 48/84, *Hannelore Spitzley* v. *Sommer Exploitation SA*, [1985] ECR 787, at Paras. 13-15; Case 111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group* v. *Michal Bilas*, [2010] ECLI:EU:C:2010:290, at Para. 33. *See also* Jenard, Report, above n. 50, Commentary on the sections of Title II, Section 6, Prorogation of jurisdiction, Art. 18.
75. Garcimartin, above n. 51, Art. 26 Brussels I*bis* Regulation, at margin no. 9.100; A.-L. Calvo Caravaca and J. Carrascosa González, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation* (2016), Art. 26 Brussels I*bis* Regulation, at margin no. 1.
76. Calvo Caravaca and Carrascosa González, above n. 75, Art. 26 Brussels I*bis* Regulation, at margin no. 1, 23.
77. Bork, above n. 42, Art. 38 ZPO, at margin no. 22; Schlosser, above n. 61, Art. 25 Brussels I*bis* Regulation, at margin no. 7; Mankowski, above n. 43, Art. 25 Brussels I*bis* Regulation, at margin no. 62, 74-5.
78. Critical also B. Hess as reported in M. Sonnentag, 'Justiz & Brexit: Frankfurt Chamber for International Commercial Disputes – Veranstaltung in Frankfurt am Main am 9. August 2018', *Zeitschrift für Europäisches Privatrecht* 966, at 968-69 (2018).
79. Mankowski and Nielsen, above n. 46, Art. 19 Brussels I*bis* Regulation, at margin no. 22; A. Staudinger, in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (2016) Art. 19 Brussels I*bis* Regulation, at margin no. 2.

requirements listed in Article 25 (1) Brussels I*bis* Regulation.[80] On the contrary, draft Article 114b GVG requires an express and in writing agreement.

Just as the previous section on the NCC has shown, the requirement for an express agreement stands in the way of various forms of choice-of-court agreements, which have been deemed valid by the ECJ despite the lack of an express consensus. First, the requirement for an express agreement necessitates an unambiguous clause that clearly states the competent court as well as the legal relationship such an agreement refers to.[81] Furthermore, the requirement for an express agreement excludes the insertion of a choice-of-court agreement in general terms and conditions.[82] However, the likelihood of including a choice-of-court clause in general terms and conditions after the dispute has arisen is rather low. At this stage of the dispute, the parties have already concluded a contract. Hence, after the dispute has arisen, a choice-of-court agreement will most probably be a separate, self-standing agreement.[83]

Finally, it is needless to say that the requirement for a written agreement sharply contrasts with Article 25 (1) Brussels I*bis* Regulation, which also allows for agreements evidenced in writing, in a form which accords with the practices established between the parties or in a form which accords with international trade or commerce usages.

5 The Consequences of the Clash

5.1 A Matter of Characterisation

The previous sections have demonstrated the various clashing points between the provisions regulating the jurisdiction of the international commercial courts in the Netherlands and Germany and the Brussels I*bis* Regulation. Contrary to the latter, the NCC provisions require parties to conclude an explicit agreement in writing when opting in favour of the NCC. The German proposal, on the other hand, promises commercial parties a greater freedom when agreeing on the jurisdiction of the KfiH. However, the draft provisions requiring the claimant to attach the agreement or the defendant's declaration of consent to litigate in English to the statement of claim put a leash on this freedom and, in effect, cancel it.

As depicted, the strict formal requirements set by the proposals are driven by the concern to ensure the will of the parties and, in particular, the weaker parties, such as consumers and small enterprises, to litigate before the NCC and the KfiH. The aim to protect the unsuspecting consumers, small enterprises and third parties from an expensive trial in a foreign language found its expression in the provisions regulating the jurisdiction of the NCC and the KfiH and was, in particular, translated into additional formal requirements. Thus, the requirement for an explicit or written agreement embodies some of the biggest challenges surrounding the creation of international commercial courts, namely the use of a foreign language before court and the high court fees several international commercial courts, such as the NCC, introduce. However, this article has so far questioned the compliance of these requirements with the formal requirements set by the Brussels I*bis* Regulation on choice-of-court agreements.

These divergences lay bare the question whether the formal requirements upon agreements in favour of the NCC and the KfiH contravene Article 25 (1) Brussels I*bis* Regulation. The answer depends on the characterisation of agreements in favour of the NCC and the soon-to-be KfiH. If agreements in favour of the NCC and the KfiH were characterised as international jurisdiction agreements, then, under the principle of the primacy of European Law, the Brussels I*bis* Regulation would prevail over national rules on jurisdiction. Accordingly, the Brussels I*bis* Regulation would outlaw Articles 30r (1) Rv, 1.3.1. (d) NCC Rules and 114b GVG. If, on the other hand, agreements in favour of the NCC and the KfiH were characterised as functional jurisdiction agreements, where parties merely agree on the jurisdiction of a specific chamber within a court, then the Brussels I*bis* Regulation and the NCC provisions or the KfiH proposal would not collide, since they regulate different kind of agreements. Hence, it all boils down to the characterisation of agreements in favour of the NCC and the KfiH. The following sections undertake the tricky task to characterise agreements in favour of the NCC and the KfiH by demarcating the regulative scope of the Brussels I*bis* Regulation, the NCC law and the legislative proposal for the establishment of the KfiH.

5.2 Functional Jurisdiction Agreements

The Brussels I*bis* Regulation primarily regulates the international jurisdiction of the Member States' courts. However, some of its provisions also designate the territorially competent court within a Member State. This is the case for Articles 7 and 8 as well as Article 25 Brussels I*bis* Regulation.[84] Whether the Brussels I*bis* Regulation determines both the international and the territorial

80. Schlosser, Report, above n. 51, at Para. 161; von Hein, above n. 51, Art. 17 Brussels I Regulation, at margin no. 1 and Art. 23 Brussels I Regulation, at margin no. 79; A. Bonomi, in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast* (2015) Art. 19, at margin no. 9.83; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 132; Staudinger, above n. 79, Art. 19 Brussels I*bis* Regulation, at margin no. 5. For insurance matters, *see* Case 201/82, *Gerling Konzern Speziale Kreditversicherungs-AG* v. *Amministrazione del Tesoro dello Stato* [1983] ECR 2503, at Para. 20.

81. Bork, above n. 42, Art. 38 ZPO, at margin no. 39, 43; Heinrich, above n. 42, Art. 38 ZPO, at margin no. 22.

82. Bork, above n. 42, Art. 38 ZPO, at margin no. 44; L. Rosenberg, K. H. Schwab and P. Gottwald, *Zivilprozessrecht* (2018), § 37. Zuständigkeit infolge Parteiverhaltens, at margin no. 20.

83. Bork, above n. 42, Art. 38 ZPO, at margin no. 39. For Art. 19 Brussels I*bis* Regulation, *see* Mankowski and Nielsen, above n. 46, Art. 19 Brussels I*bis* Regulation, at margin no. 18.

84. For the previous Art. 5 Nr. 1 lit. b Brussels I Regulation, *see* Case 386/05 *Color Drack GmbH* v. *Lexx International Vertriebs GmbH*, [2007] ECR I-3699, at Para. 30. Jenard, Report, above n. 50,

jurisdiction of a Member State's courts depends on the wording of the relevant provision.[85] In particular, under Article 25 (1) Brussels I*bis* Regulation, the parties may choose '*a court or the courts of a Member State*'. As a result, an agreement under Article 25 (1) designates the internationally competent court and, upon the parties' choice, also the territorially competent court. If the parties have omitted to confer jurisdiction on a certain court, then – and only then – the national law of the designated Member State will determine the territorially competent court.[86] In contrast, the Brussels I*bis* Regulation does not touch upon national rules pertaining to the subject-matter or functional jurisdiction of a Member State's courts.[87] It remains, therefore, largely a matter of the Member States to identify the court with specific jurisdiction to rule on specific disputes.[88]

As noted above, the NCC and the KfiH are not self-standing courts but chambers of the Amsterdam District Court and the lower State Courts, respectively. In this sense, the Explanatory Memorandum to the NCC proposal clarified that the provisions pertaining to the jurisdiction of the NCC do not decide whether a case can be brought before the Dutch courts. That is left to the relevant European regulations or international conventions and the Dutch civil procedure law. The NCC law solely decides whether a case can come before the NCC or the Amsterdam District Court.[89] In a similar vein, the proposal for the establishment of the KfiH clarifies that just as the already-existing Chambers for Commercial Disputes, the KfiH are specialised chambers within the lower State Courts, whose jurisdiction is a matter of allocating cases to the various judges and chambers within a court and is regulated by law.[90]

The structure of the NCC and the KfiH as court divisions points, indeed, towards the conclusion that agreements in favour of the NCC and the KfiH are not international jurisdiction agreements but functional jurisdiction agreements,[91] where the parties merely agree on the jurisdiction of a specific chamber within a court. This leads us, in turn, to the conclusion that the additional formal requirements set by the NCC law and the KfiH proposal on agreements in favour of these courts do not clash with the formal requirements on jurisdiction agreements set by Article 25 (1) Brussels I*bis* Regulation. As a result, an agreement contained in general terms and conditions to resolve an international dispute before the NCC would be valid under Article 25 (1) Brussels I*bis* Regulation and thus establish the international jurisdiction of the Dutch courts as well as the territorial jurisdiction of the courts in Amsterdam. However, such an agreement would fail to meet the formal requirements prescribed in the NCC provisions, and therefore, it would fail to establish the jurisdiction of the NCC.

5.3 Lost in Terminology

Notwithstanding the Explanatory Memorandum to the NCC law and the KfiH proposal, it should be underlined that the distinction between the various kinds of jurisdiction is not always crystal clear. The example of the existing German Chambers for Commercial Disputes, of which the KfiH are an alternative, English version, is indicative. Although the Chambers for Commercial Disputes are mere chambers of the lower State Courts, doubts have been expressed as to the characterisation of the provisions pertaining to their jurisdiction as functional jurisdiction provisions. First, Article 95 GVG sets multiple conditions so as to determine which cases are commercial and can thus be litigated before the Chambers for Commercial Disputes. Second, Articles 96 and 98 GVG provide that the parties shall apply so as to bring their dispute before the Chambers. The parties' ability to influence the internal allocation of cases between the chambers of the lower State Courts questions the characterisation of the relevant provisions as functional jurisdiction provisions, since the distribution of cases within a court is typically exempted from the parties' choice.[92] It has been, therefore, claimed that the jurisdiction of the Chambers of Commercial Disputes strongly resembles the subject-matter jurisdiction of a

Commentary on the sections of Title II, Section 2 Special jurisdiction, Art. 5 and 6; Schlosser, Report, above n. 51, at Para. 70.

85. von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 3; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels I*bis* Regulation, at margin no. 44.
86. Case C-222/15, *Hőszig Kft.* v. *Alstom Power Thermal Services*, [2016] ECLI:EU:C:2016:525, at Para. 48; Rechtbank Rotterdam, ECLI:NL:RBROT:2018:594, at 4.5; von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 75-76; Garcimartin, above n. 51, Art. 25 Brussels I*bis* Regulation, at margin no. 9.11; Schlosser, above n. 61, Art. 25 Brussels I*bis* Regulation, at margin no. 4, 14; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 30; Gottwald, above n. 51, Art. 25 Brussels I*bis* Regulation, at margin no. 66.
87. Exceptions are Art. 8 (3) and 47 (1) Brussels I*bis* Regulation. Schlosser, Report, above n. 51, at margin no. 81; von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 4; Schlosser, above n. 61, Preliminary remarks to Art. 4-35 Brussels I*bis* Regulation, at margin no. 2; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels I*bis* Regulation, at margin no. 47; Gottwald, above n. 51, Art. 4 Brussels I*bis* Regulation, at margin no. 15; R. Geimer, in Zöller (ed.), *Zivilprozessordnung* (2018) Art. 4 Brussels I*bis* Regulation, at margin no. 57.
88. *See also* Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 32.
89. Explanatory Memorandum 2017, at 5-6.
90. Legislative Proposal 2018, Explanatory Statement (Begründung), at 14: '*dessen Zuständigkeit im Wege der gesetzlich geregelten Geschäftsverteilung geregelt ist*'.
91. In this article, the term 'functional jurisdiction' is used in the broader sense and therefore encompasses the internal allocation of cases within a court; *see* H. Roth, in R. Bork and H. Roth (eds.), *Stein/ Jonas Kommentar zur Zivilprozessordnung* (2014) Art. 1 ZPO, at margin no. 58, 60.
92. Roth, above n. 91, Art. 1 ZPO, at margin no. 58, 60; W. Zeiss and K. Schreiber, *Zivilprozessrecht* (2014), § 11 Die funktionelle Zuständigkeit, at margin no. 64; R. Hüßtege, in K. Reichold, R. Hüßtege and C. Seiler (eds.), *Thomas/Putzo Zivilprozessordnung* (2018), Preliminary remarks to Art. 93-114, at margin no. 1; Rosenberg, Schwab and Gottwald, above n. 82, § 29. Begriff, Arten und Bedeutung der Zuständigkeit, at margin no. 14 and § 33. Die Kammer für Handelssachen, at margin no. 5-6. *See also* P. Meier, 'Fremdsprachige Verhandlung vor deutschen Gerichten?', *Wertpapier-Mitteilungen* 1827, at 1831-1832 (2018).

self-standing court.[93] The legislative history of the Chambers of Commercial Disputes, which were initially envisioned as self-standing courts but subsequently established as chambers within the lower State Courts, further supports this view.[94]

Since the KfiH are an alternative form of the Chambers for Commercial Disputes, the same doubts could be raised. The multiple requirements set on disputes so as to be eligible to be heard by the upcoming chambers, such as the internationality of the dispute as well as the conditions of Article 95 GVG, question their classification as mere chambers of a court. In a telling way, the proposal for the establishment of the KfiH uses, in some instances, the term 'subject matter',[95] whereas in others, the term 'internal allocation of cases'[96] when referring to the jurisdiction of the upcoming chambers. Furthermore, characterising the provisions pertaining to the jurisdiction of the KfiH as mere functional jurisdiction provisions may take into consideration their organisational structure as chambers but disregards the parties' choice as one of the most important conditions to gain access to them.

However, as remarked above, the German proposal throws one more term on the table. So as to justify the multiple formal requirements imposed on agreements in favour of the KfiH, it characterises such agreements as court-language agreements.[97] On the other hand, the Explanatory Memorandum to the NCC law in combination with the subsequent parliamentary papers characterised agreements in favour of the NCC as procedural agreements.[98] Yet there are reasons to question such a characterisation, too.

For instance, an international jurisdiction agreement may confer jurisdiction on a third state's neutral court, which has no ties to the dispute or the parties. This choice of a neutral 'unrelated' court is common in international commercial disputes, since it ensures that none of the parties will enjoy the advantages of litigating before its home-state courts.[99] As a result, jurisdiction agreements in international disputes may confer jurisdiction on a court that conducts proceedings in its national, but foreign to the parties, language and according to its national, but alien to the parties, rules of civil procedure. When a German company concludes with a Dutch company a choice-of-court agreement in favour of the London Commercial Court, the parties will necessarily litigate in English and according to English civil procedure law. In addition, the parties will pay the fees of the London Commercial Court and will be subjected to the reputably high lawyers' fees in England. Hence, every choice in favour of a foreign court entails a choice in favour of a foreign language, a foreign set of rules governing proceedings and the associated legal fees.[100] Seen from this perspective, the distinction between procedural agreements and court-language agreements appears a fictitious distinction that overlooks the realities of international commercial dispute resolution by adopting a confusing nomenclature.

It could be, therefore, claimed that the strict formal requirements set by the NCC provisions and the KfiH proposal upon agreements in favour of these courts, although not directly colliding with Article 25 (1) Brussels I*bis* Regulation, nevertheless, undermine its effective application. Despite the harmonisation of the rules of international jurisdiction on a European level, it remains a matter for the Member States, in the framework of the organisation of their courts, to identify the court with specific jurisdiction to rule on specific disputes.[101] However, although the Member States enjoy procedural autonomy, the national laws should not undermine the objectives of the Brussels I*bis* Regulation or render it ineffective.[102] In consequence, even if agreements in favour of the NCC or the KfiH are simply agreements on the competence of a chamber within a court or procedural agreements or court-language agreements, excessive national formal requirements may circumvent the formal requirements under the Brussels I*bis* Regulation and, in effect, threaten its effectiveness. Litigants in international disputes who wish to choose the NCC or the KfiH cannot, in drafting their choice-of-court agreement, solely rely on the provisions of the

93. F. Gaul, 'Das Zuständigkeitsverhältnis der Zivilkammer zur Kammer für Handelssachen bei gemischter Klagenhäufung und (handelsrechtlicher) Widerklage', *Juristen Zeitung* 57, at 57-58 (1984); G. Wagner, *Prozeßvertäge* (1998), at 570-72. *See also* H. Mayer, *Kissel/Mayer Gerichtsverfassungsgesetz* (2018) Art. 94 GVG, at margin no. 2. For the NCC and its resemblance to a self-standing court, *see* P. Ortolani and B. van Zelst, 'The Netherlands Commercial Court: Enforceability of Choice-of-Court Agreements and Decisions', *Journal of Private International Law* (forthcoming).
94. For an extensive account *see* H. Fleischer and N. Danninger, 'Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven', *Zeitschrift für Wirtschaftsrecht* 205, at 206 (2017); Mayer, above n. 93, Art. 93 GVG, at margin no. 2.
95. Legislative Proposal 2018, Explanatory Statement (Begründung), at 14, 16.
96. *Ibid*., at 14.
97. Legislative Proposal 2018, Explanatory Statement (Begründung), at. 16.
98. Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 6. *See also* Explanatory Memorandum 2017, at 5-6; Oranje, above n. 23, at 123-24.
99. F. Sandrock, *Die Vereinbarung eines "neutralen" internationalen Gerichtsstands* (1997), at 50-62.
100. H. Koster, 'Netherlands Commercial Court bezien vanuit het perspectief van het ondernemingsrecht', in E. Bauw, H. Koster and S. Kruisinga (eds.), *De kansen voor een Netherlands Commercial Court* (2018) 145, at 147. *See also* E. Rubin, 'Toward a General Theory of Waiver', 28 *UCLA Law Review* 478, at 488-91 (1981); L. Mullenix, 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court', *Fordham Law Review* 291, at 293-96 (1988).
101. *See also* Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 32.
102. Case 119/84 *P. Capelloni and F. Aquilini* v. *J. C. J. Pelkmans*, [1985] EU:C:1985:388, at Para. 21; 420/07, *Meletis Apostolides* v. *David Charles Orams, Linda Elizabeth Orams*, [2009] ECLI:EU:C:2009:271, at Para. 69; Case 189/08, *Zuid-Chemie BV* v. *Philippo's Mineralenfabriek NV/SA*, [2009] ECLI:EU:C:2009:475, at Para. 30; Case C-379/17, *Società Immobiliare Al Bosco Srl*, [2018] ECLI:EU:C:2018:806, at Para. 26; Staudinger, above n. 79, Introduction Brussels I*bis* Regulation, at margin no. 29. *See also* Case C-92/12 PPU, *Health Service Executive* v. *S.C., A.C.*, [2012] ECLI:EU:C:2012:255, at Para. 79; Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Paras. 31-32.

Brussels I*bis* Regulation. A detour via the cumbersome and strict provisions of domestic law is necessary.[103] Hence, although the NCC law and the KfiH proposal do not directly clash with Article 25 (1) Brussels I*bis* Regulation, they, nevertheless, undermine its effectiveness.

The German proposal for the establishment of the KfiH illustrates how national provisions may bypass the provisions of the Brussels I*bis* Regulation and, in result, vacate their effective application. In disputes falling under the Brussels I*bis* Regulation, Article 25 (1) Brussels I*bis* Regulation takes precedence over national rules on international jurisdiction agreements. As a result, the respective Article 38 ZPO and the stringent limits it sets upon jurisdiction agreements[104] remain inapplicable.[105] However, draft Article 114b GVG partly copies Article 38 ZPO. Thus, draft Article 114b GVG revives a national rule that would have otherwise remained inapplicable through the back door of the German Courts Constitution Act and under the disguise of a court-language agreement.

Although the formal requirements set by the NCC provisions and the German proposal aim to protect parties from the peculiarities of the upcoming courts, such as the high court fees of the NCC and the use of English before court, they disregard that the Brussels I*bis* Regulation already safeguards the parties' agreement on the chosen court[106] and sufficiently protects procedurally weaker parties, such as consumers.[107] While Article 25 (1) lists various formal requirements to ensure that the parties are *ad idem*, Article 19 prohibits disadvantageous for the consumer jurisdiction agreements. Furthermore, the Regulation's provisions are driven by the aims to facilitate the parties' access to a court, respect party autonomy and secure the foreseeability of the competent forum.[108] As a result, the national laws of the Member States should not place access to justice, party autonomy and the foreseeability of the jurisdiction at risk by adding additional and complex layers of national provisions to the existing rules of the Brussels I*bis* Regulation.[109]

With respect to the foreign language of the proceedings, it is recommended that the proposals shift their focus on the definition of international disputes. A clear definition of the international aspect of a dispute, which safeguards that only truly international disputes end up before the NCC and the KfiH, would pay heed to the parties' increased in international disputes ability to expect and thus foresee an English-language litigation.[110]

Leaving aside the clash between the Brussels I*bis* Regulation and the jurisdictional provisions of the NCC and the KfiH, a final remark should be made. Requirements for an explicit or in writing agreement turn their back to the policy considerations underlying the Brussels I*bis* Regulation. The regulation and the respective ECJ case law gradually relaxed the formal requirements set upon choice-of-court agreements driven by the aim to adequately cater for the customs and practices in international trade. Excessive formalities disregard the need for speed and simplicity in commercial transactions. Moreover, the demanding formal requirements set by the proposals complicate the establishment of the international commercial courts' jurisdiction and increase the possibility of litigation over jurisdictional issues. Such 'boundary' litigation, which protracts the length of the trial and increases the litigation costs,[111] favours the better funded party and burdens weaker parties, such as small enterprises, which the proposals after all strive to protect.[112] Hence, the strict formal requirements on agreements set by the proposals for the establishment of the NCC and the German KfiH overburden international commercial parties, complicate the establishment of the courts' jurisdiction and may undermine their attractiveness as future venues for the resolution of international commercial disputes.

6 Conclusion

The establishment of the NCC and the KfiH has been accompanied by various concerns and objections focusing on the high court fees of the NCC and the use of

103. *See also* Opinion of Advocate General Jääskinen, Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2171, at Paras. 52, 58.
104. Critical against Art. 38 ZPO G. Lüke, 'Unorthodoxe Gedanken zur Verkürzung der Prozessdauer und Entlastung der Zivilgerichte', in H. Prütting (ed.), *Festschrift für Gottfried Baumgärtel* (1990) 349, at 353; O. Jauerning and B. Hess, *Zivilprozessrecht* (2011), § 11 Angeordnete, vereinbarte und veranlasste Zuständigkeit, at margin no. 2; Bork, above n. 42, Art. 38 ZPO, at margin no. 5.
105. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 16; Schlosser, above n. 61, Art. 25 Brussels I*bis* Regulation, at margin no. 7; Magnus, above n. 54, Art. 25 Brussels I*bis* Regulation, at margin no. 14; Mankowski, above n. 43, Art. 25 Brussels I*bis* Regulation, at margin no. 62; Gottwald, above n. 51, Art. 25 Brussels I*bis* Regulation, at margin no. 76-77; Rosenberg, Schwab and Gottwald, above n. 82, § 31. Die internationale Zuständigkeit, at margin no. 44.
106. *See* above Section 4.1.
107. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 20. For employment contracts, *see* Case 25/79, *Sanicentral GmbH* v. *René Collin*, [1979] ECR 3423, at Para. 5.
108. Recitals 1, 3, 15, 19 and 22 Brussels I*bis* Regulation. *See also* Case 533/08, *TNT Express Nederland BV* v. *AXA Versicherung AG*, [2010] ECLI:EU:C:2010:243, at Para. 49.
109. *See also* Requejo Isidro, above n. 1, at 3.2.1.1; Opinion of Advocate General Jääskinen, Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2171, at Para. 69; Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v. *David Verhaegen* & *Barbara Huber* v. *Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 29.
110. *See also* Schlosser, above n. 61, Art. 25 Brussels I*bis* Regulation, at margin no. 20a.
111. On the importance of litigation time and costs in commercial disputes, *see also* Committee on Legal Affairs, Draft Report with recommendations to the Commission on expedited settlement of commercial disputes, (2018/2079[INL]) available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-627.896+02+DOC+PDF+V0//EN&language=EN (last visited 20 December 2018).
112. *See also* Fentiman, above n. 45, at 248; Wagner (2017), above n. 34, at 217.

English as court language before both courts. These concerns were, in particular, projected on the provisions regulating agreements in favour of the respective international commercial courts. The NCC law and the legislative proposal for the establishment of KfiH set additional formal requirements in order to secure that the will of the parties to litigate before them has been clearly manifested. Yet, this article demonstrates that these formal requirements undermine the effectiveness of the Brussels I*bis* Regulation, complicate the establishment of the courts' jurisdiction and may, as a result, undermine their attractiveness to international commercial parties. It is, thus, recommended that the national legislators ensure the compliance of the provisions regulating the jurisdiction of the NCC and the KfiH with the Brussels I*bis* Regulation and safeguard that the formalities of the provisions pertaining to the jurisdiction of these courts do not override the informalities of business practices.

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Matchmaking International Commercial Courts and Lawyers' Preferences in Europe

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Abstract

France, Germany, Belgium, and the Netherlands have taken concrete steps to design and develop international commercial courts. Most of the projects claim to be building courts that match the preferences of court users. They also try to challenge England and Wales, which evidence suggests is the most attractive jurisdiction in the EU. For the success of these projects, it is important that their proposed courts corresponds with the expectations of the parties, but also manages to attract some of the litigants that go to London. This article argues that lawyers are the most important group of choice makers, and that their preferences are not sufficiently matched by the new courts. Lawyers have certain litigation service and court perception preferences. And while the new courts improve their litigation service, they do not sufficiently addressed these court perception preferences.

Keywords: choice of court, commercial court, lawyers' preferences, survey on lawyers, international court

1 Problem Definition and Background

France, Germany, Belgium, and the Netherlands have taken concrete steps to design and develop international commercial courts. Most of the projects claim to be building courts that match the preferences of court users (hereafter the new courts).[1] They also try to challenge England and Wales, which evidence suggests is the most attractive jurisdiction in the EU.[2] For the success of these projects, it is important that their proposed offer not only correspond with the expectations prospective users, but also manage to attract some of the litigants that go to London. This article argues that lawyers are the most important group of choice makers and that their preferences are not sufficiently matched by the new courts. Lawyers have certain litigation service and court perception preferences. And while the new courts are an improvement compared with the existing courts, they do not sufficiently address lawyers' preferences, in particular those related to court perception.

This article proceeds as follows. The first section identifies the dominant position lawyers have in relation to their clients and reports findings from a survey I organised on lawyers' choice-of-court preferences. The second section provides an overview of not only the new courts in the EU, but also the general characteristics of the jurisdiction where they operate. The third section compares the offer of the new courts – within the framework of their jurisdiction – with the demand of their potential court users. It highlights the discrepancy between the preferences of lawyers and the offer of courts. The fourth section concludes this article and offers some recommendations for improvement to court designers and policy makers.

2 Lawyers' Choice-of-Court Preferences

This section shows why lawyers dominate their clients and what their most preferred element in making a choice of court is in relation to international commercial cases. The first part of this section identifies lawyers, and not their clients, as the real force when it comes to making a choice of court. The second part reports some of the findings from a survey I organised on lawyers' choice-of-court preferences in Europe.[3]

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1. From the website of the Netherlands Commercial Court: '[…] *to create a baseline that judges, lawyers and parties can easily refer to*' (See the website of the NNC: https://www.rechtspraak.nl/English/NCC (last visited 8 February 2019), or the International Chamber of the Paris Court of Appeal […] *il est unanimement estimé que pour se rapprocher des standards internationaux, il serait indispensable que nos juridictions répondent, mieux qu'elles ne le font actuellement, aux impératifs de délais exigés pour la resolution des affaires aux enjeux financiers importants.*' (Haut comité juridique de la place financière de Paris, '*Preconisations sur la mise en place à Paris de chambres specialisees pour le traitement du contentieux international des affaires*', (2017), HCJP, Paris).
2. S. Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', *European Review of Private Law* 13, at 53-60 (2013); E. Lein, R. McCorquodale, L. McNamara, H. Kupelyants & J. del Rio, '*Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts*' (2015), Ministry of Justice, London.
3. This survey was conducted during my PhD studies. Results of this study were published in: E. Themeli, *Civil Justice System Competition in the European Union* (2018), at 266-304.

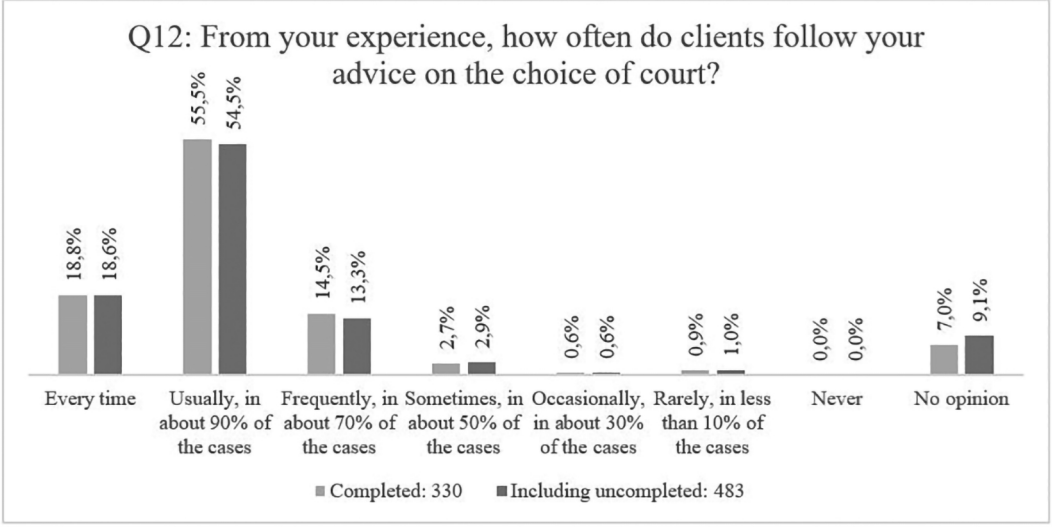
2.1 Lawyers as Choice-of-Court Makers

Cross-border litigation requires mobility. This means that parties should have financial resources for, knowledge of and, the legal possibility for litigating abroad;[4] in addition, they need to overcome certain psychological hurdles. So while there is a broad autonomy to choose a court in the EU[5] and financial difficulties to litigate abroad can be solved, lack of legal knowledge and psychological hurdles are difficult to overcome. Psychological hurdles include diffidence of foreign jurisdictions, choice habits, choice overload, and lack of information.[6, 7, 8, 9] To overcome these psychological hurdles, litigants hire lawyers.[10] Lawyers are highly specialised professionals, with experience and knowledge of the law. So, lawyers may be the solution to overcome some of the psychological hurdles and the legal information problems mentioned above, but they also increase litigation costs, making it even more expensive. In cross-border litigation, one lawyer may not even be enough. Often clients hire one lawyer for each jurisdiction they are involved. Therefore, the costs of cross-border litigation may escalate quickly, making it expensive for many and prohibitive for more.

It is suggested that lawyers dominate their clients as a result of six factors. First, legal knowledge is entropic by nature.[11] The more time passes the more complicated the interpretation of law becomes. This means that even repeat players see their knowledge become outdated overtime, and even lawyers are obliged to spend more and more time on similar cases. As mentioned earlier, complexity and time are elements that increase the costs of litigation, which means that entropy plays a role in the cost of litigation. Second, a lawyer's service is a credence good, which is a good produced by an expert, and of which consumers cannot assess the quality and the quantity they need.[12] This places the producer in a position to dictate what and how much a client should buy. When it comes to legal services, clients can only trust lawyers on what and how much service they will need.[13] Third, lawyers conduct their activities in a superstar type of market.[14] In these markets, a small difference in quality is reflected in a big difference in earnings. Clients – unaware of the quality and quantity of lawyer service they need – consider lawyers' fee as an indicator of their quality.[15] So large companies and wealthy persons have the tendency to overpay for their legal services. Fourth, the initial lawyer–client relationship develops slowly, but costs increase relatively fast due to the complexity of law, the credence good character of the lawyer's service, and the superstar type of market lawyers create. These are sunk-costs because they cannot be recovered once incurred. At the beginning, every lawyer

4. In the European Union, parties can make a choice of court agreement, which are regulated by Art. 25 of the Brussels I (recast) 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 OJ L 351, 12 December 2012, page 1-32). According to it, parties have considerable freedom to choose any of the courts in the EU despite their domicile or connecting factors with the chosen jurisdiction. Despite some restrictions – for example, the exclusive jurisdiction conferred to some courts by Art. 24 – Art. 25 gives European courts a global reach; it allows even parties with no connection to the EU to litigate in the courts of its Member States. In matters relating to insurance, consumer contracts, and individual contracts of employment choice of court agreement is regulated by Arts. 15, 19, and 23, respectively. These articles aim at providing vulnerable parties an opportunity to reach a choice of court agreement, while offering protection against the abuses of stronger parties. In this view Art. 25 is the most important for the *new* international commercial courts. For more on Art. 25 see: U. Magnus, 'Introduction to Articles 25-26', in U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law: Brussels Ibis Regulation* (2016) 583, at 583-669; F. Garcimartin, 'Choice-of-Court Agreements', in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast* (2015) 277, at 277-306.
5. X.E. Kramer, E. Themeli, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum', in V. Lazić and S. Stuij (eds.), *The Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (2017) 27, at 38-40.
6. Choice habits are important because once established, it is hard to change them. Certain game theories explain that if for some reason a choice option attracts the more attention, that is, is the most chosen, most players develop their strategies assuming that all the others will choose that option. At that point the expectation becomes self-fulfilling, and the option that has a starting edge draws even more attention towards itself. *See also*: T. Ginsburg, R.H. McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *William and Mary Law Review* 1229, at 1264-1266, and 1256 (2004). Some choice habits take the form of default contractual terms, and at that point become 'sticky'. *See* for more: D. Snyder, 'Private Lawmaking', 64 *Ohio State Law Journal* 371, at 417 (2003).
7. Choice overload affects lawyers as well. However, when it comes to making a legal choice, lawyers' choice overload limit may be higher than that of their clients. On the psychology of legal choice making *see*: G. Low, 'A Psychology of Choice of Laws', 24 *European Business Law Review* 363 (2013); G. Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws', 34 *Northwestern Journal of International Law & Business* 455 (2014).
8. For a psychological perspective *see*: R. Salecl, 'Society of Choice', 20 *A Journal of Feminist Cultural Studies* 157 (2009); B. Schwartz, 'The Tyranny of Choice', 290 *Scientific American* 70 (2004); B. Schwartz, A. Ward, J. Monterosso, S. Lyubomirsky, K. White & D.R. Lehman, 'Maximizing Versus Satisficing: Happiness Is a Matter of Choice', 83 *Journal of Personality and Social Psychology* 1178 (2002).
9. Lack of information can be considered also a practical hurdle.
10. Here I mean both lawyers hired as external experts, or as internal employees of legal entities. The presence of a lawyer in the structure of the legal entity may help to overcome some of these psychological problems. But considering the complicated source of these problems and the nature of the legal reasoning, these lawyers are not enough to overcome all of these psychological hurdles.
11. D.M. Engel, 'Society of Choice', 2 *American Bar Foundation Research Journal* 817, at 820-1 (1977).
12. R. van den Bergh and Y. Montangie, 'Competition in Professional Services Markets: Are Latin Notaries Different?', 2 *Journal of Competition Law and Economics* 189, at 193 (2006); U. Dulleck and R. Kerschbamer, 'On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods', 44 *Journal of Economic Literature* 5 (2006).
13. It can be questioned at this point whether or not companies with an internal lawyer or legal department can overcome this situation. The answer is yes and no: yes, in case the lawyer is knowledgeable enough and the case is part of this knowledge; no, if the case is complicated and if the lawyer lacks the necessary knowledge. It should be taken into account that lawyers tend to specialise in particular fields of law; and while experts on their field, they may not be able to give an opinion in others fields. But regardless of the position, the lawyer remains the most important element in the choice of court process.
14. G.K. Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System', 98 *Michigan Law Review* 953, at 972-6 (2000).
15. It helps in this regards the fact that lawyers are highly specialised and clustered in small speciality groups. *See* for this J.P. Heinz, E.O. Laumann, R.L. Nelson & E. Michelson, 'The Changing Character of Lawyers' Work: Chicago in 1975 and 1995', 32 *Law and Society Review* 751, (2006).

Figure 1



has to study a case before offering a strategy or an advice, which creates costs. This initial cost cannot be transferred to another lawyer, and thus it anchors the client to the very first lawyer in many cases. Fifth, a litigation resembles a sunk-cost auction, which means that once a client starts investing in a litigation, the costs escalate so quickly that the only way out of this situation is by investing more in the hope of winning and recovering the costs. Sixth, the market for lawyers resembles a monopoly where natural and legal barriers for entering the market exist.[16] These barriers make it (relatively) difficult to enter the market. Furthermore, natural barriers, such as the possibility to acquire meaningful professional knowledge, restrict the number of available lawyers for a certain type of case. For example, any large law firm that has been dealing with international commercial cases has been collecting knowledge as well. This knowledge remains with the firm and helps it to accumulate even more of it. It becomes, therefore, difficult for other lawyers to enter this specific market without that specific knowledge. Other barriers like education requirements, availability of this education, qualification costs, bar membership requirements, and so forth further increase the difficulties to enter the market, emphasising its resemblance with a monopoly.

The concurrence of these factors puts clients in a disadvantageous position. They search for a service often unsure of the quality and quantity they want, while costs escalate quickly, and the possibility to withdraw becomes more expensive. Lawyers benefit from this situation to dictate litigation plans and choice-of-court strategies, which makes them the true output source of the lawyer–client relationship. A relatively small group of lawyers working for the biggest law firms can be expected to be the most experienced in dealing with international commercial cases. Empirical evidence seems to confirm these findings. Results from the survey I conducted on lawyers (described hereunder) show that 45.7 per cent of the respondents discuss the choice of court with their clients in less than 50 per cent of the cases. When it comes to choice-making, only 28.1 per cent of the respondents have experience of clients making the choice, and the rest consider that they (lawyers) make the actual choice. In addition, respondents were asked to indicate how often clients followed their advice when making a choice of court (Question 12, chart hereunder), and 91.5 per cent of them responded that clients followed their advice in 70 per cent or more of the cases. Evidently, the empirical results at hand support the theoretical claim that lawyers dominate their clients and are the real choice-of-court makers in many situations.

2.2 Lawyers' Choice-of-Court Preferences in the EU – Empirical Evidence

2.2.1 Methodology and Approach to the Study

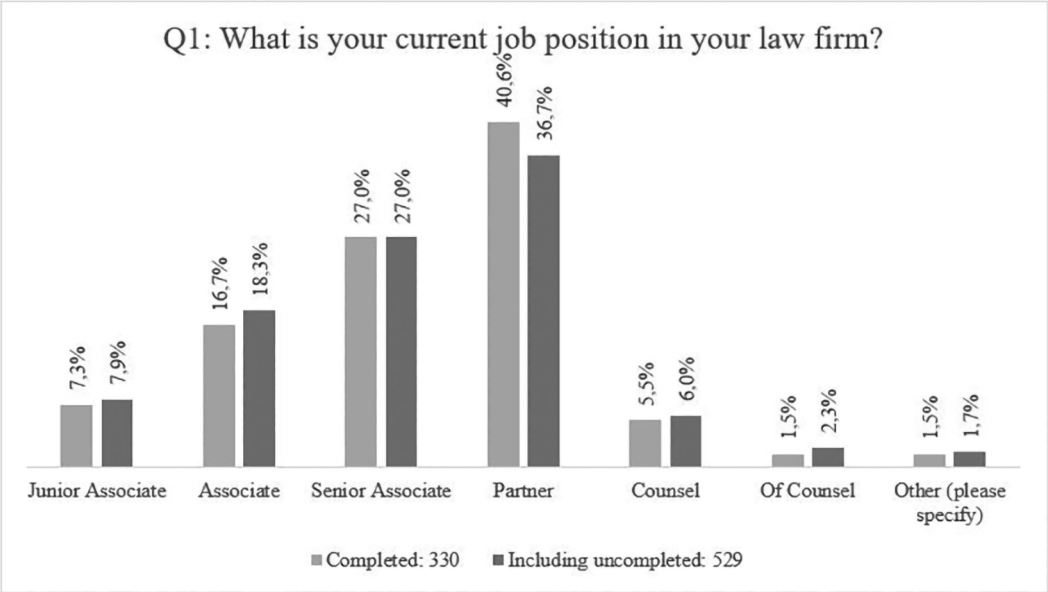
Most of the previous surveys on choice of law or choice of forum have been conducted on business representatives or companies, with few having lawyers as respondents.[17, 18] The above analysis, however, shows that the real choice makers are lawyers, and in particular lawyers working in large law firms. Considering this, I conducted a survey on this type of lawyers for their choice-of-

16. L.E. Ribstein, 'Lawyers as Lawmakers: A Theory of Lawyer Licensing', 69 *Missouri Law Review* 299, at 314-5 (2004).

17. L.G. Moser Meira, 'Parties' Preferences in International Sales Contracts: An Empirical Analysis of the Choice of Law', 20 *Uniform Law Review* 19 (2015); T. Eisenberg and G. Miller, 'The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts', 30 *Cardozo Law Review* 1475 (2008-2009); G. Cunibertit, 'The Laws of Asian International Business Transactions', 25 *Washington International Law Journal* 35 (2016); G. Cunibertit, 'The International Market for Contracts: The Most Attractive Contract Laws', 34 *Northwestern Journal of International Law & Business* 455 (2014); S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', *European Review of Private Law* 13 (2013); S. Sanga, 'Choice of Law: An Empirical Analysis', 11 *Journal of Empirical Legal Studies* 894 (2014).

18. Among the surveys organised on lawyers: P. Durand-Barthez, 'The "Governing Law" Clause: Legal and Economic Consequences of the Choice of Law in International Contracts', *International Business Law Journal* 505 (2012).

Figure 2



court preferences.[19] I selected the top law firms on the basis of their revenues in the EU. For this I used two lists, namely, one from *The American Lawyer*,[20] which lists the top one hundred law firms in the world in terms of revenue, and the other is the list of the top one hundred law firms in Europe (excluding British and American law firms) as drawn by the Lawyer.[21] I could not distinguish between lawyers knowledgeable or experienced enough and those with insufficient or little knowledge in the choice-of-court issues because lawyers' biographies were not always available and not always detailed enough. I decided to distribute the survey to all the lawyers working in these law firms, inviting only those who have experience in choice-of-court matters to respond. From the websites of these law firms, I collected the individual email addresses of all their lawyers working in the EU, to which I sent an email inviting them to take part in the survey. I received 529 responses, of which 330 completed, while the rest had different degrees of incompleteness. The survey was conducted between October and November 2015.

2.2.2 Demographics

Results from the survey show that the majority of the respondents were partners (40.6 per cent) or senior associates (27 per cent) in their firms.[22] In addition, 70.6 per cent of the respondents had more than six years of experience in their job, where 57.27 per cent of them had more than eleven years of experience. These results indicate that most of the respondents held senior positions and had considerable experience in their job. Their senior position is significant because they are often team leaders who control and design the strategies of larger groups of lawyers; furthermore, they are among the most experienced in their firms when it comes to choice-making. For the majority of the respondents (65.1 per cent), choice of court was also a frequent activity. When asked where they conducted most of their professional activity, 28.48 per cent of the respondents answered Germany, followed by the Netherlands (13.94 per cent), and England and Wales (8.48 per cent). Despite their seat, the vast majority of the respondents reported a full professional proficiency in English (76.7 per cent). This is interesting for three reasons. First, it is a further evidence that English is the *lingua franca* of international trade and business. Second, it further justifies why the new courts offer proceedings in English. Third, it is a hint that the legislation and the administrative bodies surrounding an international commercial court should be available in English so as to further facilitate the ability of foreign lawyers to familiarise with a jurisdiction. Respondents were also asked to mention the courts with which they have had a professional experience. Most of them reported experiences with the English, French and German courts. Using the data from this question, it can be calculated that lawyers have experience with an average of 3.23 courts, which can be reduced to 2.23 if their home jurisdiction is removed. In other words, it can be expected that a professional lawyer knows from a first-hand experience only two courts. While this is not per se negative, it shows that lawyers tend to have only a limited practical knowledge of foreign courts.

2.2.3 Choice-of-Court Preferences

The central part of the survey asked respondents to mention the most attractive court in the EU (Question

19. As mentioned, the survey was conducted in the ambit of a previous study. *See* n. 3.
20. *The American Lawyer*, October 2014.
21. The Lawyer, periodically, publishes the *European 100 Report*, which is an analysis of the market for lawyers in the EU and focusing only on the continental law firms. For this survey, I used data from the 2014 *Report*. *See* for the updated version: https://www.thelawyer.com/reports/european-100-2018-report/ (last visited 8 February 2019).
22. Compared to Junior Associates with 7.3 per cent, and Associates with 16.7 per cent.

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Figure 3

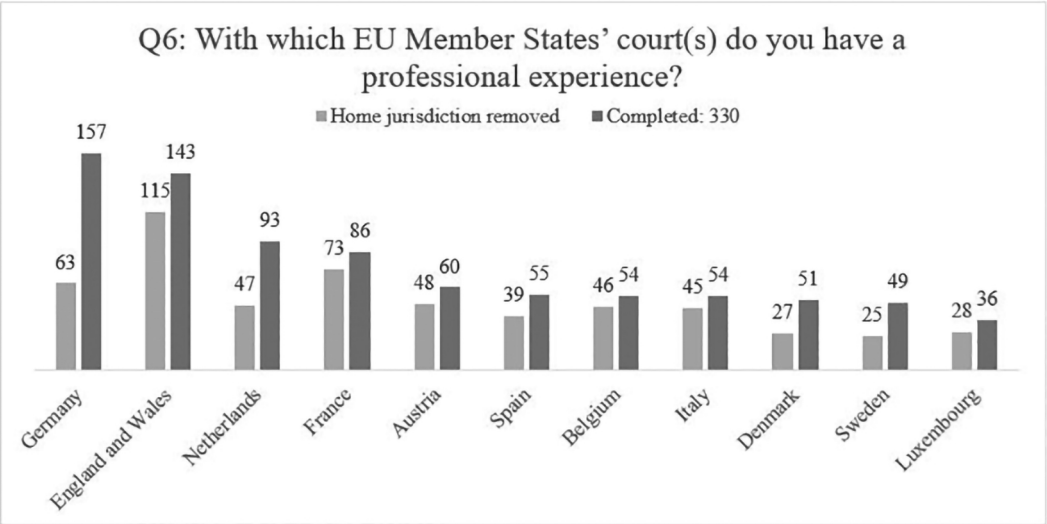
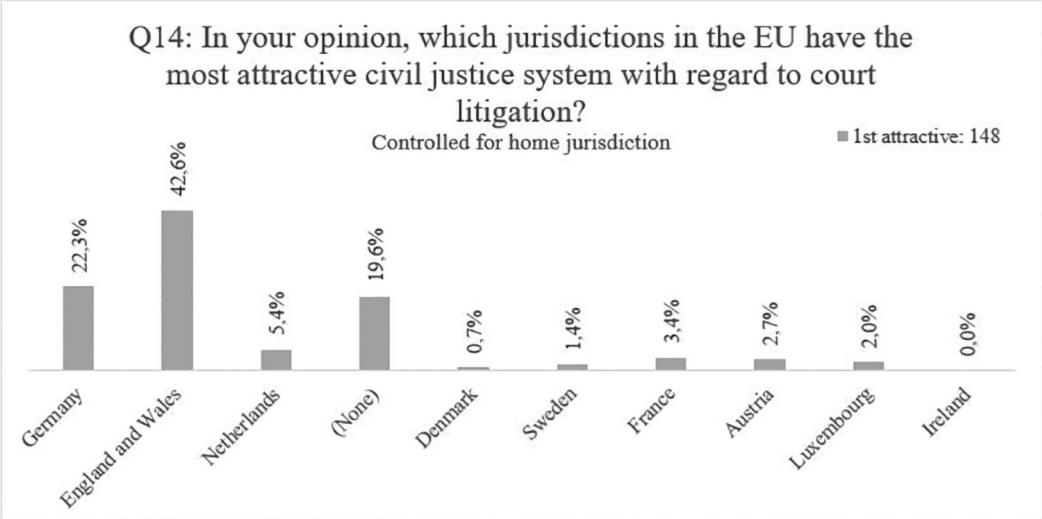


Figure 4



14). To eliminate any home bias, I removed from the answers the respondents' home jurisdiction. After this operation, England and Wales (42.6 per cent), Germany (22.3 per cent), and the Netherlands (5.4 per cent) were the most preferred jurisdictions.[23] The most attractive elements of these courts (Question 15) were 'quality of judges and courts' (22.3 per cent), 'predictability of the outcome' (11 per cent) and 'the familiarity [of the respondent] with the jurisdiction' (9.3 per cent). Most of the factors can be categorised as either having to do with the intrinsic quality of the judicial system ('quality of judges and courts', 'predictability of the outcome', etc.) or having to do with how it is perceived ('familiarity with the jurisdiction', 'a common practice of choosing that court', etc.).

Frequently, choice of court is made together with the choice of law. Parties match the law and the court of a jurisdiction in order to reduce complexity. It becomes more complex if a foreign law is interpreted by a foreign judge. Considering this, I asked respondents which was more important during the choice of court, substantive law or procedural law (Question 13). Results do not provide a clear answer, but preferences lean on the substantive law side, which may indicate that choice of court follows the choice of law. In addition, I asked respondents to reflect on the differences between common law and civil law and in which of them it was easier to litigate. These questions are important considering that it is often mentioned that an advantage of London is the use of common law compared with the civil law of continental Europe. Respondents agree (Question 21) that the differences between common law and civil law are considerable, but they disagree that it is easier to litigate in a common law country compared with a civil law country (Question 22). These results seem to indicate that the difference between civil and common law is not that important in making a choice of court.

23. These results are comparable with the results of the Vogenauer (*see* n. 17) and the Lein surveys (*see* n. 2), thought the target population is different.

Figure 5

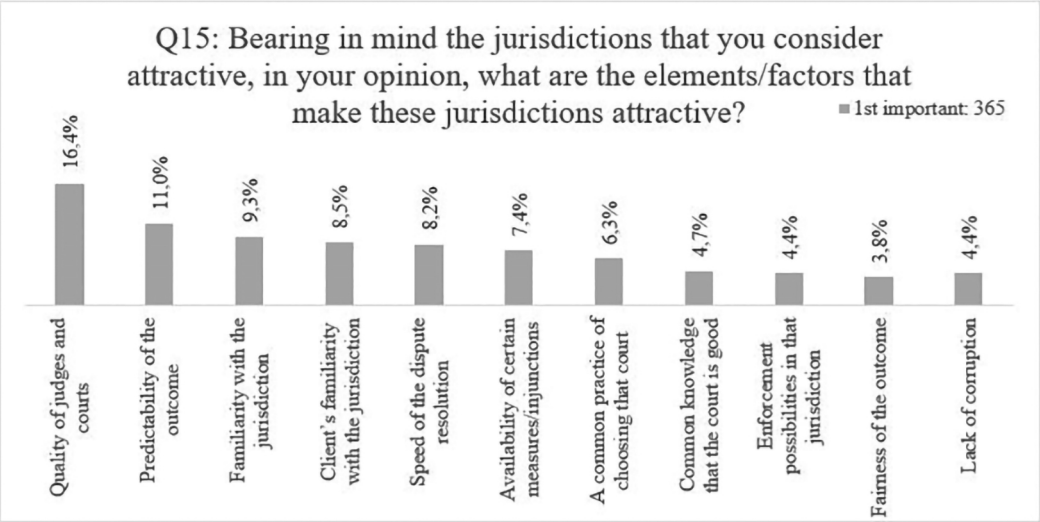
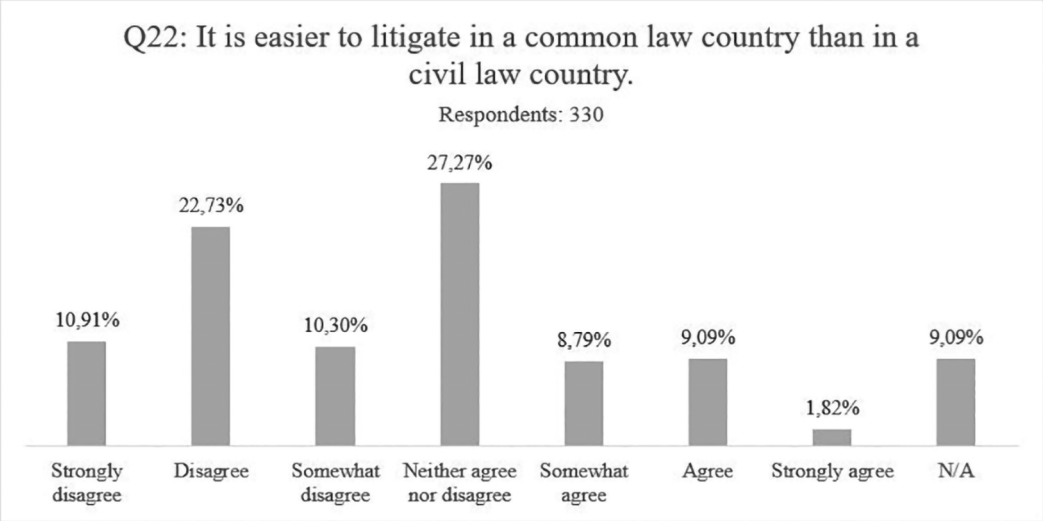


Figure 6



2.2.4 Analysis

On the basis of the results of the survey, it can be said that lawyers have two groups of preferences: one is litigation service related, and the other is court perception related. Results from the survey hint that court perception preferences are very important, and perhaps more important than litigation service preferences.[24] For example, according to the civil justice part of the Rule of Law Index (RLI), England (as the United Kingdom) is fourteenth in the world and eighth in Europe.[25] Also an analysis of the EU Justice Scoreboard shows that the United Kingdom's civil judicial system ranks seventh in the EU.[26] In view of these results, England appears to have a qualitative judicial system, but certainly not the best in the EU. One can rebut that England has the best (international) commercial courts in Europe; however, there is no evidence for this. So, while England does not have the best judicial system, it seems that lawyers' perception about its courts is of a relatively high level. In fact for respondents, 'familiarity with the jurisdiction', 'client's familiarity with the jurisdiction', and 'a common practice of choosing that court' are some of the most attractive elements that indeed have little to do with the intrinsic qualities of the system and more with how it is perceived.[27] Indeed, evidence seems to support this claim. Results from Question 6 of the survey show that most of the respondents reported professional experiences in England. This number is almost double compared with that of the second-placed Germany, which speaks of the familiarity that lawyers (and perhaps their clients) have with England. According to the results from Question 20, the majority of the respondents (69.9 per cent) considered England to actively trying to attract litigants in its court system, the Netherlands and Germany are second and third with 23.9 per cent and 23.1 per cent of the responses, respectively. Further-

24. For this, consider also the surveys of Durnad-Barthez, and Vogenauer. Above n. 17 and 18.
25. In the EU, England ranks seventh after Netherlands, Denmark, Germany, Sweden, Finland, Austria, and Estonia. RLI data can be accessed at http://data.worldjusticeproject.org/#table (last visited 8 February 2019).
26. *See* n. 3, at 245.
27. Already, the research of Lein was suggesting this for a different group of respondents. *See* Lein n. 2.

more, the Law Society of England and Wales continually promotes London's courts in international events.

In sum, lawyers consider two groups of preferences when making a choice of court: one is the litigation service preferences, and the other is court perception preferences. The case of England, which is the most attractive jurisdiction in the EU, shows that court perception preferences are very important. In fact, considering that the quality of English courts is not better than many others in Europe, perception seems to be essential to its success. For the new courts, therefore, it is important not only to be highly qualitative, but also to be perceived positively. If the system where they are embedded does not have a sufficiently positive perception, the new courts should try to improve this. If they do not improve this court perception, their success is at risk.

3 Strategies of the New International Commercial Courts

The previous section demonstrated that in some situations lawyers may dominate their clients, and when it comes to the choice of court chances are high that they will be the one to take the decision. On the basis of the results of the survey, lawyers seem to have two types of preferences when it comes to cross-border courts: one includes those related to the litigation service of the court, while the other one includes court perception preferences. To be successful, the new courts' offer should match these preferences. The new courts, however, can respond only to some of the preferences of lawyers, for example, 'quality of judges and courts', 'predictability of the outcome' or 'speed of the dispute resolution'. Other preferences, such as 'familiarity of the jurisdiction', 'enforcement possibilities in that jurisdiction' or 'a common practice of choosing that court', can be related only to the quality and reputation of the jurisdiction where the new court is established. To assess whether or not the new courts will match the preferences of their potential users, it becomes important to consider not only their offer but also the health of the judicial system where they operate. This section takes on this task. It provides an overview of the judicial system where each new court operates, focusing on the particular elements that fulfil the preferences of parties when making a choice of court; in addition, it makes on overview of how the offer of the new courts matches the preferences of their potential users. To assess the offer of each judicial system, I use data from the EU Judicial Scoreboard (Scoreboard) and the Rule of Law Index (RLI) with a particular attention on the elements considered important by potential court users. I highlight, therefore, how attractive the new courts would look for prospective court users. Despite being part of the bigger competitive picture, I omit England from this analysis because it does not offer a new court, but, instead, promotes its already existing judicial system.

The EU Judicial Scoreboard is a collection of data related to the civil justice system of each EU Member State. In the words of the Commissioner for Justice Věra Jourová '… it helps Member States to address the challenges they are facing with their justice system'.[28] Despite the name there is no ranking of the best or worst jurisdiction. This has never been the aim of the Scoreboard. Data collected by each Member State are organised and reported into categories, with figures being the smallest unit that report data. In each figure, Member States are ranked on the basis of their performance. Every figure provides relative[29] data about the health of each Member State; I use the ranking in some of the figures to consider the general offer that the new courts provide.

The Rule of Law Index is a study organised by the World Justice Project, a not-for-profit organisation based in the United States. As the name suggests, the RLI collects data on several factors that influence the rule of law in each of the jurisdictions it studies. One of the factors considered is civil justice, for which seven sub-factors are considered.[30] Data from the civil justice factor of the RLI are used hereunder to consider the general outlook of the new courts' judicial system.

Some criticism about these instruments exits. Both the Scoreboard and the RLI remain quantitative studies with little qualitative insight. Furthermore, the data they provide come with little context, which can be misleading. Despite the lacunae, both the Scoreboard and the RLI are unique in their task, and provide a compilation of data helpful in quantitative longitudinal and in-depth studies. The analysis, hereunder, refers only to some of the figures of the Scoreboard, in particular, Figure 5 ('Number of incoming civil and commercial litigious cases'), Figure 8 ('Time needed to resolve litigious civil and commercial cases'), Figure 16 ('Number of pending litigious civil and commercial cases') and Figure 59 ('Businesses' perception of judicial independence').

The next section reports data from the Scoreboard and the RLI for each of the new courts' jurisdictions. It makes an inventory of the offer of the new courts together with the judicial system where they are embedded. In Section 3, the results of this inventory will be compared with the lawyers' preferences to understand how much the offer of the new court matches them.

28. Foreword to the 2018 EU Justice Scoreboard.
29. Relative because it is difficult to find a reference frame in which to assess the importance of the data. In absence of any reference frame, data from different Member States can be compared with each other to consider the relative health of each Member State in relation with the others.
30. These sub-factors are 'Accessibility and affordability', 'No discrimination', 'No corruption', 'No improper government influence', 'No unreasonable delay', 'Effective enforcement', and 'Impartial and effective ADRs'.

3.1 Belgium – Brussels International Business Court

Belgium scores eighteenth in the world for the civil justice factor of the RLI, with high results on all the sub-factors but the 'no unreasonable delay'. Compared with the other Member States considered in this study, Belgium scores better than France, but lower than the Netherlands and Germany. Compared with the EU and EFTA[31] and North America, Belgium ranks eleventh out of twenty-four jurisdictions. Compared with developed countries, Belgium is rather average with no clear excellence.

Data from the Scoreboard (Figure 5) show that Belgian courts receive a relatively high number of civil and commercial litigious cases. Only Romania has higher figures. It is obvious to think that the high number of cases may play a role in the ability of the Belgian courts to resolve them. Surprisingly enough, Belgian courts are the fastest in the EU in resolving litigious civil and commercial cases (Figure 8). While this is true for the first instance courts, data from third instance court show that these are amongst the slowest (seventh place from the bottom, Figure 9). It can be argued that part of the large number of cases that are resolved by the first instance courts reach the higher courts, which do not have the capacity to process this volume and thus create delays and case backlog. As a result, the number of pending cases in Belgium is somehow average compared with other EU Member States (Figure 16), and while better than France, it is not as good as the Netherlands or Germany. As regards independence, businesses consider Belgian courts to be more independent than those of Germany or France. Belgium ranks ninth in this figure compared with the second-ranked Netherlands, and the third-placed United Kingdom.

Belgium is the last actor to enter the competition to attract international commercial cases and the race to create a special court for this. As mentioned in the introduction, Belgium plans to create the Brussels International Business Court (BIBC). The prominent characteristics of the BIBC will be as follows: (a) court proceedings will be held in English; (b) the court will be composed of a judge supported by two lay judges selected among experts in the field of dispute, and lay judges may also be non-Belgian nationals; (c) proceedings will be conducted according to the UNCITRAL Model Law on international commercial arbitration; (d) the possibility of appeal will be limited only to cassation; and (e) court fees will be relatively high.[32]

The draft law suggests that the BIBC is trying to avoid any association with the current court system in Belgium.[33] It does this in offering a new procedure that is, UNCITRAL Model Law, a special composition of the judging panel, and the absence of appeal. These may address three issues related to the Belgian courts. The first one is the relative slow pace at which commercial cases are resolved in Belgium's higher courts. Reducing the possibility to appeal provides parties with a final decision, but more importantly it gives the impression that court proceedings are fast and to the point. The second issue is the quality of judges. The BIBC will have in its offices selected judges, probably among the best in Belgium. These judges will be supported, case by case, by lay judges with considerable experience in the field.[34] The final issue is the relative obscurity of the Belgian courts. Data from the survey, analysed in Section 1, show that few lawyers are familiar with the Belgian courts. These data in conjunction with the data on lawyers' preferences when choosing a court, suggest that any new court aspiring to attract cross-border commercial cases should create a fan base. And this fan base can be created more easily by providing them with a set of rules that is relatively 'famous', in this case the UNCITRAL Model Law. However, this is only one facet of the same object, which includes familiarity with the court, common knowledge that the court is good, and a common practice of choosing that court, which do not seem to be addressed by the BIBC project.

3.2 Germany – Chambers for International Commercial Disputes

In the civil justice factor of the RLI, Germany ranks third in the world, and in the EU, EFTA, and North America subgroup, with above-average high scores in each sub-factor. In particular, the German civil justice scores high in the 'No corruption', 'No improper government influence', and 'Effective enforcement' sub-factors. Only the Netherlands and Denmark score better than Germany in the RLI ranking. Data from the Scoreboard show that Germany has relatively few incoming civil and commercial litigious cases (Figure 5). This number is higher compared with the Netherlands, but lower compared with Belgium and France. German courts are on the median line for the time needed to resolve civil and commercial cases, when it comes to both first instance (Figure 8), and higher instance (Figure 9). The speed of the German courts is reflected in the low number of pending cases (Figure 16), which is higher than the Netherlands, but lower than Belgium and France. Businesses' perception of judicial independence in Germany has been constantly falling from 2010 to 2017 (Figure 59). It is not clear why this is happening, but it may require some attention from the government.

Data from both the RLI and the Scoreboard may be interpreted to show that German courts are better than those of France and Belgium, but not better than those of the Netherlands. Germany seems to score relatively high on the time needed to resolve a dispute, although

31. European Free Trade Association includes Iceland, Lichtenstein, Norway, and Switzerland.
32. The bill can be accessed at the official page of the Belgian parliament: http://www.dekamer.be/doc/flwb/pdf/54/3072/54k3072011.pdf (last visited 8 February 2019).
33. This is also accepted in the bill. In particular *see* page 10-11.
34. Selecting the best judges to sit in the courts and supporting them with lay judges with a high reputation in field may be very productive according to Coyle. This is often mentioned as a success factor for arbitration. J.F. Coyle, 'Business Courts and Interstate Competition', 53 *William and Mary Law Review* 1915, at 1972-1973 (2012).

the fall of the "independence perception" needs to be addressed. Fast courts give the impression of an efficient court, which is also what the brochure 'Law Made in Germany' claims.[35] It should be added, though, that the fact that cases are resolved relatively fast in German courts does not mean that they are efficient; other factors may be important here.[36]

Germany's attempt to create a special setting for international commercial disputes is rather complicated. Some attempts to create special English-speaking sections in certain courts have failed.[37] The failure may be attributed to Article 184 of the Courts Organisation Act, which requires the use of German during court proceedings.[38] To overcome this, the proponents of the chambers for international commercial disputes have put forward amending the Courts Organisation Act with the intention to allow parties to use English in these special chambers.[39] Other parts of the proposal focus on time management, and a streamlined and predictable process. Apart from this proposal, which attempts regulation on a national level, on regional level the 'Frankfurt Justice Initiative' seems to be the most advanced. This Initiative was started by a group of academics and lawyers with the support of the Minister of Justice of the Federal State of Hessen.[40] The aim of the Initiative was to capitalise from the possible litigation migration from post Brexit London, the position of Frankfurt as an international financial hub, and the good reputation of the German courts. An achievement of the Initiative was the creation of the Chamber for International Commercial Disputes at the Lower State Court in Frankfurt (*Landgericht Frankfurt am Main*), which in its own words 'was established to create an attractive forum for cross-border disputes of English-speaking parties allowing them to benefit from Germany's reliable and expeditious public dispute resolution mechanisms and highly efficient enforcement mechanisms'.[41]

Germany's court system health seems to be better than most of the other Member States in Europe. Considering the data from the survey analysed in Section 1, Germany is the jurisdiction where lawyers have more experience after England and Wales, while its courts report fast proceeding times. These are some of the most important ingredients for creating an attractive jurisdiction for international commercial courts. In addition, Germany has a strong export-oriented economy, with a potential for cross-border litigation. What Germany lacks, in my opinion, is more aggressive promotion of its system and a different approach to establishing international commercial courts. Perhaps, it would be better to establish a single commercial court at federal level instead of courts at state level, though this may be more challenging from the legislative point of view. A positive aspect of this idea is that such a court would accumulate experience and a fan base faster than a multitude of small courts. Furthermore, it would concentrate the most talented judges in a single place, providing a more attractive venue, while reducing competition between the different federal states.[42] As it was the case with Belgium, Germany lacks a clear strategy to promote its new courts. It may be too soon to think about this considering that the proposal is still under scrutiny in the Parliament, but strategies that target lawyers' court perception are of considerable importance as the above analysis showed.

3.3 France – International Chamber for Commercial Disputes

Based on the results of the RLI, France's civil justice is twenty-second in the global ranking, and thirteenth in the EU, EFTA, and North America group. France ranks better than Belgium, but worse than the Netherlands, Germany, and the United Kingdom. France seems to have a low score in the 'No discrimination' subgroup, while the score in the other subgroups is high. Relative to the other Member States, French courts receive an average number of civil and commercial litigious cases, which is lower than that of Germany and the Netherlands, but higher than that of Belgium. However, French courts seem to be relatively slow, being almost at the bottom of the table, for the time needed to resolve litigious civil and commercial cases (Figure 8). This situation does not improve even if the first, second, and third instance are considered (Figure 9). In both these figures, France is the last from the jurisdictions studied in this article. The slow processing time reflects also in the number of pending cases (Figure 16), which is the sixth highest in the EU. France, however, has a similar score with that of Germany when it comes to businesses' perception of judicial independence, but compared with Germany the perception is improving and not deteriorating.

In February 2018, the Court of Appeal of Paris inaugurated a special chamber for international commercial disputes.[43] This special chamber will serve as second

35. Law Made in Germany is a brochure prepared and published by a consortium of German institutions, which promote the German legal culture including law and courts. It is also served by a dedicated website: https://www.lawmadeingermany.de/ (last visited 8 February 2019).
36. For instance better resources, better trained lawyers, more human resources in courts, etc.
37. In 2010, the courts of Cologne, Bonn, and Aachen created a project to use English as the language of oral proceedings in case parties would ask for it. The attempt was not very successful because apart from the oral part, the rest of the process was in German. https://www.lto.de/recht/hintergruende/h/modellprojekt-in-nrw-lg-koeln-goes-international/ (last visited 8 February 2019).
38. "Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077), das zuletzt durch Artikel 1 des Gesetzes vom 12. Juli 2018 (BGBl. I S. 1151) geändert worden ist".
39. Deutscher Bundestag, Entwurf eines Gesetzes zur Einführung von Kammern für Internationale Handelssachen (KfiHG), Drucksache 19/1717 of 18 April 2018, Begründung, at 8-10 available at http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf (last visited 8 February 2019).
40. http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/ (last visited 8 February 2019).
41. https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international (last visited 8 February 2019).
42. Judges concentration is similar to what was already mentioned in n. 30 above.
43. The protocol that establishes this chamber: https://www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_English_Protocole

instance to the already existing International and European Chamber of the Paris Commercial Court.[44] The main features of these chambers are the use of English in documentary evidence (procedural acts will be drafted in French) and during hearings, which will have a bigger place in the process – inspired by the common law tradition. Court decisions will be issued in French, accompanied by a sworn translation in English. Said features have been agreed between the courts of first instance and appeal, and the bar association of Paris. From a positive perspective, French courts and lawyers, with this agreement and the blessing of the Ministry of Justice, have avoided the legislative path that goes through the parliament.[45] From a negative perspective, this solution may be pragmatic, but legal certainty may be affected here. Considering that the use of English before the courts is based on a memorandum of understanding between the courts and the bar of Paris, parties may contest the use of English during court proceedings as a violation of French law and Constitution.[46]

France is one of the strongest economies in the EU, and also the centre of many international organisations and companies. The prospect of Brexit in conjunction with the need to offer a premium service to international commercial litigants resulted in a renovation of the existing international commercial chambers. Supposedly, Brexit provides a financial opportunity to attract litigants migrating from the London courts, while financial opportunity provides a reason for creating new streamlined court procedures. In fact, if the new procedures agreed between the Parisian courts and the bar association can improve the performance of the French courts, the later ones can become very attractive to international commercial litigants. On the positive side, France is the second jurisdictions with which lawyers have the most experience after the first-placed England and Wales.[47] This fact plays an important role considering that 'familiarity with the court' and 'a common practice of going to that court' are two of the elements that influence choice of court for lawyers. Another positive factor of the French courts is their early start, which may have created a fan base or 'a common practice of going to that court', which may be detrimental to fend off the new emerging courts from Belgium, Germany or the Netherlands.

3.4 The Netherlands – The Netherlands Commercial Court

The Netherlands has the best civil justice system in the world according to the RLI, with a very high score on all the subgroups, in particular in 'no corruption' and 'no improper government influence' subgroups. Data from the Scoreboard show that the Netherlands receives a relatively low number of civil and commercial cases, which is almost seven times less than Belgium and almost two times less than Germany (Figure 5). This low number of incoming cases may play a role in the short amount of time needed to resolve them. Figure 8 shows that Dutch courts are relatively fast when the first instance is considered, surpassed only by Belgium, Latvia, and Luxembourg. The same can be said for the number of pending litigious civil and commercial cases, which is the fourth lowest in the EU (Figure 16). Furthermore, the Netherlands is the second Member State with the highest perception of judicial independence by companies (Figure 59). Considering the RLI and the Scoreboard, it is clear that the Netherlands scores not only better than Belgium, Germany, and France, but also better than the United Kingdom.

Having this in mind, the First Chamber of the Dutch parliament approved the law for the establishment of the Netherlands Commercial Court (NCC) on 11 December 2018.[48] The NCC opened its doors on 1 January 2019 as a special chamber of the District Court of Amsterdam, which is specialised in resolving international commercial disputes in English. Parties should specifically agree to go to this court for resolving their disputes. Court fees are higher compared with the normal court to justify the special organisation and special procedural rules created for this court. The aim of these rules is to improve efficiency, and to offer case management in a case-by-case approach.[49] One positive aspect of the NCC proposal is that it requires some marketing plans.[50] If perhaps these marketing plans would suggest also activities that tackle the court perception of lawyers, it may pave the road to success for the NCC.

Considering the high score of the Netherlands, it seems difficult to find an area of improvement for the Dutch courts. However, the Dutch should not rest on laurels and should consider also that the success of the NCC depends also on how it is perceived. Attracting cross-border litigants requires considerable effort, which the NCC's promoters seem to acknowledge. But more effort will be needed to establish a common practice of choosing this court. Two factors may be essential here, one is

%20barreau%20de%20Paris%20-%20Cour%20d'appel%20de%20Paris_mai2018.pdf (last visited 8 February 2019).

44. The protocol: https://www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_EnglishVersion_Protocole%20barreau%20de%20Paris%20-%20Tribunal%20de%20commerce%20de%20Paris.pdf (last visited 8 February 2019).
45. *See* the article from Biard in the same issue of this journal. A. Biard, 'International Commercial Courts in France: Innovations Without Revolution?', *Erasmus Law Review* (2019).
46. E. Jeuland, 'The International Division of the Paris Commercial Court', 4 *Tijdschrift voor Civiele Rechtspleging* 143, at 144 (2016).
47. Question 6 from the Survey.
48. G. Antonopoulou, E. Themeli and X.E. Kramer, '*No fake news: the Netherlands Commercial Court proposal approved!*', http://conflictoflaws.net/2018/no-fake-news-the-netherlands-commercial-court-proposal-approved/ (last visited 8 February 2019).
49. *See also* the bill on the NCC '*Reglement voor de internationale handelskamers van de rechtbank Amsterdam (NCC District Court) en het gerechtshof Amsterdam (NCC Court of Appeal)*' available at: https://www.rechtspraak.nl/SiteCollectionDocuments/concept-ncc-reglement-juni-2018.pdf (last visited 8 February 2019).
50. *See* the article from Bauw in the same issue of this journal. E. Bauw, 'Commercial Litigation in Europe: In Transformation: The Case of the Netherlands Commercial Court', *Erasmus Law Review* (2019).

Table 1 *New courts and preferred court elements*

	BE	DE	FR	NL
Quality of judges and courts	n	e n		e n
Predictability of the outcome	n	n	n	n
Familiarity with the jurisdiction		e	e	
Client's familiarity with the jurisdiction		e	e	e
Speed of the dispute resolution	e n	e n		e n
A common practice of choosing that court		e	e	
Common knowledge that the court is good	n			
Enforcement possibilities in that jurisdiction		e		e
Fairness of the outcome	e n	n		e n

e = existing measures, n = measures of the *new court*
Preferences related to lawyers' court perception are marked in italics.

Brexit and the possible migration of litigation from England to other EU jurisdictions, and the second is the fact that the Netherlands is one of the most preferred jurisdictions for registering a company. The hope here is that companies registered in the Netherlands may bring cases to the NCC, and perhaps Brexit and the proximity of the Netherlands with England may also play a positive role in this respect.

4 Conclusions: Matching Preferences and Courts

This article argues that the new courts in Belgium, Germany, France, and the Netherlands do not seem to properly address users' court perceptions. Section 1 showed that large and medium companies, assisted by their lawyers, are the most probable users of the international commercial courts. Lawyers and not clients are responsible for the choice of court as a result of the service type they provide, the qualities of the market for lawyers, and some other factors created as a combination of these two. In fact lawyers dominate their clients. This conclusion was confirmed by the findings of my survey, where lawyers responded that clients follow their suggestion or leave it to them to make the choice-of-court decision. Results from the aforementioned survey show that England and Wales is the most preferred jurisdiction for international commercial litigation for lawyers. For them the quality of judges, lack of corruption, and neutrality are the most important factors when choosing a court. In addition, factors such as familiarity with the court, client's familiarity, a common practice of choosing that court, and a common knowledge that the court is qualitative play an important role. Lawyers' preferences can be grouped in two: one is the group of preferences related to the litigation service, and the other is the group of preferences related to the perception of the court.

Some preferences have to do with the characteristics of the jurisdiction where the new court is located rather than new court itself. Section 2 suggested that the new courts – as international commercial litigation venues – together with the jurisdiction where they operate should match lawyers' preferences if they want to be successful. This article argues that the new courts do not match the preferences of lawyers, and in particular court perception preferences. To argue this, I made an inventory of the offer of the new courts and their jurisdictions in the second section. Data from the RLI and the Scoreboard were used to assess the quality of these jurisdictions. According to the RLI, the Netherlands has the best judicial system in the world, followed by Germany, Belgium, and France. France suffers in all the analysed figures of the Scoreboard, while the Netherlands is often among the top five EU jurisdictions. I have left England outside of this analysis because even though being a competitor it does not create any new court. In addition, I briefly described the design of the new courts, pointing out their respective strong points, in particular those that would make them attractive to lawyers. The results of this analysis are summarised in Table 1.

Summarising the analysis, Table 1 shows that the civil system of some jurisdictions already match certain preferences of international commercial lawyers (marked with 'e'). For example, the RLI shows that the Netherlands has already a good quality of judges and courts. This does not mean that Belgium and France have low-quality judges and courts, but they are not of the same level. Yet another example, results from the survey suggest that there is a stronger common practice of going to Germany and France to litigate international commercial disputes, compared with Belgium and the Netherlands, but way weaker compared with England. Next to the already existing attributes of the judicial systems in

Table 1, I have added which one of the preferences are addressed by the new courts (marked with 'n'). Evidently the new courts address important issues such as speed of dispute resolution, predictability of the outcome, and fairness of the outcome. For example, the BIBC aims at a streamlined process, which should be able to resolve a dispute very fast. Or the fact that the new courts aim at a new structure with 'handpicked judges' shows that they want to increase the quality of judges and courts. What is missing in these projects is a plan to address the group of preferences related to lawyers' court perception (marked in *italics*). While the promoters of these new courts may be aware (*e.g.* the Netherlands) of the need to 'convince' lawyers to use these courts, it is hard to see any strategy or attempt to promote them. Most emblematic is that all the activities of the 'Frankfurt Justice Initiate' have been held in German in Germany, while the court is intended to be international and in English. It can be argued that these activities aimed at convincing the local legal community of the need of such a court; however, the international community deserves attention as well. As opposed to this approach, England actively promotes its jurisdiction on a global level and mostly to lawyers. Perhaps the promotion of its courts, combined with a tradition to go to London to litigate, and a qualitative judicial system is the key of the English success. Perhaps the outlook is as important as the substance – a lesson that the new courts should learn fast if they want to succeed.

In sum, the new courts and their supporting jurisdictions seem to offer what the international commercial litigants want. However, they do not seem to do much about court perception–related elements. It remains to be seen if this will change in the future; otherwise, the new courts increase the chances of not succeeding in this race.

5 Final Remarks

This article shows that some jurisdictions in the EU are at different stages of creating international commercial courts, with the aim of attracting cross-border litigants. While the new courts are an improvement compared with the local courts, they should do more to change the perception of lawyers about them. In this final section, I want to address the issue of Brexit and conclude this article with two recommendations.

As it was mentioned, the new courts consider Brexit as an opportunity to carve out for themselves a piece from the English pie. Brexit therefore serves two functions. It is not only a catalyst for making haste to create the new courts, but also a new opportunity of profit for them. So while, Brexit is not the reason for building the windmill of the new courts, it certainly is the wind that moves their sails. What is going to happen remains rather speculative, but according to a Thompson Reuters report, English lawyers think that their workload will decrease after Brexit, while European lawyers think that their workload will increase.[51] Some respondents from the same survey suggest that, after Brexit, cases may migrate from London's court to arbitration. However, arbitration lawyers remain sceptic about this idea. A survey, organised by White & Chase and Queen Mary University of London, found that lawyers think that London will survive as the main seat where to conduct arbitration in Europe, but no increase in the workload can be expected.[52] Interestingly, this survey finds that lawyers prefer London firstly for its reputation and secondly for being neutral and impartial. As suggested by the results of this survey, but also by the analysis in this article, reputation, perception, and image play an important role in choosing a forum. It is therefore advisable for the new courts to consider the following suggestions.

First, competing jurisdictions should not only try to promote their courts as if they were a product, by highlighting the benefits and the gains compared with other competitors, but also change the perception lawyers and their clients have of their jurisdiction. Second, the new courts should try to make local lawyers their *clients habituels* so that habit and common knowledge is created in a community, which can later be exported abroad. If the new courts would also pay attention to these points, they will have more chances to beat England at their own game.

51. Thompson Reuters®, '*Catalyst or Catastrophe? How Brexit Will Impact Law Firms*', (2018), Thompson Reuters®, London.
52. White&Chase® and Queen Mary University London, '*2018 International Arbitration Survey: The Evolution of International Arbitration*', (2018), White&Chase® and Queen Mary University London, London.

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The Singapore International Commercial Court: The Future of Litigation?

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Abstract

The Singapore International Commercial Court ('SICC') was launched on 5 January 2015, at the Opening of Legal Year held at the Singapore Supreme Court. What prompted the creation of SICC? How is the SICC model of litigation different from litigation in the Singapore High Court? What is the SICC's track record and what does it tell us about its future? This article seeks to answer these questions at greater depth than existing literature. Importantly, it examines these questions from the angle of reimagining access of justice for litigants embroiled in international commercial disputes. It argues that the SICC's enduring contribution to improving access to justice is that it helps to change our frame of reference for international commercial litigation. Hybridisation, internationalisation, and party autonomy, the underpinning values of the SICC, are likely to be the values of the future of dispute resolution. International commercial dispute resolution frameworks – typically litigation frameworks – that unduly emphasise national boundaries and formalities need not and should not be the norm. Crucially, the SICC co-opts a refreshing public-private perspective to the resolution of international commercial disputes. It illuminates on the public interest element of the resolution of such disputes which have for some time fallen into the domain of international commercial arbitration; at the same time, it introduces greater scope for self-determination in international commercial litigation.

Keywords: international commercial court, Singapore, dispute resolution, litigation

1 Introduction

The Singapore International Commercial Court (SICC) was launched on 5 January 2015 at the Opening of Legal Year, held at the Singapore Supreme Court, before a curious audience comprising both local and foreign lawyers.[1] The SICC is not the first international commercial court that the world has seen. The famous Dubai International Financial Centre Courts (DIFCC)[2] were established in 2004 to cater to the resolution of civil and commercial disputes arising from the special economic zone, the Dubai International Financial Centre.[3] But the SICC is indubitably the first of its kind. It was not created to foster investor confidence by providing for a completely different system of administration of justice from the indigenous legal system. On the contrary, the SICC was established on the foundation of a mature and established legal system that investors already have confidence in. It was set in operation before the plans for establishing the international commercial courts in various European countries and China were formulated. What prompted the creation of SICC? How is the SICC model of litigation different from litigation in the Singapore High Court? What is the SICC's track record, and what does it tell us about its future?

This article seeks to answer these questions in greater depth than does the existing literature. Importantly, it examines these questions from the angle of reimagining access to justice for litigants embroiled in international commercial disputes. It argues that the SICC's enduring contribution to improving access to justice is that it helps to change our frame of reference for international commercial litigation. Hybridisation, internationalisation and party autonomy, the underpinning values of the SICC, are likely to be the values of the future of dispute resolution. International commercial dispute resolution frameworks – typically litigation frameworks – that unduly emphasise national boundaries and formalities need not and should not be the norm. Crucially, the SICC co-opts a refreshing public–private perspective to the resolution of international commercial disputes. It illuminates the public interest element of the resolution of such disputes which have for some time fallen into the domain of international commercial arbitration; at the same time, it introduces a greater scope for self-determination in international commercial litigation.

The discussion comprises four main parts. The first part (Section 2) analyses the reasons for creating a Singaporean model of international commercial court at different levels: national interests, regional needs and

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1. A. See and M. Yip, 'Opening of Legal Year 2015: A Year for Pushing Boundaries', *Singapore Law Blog*, 6 January 2015, available at: http://www.singaporelawblog.sg/blog/article/75 (last visited 8 February 2019).
2. Dubai International Financial Centre Courts, 'About the DIFC Courts', available at: https://www.difccourts.ae/about-courts/ (last visited 8 February 2019).
3. The DIFCC's jurisdiction has expanded since to include jurisdiction in cases where parties have by written agreement submitted their disputes to the DIFCC, even if such disputes did not arise from activities in the Dubai International Financial Centre.

public interests. The second part (Section 3) discusses the salient features of the SICC litigation framework, highlighting the innovations in relation to jurisdiction, procedures, panel of judges, and foreign legal experts' participation. The third part (Section 4) critically examines the judgments handed down by the SICC to date to extract emerging patterns. The final part (Section 5) discusses two potential challenges that the SICC faces: competition from the Chinese international commercial courts and the international enforceability of Singapore judgments.

2 The Reasons for the Creation of the SICC

The idea of creating a Singaporean model of international commercial court was first mooted by the chief justice of Singapore, Sundaresh Menon, at the Opening of Legal Year 2013. As he recounted extrajudicially, his visit to the London Commercial Court in September 2012 brought fresh insights into how to further invigorate the dispute resolution landscape in Singapore. In his words,

> The London experience suggests that arbitration and commercial courts are not competing players in a zero-sum game. Rather, there is room for co-existence and development of these two systems of dispute resolution.[4]

While the inspiration for the SICC originated from the London Commercial Court, the success of the London Commercial Court alone does not explain the need to create a new litigation model in Singapore. After all, the London Commercial Court is very much a national court in design and operation. What Chief Justice Menon's account does clarify is that his vision for the Singapore landscape is based on the *coexistence* of both litigation and arbitration in the resolution of international commercial disputes. In this part, we will critically review the reasons for the creation of the SICC from different perspectives.

2.1 National Interests

Let us start with the Singapore perspective. Legal services can be a highly profitable industry. According to Mr Shanmugam, Minister for Home Affairs and Law of Singapore, the value of the legal services section had grown by 71.5% from 2008 to 2013.[5] It should, thus, come as no surprise that investing in the expansion of the legal services industry – including the dispute resolution services subsector – would be a natural move to make. Nor was it coincidental that the Singapore International Mediation Centre (SIMC) and its training arm, the Singapore International Mediation Institute (SIMI), were launched in 2014. With a booming arbitration business sector helmed by the successful Singapore International Arbitration Centre (SIAC),[6] the obvious initiative to take up would be invigorating the litigation services subsector. Singapore was gearing up to become the leading one-stop shop for dispute resolution. The SICC, the SIAC and the SIMC (in tandem with the SIMI) are the hallmarks of the nation's three-pronged strategy to become a premium dispute resolution hub through a comprehensive offering of dispute resolution services. Singapore's game plan is to augment the menu of dispute resolution options for potential users.

The next question is why a new court, as opposed to improving the existing one, namely the Singapore High Court, was created? Institutionally, there are two advantages of creating a new 'court'. First, a new litigation model provides a clean slate on which innovations may be made. Second, the creation of a *new* litigation model is a marketing strategy to highlight Singapore's thought leadership in dispute resolution and, accordingly, build a brand image. From the user perspective, the creation of a new court, while retaining the traditional Singapore court, represents a *choice* between two systems of litigation. It signals to the potential users that autonomy in litigation services is an important value under Singapore law.

2.2 Regional Needs?

The prelaunch SICC feasibility study – the Report of the Singapore International Commercial Court Committee (SICC Committee Report) – states:

> Cross border investment and trade into Asia and between Asian economies is expected to continue to grow, fuelling the need for a neutral and well-regarded dispute resolution hub in the region.[7]

The SICC Committee Report further points out that arbitration alone cannot fulfil that important role of providing satisfactory dispute resolution services:

> Arbitration has thus far been the primary means of international commercial dispute resolution within the region, but its increasing currency has highligh-

4. S. Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', 19 January 2015, at para. 10, available at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf (last visited 8 February 2019).
5. Z. Hamzah, 'Positioning Singapore as Asia's Legal Capital', *The Straits Times*, 16 January 2015, available at: https://www.straitstimes.com/opinion/positioning-singapore-as-asias-legal-capital (last visited 8 February 2019). In the same commentary, it was reported that the growth rate of Singapore's legal sector outstripped that of the overall economy.
6. In 2015, the year in which the SICC was launched, the SIAC received 271 cases from 55 jurisdictions, setting a new record for the highest number of cases filed since its commencement in 1991. *See* 'SIAC Announces Record Case Numbers for 2015', *Singapore International Arbitration Centre*, 25 February 2016, available at: http://www.siac.org.sg/images/stories/press_release/SIAC%20Announces%20Record%20Case%20Numbers%20for%202015_25%20February%202016.pdf (last visited 8 February 2019).
7. Report of the Singapore International Commercial Court Committee, 29 November 2013, at para. 8, available at: https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf (last visited 8 February 2019).

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ted weaknesses that litigation in an international court is better placed to address – the coercive jurisdiction of a court may be necessary in a multiple party dispute; the subject matter of the dispute may not be amenable to arbitration (such as special torts arising from contract, international intellectual property or trust disputes); and the New York Convention, while wide in its reach, may not be fully effective for enforcement in some countries.[8]

A study on legal systems in the Association of South-East Asian Nations (ASEAN) in 2018[9] highlighted that the domestic courts of a number of ASEAN countries adopt their indigenous language as the language of court proceedings, creating a language barrier for foreign litigants to access justice through litigation in the domestic courts. Further, litigation in domestic courts in a number of ASEAN countries is not favoured owing to perceptions of uncertainty, unpredictability in outcome, protracted processes and lack of judicial independence. As for arbitration, the study points out that there is a lack of judicial support for the recognition or enforcement of foreign arbitral awards in some ASEAN countries, even though some of these countries are Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention). The study also incorporates a survey component, one of whose findings is that slightly more than half of twenty-four respondents (businesses operating in ASEAN) saw the need for a 'new ASEAN-wide dispute resolution structure which specialises in hearing contract disputes between ASEAN businesses'.[10]

Incidentally, in the same year that Chief Justice Menon mooted the idea of establishing an international commercial court in Singapore, China announced its ambitious plan for the transnational 'One Belt, One Road' project, which is now simply known as the Belt and Road Initiative (BRI). Although the SICC Committee Report made no mention of the impact of BRI on the dispute resolution needs of the region, it is envisaged that the BRI will further increase the volume of commercial dealings between parties in the BRI countries and that disputes are, therefore, likely to increase in the coming years. For this reason, China launched two Chinese international commercial courts, one in Xi'an and the other in Shenzhen (the CICC), in June 2018 to serve the dispute needs of the BRI. A review of the CICC jurisdictional framework reveals that the CICC is not designed to take on all commercial disputes arising from the BRI.[11] There is, therefore, a gap for the SICC to fill.

Although there is a regional need for a well-regarded and efficient dispute resolution institution, it is too early to tell whether SICC can fulfil that function. Challenges would include the international enforceability of Singapore judgments as well as competition from other institutions, including arbitration centres[12] and other international commercial courts. We will look at these challenges in Section 5.

2.3 Public Interests?

The increasing popularity of using arbitration for the resolution of commercial disputes is affirmed by the Queen Mary University of London and White & Case LLP 2018 International Arbitration Survey (QMUL International Arbitration Survey 2018) findings.[13] Ninety-seven per cent of the respondents indicated international arbitration as their favoured dispute resolution mechanism, either as a stand-alone method or in combination with alternative dispute resolution (ADR). The perceived advantageous features of international arbitration, in descending order, are enforceability of awards, avoiding specific legal systems/national courts, flexibility, and ability of parties to select arbitrators. Ninety-nine per cent of the respondents 'would recommend international arbitration to resolve cross-border disputes in the future'.[14] In a survey conducted by the Singapore Academy of Law's International Promotion of Singapore Law Committee in 2016, arbitration similarly emerged as the preferred dispute resolution mechanism.[15]

The advantages of arbitration notwithstanding, from a public interest standpoint, the fact that the arbitral proceedings and awards are confidential would mean that the application and development of commercial law are hidden from the world.[16] As arbitral awards do not have a binding effect and the merits of the award are not open to review, there is no system of ensuring consistent application and development of commercial law in arbitral practice. While this may suit the parties inter se, a 'hidden from view' approach impedes the coherent development of commercial law. If the popularity of using arbitration continues, visible development of com-

8. *Id*., at para. 16.
9. L. Hsu, P. Koh & M. Yip, 'Report: Improving Connectivity between ASEAN's Legal Systems to Address Commercial Issues', 22 March 2018, available at: https://www.canasean.com/reports/ (last visited 8 February 2019).
10. *Id*., at 105-6. *See further* P. Koh, 'Enhancing Economic Co-operation: A Regional Arbitration Centre for ASEAN?', 49 *International and Comparative Law Quarterly* 390 (2000).
11. M.S. Erie, 'The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative"', 22(11) *American Society of International Law Insights* 1 (2018); Z. Huo and M. Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court', *International and Comparative Law Quarterly* (2019, forthcoming).
12. For instance, the recently rebranded Asian International Arbitration Centre (formerly Kuala Lumpur Regional Centre for Arbitration) would be keen to compete for dispute business.
13. Queen Mary University of London and White & Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration', 2018, at 2, available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF (last visited 8 February 2019).
14. *Ibid*.
15. For a summary of the survey findings, *see* Singapore Academy of Law, 'Study on Governing Law & Jurisdictional Choices in Cross-border Transactions', 11 January 2016, available at: http://www.ciarb.org.sg/wp-content/uploads/2016/02/SAL_Singapore_Law_Survey.pdf (last visited 8 February 2019).
16. *See generally* C.A. Rogers, 'Transparency in International Commercial Arbitration', 54 *Kansas Law Review* 1301 (2006).

mercial law (in the courts) will continue to decline. The merits of the common law system depend critically on a steady stream of cases to enable incremental development (including refinement or correction) of the law. Crucially, the arbitral outcomes do not *only* affect the commercial parties to the proceedings. The outcomes will necessarily generate downstream effects on other parties (*e.g.* the parties who would ultimately bear the costs of the decision or third parties related to the dispute but did not consent to participate in the same arbitration). Finally, the fact that arbitral proceedings are not subject to public scrutiny raised issues of accountability.[17] According to the QMUL International Arbitration Survey 2018 findings, respondents 'think that arbitration rules should include provisions dealing with arbitrator conduct in terms of both standards of independence and impartiality and efficiency (or lack thereof)'.[18]

In view of the foregoing concerns, there is a place for litigation. The practical question is the ways in which we can encourage commercial parties to choose litigation. In Section 3, we consider the innovative litigation framework of the SICC, which borrows from the arbitration template.

3 The SICC Litigation Framework

This part of the discussion reviews the innovative features of the SICC litigation framework, which may be broadly grouped into three categories: (a) jurisdiction; (b) procedural features and (c) international judges. All three aspects are critical to the delivery of justice.

To begin with an overview, the SICC was established as a division of the Singapore High Court.[19] Within the Singapore judicial system, the Singapore Court of Appeal is the apex court. Below the Court of Appeal is the High Court, and below the High Court is the State Courts.[20] The jurisdictional rules and procedural features of the SICC are set out in the Supreme Court of Judicature Act (SCJA)[21] and the Rules of Court, a subsidiary legislation of the SCJA.[22] As Singapore is a common law jurisdiction, the Singapore courts' interpretation and application of the legislative provisions – producing what may be described as a body of statute-based common law – is a binding source of law on the application of these legislative rules. Supplementing and clarifying the operation of the legislation are the SICC Practice Directions,[23] the SICC User Guides[24] and the SICC Procedural Guide.[25] However, these supplementary materials[26] are not formal sources of law.

3.1 Jurisdiction Over International and Commercial Actions

Existing literature has dealt extensively with the jurisdictional rules of the SICC from a private international law perspective.[27] The present analysis shall instead focus on highlighting the innovations and how they have improved access to justice for litigants.

3.1.1 Subject Matter Jurisdiction

The SICC hears 'international' and 'commercial' claims.[28] The term 'international' is generally defined by reference to parties' places of business: if they are in different states; if neither is in Singapore; or if one party's place of business is in a different state from either the state in which a substantial part of the obligations arising from the parties' commercial relationship is to be performed or the state with which the subject matter of the dispute is most closely connected.[29] Further, the definition 'international' allows parties to expressly agree that 'the subject matter of their claim relates to more than one State'.[30]

As for the meaning of 'commercial', a claim is considered 'commercial' if it arises from a commercial rela-

17. For instance, the arbitral practice of allowing party-appointed arbitrator has come under attack. *See, e.g.,* S. Menon, 'Adjudicator, Advocate or Something in Between?: Coming to Terms with the Role of the Party-appointed Arbitrator', 24 November 2016, available at: http://www.supremecourt.gov.sg/Data/Editor/Documents/CJ%20speech%20at%20CIArb%20Presidential%20Lecture%202016.pdf (last visited 8 February 2019).
18. Queen Mary University of London and White & Case LLP, above n. 13, at 3. *See generally* D.H. Wong, 'The Rise of the International Commercial Court: What Is It and Will It Work?', 33 *Civil Justice Quarterly* 205, at 216-19 (2014).
19. To avoid confusion, any reference to the 'High Court' or 'Singapore High Court' henceforth shall refer to the Singapore High Court sans the SICC division, unless otherwise indicated. For a diagram of the court structure, *see* Singapore International Commercial Court, Overview of the SICC, available at: https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc (last visited 8 February 2019).
20. For a more detailed discussion of the structure and responsibilities of the Singapore judiciary, *see* G. Chan, 'The Judiciary', in G. Chan and J. Lee (gen. eds.), *The Legal System of Singapore: Institutions, Principles and Practices* (2015), at 155.
21. Supreme Court of Judicature Act, ch. 322 (2007) (SCJA).
22. Rules of Court, ch. 332, s. 80 (2014).
23. In this article, a reference to the 'SICC Practice Directions' shall refer to the version that is effective as of 1 November 2018.
24. Reference to the SICC User Guides in this article refers to the version as at 31 January 2019.
25. These materials are available at: www.sicc.gov.sg (last visited 8 February 2019).
26. For instance, the SICC User Guides explicitly state that the contents are 'for reference purposes only' and are not 'binding on the [SICC]'. See https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf (last visited 10 February 2019).
27. *See, e.g.*, T.M. Yeo, 'Staying Relevant: Exercise of Jurisdiction in the Age of the SICC', 13 May 2015, available at: http://law.smu.edu.sg/sites/default/files/law/CEBCLA/YPH-Paper-2015.pdf (last visited 8 February 2019); M. Yip, 'The Resolution of Disputes before the Singapore International Commercial Court', 65 *International and Comparative Law Quarterly* 439 (2016); M. Yip, 'Navigating Singapore's Private International Rules in the Age of Innovative Cross-border Commercial Litigation Framework', in P. Sooksripaisarnkit and S.R. Garimella (eds.), *China's One Belt One Road Initiative and Private International Law* (2018) 55; A. Chong and M. Yip, 'Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore', 15 *Journal of Private International Law* 97 (2019, forthcoming).
28. Section 18D(*a*) SCJA; Order 110, rule 7(1)(*a*) Rules of Court.
29. Order 110, rule 1(2)(*a*)(i)-(iii) Rules of Court.
30. Order 110, rule 1(2)(*a*)(iv) Rules of Court.

tionship,[31] if it pertains to an in personam intellectual property dispute or if parties have expressly agreed that the claim is commercial in character.[32]

A striking commonality of the statutory definitions for 'international' and 'commercial' is that it admits parties' agreement on the nature of the claim. From a policy perspective, this approach upholds the value of party autonomy. Pragmatically, this approach also relieved the Singapore legislature of the difficult task of laying down workable and comprehensive definitions. It implicitly acknowledges that the distinction between 'international' and 'domestic' as well as between 'commercial' and 'non-commercial' is not a bright-line exercise. The SICC approach is, thus, to favour characterising the claim as 'international' or 'commercial' in the first instance for the purpose of commencement of proceedings in the SICC by according to the parties the right of determination. Overly technical definitions are thereby avoided. As will become clear in the discussion later on the SICC's in personam jurisdictional rules, where the SICC suit was commenced pursuant to an SICC jurisdiction clause, the SICC may decline to assume jurisdiction on exceptional grounds, in particular, by considering the character of the claim before it.[33]

3.1.2 Written Jurisdiction Agreement

There are two main ways in which international and commercial claims would come before the SICC.[34] The first way is by the parties' submission to the SICC's jurisdiction through a written jurisdiction agreement.[35] Consensual jurisdiction is a well-established basis of jurisdiction under Singapore law, even pre-SICC. What is novel is that even if the defendant is based abroad and service of legal process out of Singapore is therefore required, leave of court for extraterritorial service is *not* required.[36] By contrast, under the traditional Singapore High Court procedural regime, even where the dispute arises out of a Singapore jurisdiction agreement, leave of court for service out of jurisdiction is mandated,[37] save where there is a contractually stipulated mode of local service.[38] This procedural liberalisation under the SICC framework implicitly recognises that the exercise of extraterritorial jurisdiction is not as 'exorbitant' as traditionally perceived to be[39] and that parties' choice alone is a sufficient basis to establish existence of jurisdiction. In this day and age, given the ease of travel, technological advancement and the trend of globalisation, cross-border disputes are commonplace. Importantly, if a foreign defendant has agreed to submit to the jurisdiction of the SICC, there is little basis for him or her to complain about the inconvenience and costs associated with defending himself or herself in the SICC as these would generally be foreseeable at the time of contracting. Thus, in practice, the dispensation of court's leave to serve out of Singapore would save the plaintiff both costs and time.

Further, the SICC jurisdictional rules make clear that the SICC may decline to assume jurisdiction only if it is 'not appropriate' for the case to be heard by the SICC[40] and that it may not do so on the sole ground that the claim is connected to a foreign forum.[41] In considering the guiding criterion of 'not appropriate', the SICC shall have regard to the international and commercial character of the claim.[42] While this approach is unremarkable insofar as an exclusive jurisdiction clause is concerned,[43] it is remarkable where a non-exclusive jurisdiction clause is concerned, as the conventional test for forum appropriateness under Singapore law is in part based on an evaluation of connections with the competing fora.[44]

The overarching point is this: the parties' expression of choice in the form of a non-exclusive jurisdiction clause is accorded greater respect under the SICC framework than under the traditional High Court framework. On one view, this may be celebrated as a triumph of party autonomy over conservative forum regulation. Indeed, as will become apparent in subsequent discussion, the SICC operates on a more internationalised framework than traditional litigation. It is designed to hear cases

31. *See* Order 110, rule 1(2)(*b*)(i) Rules of Court for a non-exhaustive list of commercial relationships.
32. Order 110, rule 1(2)(*b*)(ii)-(iii) Rules of Court.
33. *See* text to n. 42 below.
34. The third way arises exceptionally in cases involving 'an originating summons under Order 52 for leave to commit a person for contempt in respect of any judgment or order made by the Court': *see* Order 110, rule 7(2)(*b*) Rules of Court.
35. Order 110, rule 7(1)(*b*) Rules of Court. This is provided that parties are not seeking any form of prerogative relief: *see* Order 110, rule 7(1)(*c*) Rules of Court. *See* Singapore International Commercial Court, SICC Model Clauses, available at: https://www.sicc.gov.sg/guide-to-the-sicc/model-clauses (last visited 8 February 2019).
36. Order 110, rule 6(2) and (2A) Rules of Court.
37. Order 11, rule 1 Rules of Court.
38. Order 10, rule 3 Rules of Court.
39. *Cf. Zoom Communications Ltd* v. *Broadcast Solutions Pte Ltd* [2014] SGCA 44, [2014] 4 SLR 500, at para. 72. The Singapore Court of Appeal remarked (in a pre-SICC case) that 'the exercise of jurisdiction by the Singapore courts over a foreign defendant is, in a real sense, an imposition on him'.
40. Order 110, rule 8(1) Rules of Court.
41. Order 110, rule 8(2) Rules of Court.
42. Order 110, rule 8(3) Rules of Court. For example, an apparent dispute between two companies may on closer scrutiny reveal that the background to the commercial dispute involves a husband and a wife – respectively, the sole shareholder and director of the companies – embroiled in contentious ancillary divorce proceedings. The dispute is thus substantively a contest over (quasi) matrimonial assets. *See IM Skaugen SE* v. *MAN Diesel & Turbo SE* [2016] SGHCR 6, at para. 112; Report of the Singapore International Commercial Court Committee, above n. 7, at para. 28.
43. Even in respect of proceedings before the Singapore High Court, the court would generally enforce the obligation to sue in the exclusively chosen forum, save where exceptional circumstance amounting to 'strong cause' can be shown to justify the breach of contract to sue in a non-chosen forum. Connections to a foreign forum are generally not considered exceptional circumstances. *See Golden Shore Transportation Pte Ltd* v. *UCO Bank* [2003] SGCA 43, [2004] 1 SLR(R) 6 at paras. 33 and 38.
44. *Orchard Capital I Ltd* v. *Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, [2012] 2 SLR 519, at para. 12. The non-exclusive jurisdiction clause is one of the factors in the discretionary analysis: at para. 30. Notably, the SICC Committee Report proposed reforming the *forum non conveniens* rules on which the SICC may decline to exercise jurisdiction in the context of a non-exclusive jurisdiction agreement. *See* Report of the Singapore International Commercial Court Committee, above n. 7, at para. 27.

with foreign or international elements. In fact, the SICC framework recognises a category of cases known as 'offshore cases', that is, cases with no substantial connection to Singapore.[45] As will be explained below, there is greater scope for procedural flexibility in this category of cases, in order to attract disputes that would not otherwise be heard in the Singapore courts. On another view, party autonomy is used as a means to favour the SICC hearing international commercial disputes. This view is bolstered by other pro-SICC provisions. For instance, unless there is provision to the contrary, a written jurisdiction agreement in favour of the SICC is considered to be exclusive in nature.[46] For jurisdiction agreements entered into, on or after 1 October 2016,[47] unless 'a contrary intention appears in the agreement', an agreement to submit to the jurisdiction of the Singapore High Court shall be construed as 'including an agreement to submit to the jurisdiction of the [SICC]'.[48] While these pro-SICC provisions may be justified on pragmatic concerns to avoid uncertainty, it cannot be denied that the overall effect is to favour the SICC hearing the claims in dispute.

3.1.3 Transfer Jurisdiction

A second main way by which disputes will come before the SICC is through the transfer of proceedings from the Singapore High Court to the SICC.[49] The rules on transfer jurisdiction have been made more complex by Singapore's ratification of the Hague Convention on Choice of Court Agreements (Hague Convention).[50] Pursuant to Order 110, rule 12(4) of the Rules of Court, a non-Hague Convention case may be transferred from the Singapore High Court to the SICC if the action concerns international and commercial claims; if the parties are not seeking any form of prerogative relief; it is more appropriate for the action to be heard in the SICC; and if all the parties consent to the transfer or the High Court orders the transfer on its own motion after hearing the parties. As for Hague Convention cases, Order 110, rule 12(3B) provides for the same criteria, save that the High Court may not order a transfer of proceedings on its own motion without having obtained all parties' consent. Although the level of consent required for transfer of proceedings differs under the two sets of rules,[51] more generally, the rules on transfer jurisdiction oblige the Singapore High Court to have regard to parties' choice, even though parties' choice is not determinative of the outcome in non-Hague Convention cases under Order 110, rule 12(4).

The statutory rules do not clarify when it might be more 'appropriate' for a case to be heard in the SICC than in the High Court. In this connection, two recent Singapore cases may helpfully shed light on the possible interpretation of 'appropriate'. Both cases concerned a situation where the plaintiff argued for the case to be heard in Singapore but the defendant applied for a stay of proceedings in order that the case may be transferred to a foreign forum for resolution. The legal inquiry was whether it would be more appropriate for Singapore than a foreign forum to hear the dispute – that is, a question of international jurisdiction. In *Rappo, Tania* v. *Accent Delight International Ltd*,[52] the Singapore Court of Appeal affirmed that '[t]he presence of the SICC and its capabilities are potentially relevant to the [*forum non conveniens*] analysis',[53] as the procedural features of the SICC may reduce costs or neutralise the advantages of having the case heard overseas. In the subsequent case of *IM Skaugen SE* v. *MAN Diesel & Turbo SE*, the Singapore High Court remarked that an 'archetypal dispute' that might be better dealt with by the SICC is one where the factual and legal connections are distributed across 'diverse and geographically divided' jurisdictions.[54] Based on the foregoing, the overall tenor is that the SICC is especially suitable for dealing with cases with international elements, as they lend themselves to the SICC's unique capabilities. By extension, it may be argued that the characteristics of a claim and whether they lend themselves to the SICC's capabilities are relevant factors in determining whether it is more appropriate for the SICC, as compared with the High Court, to resolve the dispute[55] – a question of internal jurisdiction. We will consider the capabilities of the SICC in Section 3.3.

3.2 Jurisdiction Over International Commercial Arbitration Matters

With effect from 1 November 2018, the SICC is conferred jurisdiction 'to hear any proceedings relating to international commercial arbitration that the High

45. *See* Order 110, rule 1(1) Rules of Court. However, an 'offshore case' does not include IAA proceedings commenced by way of originating summons and in rem actions (against a ship or any other property) under the High Court (Admiralty Jurisdiction) Act (Cap. 123). Order 110, rule 1(2)(*f*) Rules of Court continues to specify that an action has no substantial connection to Singapore where Singapore law is not the governing law and the subject-matter of the dispute is not regulated by Singapore law; or if the only connections to Singapore are parties' choice of Singapore law as the governing law of the dispute and parties' submission to the SICC. In *Teras Offshore Pte Ltd* v. *Teras Cargo Transport (America) LLC* [2016] SGHC(I) 02, [2016] 4 SLR 75, at para. 8, Eder IJ explained that 'the question is *not* whether the action has a substantial connection with some place or places other than Singapore but whether the action has no substantial connection with Singapore'. He also clarified that some connections may be irrelevant or peripheral: at para. 16.
46. Sections 18F(1)(a) and 18F(2) SCJA.
47. The date on which the implementing legislation for the Hague Convention on Choice of Court Agreements entered into force in Singapore.
48. Order 110, rule 1(2)(*ca*) Rules of Court.
49. Order 110, rule 7(2)(*a*) Rules of Court.
50. Hague Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (last visited on 8 February 2019).
51. The more stringent requirement of consent under Order 110, rule 12(3B) Rules of Court may be justified on the basis of ensuring a more straightforward process for the enforcement and recognition of the resulting judgment in other Contracting States: *see* Art. 8(5) Hague Convention. *See* explanation in Chong and Yip (2019), above n. 27.
52. [2017] SGCA 27, [2017] 2 SLR 265. In this case, the lower court urged the parties to consider a transfer of proceedings to the SICC: *see Accent Delight International Ltd* v. *Bouvier, Yves Charles Edgar* [2016] SGHC 40, [2016] 2 SLR 841, at paras. 111-16.
53. *Id.*, at para. 116.
54. [2018] SGHC 123, at para. 216. This case is currently pending appeal.
55. *See further* Chong and Yip (2019), above n. 27.

Court may hear and that satisfy such conditions as the Rules of Court may prescribe'.[56] According to the Rules of Court, the only requirement in respect of the SICC's jurisdiction to hear international commercial arbitration matters is that the 'proceedings must be proceedings that the High Court may hear' under the International Arbitration Act (IAA).[57] These applications include stay of proceedings, interim measures, challenges to arbitrators, challenges to awards, recognition and enforcement of awards, appeals on ruling of jurisdiction and subpoenas. The term 'international' in this context adopts the meaning set out in section 5(2) of the IAA; and the meaning of 'commercial' is to be guided by that provided in the UNCITRAL Model Law on International Commercial Arbitration.[58] Further, IAA proceedings commenced in the High Court may be transferred to the SICC, pursuant to the requirements provided in Order 110, rule 58 of the Rules of Court.

The expansion of the SICC's jurisdiction to hear international arbitration matters had been predicted 3 years ago, when the SICC was launched into operation.[59] The parliamentary intention was to 'increase Singapore's attractiveness as a seat of arbitration', in part, through the enhanced appeal of the Singapore bench, which now includes international judges.[60] This legislative reform iterates that the Singapore vision for its dispute resolution landscape is based on the coexistence of arbitration and litigation.

However, in line with the position in respect of IAA applications before the High Court, only Singapore-qualified lawyers may appear before the SICC in respect of IAA applications.[61] As such, the definition of an 'offshore' case[62] – matters in which the SICC will take a more generous approach in granting foreign representation – does not include IAA proceedings brought before the SICC. The exclusion of foreign representation in IAA proceedings was explained in the second reading of the bill in parliament:[63]

> The IAA is part of Singapore law, with features that are tailored for the Singapore arbitration landscape, and there is a developed body of local jurisprudence based on our Courts' interpretation and application of the IAA provisions, which Singapore lawyers are well versed in.

3.3 Procedural Features

The SICC has been described as 'a careful marriage between litigation and arbitration'.[64] In other words, it is a hybrid design, drawing from the advantageous features of both processes. This does not, however, mean that the SICC is the sum of the advantages of both processes. The hybridisation of litigation and arbitration inevitably results in a different mechanism. All in all, it may be said that the SICC procedural framework admits a greater scope for the consideration of parties' preferences than the traditional litigation process. Given Chief Justice Menon's vision to optimise the coexistence of both litigation and arbitration, the SICC was not established to be a direct competitor with arbitration. For this reason, it is unfair to assess the merits of the SICC by a simplistic comparison with arbitration on the parameters of procedural flexibility and party autonomy.

More importantly, the SICC provides a platform for the innovation and experimentation of procedural reform. Some of the innovations may in due course be adapted for or applied in non-SICC proceedings; they can also serve as a reference template for other jurisdictions interested in embarking upon similar reforms. As such, the SICC and Singapore High Court bifurcation need not be viewed as an immutable 'business class' and 'economy class' treatment of litigants.[65] But the bifurcation, by reason of the nature of the cases that are to come before the SICC, does emphasise the point that one size does not fit all.[66]

We now consider the unique procedural features of the SICC, each in turn.

3.3.1 Rules of Evidence

In SICC proceedings, parties may by agreement apply to the SICC for the disapplication of Singapore rules of evidence[67] and for other rules of evidence (including rules of evidence that may not constitute part of foreign

56. Section 18D(2) SCJA. This provision was introduced pursuant to a bill passed by Singapore Parliament on 9 January 2018.
57. Cap 143A, Rev Ed 2002.
58. Order 110, rule 57(2) Rules of Court. *See*, in particular, the meaning of 'commercial arbitration' set out in Order 110, rule 57(2)(c).
59. J. Ahmad and P. Tan, 'Should Court Actions Arising Out of International Arbitration Disputes Be Heard at the Singapore International Commercial Court', *Kluwer Arbitration Blog*, 17 July 2015, available at: http://arbitrationblog.kluwerarbitration.com/2015/07/17/should-court-actions-arising-out-of-international-arbitration-disputes-be-heard-at-the-singapore-international-commercial-court/?print=pdf (last visited 8 February 2019).
60. 'Second Reading Speech by Ms Indranee Rajah, Senior Minister of State for Law and Finance, on Supreme Court of Judicature (Amendment) Bill', available at: https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/second-reading-speech-supreme-court-of-judicature-bill.html (last visited 8 February 2019).
61. *Ibid*.
62. *See* n. 45 above.
63. 'Second Reading Speech by Ms Indranee Rajah, Senior Minister of State for Law and Finance, on Supreme Court of Judicature (Amendment) Bill', above n. 60.
64. S. Chong, 'The Singapore International Commercial Court: A New Opening in a Forked Path', 21 October 2015, at para. 5.2, available at: http://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20(21.10.15).pdf (last visited 8 February 2019).
65. The 'business class' and 'economy class' dichotomy is borrowed from the Right Honorable the Lord Thomas of Cwmgiedd's article, 'Singapore Academy of Law Annual Lecture 2016 – "Cutting the Cloth to Fit the Dispute: Steps towards Better Procedures across the Jurisdictions"' 29 *Singapore Academy of Law Journal* 1, at 9 (2017).
66. *Ibid*. For a detailed commentary on and insights into the procedural features of the SICC with illustrations from the first case before the SICC, *see* H.H. Teh, J. Yeo & C. Seow, 'The Singapore International Commercial Court in Action: Illustrations from the First Case', 28 *Singapore Academy of Law Journal* 692 (2016).
67. Section 18K SCJA; Order 110, rule 23(6) Rules of Court. Notably, parties may ask for the disapplication of particular rules or all the rules of evidence under Singapore law.

law) to be applied instead.[68] In granting the order, the SICC may, 'for the just, expeditious and economical disposal' of the dispute, modify the parties' agreement with parties' consent or stipulate supplementary terms that are consistent with the parties' agreement as it sees fit.[69] This procedural feature amply demonstrates the balance between party autonomy and judicial control that the SICC seeks to strike.

The SICC User Guides further explain, using examples, what the outcome might be if Singapore evidence rules are disapplied in the SICC proceedings.[70] For example, parties may apply to the SICC for the disapplication of the Singapore rule on hearsay without stating which rule should apply in its place. According to the SICC User Guides, if the order is granted, this means that evidence that would otherwise be considered hearsay under Singapore law may be admitted in the proceedings and the issue of reliability of the evidence will be addressed as a matter of the weight of evidence.[71] It is also useful to note that parties to SICC proceedings may apply for the disapplication of all the rules on evidence under Singapore law and for the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), as appropriately adapted, to apply instead.[72]

3.3.2 Foreign Law

Following the convention of common law, foreign law is regarded as an issue of fact under Singapore law. Accordingly, foreign law must be pleaded and proved like facts,[73] notwithstanding the obvious 'legal quality inherent in this "fact"'.[74] As a rule of convenience, if the parties fail to prove the content of the applicable foreign law, Singapore courts will presume the content of foreign law to be identical with Singapore law (referred to as the presumption of similarity of laws), unless 'it is unjust and inconvenient to do so'.[75]

However, the common law mode of proof of foreign law is far from perfect. Reliance on expert evidence, in particular, is expensive, and the expert evidence is at times partisan or even deficient in quality.[76] Further, the combination of proof and presumption of similarity can lead to 'curious consequences'.[77] For example, one party may decide to prove the content of some rules of foreign law but not prove the other relevant rules in the hope of relying on the operation of the presumption of similarity, so as to 'mix a cocktail of the two' to arrive at an outcome available under neither legal system.[78]

The SICC framework, while retaining the traditional common law mode of proof, allows for the possibility of dealing with foreign law by way of direct submissions (oral, written or both),[79] as per the practice in international arbitrations. This reform is strategic, as explained in the SICC Committee Report:

> In line with the international character of the SICC, foreign law need not be pleaded and proved as fact in proceedings before the SICC, as the Judges can take judicial notice of foreign law with the assistance of oral and written legal submissions, supported by relevant authorities. The SICC would then apply foreign law to determine the issues in dispute. *This would facilitate buy-in from foreign counsel to bring their disputes to the SICC and, at the same time, aligns SICC procedure with the practice in international arbitration…*[80] (emphasis added)

Importantly, the 'buy-in from foreign counsel' is also forged on other aspects of liberalisation in the SICC framework: the appointment of foreign judges and the greater scope for representation by foreign counsel in SICC proceedings. We will consider these two matters in greater detail in a moment. For present purposes, it suffices to highlight that before ordering the determination of foreign law on the basis of submissions, the SICC must be satisfied that all parties are or will be represented by 'a counsel,[81] restricted registration foreign lawyer or registered law expert[82] who is suitable[83] and competent to submit on the relevant questions of foreign law'.[84]

3.3.3 Representation by Foreign Lawyers

As the SICC is a division of the High Court, the general rule is that parties to SICC proceedings are to be represented by lawyers called to the Singapore bar. In traditional High Court proceedings, foreign representation is available in very limited circumstances. Subject to the

68. Section 18K SCJA read with Order 110, rule 23(1) Rules of Court. An application may not be made unless all parties agree to the rules of evidence that shall not apply to their proceedings, and the rules that shall apply instead.
69. Order 110, rule 23(3) Rules of Court.
70. SICC User Guides Note 4, at paras. 23-5. *See*https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf (last visited 10 February 2019).
71. *Id*., at para. 23.
72. *Id*., at para. 25.
73. Foreign law may be proved by 'directly adducing raw sources of foreign law as evidence' or by an expert opinion: *see Pacific Recreation Pte Ltd* v. *S Y Technology Inc* [2008] SGCA 1, [2008] 2 SLR(R) 491, at para. 54.
74. *EFT Holdings, Inc* v. *Marinteknik Shipbuilders (S) Pte Ltd* [2013] SGCA 64, [2014] 1 SLR 860, at para. 57.
75. *D'Oz International Pte Ltd* v. *PSB Corp Pte Ltd* [2010] SGHC 88; [2010] 3 SLR 267, at para. 25.
76. T.M. Yeo, 'Common Law Innovations in Proving Foreign Law', 12 *Yearbook of Private International Law* 493, at 493-94 (2010).
77. D. Foxton QC, 'Foreign Law in Domestic Courts', 29 *Singapore Academy of Law Journal* 194, at 198 (2017).
78. *Ibid.*
79. Section 18L SCJA; Order 110, rule 25(1) Rules of Court.
80. Report of the Singapore International Commercial Court Committee, above n. 7, at para. 34.
81. *See* Order 110, rule1(1). 'Counsel' includes 'a registered foreign lawyer who is granted full registration under section 36P of the Legal Profession Act'.
82. *See* Order 110, rule 1(1). A 'registered law expert' refers to a law expert registered under section 36PA of the Legal Profession Act, ch. 161 (2009) ('LPA'). A registered law expert may appear in SICC proceedings (including appeals) and give advice and prepare documents 'solely for the purposes of making submissions' on matters of foreign law as permitted by the SICC.
83. On showing 'suitability' of the foreign jurist, *see* Order 110, rule 25(2A) Rules of Court. The SICC may require evidence of good standing.
84. *See* Order 110, rule 25(2) Rules of Court.

discretion of the High Court, a foreign lawyer, who is a Queen's Counsel or of equivalent standing, may be granted a right of audience before the High Court on an ad hoc basis.[85] Considerations that the High Court would need to balance in this discretionary exercise are '(a) nurturing the local Bar; (b) allowing litigants to engage counsel of their choice to advance their case as well as possible; and (c) ensuring the proper and timely administration of justice'.[86]

In sharp contrast, in SICC proceedings, less restrictive conditions apply in respect of representation by foreign lawyers.[87] To represent parties in SICC proceedings, foreign lawyers would need to be registered under section 36P of the Legal Profession Act. The SICC foreign lawyer registration regime differentiates between full registration and restricted registration. The type of registration will determine the requisite qualifications of the foreign lawyer as well as the scope of work that the foreign lawyer may undertake on behalf of a party in an SICC case.[88] In short, only foreign lawyers who have been granted full registration may represent parties in SICC proceedings. Foreign lawyers who have been granted restricted registration may only represent parties for the purposes of making submissions on matters of foreign law as permitted by the SICC or the Court of Appeal. By way of reference, to qualify for full registration, the following criteria must be met:[89]

a. The foreign lawyer is duly authorised or registered to practice law in a foreign jurisdiction.
b. The foreign lawyer has at least 5 years' experience in advocacy before any court or tribunal.
c. The foreign lawyer is sufficiently proficient in English for the purpose of conducting proceedings or appeal.
d. The foreign lawyer has not been disbarred, struck off, suspended, fined, censured or reprimanded in the capacity of a legal practitioner.
e. The foreign lawyer is to give an undertaking that he or she will appear and perform the scope of work that he or she is permitted to undertake on behalf of a party to the SICC proceedings.

At the time of writing this article, seventy-eight foreign lawyers from different jurisdictions have been granted full registration; one English lawyer has been granted restricted registration.[90]

The SICC Practice Directions set out the circumstances under which representation by foreign lawyers in SICC proceedings may be permitted.[91] The SICC User Guides go on to explain that the 'main category of cases' in which foreign representation would be allowed is offshore cases.[92] As explained previously,[93] these are cases with no substantial connection to Singapore. Taking a more generous approach in allowing foreign representation in this category of cases may attract foreign counsel to advise their clients to choose the SICC as the dispute resolution forum in cases that are otherwise unlikely to come before the Singapore courts. Conversely, a more restrictive approach towards allowing foreign representation in non-offshore cases protects business for Singapore practitioners and, thus, facilitates buy-in from them to bring their clients' international commercial disputes to the SICC.

3.3.4 Right of Appeal

As the SICC is established as a division of the Singapore High Court, SICC cases may be appealed to the Singapore Court of Appeal. However, parties may by writing agree to waive, limit or vary the right to appeal against an SICC judgment.[94] Instead of mandating a no-appeal litigation model or a traditional litigation model that entails an appeal mechanism, the SICC accords the parties the right to determine for themselves the extent of appeal that they desire. While it may be said that the traditional litigation process enables parties to decide for themselves if they would like to appeal after the trial judge has handed down the judgment and on what issues, the SICC model accords parties the right of determination pre-dispute. Parties may opt for the wholesale exclusion of the right of appeal if they desire a prompt resolution of their dispute and finality of outcome, as per the international commercial arbitration practice.

3.3.5 Confidentiality

The default position for SICC cases is open court proceedings and publication of its judgments. Transparency is perceived to be 'important for the branding of the SICC'.[95] The SICC Committee, clearly in recognition of the public interest element in dispute resolution, agreed that confidentiality would '[militate] against the development of a body of jurisprudence, which will be necessary to enable prospective users of SICC dispute resolution to model their future commercial relations'.[96] Nevertheless, parties may apply to the SICC for a confidentiality order under Order 110, rule 30(1) of the Rules of Court, which provides for three different kinds of confidentiality orders: that the case be heard in camera; no disclosure or publication of any information or docu-

85. Section 15 LPA.
86. *Re Andrews Geraldine Mary QC* [2012] SGHC 229, [2013] 1 SLR 872, at para. 66.
87. Section 18M SCJA.
88. *See* Sections 36P(1) and (2) LPA.
89. Rule 4(1) Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014.
90. Singapore International Commercial Court, 'Register of Foreign Lawyers,' available at: https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers (last visited 8 February 2019).
91. SICC Practice Directions, at para. 26, available at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions-(with-effect-from-1-jan-2016)f7782f33f22f6eceb9b0ff0000fcc945.pdf.
92. SICC User Guides Note 3, at para. 3. A declaration of 'offshore' status was sought in *Teras Offshore Pte Ltd* v. *Teras Cargo Transport (America) LLC* [2016] SGHC(I) 02, [2016] 4 SLR 75 and *BNP Paribas SA* v. *Jacob Agam* [2018] SGHC(I) 03 for the purpose of appointing foreign counsel.
93. *See* text to n. 45 above.
94. SICC Practice Directions, above n. 91, at para. 139.
95. Report of the Singapore International Commercial Court Committee, above n. 7, at para. 32.
96. *Ibid*.

ment relating to the case; and the sealing of the court order. In deciding whether to grant the confidentiality order sought for, the SICC shall take into account two factors: first, whether the case at hand is an offshore case, and, secondly, whether the parties have agreed to the making of the order.[97] The SICC User Guides state that 'the [SICC] will generally give due weight to the fact that the case is an offshore case and the parties agree that such an order should be made'.[98]

3.3.6 Coram

Every SICC case shall be heard by a single judge or a panel of three judges.[99] Where the case is to be heard by a panel of three judges, one of the appointed judges shall be appointed by the chief justice to preside over the proceedings.[100] The case shall be decided in accordance with the majority opinion of the three-judge panel.[101]

Exceptionally, an SICC case may be heard by two judges.[102] This occurs where one of the three judges originally appointed to decide the case cannot continue in the proceedings and the parties have consented to the proceedings continuing with two judges.

An appeal against an SICC judgment will be heard by the Singapore Court of Appeal. Following the rules applying to Court of Appeal hearings, appeals will be heard by a panel comprising three or 'any greater uneven number of Judges of Appeal'.[103] An international judge may be appointed by the Chief Justice to sit in the Court of Appeal to hear an appeal against an SICC judgment or order.[104]

3.3.7 Discovery

Order 110, rule 21 of the Rules of Court provides that the default position is that the Order 24 procedure that applies in High Court proceedings does not apply in SICC proceedings.[105] As Thorley IJ noted in *B2C2 Ltd* v. *Quoine Pte Ltd* ('*B2C2 Ltd*'), '[t]here are material differences in language and approach between the discovery provisions in O 110 and O 24'.[106] Under the SICC regime, the discovery process is referred to as 'production of documents'. The provisions for the SICC regime for production of documents are found in Order 110, rules 14-20 of the Rules of Court.

The traditional process under Order 24 that applies to High Court proceedings requires the parties 'to disclose all documents which are relevant to the issues in the suit, including those of which are or have at any time been in their possession, custody or power'.[107] For general discovery, parties are to disclose documents on which the parties rely or will rely, as well as documents that could adversely affect his or her own case, adversely affect the case of another party and support another party's case.[108] In contrast, under the SICC regime, the obligation on parties is more limited – each party is only required to provide 'all documents available to it on which it relies'.[109] In *B2C2 Ltd*, Thorley IJ explained that the SICC discovery process

> is intended to institute a simplified process compared to [Order 24]. Disclosure is only required of documents that are relevant and material and there is no general discovery.[110]

Relevantly, the SICC provisions on discovery are 'largely' based on the IBA rules.[111] For example, Order 110, rule 17(2)(*b*) is based on the wording of Article 9(2) of the IBA Rules.[112]

3.3.8 Costs

Costs recovery is an important aspect of litigation. Order 110, rule 46(6) of the Rules of Court makes clear that the SICC regime precludes the application of the Order 59 procedure on taxation of costs by the High Court which applies to traditional High Court proceedings. By way of background, Order 59 provisions are expressed in the terminology of 'costs in in the cause', 'costs in the application', 'costs thrown away', 'costs in any event', 'standard costs', 'indemnity costs' and the like – language which parties from civilian jurisdictions are unaccustomed to.[113]

By contrast, the SICC regime on costs is stated in clear and simple language that may be readily understood by parties from both common law and civil law jurisdictions. Indeed, Vivian Ramsay IJ emphasised in *CPIT Investments Ltd* v. *Qilin World Capital Ltd*[114] that the SICC costs regime is different and simpler than the traditional Order 59 regime. Order 110, rule 46(1), which applies in the SICC, states that:

> The *unsuccessful party* in any application or proceedings in the Court must pay the *reasonable costs* of the

97. Order 110, rule 30(2) Rules of Court.
98. SICC User Guides Note 3, at para. 8.
99. Section 18G SCJA.
100. Section 18H(2) SCJA.
101. Section 18H(3) SCJA.
102. Section 18H(5) SCJA. In that event, where the two judges reach different conclusions on the relevant claim, counterclaim or application, the claim, counterclaim or application shall be dismissed (Section 18H(6) SCJA).
103. Section 30(1) SCJA.
104. Section 29(4) SCJA.
105. The SICC or the High Court (in the case of a transfer of proceedings to the SICC) may order the application of the Order 24 procedure.
106. [2018] SGHC(I) 04, [2018] 4 SLR 67, at para.15.
107. Teh, Yeo & Seow (2016), above n. 66, at 700.
108. *See* Order 24, rule (1) and (2) Rules of Court. For specific discovery of documents, *see* Order 24, rule 5 Rules of Court.
109. Order 110, rule 14(1) Rules of Court. For provisions on request to produce documents, objection to request and application for SICC to order production, *see* Order 110, rules 15-17 Rules of Court. This process is commonly practised in international arbitration.
110. *Id.*, at para. 32.
111. Teh, Yeo & C. Seow (2016), above n. 66, at 701.
112. In *B2C2 Ltd*, above n. 106, at para. 35, however, Thorley IJ said that case law under discovery regimes in other common law jurisdictions would equally provide guidance on the application of Order 110, rule 17(2)(*b*)(v) Rules of Court.
113. L. Teh, 'Costs Recovery in the SICC, A Different Regime', available at: https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-costs-recovery-in-the-sicc-a-different-regime-mr-lawrence-teh-dentons-rodyk-davidson-llp_8a224afc-96aa-48c4-8394-7c83ffc3f3bd.pdf (last visited 8 February 2019).
114. [2018] SGHC(I) 2, [2018] 4 SLR 38, at para. 15.

application or proceedings to the successful party, unless the Court orders otherwise. (emphasis added)

Order 110, rule 46(3) continues to set out the broad discretion which the SICC has in respect of costs orders. Pursuant to the said provision, the SICC may apportion costs between the parties; consider all relevant circumstances (including conduct of the case); order costs to be paid by a lawyer, law expert or a non-party; order interest on costs; or make an ancillary order, including one on time and manner of payment. Supplementing Order 110, rule 46 of the Rules of Court is the guidance provisions in the SICC Practice Directions on costs. At paragraph 152, the SICC Practice Directions reiterates that costs issues 'shall be in the discretion of the Court and the Court shall have the full power to determine by whom and to what extent the costs are to be paid'. Paragraphs 152(3) and 152(5), in particular, prescribe non-exhaustively the matters which the SICC may take into account in ordering costs.

Notably, the use of wide discretion, the concept of 'reasonable costs' and the principle of the unsuccessful party paying costs are commonly employed in arbitration.[115]

3.4 International Judges

The SICC panel comprises both local and foreign judges (known as 'International Judges').[116] The International Judges are appointed for a fixed term as the chief justice specifies.[117] The formal power of appointment of International Judges lies with the president of Singapore;[118] and the President of Singapore is to act with the advice of the Prime Minister of Singapore who shall in turn consult the chief justice on the appointment.[119] There are no legislative provisions on the qualifications of the International Judges. In practice, the matter lies at the discretion of the Chief Justice as he/she is the person to make recommendations for appointment.[120]

The International Judges are assigned by the chief justice to hear SICC disputes on an ad hoc basis. Unlike in arbitrations, there is no scope within the SICC framework for parties to appoint their preferred adjudicator or express a preference for a certain judge to be appointed.

To date, sixteen International Judges have been appointed to the SICC (see table on the next page).

The appointments thus far indicate a trend of favouring the appointment of retired judges. Further, the number of foreign jurists from the UK and Australia appointed as International Judges is significantly higher as compared with jurists from other jurisdictions. This is unsurprising given that English and Australian cases – by reason of common law heritage and legislative influence – are most referred to and followed in Singapore cases, as compared with case law developed in other jurisdictions.[121] As will be discussed in greater detail in Section 4, many of the SICC cases to date are governed by Singapore law or the relevant applicable foreign law which, in the absence of proof, was presumed to be identical with Singapore law. Given the strong jurisprudential links between Singapore law and English law as well as Australian law, former English and Australian judges are well suited for deciding such disputes and may be (as indeed have been) appointed as sole judges at first instance.

Going forward, it remains to be seen if more jurists from Asian jurisdictions will be appointed to the SICC, in view that a primary aim of the SICC is to become the leading Asian dispute resolution centre. Casting a sideway glance at the SIAC's panel of arbitrators, while there are many Australian and UK arbitrators, the SIAC panel also boasts arbitrators from many Asian jurisdictions, including India, Philippines, Indonesia, Korea, China and Malaysia.[122]

4 Review of SICC Judgments

At the date of writing, a total of thirty-four SICC judgments, comprising both procedural orders and judgments on the merits of the disputes, have been handed down. Of course, a number of the orders and judgments pertain to (different aspects of) the same cases. Of the thirty-four judgments, seven were appellate judgments rendered by the Singapore Court of Appeal. All thirty-four judgments related to cases transferred from the Singapore High Court to the SICC.[123] This is unsurprising. In the initial years of the SICC's operation, many potential users of the SICC are likely to take a 'wait and see' approach, generally resistant to the idea to be the first ones to try out something new and untested. Moreover, even if parties are willing to insert an SICC clause into their contract, it will be some time before a dispute arises. In February 2018, marking an important milestone for the SICC, a case was directly filed with the SICC. While we wait for more cases to be filed directly with the SICC on the basis of an SICC clause, the transfer cases would play a crucial role in establishing the initial track record for the SICC. For this rea-

115. *See* C.Y.C. Ong and M.P. O'Reilly, *Costs in International Arbitration* (LexisNexis, 2013), at 70-73 (survey of arbitration legislations and procedural rules); The Honourable Sir V. Ramsay, 'Establishing Claims for Damages, Costs and Interest in International Arbitration', 26 *American University International Law Review* 1211, at 1233-1239 (2011).
116. *See* Singapore International Commercial Court, 'Judges', available at: https://www.sicc.gov.sg/about-the-sicc/judges (last visited 8 February 2019).
117. *See* Art. 95(5) Constitution of the Republic of Singapore (1965).
118. Article 95(4) Constitution of the Republic of Singapore.
119. Article 95(6) Constitution of the Republic of Singapore.
120. Article 95(4)(*c*) Constitution of the Republic of Singapore.
121. *See* Y.H. Goh and P. Tan, 'The Development of Local Jurisprudence', in Y.H. Goh and P. Tan (gen. eds.), *Singapore Law: 50 Years in the Making* (2015) 195, at 222-35.
122. *See* Singapore International Arbitration Centre, Our Arbitrators, available at: http://siac.org.sg/our-arbitrators/siac-panel (last visited 8 February 2019).
123. What is unclear is how many of the cases were non-consensual transfers.

No.	International judge	Home jurisdiction	Appointment	Professional experience (in brief)[121]
1.	Justice Patricia Bergin	Australia	January 2015-present	Former Judge of the Supreme Court of New South Wales (retired in 2017)
2.	Justice Roger Giles	Australia	January 2015-present	Former Judge of the Court of Appeal of New South Wales (retired in 2011)
3.	Justice Dyson Heydon AC QC	Australia	January 2015-present	Former Judge of the High Court of Australia (retired in 2013); currently barrister and arbitrator
4.	Justice Robert French	Australia	January 2018-present	Former Chief Justice of Australia (retired in 2017); non-permanent Judge in the Hong Kong Court of Final Appeal
5.	Justice Irmgard Griss	Austria	January 2015-January 2018	Former president of the Austrian Supreme Court
6.	Justice Beverley McLachlin PC	Canada	January 2018-present	Former Chief Justice of Canada (retired in 2017)
7.	Justice Dominique T. Hascher	France	January 2015-present	Judge of Supreme Judicial Court of France
8.	Justice Anselmo Reyes	Hong Kong	January 2015-present	Former Judge of the Court of First Instance in Hong Kong (retired in 2012)
9.	Justice Yasuhei Taniguchi	Japan	January 2015-present	Professor Emeritus at Kyoto University, Japan; former Chairperson of the appellate body of WTO
10.	Justice Sir Vivian Ramsey	UK	January 2015-present	Former Judge of the High Court (Queen's Bench Division) of England and Wales (retired in 2014)
11.	Justice Sir Bernard Rix	UK	January 2015-present	Former Lord Justice of Appeal in the Court of Appeal of England and Wales (retired in 2013)
12.	Justice Simon Thorley QC	UK	January 2015-present	Former barrister specialising in intellectual property (retired in 2014); former Deputy High Court Judge of England and Wales
13.	Justice Sir Henry Bernard Eder	UK	May 2015-present	Former Judge of the High Court of England and Wales (retired in 2015)
14.	Justice David Edmond Neuberger	UK	January 2018-present	Former President of the UK Supreme Court (retired in 2017)
15.	Justice Jeremy Cooke	UK	January 2018-present	Former Judge of the High Court of England and Wales (retired in 2016); current international judge of the DIFCC
16.	Justice Carolyn Berger	US	January 2015-present	Former Justice on the Delaware Supreme Court (retired in 2014)

[121] Information is based on the international judges' biographies on the SICC website: *see* Singapore International Commercial Court, above n. 116.

son, the last part of the discussion reviews the SICC judgments.

4.1 Profile of Cases

By way of a quick overview, the following is a summary of the profile of SICC cases decided to date:

a. In all cases, at least one of the parties was based in an Asian jurisdiction.
b. In all cases, the party and event connections of the dispute were distributed across at least two different jurisdictions.
c. The substantive legal issues that have been raised include contract,[124] tort,[125] trust,[126] fiduciary duties, directors' duties and minority oppression.
d. Most of the cases involved Singapore law as the governing law of the issues in dispute.[127] Two matters raised issues governed by French law.[128] One matter involved issues governed by English law.[129] One matter involved Bahamas law as the governing law but the parties agreed that the content of Bahamas law did not differ from Singapore law.[130] One matter raised an issue governed by Indonesian law.[131]

4.2 Assignment of International Judges

Based on a review of the SICC judgments handed down to date, it is clear that the international judges – touted as a distinctive capability of the SICC – have been actively deployed to hear the cases brought before the SICC by way of exercise of transfer jurisdiction. They have been appointed as either a single judge or a member of a three-judge panel to hear SICC appeals, trials and procedural/interlocutory matters. When appointed as a member of a three-judge panel,[132] the international judges had also taken on the responsibility to deliver the judgment of the court in a number of cases.[133] Further, in all appeal hearings, at least one member of the three-judge panel was an international judge.[134]

In the two matters which had connections with France and in which French issues were raised, Dominique Hascher IJ was appointed as a member of the three-judge panel.[135] In the matter in which issues governed by English law were raised, Sir Henry Bernard Eder IJ was appointed as the sole judge.[136] Interestingly, international judges from the UK and Australia have been appointed as a single judge to hear cases which involved issues governed by Singapore law[137] or where the matter raised issues of Singapore procedural law.[138] In these disputes concerning Singapore law as the applicable law, it is evident from the judgments that the presiding international judge ensured that relevant Singapore cases were cited and discussed.

In light of the foregoing review, one could surmise that the Singapore judiciary is unafraid of allowing foreign jurists to directly participate in the application and development of Singapore law. As the SICC is a division of the High Court, its judgments on Singapore law are binding authorities on the High Court.

A number of interesting questions may be asked in the future when there is a sizeable pool of SICC judgments on Singapore law for a more in-depth study. First, whether the development of Singapore law in the SICC has proceeded on a more transnational (and less English law-biased) trajectory, with the participation of non-UK international judges.[139] Indeed, a similar question may be asked in respect of the development of commercial law in general in the SICC. Second, whether the creation of the SICC has led to a two-track development of Singapore law: one in the SICC and one in the High Court. For example, the SICC judges, being aware of their capacity as a judge in an international commercial court, might be more inclined towards applying 'hard and fast rules' and 'fixed' criteria, as opposed to discretionary approaches.[140] Third, whether the international judges are adept at grappling with questions of Singapore public policy? Fourth, whether the presence of international judges would enhance the global influence of the SICC judgments? For example, these judgments may be more persuasive or more frequently referred to

124. A wide range of contractual issues have been discussed, including interpretation, breach, contract formation, misrepresentation and mistake.
125. For example, tort of conspiracy, tort of inducing breach of contract, and tort of conversion.
126. For example, constructive trust and equitable compensation for breach of trust.
127. This is unsurprising as these are cases transferred from the High Court to the SICC.
128. See *BNP Paribas Wealth Management* v. *Jacob Agam* [2017] SGHC(I) 02, [2017] 4 SLR 14 (concept of subrogation under French law); *BNP Paribas SA* v. *Jacob Agam* [2017] SGHC(I) 10, [2018] 3 SLR 1 (The French law issues were later abandoned.).
129. *Macquarie Bank Ltd* v. *Graceland Industry Pte Ltd* [2018] SGHC(I) 05, [2018] 4 SLR 87.
130. *Telemedia Pacific Group Limited* v. *Yuanta Asset Management International Limited* [2016] SGHC(I) 03, [2016] 5 SLR 1 (Patricia Bergin IJ was appointed as a single judge in the case.).
131. *BCBC Singapore Pte Ltd* v. *PT Bayan Resources TBK* [2016] SGHC(I) 01, [2016] 4 SLR 1, at paras. 181-228.
132. As a matter of general practice, at least one Singapore judge is included in a three-member panel.
133. See, e.g. *Arris Solutions Inc* v. *Asian Broadcasting Network (M) Sdn Bhd* [2017] SGHC(I) 01, [2017] 4 SLR 1 (Judgment was delivered by Simon Thorley IJ.).
134. See, e.g. *BNP Paribas SA* v. *Jacob Agam* [2018] SGCA(I) 07 (Judgment was delivered by David Edmond Neuberger IJ.).
135. See, *BNP Paribas Wealth Management* v. *Jacob Agam* [2017] SGHC(I) 02, [2017] 4 SLR 14; *BNP Paribas SA* v. *Jacob Agam* [2017] SGHC(I) 10, [2018] 3 SLR 1.
136. See Macquarie Bank Ltd, above n. 129.
137. See, e.g. Telemedia Pacific Group, above n. 130 (Parties have agreed that the content of applicable foreign law is identical to that of Singapore law and proceeded on that basis); *CPIT Investments Ltd* v. *Qilin World Capital Ltd* [2017] SGHC(I) 05, [2017] 5 SLR 1 (Vivian Ramsay IJ).
138. See, e.g., *Macquarie Bank Ltd* v. *Graceland Industry Pte Ltd* [2017] SGHC(I) 12 (Henry Bernard Eder IJ); *Arovin Ltd* v. *Hadiran Sridjaja* [2018] SGHC(I) 09, (Vivian Ramsay IJ). To be clear, these two judgments ruled on issues concerning general Singapore procedural law that is also applicable to traditional High Court proceedings, as opposed to procedural rules that are unique to the SICC regime.
139. See Telemedia Pacific Group, above n. 130. Bergin IJ, an Australian international judge, cited a number of Australian authorities in support of trite contractual principles.
140. See *CPIT Investments Ltd* v. *Qilin World Capital Ltd*, above n. 137, at para. 199, where Vivian Ramsey IJ suggested that under Singapore law (as with any other legal system), a remedial constructive trust is 'imposed sparingly'.

by the courts of the home jurisdictions of the international judges.

5 Challenges Ahead

We now consider the challenges confronting the SICC going forward.

5.1 Competition from CICC?

To provide a judicial safeguard for the BRI, on 29 June 2018, China established the CICC to serve the dispute needs of the BRI. Presently, the Supreme People's Court of China (SPC), in charge of the creation of the CICC, is 'in the final stages of formalising its rules and procedures'.[141] A judicial interpretation document issued by the SPC, entitled 'Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Courts' sets out the CICC framework, the jurisdiction of its courts, judicial panel and numerous procedural provisions (the 'Judicial Interpretation on the CICC').[142] The creation of the CICC may raise some concern as to whether it would compete for judicial business with the SICC.[143]

A review of the CICC framework deserves detailed treatment in a separate article.[144] It suffices, for present purposes, to highlight the main competitive advantages which the SICC has over the CICC. It is argued that the SICC is a far more attractive litigation option than the CICC.

First, unlike the SICC, the CICC's jurisdictional framework is much more constrained. Notably, a written jurisdiction agreement in favour of the CICC is insufficient by itself to establish the CICC's jurisdiction over a dispute, unless the amount in dispute exceeds RMB 300 million and the case has an actual connection with China.[145] As such, party autonomy is clearly less valued within the CICC's jurisdictional framework, as compared with the SICC regime.

Second, the CICC judges are Chinese judges drawn from the SPC.[146] Currently, fifteen SPC judges have been appointed to the CICC.[147] Chinese law (Judges' Law and the Law on the Organisation of the People's Courts) does not permit the appointment of foreigners as judges of the Chinese courts. The absence of an international bench may affect user confidence in the impartiality and trustworthiness of the CICC, especially because the CICC disputes will likely involve at least one non-Chinese party. Further, it is envisaged that many of the disputes arising from the BRI would involve foreign law elements. An international bench (such as the SICC panel) would boost greater confidence in the more accurate interpretation and application of foreign law, where there are foreign judges on the bench who are trained in the relevant foreign law. The decision to appoint only Chinese nationals as CICC judges reflects a strong desire for ensuring forum control in the dispute resolution process. Perhaps, this shortcoming of the CICC could be mitigated to some extent by the establishment of the CICC's International Commercial Expert Committee. To date, thirty-two experts from different countries have been appointed.[148] However, the precise remit of the Expert Committee remains unclear, and its utility cannot, thus, be fully assessed at this point.

Third, current Chinese law does not grant foreign lawyers a right of audience before the Chinese courts (including the CICC).[149] This limitation diminishes the CICC's appeal to the international business community who are very much used to the procedural flexibility of arbitration practice. Indeed, in cases which raise foreign law issues, litigants (especially non-Chinese nationals) would likely prefer to engage foreign counsel who are familiar with the relevant foreign law.

Finally, pursuant to existing Chinese legislation, proceedings of cases involving foreign elements must be conducted in 'languages commonly used in China' – in other words, in Chinese or the native languages of the

141. M. Walters, 'Jury Is Out Over China's New Commercial Court, Say Lawyers', *UK Law Gazette,* 1 November 2018, available at: https://www.lawgazette.co.uk/law/jury-is-out-over-chinas-new-commercial-court-saylawyers/5068125.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 (last visited 8 February 2019).
142. 'Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court' (Court Explanation No 11 of 2018)] (promulgated by the Supreme People's Court on 27 June 2018; effective as on 1 July 2018), available at: http://www.court.gov.cn/zixun-xiangqing-104602.html? (last visited 8 February 2019).
143. The CICC has announced on 29 December 2018 that it has accepted 'a number of international commercial disputes in accordance with Article 20 and Article 38 of the Civil Procedure Law of the People's Republic of China and Article 2 of the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court'. Based on the information, it may be surmised that these are transfer cases. *See* http://cicc.court.gov.cn/html/1/219/208/210/1152.html (last visited 8 February 2019).
144. *See* W. Sun, 'International Commercial Court in China: Innovations, Misunderstandings and Clarifications', *Kluwer Arbitration Blog*, 4 July 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/ (last visited 8 February 2019); 'With An Eye on Belt and Road Disputes, China Establishes New International Commercial Courts', *Herbert Smith Freehills*, 4 July 2018, available at: https://www.herbertsmithfreehills.com/latest-thinking/with-an-eye-on-belt-and-road-disputes-china-establishes-new-international-commercial (last visited 8 February 2019); Z. Huo and M. Yip, (2019, forthcoming), above n. 11.
145. Judicial Interpretation on the CICC, above n. 143, Art. 2.
146. On the basic qualifications of CICC judges, *see* Judicial Interpretation on the CICC, above n. 143, Art. 4.
147. *See* China International Commercial Court, available at: http://cicc.court.gov.cn/html/1/219/193/196/index.html (last visited 8 February 2019).
148. *See* 'The Decision on Appointment of the First Group of Members for the International Commercial Expert Committee', *China International Commercial Court*, 24 August 2018, available at: http://cicc.court.gov.cn/html/1/219/235/245/index.html (last visited 8 February 2019). This first group of experts have been appointed for a four-year term, from 26 August 2018 to 26 August 2022.
149. Civil Procedure Law (promulgated by the President of the People's Republic of China on 9 April 1991) and the Law on the Organisation of the People's Courts (promulgated by the Chairman of the Standing Committee of the National People's Congress on 5 July 1979; effective as on 1 July 1980).

fifty-five officially recognised ethnic minorities in China.[150] This creates an unnecessary language barrier for foreign litigants. Moreover, it is unclear why the language of proceedings before the CICC – an international commercial court – does not include English, given that litigants from the BRI countries would speak a variety of languages and that the prescribed qualifications of the CICC judges include the ability to use English as a working language.[151]

5.2 International Enforceability of Singapore Judgments

The real challenge for the SICC concerns the international enforceability of Singapore judgments. Practically speaking, users of the SICC (or any international commercial court for that matter) would be most concerned with whether the judgments may be recognised and enforced in other jurisdictions, most notably, where the assets of the judgment debtor are located. Enforceability of outcomes is the key reason why business parties favour international commercial arbitrations.[152] As Godwin, Ramsay and Webster have astutely observed, 'the problem of enforcement is more acute for international commercial courts as "the parties before such courts may have little or no presence and few (if any) assets within the state where the courts are located"'.[153] Hence, in 2016, Singapore has signed and ratified the Hague Convention which prescribes rules for both jurisdiction and the recognition and enforcement of judgments.[154] The Hague Convention regime applies in 'international cases to exclusive choice of court agreements concluded in civil or commercial matters'.[155] One of the basic rules under the Hague Convention is that a judgment by the chosen court must be recognised or enforced in Contracting States,[156] subject to limited exceptions set out in Article 9. At the date of writing, the Hague Convention has entered into force in Mexico, Montenegro and the European Union member states (including Denmark). China, the USA and Ukraine have signed but yet to ratify the Hague Convention.[157] Where there is no treaty arrangement in place, a Singapore judgment may be recognised and enforced in accordance with the domestic rules of the recognising/enforcing jurisdiction.[158] However, this domestic rule avenue is far more uncertain, as the requirements and their application would vary from jurisdiction to jurisdiction.[159] Indeed, it has been observed that it is very difficult to recognise or enforce foreign judgments in some ASEAN countries.[160]

To increase the portability of its judgments abroad, Singapore continues to seek ways, directly or indirectly, to foster collaboration and trust with the courts of other countries. The Supreme Court of Singapore, on 19 January 2015, entered into a non-binding 'Memorandum of Guidance' with the DIFC Courts concerning the reciprocal enforcement of money judgments.[161] On 31 August 2018, the Supreme Court of Singapore entered into a Memorandum of Guidance with the SPC on the recognition and enforcement of money judgment in commercial cases.[162] The Asian Business Law Institute is now undertaking a project on the harmonisation of the rules of recognition and enforcement of foreign judgments in Asia. The first phase of the project concerning the description of domestic rules in each Asian jurisdiction has been completed and published.[163] It is hoped that these efforts will bring forth comprehensive reciprocal treaty arrangements in the future.

6 Conclusion

The SICC framework of litigation is undergirded by the values of hybridisation (between litigation and arbitration), internationalisation (participation by foreign lawyers and judges) and party autonomy. It changes our frame of reference for what international commercial litigation should be like. It helps to establish the norm that litigation can be neutral, effective and user focused. This is Singapore's contribution to the future of dispute resolution.

Going forward, the SICC will need to build its docket on the basis of cases arising out of an SICC clause and not continue to be heavily reliant on transfer cases. How soon this may be achieved would depend on the compe-

150. Civil Procedural Law, Art. 11.
151. Judicial Interpretation on the CICC, above n. 143, Art. 4.
152. *See* discussion in text to nn. 13-15 above.
153. A. Godwin, I. Ramsay & M. Webster, 'International Commercial Courts: The Singapore Experience', 18 *Melbourne Journal of International Law* 219, at 233 (2017).
154. The local implementing legislation is the Choice of Court Agreements Act, ch. 39A (2016).
155. Hague Convention, Art. 1(1).
156. Hague Convention, Art. 8.
157. *See* Status Table, available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last visited 8 February 2019). Although Canada has not ratified the Hague Convention, Ontario has recently enacted the International Choice of Court Agreements Convention Act 2017 to give effect to the Hague Convention in anticipation of Canada's ratification.
158. For more details, see discussion in 'Report of the Law Reform Committee on Enforcement of Enforcement of Foreign Judgments' Singapore Academy of Law, Law Reform Committee (June 2005), at pp. 8-9, available at: https://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/2005-06%20-%20Enforcement%20of%20Foreign%20Judgments.pdf (last visited 8 February 2019).
159. For common law countries, the requirements for enforcement of foreign judgments are largely similarly to the requirements under Singapore law.
160. For example, Thailand and Indonesia. *See* Hsu, Koh & Yip (2018), above n. 9.
161. *See* Supreme Court of Singapore and DIFC Courts, 'Memorandum of Guidance as to Enforcement Between the Supreme Court of Singapore and the Dubai International Financial Centre Courts', 2015, available at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/dubai-mog-2015-cj-menon-and-cj-of-difc-(memorandum-of-guidance)4bb63033f22f6eceb9b0ff0000fcc945.pdf (last visited 8 February 2019).
162. *See* H. Baharudin, 'Singapore and China Courts Agree on Guide for Money Judgement in Commercial Cases to Be Recognised in Each Other's Countries', *The Straits Times*, 3 September 2018, available at: https://www.straitstimes.com/singapore/singapore-and-china-courts-agree-on-guide-for-money-judgment-in-commercial-cases-to-be (last visited 8 February 2019).
163. A. Chong (ed.), *Recognition and Enforcement of Foreign Judgments in Asia*, ABLI Legal Convergence Series (2017).

tition from other dispute resolution institutions, the degree of the international enforceability of the SICC judgments, and the willingness of lawyers and in-house counsel to insert SICC clauses into commercial contracts.

More interestingly, the mid- to long-term impact of the SICC, domestically and internationally, merits an in-depth study in due course. Section 4 highlights questions concerning the impact of foreign judges on the development and influence of Singapore law. But there are other equally interesting facets to consider, for instance, whether other international commercial courts would base their design on the SICC or adopt successful procedural reforms from the SICC. This will be a measure of SICC's influence on the design of dispute resolution mechanisms. Further, what is the impact of the liberalisation of the criteria for foreign lawyers to appear as counsel in SICC proceedings? Does this reform bring in more dispute business for Singapore? How do local lawyers support litigation in which foreign lawyers appear as counsel, and do these interactions inspire healthy competition and better litigation practices? We await the full impact of the SICC.

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

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Abstract

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

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

1 Introduction

In early 2015, the Singaporean Government constituted the Singapore International Commercial Court (SICC) as a division of the High Court of Singapore, to provide an alternative to arbitration for the resolution of international commercial disputes. Perhaps, most importantly, the SICC's jurisdiction is predominantly derived from disputants' exclusive choice of forum and requires no underlying link or links to Singapore beyond this choice. Because of this, the SICC is intimately concerned with its perceived attractiveness in the eyes of transnational disputants.[1] To this end, it offers disputants more flexible court procedures compared to traditional national courts, straddling and 'hybridising' aspects of commercial court practice, that are 'strongly influenced' by international commercial arbitration practice.[2] For example, the SICC offers a range of procedural accommodations, such as with respect to confidentiality, proof of foreign law and rules of evidence.[3] Further reflecting influence from arbitration, the SICC is able to be constituted by both or either 'local' and international judges, rather than solely judges trained in a domestic legal tradition.[4] These procedures are

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

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

At first glance, this seems to be an oxymoron: if the SICC derives its jurisdiction from an exclusive choice of forum, it should not have any ability to compulsorily join what can be described as a 'true' third party.[7] In this sense, the SICC straddles the conventional arbitration-litigation divide. As arbitration is grounded in party autonomy an arbitrator can have no authority or jurisdiction over parties who have not agreed to arbitration.[8] Reflecting this idea, allowing joinder of a 'true' non-consenting party (rather than a mere non-signatory) has been described as 'anathema to the internal logic of consensual arbitration'.[9] By contrast, it is usual practice for traditional courts to rely upon joinder or consolidation of proceedings involving third parties without requiring their consent.[10] Thus, the SICC derives jurisdiction in a 'hybrid' fashion: like international commercial arbitration, the SICC draws upon an original exclusive choice of forum between disputants who have agreed to arbitrate; however, it also expressly markets its ability – underpinned by Singaporean law – to compulsorily join disputants to this original dispute.[11] Yet, by doing so – deriving jurisdiction from the consent of disputants, with no necessary underlying link to the jurisdiction – SICC judgments lose the traditional territorial bases for jurisdiction relied upon for recognition and enforcement in foreign States.

It is in this uncomfortable juncture that the focus of this article arises: given that Singaporean law authorises the SICC to compulsorily join non-consenting parties to its proceedings, how is any resulting judgment that does so likely to be handled beyond Singapore? We attempt to answer this question by focusing on what is likely to be the most controversial subset of judgments: attempts to join non-consenting parties who, apart from this joinder, have no underlying link or links to Singapore. The recognition-and-enforcement prospects of any resulting judgments are particularly important for the SICC, as it aims to attract foreign litigants in circumstances where the dispute or the disputants themselves have no connection to Singapore. In such cases, the third party against whom judgment is rendered may not have significant (or indeed, any) attachable assets within Singapore.[12] Where this is the case, the support of a foreign enforcing court is required to give practical effect to the third-party SICC judgment in most circumstances.[13] In this article, we argue that such judgments are presently likely to face significant difficulties when recognition and enforcement is sought outside of Singapore. To support this argument, we make two related claims. First, as Section 2 sets out, the SICC has a broad and discretionary mandate to join non-consenting parties to its proceedings. Second, as analysed in Section 3, this mandate is not presently supported at the recognition-and-enforcement stage, across the most likely applicable recognition-and-enforcement regimes. These range, in order of potential reach, from the transnational[14] to the

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

5. Singapore International Commercial Court Committee, 'Report of the Singapore International Commercial Court Committee' (November 2013) [55].
6. M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' 31(2) *Arbitration International* 193, at 196 (2015).
7. A 'true' third party in this scenario is a third party that is at arms-length from the original parties and the contract between them. It is not merely a 'non-signatory', which suggests only that the third party may not have complied with the requirements of writing or signature, but who might otherwise be brought into the contract by some form of deemed agreement. In this article, we prefer the term 'non-consenting party', but we also use the terms 'third party' and 'true third party' interchangeably, unless otherwise apparent from the context. For an expansive discussion of the operation of these ideas in the context of international commercial arbitration, *see* S. Strong, 'Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' 31 *Vanderbilt Journal of Transnational Law* 915 (1998). In the context of international litigation, Black and Pitel comprehensively explore the way in which a forum selection clause may extend beyond the prima facie contracting parties: V. Black and S. G. A. Pitel, 'Forum-Selection Clauses: Beyond the Contracting Parties' 12(1) *Journal of Private International Law* 26 (2016).
8. Noting, of course, various devices developed to join disputants to arbitration despite not appearing, on the face of the arbitral agreement, to have consented to it, as considered thematically in B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2005) 7 (and following).
9. *PT First Media TBK* v. *Astro Nusantara International BV* [2014] 1 SLR 372 (Unreported, Court of Appeal) 197.
10. Chief Justice Hwang (of the DIFC Courts in Dubai), for example, notes that some disputants select dispute resolution in English courts – as opposed to international commercial arbitration – to allow for this possibility: Hwang, above n. 6, 198.
11. Singapore International Commercial Court Committee, above n. 5, at 12.
12. S. Menon, 'International Commercial Courts – Towards a Transnational System of Dispute', *Opening Lecture for the DIFC Courts Lecture Series* 2015:12. This is particularly likely to arise where third parties become involved at later stages of proceedings.
13. For an exposition of the limited circumstances that parties may still pursue recognition and enforcement, despite a lack of available assets, *see*, further, E. Bettoni, 'Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets' 10(1) *New York University Journal of Law and Business* 155, at 168 (and following) (2013). Indeed, it has recently been argued that despite the seeming futility of such a course of action, the burden of proof should be reversed such that the judgment debtor would need to establish that enforcement of a foreign judgment in a jurisdiction where they do not have assets is an abuse of process: H. Kupelyants, 'Recognition and Enforcement of Foreign Judgments in the Absence of the Debtor and His Assets within the Jurisdiction: Reversing the Burden of Proof' 14(3) *Journal of Private International Law* 455 (2018).
14. *See* Section 3.1, below. These instruments are the extant *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) ('Convention on Choice of Court Agreements'), which is applicable to disputants' exclusive choice of forum), and the broad-based Judgments Project draft, put forward by Hague Conference on Private International Law, which remains under negotiation (the most recent draft, as at the time of writing,

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

2 Joinder of Third Parties in the SICC under Singaporean Law

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

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

These requirements are explored in some detail in the Singapore Rules of Court at Order 110, where the terms 'international' and 'commercial' are given a broad sphere of application, including where the original parties agree the proceedings are international and commercial.[20] Alternatively, proceedings may be brought before the SICC if the High Court of Singapore makes an order transferring a matter commenced under its jurisdiction to the SICC.[21] Where proceedings are originally commenced before the SICC, however, the original parties must have a written jurisdiction agreement that states the parties' consent and submit to the SICC's jurisdiction.[22] For any agreement between the parties drafted after 1 October 2016, an agreement that confers jurisdiction to the High Court is also taken to provide consent for the SICC to hear the matter, unless a 'contrary intention appears in the agreement.'[23] The requirement of agreement as to the SICC's jurisdiction, as will be seen later in following part, is a significant factor in why foreign enforcing courts may give effect to SICC judgments. However, the SICC's reliance upon the original parties' consent to have a claim to jurisdiction is not carried over to the power of the SICC to join third parties. In other words, a non-consenting third party may still be validly joined to SICC proceedings as long as the written agreement between the original parties exists, a dispute is on foot in the SICC and the third party is validly served under Singaporean law.[24]

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

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

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

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

15. *See* Section 3.2, below.
16. Singapore International Commercial Court Committee, above n. 5, at 55.
17. *See*, for a more detailed analysis of establishing jurisdiction before the SICC, M Yip, above n. 3, at 163-71.
18. *Supreme Court of Judicature Act 1969* s 18A.
19. *Ibid.*, s 18(d).
20. *Rules of Court* Order 110, Rule 1, ss 2(a)(iv), 2(b)(iii).
21. *Supreme Court of Judicature Act 1969* 18J(2); *Rules of Court* Order 110, Rule 7, 12(1).
22. *Rules of Court* Order 110, Rule 7(1)(b).
23. *Ibid.*, Order 110, Rule 1(2)(ca).
24. *Ibid.*, Order 16, Rule 3; Order 110, 9(1).
25. Order 15, Rule 4(1)(a), Order 16, 1.

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

Although there have been no judgments of the SICC that join third parties,[29] it is, nonetheless, possible to venture some initial – and very tentative – observations as to the possible contours of this discretion. First, it is likely that the SICC's 'formal' discretion to join third parties will – over time, as case law develops – come to mask some developing body of rules or norms.[30] At present, the only formal guidance arises in the Rules of Court, which provides a largely discretionary basis; however, this discretion is unlikely to prove to be unfettered or completely 'open-ended' in practice.[31] Second, to the extent that the judgments of other Singaporean judicial organs assist – which they may not to any significant degree, as the SICC has a unique mandate to attract disputants with no link to Singapore – it is apparent that Singaporean courts take a relatively wide approach to the issue of joinder and misjoinder in considering the application of the Rules of Court in commercial matters.[32] For example, the position of the High Court – of which the SICC is constituted as a division – is that its power to 'bring and keep the appropriate parties before it' is sufficiently wide to extend to allow the joinder of a defendant even in circumstances 'where no cause of action is asserted against a particular defendant'.[33] Nevertheless, it has also been noted – albeit in a case testing executive discretion in detention matters – that the very 'notion of a subjective or unfettered discretion is contrary to the rule of law'.[34] Third, the situations where such joinder is likely to arise are those that are likely to *require* joinder to effectively resolve a dispute, in line with the SICC's constituent motif of acting in a 'commercially sensible' fashion. As Hwang suggests, these may involve contracting relationships based upon a 'web' of contracts, such as those arising from 'employer/main contractor/subcontractor' and 'insurance/reinsurance/retrocession' contracts.[35]

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

3 Recognising and Enforcing SICC Judgments against Non-consenting Parties

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

26. A. Reyes, 'Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court' 2 *Journal of International and Comparative Law* 337, at 355 (2015).
27. As compared to establishing jurisdiction over the original claim.
28. J. Landbrecht, 'The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?' 34(1) *ASA Bulletin* 112, at 118-9 (2016).
29. All SICC judgments to date can be found on the SICC website, and none of these refer to joinder: *SICC – Hearings & Judgments*, available at: https://www.sicc.gov.sg/hearings-judgments/judgments (accessed 29 March 2019).
30. J. Hill, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' 36(2) *Oxford Journal of Legal Studies* 304, at 306 (2016).
31. As Hill argues in the context of enforcing arbitral awards: *Ibid.*
32. *Tan Yow Kon* v. *Tan Swat Ping & Ors* [2006] 3 SLR 881.
33. *Ibid.* at [58].
34. *Chng Suan Tze* v. *Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
35. Hwang, above n. 6, at 195.
36. As Platte notes, there is some controversy in describing this as a 'duty' that an arbitral panel faces, but a consideration of eventual recognition-and-enforcement prospects is nonetheless an identifiable phenomenon within the context of international commercial arbitration: M. Platte, 'An Arbitrator's Duty to Render Enforceable Awards' 20(3) *Journal of International Arbitration* 307 (2003).

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

3.1 Transnational Recognition-and-Enforcement Regimes

Perhaps the most effective way that the enforcement prospects of SICC judgments can be communicated is in circumstances where some form of transnational treaty-based regime compels a foreign enforcing court to give effect to these judgments. Ease of transnational recognition and enforcement is particularly important for the SICC, as it is pitched at attracting disputants and competing with – or at least as an alternative to – not just courts but also arbitral tribunals.[39] The product of the latter, of course, has the benefit of widespread facilitated recognition and enforcement of arbitral awards under the *1958 UNCITRAL Convention on the Recognition and Enforcement of Arbitral Awards* (hereafter 'the New York Convention').[40] To explore the treatment of foreign judgments, we set out the approach of the two key 'global' transnational instruments that govern the recognition and enforcement of foreign judgments and consider how they might apply to a third-party judgment of the SICC. First, and the only instrument currently in force, is the *2005 Convention on Choice of Court Agreements* ('2005 Convention'), currently in force between the European Union (and all of its Member States), Mexico, Montenegro, Singapore and the United Kingdom.[41] The 2005 Convention aims to harmonise and promote the recognition and enforcement of foreign judgments in a similar fashion to the New York Convention's approach to arbitral awards. It applies only where parties to a dispute have validly entered into an agreement that exclusively determines a forum to have jurisdiction over their dispute.[42] In other words, it can only apply upon one jurisdictional basis: where a forum (or potentially multiple fora) in a single jurisdiction is *chosen* and the jurisdiction of other courts/States is clearly excluded.[43] For the sake of simplicity, we refer to this forum as the 'rendering court' (which, in the context of this article, is the SICC). Broadly mirroring the New York Convention, and also the SICC's constitutive requirements in the *Supreme Court of Judicature Act*, the 2005 Convention has broad application to international commercial and civil matters, with only limited exceptions.[44] As such, it has real application to judgments rendered by the SICC and, understandably, forms a key part of the SICC's marketed enforcement strategy.[45] At present, the 2005 Convention is the only transnational recognition-and-enforcement regime that is in force.

The second instrument, which remains under negotiation (albeit at an advanced stage), is encapsulated in the approach of the draft *Convention on the Recognition and Enforcement of Foreign Judgments* (the 'Draft Judgments Convention').[46] The negotiations underpinning this draft are undertaken under the auspices of the Hague Conference on Private International Law, with a view towards finalisation of a Convention at a targeted Diplomatic Session in mid-2019.[47] These negotiations are also referred to as the broad-based judgments project, as they take a broader approach to jurisdictional bases than the sole base of an exclusive choice of forum (covered in the 2005 Convention). As with the 2005 Convention and the New York Convention, the Draft Convention has broad application to a range of international civil and

37. *See, e.g.*, 'Convention on Choice of Court Agreements', above n 14, Art. 15; '2018 Draft Convention' above n 14, Art. 9; and, the *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264)* s 3(3)(b), which grants the enforcing court 'the same control and jurisdiction over the judgment' as it would judgments of the enforcing court.
38. 'Report of the Singapore International Court Committee', above n. 5, [42]-[46].
39. *Ibid.* at 11-12.
40. The reach of which is clear from its widespread acceptance globally: UNCITRAL, *Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed 12 January 2019).
41. Hague Conference on Private International Law, *HCCH | #37 – Status Table*, available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (accessed 29 March 2019). Note that some of these States, whilst signatories to the Convention, have not yet implemented it into their domestic laws. *See, e.g.*, China and the United States of America.
42. 'Convention on Choice of Court Agreements', above n. 14, Art 3(a).
43. *Ibid.*, Art 1.
44. *Ibid.*, Art 1(1).
45. See, for example, Singapore International Commercial Court, 'Note on Enforcement of SICC Judgments' 2, available at: https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_enforcement_guide2cac21700a1d6b0c895eff0000f6c7a3.pdf where it is noted, at [2], that "SICC judgments can be enforced in almost all major commercial jurisdictions and in many other regional ones".
46. '2018 Draft Convention', above n. 14.
47. Hague Conference on Private International Law, 'Conclusions & Recommendations Adopted by the Council' in *Council on General Affairs and Policy of the Conference* (2018):1.

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

3.1.1 Consent and Submission to Jurisdiction

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

(a) Contractual agreements

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

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

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

In any event, the Draft Convention, if successful, will cover the remainder of the field of third-party agreement. This is because Article 4 of the Draft Convention provides a similar obligation to recognise and enforce judgments that meet one or more bases for recognition in Article 5. Relevantly for consent to a particular forum, such as the SICC, Article 5(1)(m) provides a jurisdictional base if:

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

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

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

48. '2018 Draft Convention', above n. 14, Art. 2.
49. *Supreme Court of Judicature Act 1969* (Singapore).
50. By excluding agreements under the Convention to avoid overlap: 'Judgments Convention: Revised Preliminary Explanatory Report' (May 2018) 41-2 [188].
51. Reyes, above n. 26, at 355.
52. 'Convention on Choice of Court Agreements', above n. 14, Art. 3(c).

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

(b) Deemed consent via procedural submission

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

The application of Article 5(1)(f) further reinforces the need for express consent or direct submission to the jurisdiction of the rendering court for a judgment to be eligible for recognition and enforcement. This jurisdictional ground arises where:

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

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

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

53. Reyes, above n. 26, at 356.
54. 'Judgments Convention: Revised Preliminary Explanatory Report', above n. 50, 41 [193].
55. *Ibid.*, 43 [140].
56. *Ibid.*, 43 [140]. For examples of express consent, *see* 32 [142] of the Preliminary Explanatory Report, including where a party agrees to defend a case in the jurisdiction of a State in correspondence or the defendant orally informs the court of an acceptance of its jurisdiction to hear the matter.
57. *Ibid.*, 43 [148].
58. Hague Conference, above n. 47, Art. 3(1)(a); 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 14-15 [64]-[66].
59. 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 28 [134].
60. *Ibid.*, 29 [142].
61. 'Report of the Singapore International Court Committee', above n. 5, [22]-[25].

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

3.1.2 Territorial Connections to Jurisdiction

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

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

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

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

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

62. 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 29 [143].
63. *Ibid.*, 29 [144].
64. These connections are well rehearsed and widely accepted, including, for example, formulations based upon the place of business, ordinary or habitual residence of one or more of the parties, the place for where the transaction occurred or the location of the property in dispute. *See, e.g.*, the factors set out in the 2018 Draft Convention, above n. 14, Art. 5.
65. '2018 Draft Convention', above n. 14, Art. 5(1)(a).
66. 'Judgments Convention: Preliminary Explanatory Report', above n. 50, 23 [111].
67. *Ibid.*, 23-4 [111]-[113]; *see also* (from the 2016 Draft Convention where the bases read the same): 'Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues' (April 2016) 18 [70].
68. '2018 Draft Convention', above n. 14, Art. 5(1)(h). It should be noted, however, that the harm itself need not occur in the state of origin so long as the act or omission causing it is sufficiently connected.
69. *Ibid.*, Art. 5(1)(g).
70. As Black and Pitel suggest, joinder of a third party in a manner that is not consistent with or supported by the law of the enforcing court may be such an example: Black and Pitel, above n. 7, at 58 (at fn 120).

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

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

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

71. *See*, in the context of the 2005 Convention, Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) 23. The Draft Convention as well as the New York Convention also follow a similar approach. Note, however, that domestic approaches can choose to refrain from providing residual recourse to national law. *See, e.g.*, s 2A of the Singaporean version of the Commonwealth Model, as reflected in *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore)*. This provision clarifies that 'this Act [Singapore's implementation of the Commonwealth Model] does not apply to any judgment which may be recognised or enforced in Singapore under the Choice of Court Agreements Act 2016'.
72. M. Paulsson, *The 1958 New York Convention in Action* (Wolters Kluwer, 2016) 124. Paulsson's comments are made with respect to the New York Convention but are equally applicable to both the 2005 Convention and the 2018 Draft Convention.
73. *See*, in the context of 2005 Convention, Brand and Herrup, above n. 71, at 110, who note that the use of the permissive language of 'may' allows this (Art. 9 of the 2005 Convention). This is consistent with the approach of the Draft Convention (Art. 7(1) provides 'Recognition or enforcement *may* be refused if …').

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

3.2.1 Recognition and Enforcement under the Commonwealth Model

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

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

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

74. 'Report of the Singapore International Court Committee', above n. 5, *see* 20-2 [42]-[51].
75. *Ibid.*, [42].
76. Each jurisdiction thus has its own Acts, but they are, in large, part modelled on the original UK Acts: *Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK)* ch. 13, 23 and 24 Geo 5; *Administration of Justice Act 1920 (UK)* ch. 81, 10 and 11 Geo 5.
77. B. Paige, 'Foreign Judgments in American and English Courts: A Comparative Analysis' 26(3) *Seattle University Law Review* 591, at 611 (2003).
78. *See* Section 1 of the 1933 Act, which establishes the requirement for reciprocity.

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

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

> (2) No judgment shall be ordered to be registered under this section if —
> a. the original court acted without jurisdiction;
> b. the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
> …

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

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

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

3.2.2 Common Law Recognition and Enforcement

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

79. Previously referred to as 'superior' courts: *Civil Jurisdiction and Judgments Act 1982 (UK)* Sch 10.
80. Paige, above n. 77, at 619.
81. *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore)*. This is not surprising, as like other Commonwealth Model participants, the Act is drawn closely upon the original UK Act. *See*: H. L. Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' 46(2) *The International and Comparative Law Quarterly* 443, at 456 (1997). Note that there is also another Singaporean Act, The *Reciprocal Enforcement of Foreign Judgments Act (Chapter 265)*, which only has application to Hong Kong and thus is of limited use in assessing international prospects of recognition and enforcement: 'Report of the Singapore International Commercial Court Committee', above n. 5, at 20 [42].
82. *Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK)*. The provisions of this Act with respect to jurisdiction and recognition and enforcement are similar to the approach in Singapore in the *Reciprocal Enforcement of Foreign Judgments Act (Chapter 265),* referred to at footnote 77.
83. *Ibid.*, s 4(2); *Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore)* s 5(2).
84. A. Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, 6th ed, 2015) 759.
85. *Administration of Justice Act 1920 (UK)* 9.

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

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

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

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

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

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

86. Section 6 provides that 'No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.'
87. In the United States, this formulation can be traced back to *Hilton* v. *Guyot* (1895) 159 US 113, 144. This continues to inform current recognition-and-enforcement practice: G. Born, *International Civil Litigation in United States Courts: Commentary and Materials* (Kluwer Law International, 1996) 12, discusses extensively *Hilton*'s approach to recognition and enforcement of judgments and the (significant) extent to which it informs modern practice despite a range of developments and codification in some States. *See*, for examples of Australian and English approaches, respectively: M. Davies, A. Bell & P. Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed., 2014) 895 (and following); A. V. Dicey, L. Collins & J. H. C. Morris, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 2015) 15.
88. *See eg In Sik Choi* v. *Kim, Lee & Or* 50 F 3d 233 (3rd Circuit 1995) at 252, where the court stresses that comity should be accorded to the greatest extent possible to respect foreign laws.
89. 662 F 2d 862 (DC Circuit 1981) at 864-8.
90. J. Turner, 'Enforcing Foreign Judgments at Common Law in New Zealand: Is the Concept of Comity Still Relevant?' 2013(4) *New Zealand Law Review* 653, at 669 (2013).
91. Despite the ready recognition of judgments *in rem* under English common law – for example, judgments that relate to immovable property, or adjudicate on status – these judgments rarely come for enforcement: Dicey, Collins and Morris, above n. 87, at [14-110]. For this reason, we focus on *in personam* jurisdiction, as this is the jurisdiction most likely to be implicated by third-party SICC cases (which necessarily have a commercial character) and most likely to require recognition and enforcement in a foreign enforcing court.
92. Davies, Bell & Brereton, above n. 87, at 4.04; Dicey, Collins and Morris, above n. 87, at [14-055].
93. Dicey, Collins & Morris, above n. 87, at [14-129].
94. Briggs, above n. 84, at 692.
95. Dicey, Collins & Morris, above n. 87, at [14R-044] (and accompanying commentary). *See*, further for a detailed exposition of English case law on international jurisdiction, Briggs, above n. 84, at 690-715.
96. This formulation of acceptable international jurisdiction is similar to what is required in other common law recognition-and-enforcement approaches that derive from the English tradition: *see*, further, Reyes, above n. 26, at 338; *Aratra Potato Company Limited Morello International Limited* v. *The Owners of the Ship 'El Amria' 1979 Folio 326* (Unreported, ewhc.qb.admiralty); *see, e.g.*, in Canada, T. J. Monestier, 'Jurisdiction and the Enforcement of Foreign Judgments' 42 *Advocates' Quarterly* 107, at 110 (2013–2014).
97. *Adams* v. *Cape Industries Plc* [1990] Ch. 433, 517-8.

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

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

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

For these reasons – and although joinder without territorial links, or links based on presence or submission to jurisdiction, is permissible under Singaporean law – enforcing courts in English common law jurisdictions are not compelled to enforce such judgments. This may be either due to a strict conception of a 'prerequisite' requirement of jurisdiction or even because of the potential application of an overriding public policy concern as to the appropriateness of the SICC exercising jurisdiction over a foreign entity in a transaction that occurred outside the bounds of the State's (Singapore's) jurisdiction. Thus, we are left in much the same position as considering statutory or transnational regimes: absent another jurisdictional basis (such as consent or a territorial link), none of the approaches to recognition and enforcement analysed compel recognition and enforcement of third-party SICC judgments.

4 Concluding Remarks

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

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

98. Black and Pitel, above n. 7, at 58 (fn 120).
99. Dicey, Collins and Morris, above n. 87, Rule 51.

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

Third, and perhaps most importantly, the SICC's mandate to compulsorily join non-consenting parties – and the eventual exercise of this power – will continue to place practical pressure on enforcing courts (and their host jurisdictions) to recognise and enforce any resulting judgment. This is largely because, despite the lack of transnational obligations to do so,[103] foreign enforcing courts can take a more permissive approach to recognising and enforcing such judgments if they so choose.[104] Thus, domestic approaches may be more permissive in giving effect to a third-party SICC judgment, based upon the extent to which they embody a degree of discretion and are potentially amenable to legal development. That is, where there is greater 'familiarity, trust and confidence' in a particular State or its rendering courts, there is a greater prospect of its judgment being recognised and enforced.[105] In such cases, competing factors in recognition and enforcement – such as the finality of proceedings – may favour giving effect to the SICC judgment against a non-consenting party, to avoid expensive (and potentially unnecessary) re-litigation of the matter.[106] Singapore will be assisted in this sense by its long-standing efforts to build and maintain its 'brand-name and reputation' in dispute resolution, based on 'trust, neutrality and efficiency'.[107] Such comments are not mere marketing hyperbole.[108] Based on these reputational claims, it may even be that there is some advantage to recognition and enforcement of SICC judgments over arbitral awards. This will be assisted by the fact that considerations of both State and judicial comity and reciprocity are likely to resound more heavily with respect to the emanation of State power contained in a judgment vis a vis an emanation of private decision making in the form of an arbitral award.[109]

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

100. Bettoni, cited at footnote 13, above, provides an overview of the kinds of pressures that a third party may face, even where they may not have assets in a particular jurisdiction.
101. As Black and Pitel note, it is now 'widely accepted' that forum-selection clauses should be presumptively enforced: Black and Pitel, above n. 7, at 26.
102. Hwang, above n. 1, at 195; Reyes, above n. 26, at 357.
103. Indeed, this is likely to be one of the key ways that legal development occurs with respect to transnational recognition-and-enforcement instruments, as the legal ordering surrounding recognition and enforcement (in both the 2005 Convention and the advanced Draft Convention) is unlikely to substantially change or update, given the 'incrementalist' nature of transnational private law-making: *see*, further, S. Block-Lieb and T. Halliday, 'Incrementalisms in Global Lawmaking' 32(3) *Brooklyn Journal of International Law* (2007).
104. This option remains open to enforcing courts, as transnational recognition-and-enforcement instruments allow residual recourse to more permissive domestic (municipal) recognition-and-enforcement approaches. That is, enforcing courts can never violate any transnational obligations by giving effect to foreign decisions; instead, 'only by failing to do so': Paulsson, above n. 72, at 124.
105. This suggests only that the 'greater the familiarity, trust and confidence, the greater the willingness to enforce: conversely, the greater the ignorance and suspicion, the more reluctant we would be to grant enforcement': Ho, above n. 81, at 448. It should not be taken to suggest that Singaporean judgments are likely to be treated in a similar way to other mutual recognition schemes that have a mandatory nature (*e.g.*,, the approach in the Brussels I system).
106. *Ibid.*, 60.
107. Singapore Minister for Law (Kasiviswanathan Shanmugam), 'Opening Address' (SIAC Congress 2016, 27 May 2016) [8], available at: https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-minister-for-law--k-shanmugam--at-siac-congre.html (accessed 22 December 2018). This reputation is not solely tied to one institution – like the SICC – but instead reflects a combination of perceptions about Singaporean institutions generally. Perhaps most prominently for international commercial disputants, these are the existing national courts of Singapore, the Singapore International Arbitral Centre (SIAC), the Singapore International Mediation Centre. The SICC also attempts to market not just its own prowess but Singapore's overall 'legal infrastructure', by reference to its well-developed and respected institutions and its 'efficient, competent and honest judiciary', allowing it to serve as a 'neutral third party venue', thereby making it the right choice to provide effective decision-making services: Singapore International Commercial Court Committee, above n. 5, at 10,15.
108. Singapore is widely recognised as an efficient jurisdiction for resolving commercial disputes, with one of the lowest 'congestion rates' globally (caseload divided by resolved cases) and high user- and academic perceptions of effectiveness and efficiency: Dakolias, 'Court Performance around the World: A Comparative Perspective' 2(1) *Yale Human Rights and Development Journal* 87, at 103, 131-4 (1999). Recent indicators remain in line with this image: *see, e.g.*, the 2017 IMD World Competitiveness Yearbook. The Yearbook, which combines statistical and survey data, regularly places Singapore in the top ranking of nations from the perspective of business, legal and regulatory competitiveness (Singapore comes in third globally in 2017).
109. Ho, above n. 81, at 453-4.

The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?

Sai Ramani Garimella & M.Z. Ashraful*

Abstract

The liberal globalised order has brought increased focus on the regulation of international commerce, and especially dispute resolution. Enforcement of contracts has been a concern largely owing to the insufficiencies of the legal systems, especially relating to the institutional structure, and it holds true for India as well. The commercial courts mechanism – international and domestic – with innovative features aimed at providing expedited justice is witnessing much traction. India, similar to many other jurisdictions, legislated in favour of specialized dispute resolution mechanisms for commercial disputes that could help improve the procedures for enforcement of contracts. This research attempts to critique the comparable strengths and the reform spaces within the Indian legislation on commercial courts. It parses the status of commercial dispute resolution in India especially in the context of cross-border contracts and critiques India's attempt to have specialised courts to address commercial dispute resolution.

Keywords: Commercial contracts, Enforcement, Jurisdiction, Specialized courts, India

1 Introduction

Commercial dispute resolution in India is handled by the civil courts established in each of the 719 districts. The jurisdiction of these courts is founded upon territorial and pecuniary reasons. An empirical analysis of dispute resolution systems in two provincial units of Indian federation (reported in 2010) brought forth an important truism about the judicial system in India, albeit only in those two geographical regions – [increased] pendency in courts and the consequent delays could reduce the confidence of litigants in filing cases in courts.[1] Higher pendency of cases significantly impacted the probability of rational selection to prefer litigation. Investment in human resources and infrastructural facilities resulted in a positive effect on the disposal of cases. The study also found that increased disposal rate increases filing rate, other things remaining constant. Availability of the number of judges has a decisive impact on disposal efficiency and pendency.[2] Given the similarity of the judicial system across the country, it is not farfetching to state that the scenario in other provinces is significantly the same. The country profile for India in the World Bank's 2016 edition on 'Ease of Doing Business'[3] summarised that a total of 1,420 days was invested in the resolution of a civil dispute, including commercial disputes, given that civil courts in India handled the commercial disputes also. This period is significantly higher than its partners in the BRICS like China, standing at 452 days and the Russian Federation at 307 days.

In 2015, the Government of India initiated efforts to overhaul the commercial dispute resolution procedures as part of its ambitious programme to incentivise foreign direct investment. Directed at improving the ease of doing business in India (and with India), the government embarked on a reform process to improve investor confidence and reduce delays by separating the commercial disputes from the civil disputes and prescribing a timeline for their resolution.

Court specialisation is perceived as being of utility to address broader developmental constraints, like effective access to contract enforcement and improvements in the investment climate.[4] Growing complexity of topics explaining the dispute apart, Finigen, Carey and Cox point out that specialisation ushers in benefits such as efficient processes and greater understanding of the law and the efficient mapping of the impact of the court's decision on the parties.[5]

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1. Empirical Research on Indian courts is sparse. *See,* generally, S. Rabiyath and R. V. Ramanamurthy, 'Disposal Rates, Pendency, and Filing in Indian Courts: An Empirical Study of the Two States of Andhra Pradesh and Kerala', in P. G. Babu, T. Eger, A. V. Raja, Hans-Bernd Schäfer & T. S. Somashekar (eds.), *Economic Analysis of Law in India: Theory and Application* (2010); N. Robinson. 'A Quantitative Analysis of the Indian Supreme Court's Workload' 10(3) *Journal of Empirical Legal Studies* 570 (2013).
2. Rabiyath and Ramanamurthy, above n. 1.
3. World Bank's Report on 'Ease of Doing Business' (2016), available at: www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf (last visited 5 October 2018).
4. H. Gramckow and B. Walsh, 'Developing Specialized Courts Services: International Experiences and Lessons Learned', *WBJD Working Paper Series*, 2013:1.
5. M. W. Finigan, S. M. Carey & A. Cox, 'Impact of a Mature Drug Court over 10 Years of Operation: Recidivism and Costs (Final Report)', *NPC Research*, 2017.

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While the early examples of commercial courts in England and elsewhere aimed 'to provide a court staffed with a single Judge who was familiar with the subject-matter of commercial dispute',[6] and efficient procedures for expeditious dispute resolution, contemporary examples of commercial courts are innovating to improve institutional functionality, especially in the wake of the success seen in the space of arbitration.[7] The English model, a domestic court structure, has emerged as a preferred choice for transnational commercial dispute resolution.[8] Elsewhere, there are international commercial courts, such as the Singapore-based International Commercial Court,[9] the Dubai-based Dubai International Financial Centre (DIFC) Courts,[10] the commercial court in the Abu Dhabi Global Market[11] and few others that were modelled upon the English Commercial Courts.[12] The Law Commission of India (hereafter, the Law Commission)[13] in its two reports[14] recommended the establishment of a commercial court to address the concerns related to enforcement of contracts, and especially to reduce procedural delay concerns. This research analyses the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereafter, the Commercial Courts Act), and the amendments to evaluate and suggest ways to improve its efficacy to help improve the enforceability of contracts, and thereby further the ease of doing business in India.

The narrative would attempt to nuance its arguments from a comparative perspective of institutions in other jurisdictions. The first section of this research traces the importance of commercial courts, as specialised tribunals, for dispute resolution. Towards this purpose, the research follows the template of classifying the existing court models – domestic courts model and international courts model. Noting that national courts resort to private international law rules for cross-border dispute resolution, the second section of this research attempts to encapsulate the conflict of laws rules in India. This is followed by a summarisation of the regime for commercial claims resolution introduced by the Commercial Courts Act, 2015, and the amendments to the law. Section 4 critiques this regime for its strengths and flaws and further attempts to suggest the path to be travelled to ensure that businesses receive a robust regime upholding the rule of law.

2 Commercial Courts

The constitution of commercial courts in India has been in the discussion space for some time. The Law Commission's 188th Report proposed establishment of fast-track courts with high-tech procedures for commercial disputes of high pecuniary value. The 253rd Report released in 2015 recommended establishment of commercial courts and commercial divisions after taking note of the high pendency of commercial disputes in five High Courts of India with original jurisdiction. The Report noted that 51.4% of the civil disputes as of 2013 (32,656 cases) were commercial disputes. The Commission observed that this affected the investor confidence as expressed in the World Bank's Doing Business Report.[15] The establishment of the commercial courts was seen as critical to encourage investment by, inter alia, ensuring the speedy enforcement of contracts. These Reports made suggestions after considering the experience of the working of commercial courts in other jurisdictions; hence, a brief narrative about the commercial courts in other jurisdictions is germane for appreci-

6. R. Southwell, 'A Specialist Commercial Court in Singapore', 2 *Singapore Academy Law Journal* 274 (1990)
7. International Arbitration continues to adapt to contemporary needs of dispute resolution ushering increased discussion about the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention') on its 60th anniversary.
8. In 2015, more than two-thirds of the 1,100 claims (approximately) handled by the English Commercial Court were of international character. *See,* generally, *UK Legal Service Report* (2016), available at: https://www.thecityuk.com/research/uk-legal-services-2016-report/ (last visited 20 October 2018).
9. Section 29A(1) of the Supreme Court of Judicature Act has provided the right to appeal against the judgement or order of the SICC to the Court of Appeal of the Singapore Supreme Court, although according to the Singapore International Commercial Court Practice Directions, 2017, parties could agree in writing to waive this right. *See*, A. Godwin, I. Ramsay & M. Webster, 'International Commercial Courts: The Singapore Experience', 18 *Melbourne Journal of International Law* 219 (2017).
10. International Commercial Court was established in the DIFC in 2004 based on English Common Law system. DIFC courts are administered by eleven judges from various common law jurisdictions. *See*, Standing International Forum of Commercial Courts, *Dubai International Financial Centre Courts*, available at: https://www.sifocc.org/countries/dubai/ (last visited 20 October 2018).
11. The Abu Dhabi Global Market (ADGM) Courts were established by the Abu Dhabi Law No. (4) of 2013. In the Middle East, ADGM is the first jurisdiction that directly applied the common law of England and Wales. *See*, J. Gaffney, 'Abu Dhabi Establishes English-Language Commercial Courts', *Essam Al Tamimi & Co.* (2016).
12. For example, The Qatar International Court and Dispute Resolution Centre.
13. A statutory body established to suggest law reform measures either upon recommendation or *suo moto.* The commission's membership includes practitioners and academics experienced in various disciplines and is chaired by a former member from the higher judiciary.
14. Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Report on the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015* (Report No. 78, 2015), available at: www.prsindia.org/uploads/media/Commercial%20courts/SCR-%20Commercial%20Courts%20bill.pdf (last visited 10 July 2018). Also *see*, Law Commission of India, *Proposals for Constitution of Hi-Tech Fast Track Commercial Divisions in High Courts* (188th Report, December, 2003), available at: http://lawcommissionofindia.nic.in/reports/188th%20report.pdf (last visited 10 July 2018) and Law Commission of India, Commercial Division and Appellate Division of the High Courts and Commercial Courts Bill, 2015 (253rd Report, January 2015), available at: http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf (last visited 10 July 2018).
15. The World Bank's 2015 "Ease of Doing Business" rankings in which of the 189 countries surveyed, India was given an overall rank of 142, available at: www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf (last visited 1 October 2018).

ating the Indian model for its comparable strengths and spaces for reform.

The Right Honourable the Lord Thomas of Cwmgiedd emphasised the importance of specialised dispute resolution to the economic prosperity of nations and exhorted the commercial courts to work together to uphold the rule of law and further international economic cooperation and prosperity.[16] The Lordship cited the 18th century example of juries comprised experts appointed by Lord Mansfield.[17] The Admiralty and Commercial Courts Guide[18] Part 58 includes an important feature – review and adapt the feedback about the working of the Commercial Courts generated through its users' committees, constructive suggestions from the litigants before it and from professional advice.[19] The success of the London Commercial Court model has inspired the functioning of the recent international commercial courts.[20]

International court models at Dubai and Abu Dhabi in the United Arab Emirates and the State of Qatar, as well as the Singapore International Commercial Court (SICC), are a unique hybrid model that is neither arbitration nor litigation before a national court but aims to combine the benefits of both.[21] The DIFC Courts, located in the financial free zone in DIFC have been described as 'a common law island in a civil law ocean'.[22] They are also the curial courts for all arbitrations seated in the DIFC.[23]

Established in 2015, the SICC[24] adapted from the arbitral model but underpinned by judicial control.[25] SICC's jurisdiction can be invoked in disputes that are primarily 'international' and 'commercial', unlike the London Commercial Court that has general jurisdiction to hear international as well as domestic disputes[26] Additionally, subject to the forum non-conveniens rule,[27] parties could designate the SICC through a forum selection clause;[28] SICC could acquire jurisdiction through the transfer of a dispute to it by the Singapore High Court either on its own motion[29] or because of an agreement of the parties.[30] Parties could choose the IBA Rules of Evidence to the exclusion of the domestic rules of evidence.[31] As with the DIFC, the SICC provides a mix of local and international judges to adjudicate disputes. Twelve of the thirty-one judges at the SICC are international.[32] Foreign counsel is allowed to appear in 'offshore cases'[33] before the SICC, and in DIFC Courts as well. In a first of its kind, the DIFC Courts have devised a novel process of 'converting'[34] DIFC Court judgements into arbitral awards. Parties, in an arbitration clause, could agree to refer any dispute concerning a judgement rendered by the DIFC Courts to arbitration in the DIFCC-LCIA Arbitration Centre; the LCIA tribunal will consequently render an award that a party may seek to enforce under the New York Convention.[35] While this novel procedure and the discussion surrounding it is outside the scope of this research paper, this experiment demonstrates the streamlining of the classic dispute resolution procedures to the advantage of international investors and commercial entities.

16. The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Giving Business What It Wants – A Well Run Court for Commercial and Business Disputes', *Grand Court of the Cayman Islands Guest Lecture* 2017, available at: https://www.judiciary.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf (last visited 24 September 2018).
17. *Ibid*., at 15.
18. The Judges of the Commercial Court of England & Wales (eds.), *The Commercial Courts Guide*, (10 edn. 2017), available at: https://www.gov.uk/government/publications/admiralty-and-commercial-courts-guide (last visited 25 September 2018).
19. *Ibid*., at 9.
20. S. Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', *DIFC Courts Lecture Series* 2015: 1, 42-43, available at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf (last visited 12 September 2018).
21. Sir W. Blair, 'Contemporary Trends in the Resolution of International Commercial and Financial Disputes', *Institute of Commercial and Corporate Law Annual Lecture*, at 1, 9, & 13 (Durham University, 21 January 2016), available at: https://www.judiciary.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf (last visited 12 September 2018).
22. M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?', 31(1) *Arbitration International*, at 193, 201 (2015). DIFC Courts follow the English common law tradition unlike the rest of the UAE that adopted the civil law tradition. DIFC courts are two-tiered, the Court of First Instance is presided by a single judge and a three-member Court of Appeal hears appeals. The Chief Justice of the DIFC Courts is the eminent Singapore arbitrator Michael Hwang SC.
23. Arbitration law of the DIFC Law No. 1 of 2008 (amended by DIFC Law No. 6 of 2013).
24. The Singapore Supreme Court consists of the Singapore High Court, which is the court of first instance, and the Court of Appeal, which is the court of final appeal. *See*, M. Yip, 'The Resolution of Disputes Before the Singapore International Commercial Court', 65 *International and Comparative Law Quarterly*, at 439-73 (2016); also *see*, M. Yip, 'Navigating the Singapore's Private International Rules in the Age of Innovative Cross-Border Commercial Litigation Framework' in P. Sooksripaisarnkit and S. R. Garimella (eds.), *China's One Belt One Road Initiative and Private International Law* (2018).
25. *See*, Rules of Court, O 1.10, R 1(2) (a) and (b).
26. J. Landbrecht, 'The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?', 34 *ASA Bulletin*, at 112, 114 (2016); also *see*, D. Demeter and K. M. Smith, 'The Implications of International Commercial Courts on Arbitration', 33(5) *Journal of International Arbitration*, at 441-70, 452 (2016).
27. Rules of Court O 110, R 8.
28. Rules of Court O 110, R 12(3)(b) read with R 12(4)(a)(i).
29. Rules of Court O 110 R 12(3)(a)(ii).
30. SCJA Section 18J read with Rule of Court O 110, R 7(2).
31. Rules of Court O 110, R 23(1).
32. A list of the judges of the SICC is available at: https://www.sicc.gov.sg/about-the-sicc/judges.
33. The Singapore International Commercial Court Procedure Guide, paragraph 3.5.1, defines an offshore case as 'an action which has no substantial connection with Singapore, but does not include an action in rem (against a ship or any other property) under the High Court (Admiralty Jurisdiction) Act (Cap 123);' *see* ROC O 110 r 1(1). For more information on what constitutes no substantial connection with Singapore, *see*, O 110 r 1(2)(f); PD Part V https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc_procedural_guide.pdf (last visited 10 September 2018).
34. For a suggested arbitration clause, *see*, DIFC Courts Practice Direction No. 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration, 16 February 2015, available at: https://www.difccourts.ae/2015/05/27/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/ (last visited 10 August 2018).
35. S. Menon, above n. 20, at 37.

3 Cross-Border Commercial Dispute Resolution – The Conflicts of Laws Rules in India

National courts resolve much of the cross-border commercial disputes, as demonstrated by the robust, and often maze-like, normative content of private international law rules in most jurisdictions, India included. There is a little accession to harmonised law,[36] except to the immensely successful New York Convention on the Enforcement of Foreign Arbitral Awards, 1958. While arbitration has been a preferred mode of dispute resolution, few concerns came forth, especially with regard to costs and lack of sanctions during the arbitral process.[37] The default regime for resolution of cross-border disputes, including commercial disputes in India, is limited to colonial law and post-independence judicial development, with minimal accession to international conventions.[38] Per the Commercial Courts Act, 2015, the commercial court in the districts and the commercial divisions shall function as the courts of the first instance for commercial disputes that would have otherwise been heard in the civil court (the jurisdiction of the civil court is pecuniary and territorial). The Commercial Courts, hearing disputes involving a foreign element, will, therefore, apply the private international law rules that were hitherto applied by the civil court hearing cross-border commercial disputes. Interestingly while India adopted the *lex situs* principle in disputes related to immovable property, the commercial courts will receive applications related to immovable property that is a part of the commercial dispute.[39] Apart from fidelity to the principle of autonomy in the matters of choice of law, Indian law also provided clarification with regard to the validity of forum selection clauses. In *ABC Laminart Pvt. Ltd.* v. *A.P. Agencies, Salem,*[40] the Court outlined the rules explaining the validity of such contractual clauses.

a. Ousting the jurisdiction of a court, which otherwise would have jurisdiction, by a contract, is void.
b. Conferring jurisdiction on a court, which otherwise does not have any jurisdiction, by a contract, is void.
c. Where two or more courts have jurisdiction to try a matter, then limiting the jurisdiction to a particular court is valid. However, such contract should be clear, unambiguous and specific. Ouster clauses may use the words 'alone', 'exclusively' and 'only', and the same pose no difficulty in interpretation.[41] In a recent decision, the Delhi High Court ruled in favour of the validity of a forum selection clause where the contracting parties agreed to confer jurisdiction on the London Commercial Court.[42]

Party autonomy in the context of the choice of forum is also a feature of the Indian law, thus allowing Commercial Courts, as chosen forum, hear disputes. Jurisdictional clauses in the contract are valid, especially when the petitioner is a foreigner, and the parties have designated the law applicable to their contract and disputes.[43] However, as a non-chosen court, they could exercise jurisdiction if:

a. the contracting parties being subject to the municipal law of the country with which the case has the connection or where the cause of action may have arisen;
b. the governing law clause of the contract is violative of the public policy of the country, and such clause does not confer exclusive jurisdiction on the forum chosen or
c. it is possible according to the chosen applicable law to override the chosen forum.[44]

Regarding applicable law, Indian courts[45] have shown favour to the principle of party autonomy and ruled that an express or implied choice of law by the parties trumps any presumption in favour of *lex loci solutionis*.

36. There is no policy statement on accession to the Convention on Contracts for the International Sale of Goods, 1980. India is a member of the Hague Conference on Private International Law and the International Institute for Unification of Private Law (UNIDROIT), but has a membership only to four Hague Conventions to date. These conventions are the Convention of Abolishing the Requirement of Legalization for Foreign Public Documents 1961; the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (not ratified as yet) and the Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993.
37. F. Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross-Border Commercial Dispute Resolution in Asia', 14 *Loyola University Chicago International Law Review* 31, at 38-39 (2016); Sai Ramani Garimella, 'Arbitral Reforms in India: The Case for Third Party Funding of Arbitral Claims' 15 *Transnational Dispute Management* (2018), available at: https://www.transnational-dispute-management.com/article.asp?key=2558 (last visited 18 July 2018); approaching national courts is not concern-free either owing to the unfamiliarity with procedures and challenges related to inconsistent outcomes. *See,* generally, F. P. Phillips, 'The Challenges of International Commercial Dispute Resolution', *CPR: The Int'l Inst. for Conflict Prevention and Resolution*, available at: www.businessconflict management.com/pdf/BCMpressOl.pdf (last visited 18 August 2018); *also see*, W. L. Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration', 50 *Texas International Law Journal* 699, at 700 (2016).
38. S. R. Garimella, 'OBOR and the Syncretic Private International Law Rules in India: Time for Accession to Harmonised Legal Regimes', in P. Sooksripaisarnkit and S. R. Garimella (eds.) *China's One Belt One Road Initiative and Private International Law* (2018).
39. Explanation (a) to Section 2(1)(c), Commercial Courts Act; *see,* generally, Sections 2(1)(c), 6 and 7, Commercial Courts Act r/w Section 20 of the Civil Procedure Code.
40. AIR [1989] SC 1239.
41. *Ibid.*, at 3.
42. *Bharat Heavy Electricals* v. *Electricity Generation Incorporations* [2017] Delhi High Court CS (COMM) 190/2017.
43. *Kumarina Investment Ltd.* v. *Digital Media Convergence Ltd. and Another* [2010] SCC Online TDSAT 641.
44. *Ibid.*, at 69.
45. *See,* generally, *National Thermal Power Corporation Ltd.* v. *the Singer Company* (1992) 3 SCC 551 [25] and [28]; *Shreejee Traco (I) Pvt. Ltd.* v. *Paperline International Inc.* (2003) 9 SCC 79 [7]; *also see*, Jan Neels, 'The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law', 22(2) *Uniform Law Review* 443-451 (2017).

Recognition and enforcement of foreign judgements are primarily founded upon the principle of reciprocity.[46] Decrees from a non-reciprocating territory could be enforced through a civil suit[47] where the foreign court's order could be a cause of action.

The foregoing narrative shows that issues related to enforcement of contracts are addressed through rudimentary principles, with minimal participation in harmonised law. Added to this is the concern regarding costs-related orders, an achilles heel within the commercial dispute resolution system in India. There has been a general reluctance to issue and enforce costs-related orders in litigation as well as arbitration. A study of eighty-three judgements on Petitions for Special Leave to Appeal against orders made Section 11 of the Arbitration and Conciliation Act, 1996, reveal that costs were ordered in about 1.2% of the petitions.[48]

4 Commercial Courts Act, 2015 – Access to Justice Reset

Following extensive analysis of the commercial courts mechanism in the United Kingdom, the United States (Delaware, New York and Maryland), Singapore, Ireland, France, Kenya and nine other countries and, on two occasions, in 2009 and in 2015, the Law Commission recommended the establishment of an extensive commercial dispute resolution mechanism.[49]

4.1 Commercial Courts in India – The Wherewithal of Innovation in Dispute Resolution

A vibrant legal system is of utmost necessity in ensuring investor confidence; courts and dispute resolution institutions are of vital importance as they help in enforcing contracts and ensuring compliance with the rule of law. As observed by India's Prime Minister:

> Businesses seek assurance of the prevalence of the rule of law in the Indian market. They need to be assured that […] commercial disputes will be resolved efficiently.[50]

India's tryst with commercial courts began in 2003 – the Law Commission in its 188th Report[51] recommended the establishment of fast-track commercial divisions in the High Courts.[52] However, the recommendations were not acted upon. The Commission further deliberated on the issue and submitted another report calling for the immediate establishment of commercial courts. The 253rd Report contained a draft commercial courts bill as an annexe outlining a structure for constituting specialist courts for commercial claims.[53] Pending consideration by the Indian Parliament, and realising the immediate necessity[54] for the constitution of commercial courts, the President of India promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division Ordinance, which was subsequently replaced by Commercial Courts Act, 2015.[55]

The legislation established a multi-tiered court structure for commercial disputes resolution

- State governments (India is a federal country, the constituent units are referred to as States) shall establish Commercial Courts at the district level (the district is an important geographical unit within the States, and the district administration is largely supervised by the State government) in all territories where a High Court does not exercise original civil jurisdiction[56] (where a High Court is not the court of the first instance).
- Within territories where a High Court exercises original civil jurisdiction, the Chief Justice of the High Court may order constitution of Commercial Divisions with one or more benches presided by a Single Judge.[57]
- The Chief Justice of every High Court shall set up a Commercial Appellate Division within the High Court, consisting of one or more benches.[58]

Following the Law Commission's recommendation[59] the term 'commercial disputes' has been expansively worded, through indicative content given in a non-exhaustive list of twenty-two standard and non-specific commercial transactions that may form the subject-mat-

46. Section 44A, Code of Civil Procedure – Decrees from the following territories are executed as similar to a decree from a domestic court. United Kingdom, Singapore, Bangladesh, UAE, Malaysia, Trinidad & Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Fiji, Aden.
47. *Moloji Nar Singh Rao* v. *Shankar Saran* AIR [1962] SC 1737.
48. *See*, B. Sreenivasan, 'Appeal Against the Order of the Chief Justice Under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis', 1 *Indian Journal of Arbitration Law* 21 (2012). *See*, Garimella, above, n. 37, at 20.
49. M. V. D. Prasad, *Commentary on the Commercial Courts Act 2015* (2018), at 3.
50. Valedictory address by Prime Minister Narendra Modi at the National Conclave for Strengthening Arbitration and Enforcement, 23 October 2016, available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=151887 (last visited 10 July 2018).
51. Law Commission of India (188th Report, December 2003), above, n. 14.
52. *Ibid.*, at 159-78. The report recommended that the fast-track courts adopt simplified procedures, including effective case management and requisite technology processes.
53. Law Commission of India (253rd Report, January 2015) above, n. 14.
54. *See*, the World Bank's *Doing Business* Reports. The 2016 Report discussing the position as of 2015, ranked India at 178 out of 189 countries. A key performance metric for the ranking is the ease of enforcement of contracts, available at: http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf (last visited 12 July 2018).
55. Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (Act No. 4 of 2016). Notified in the Gazette of India as being effective from 23rd October 2015. The Act has since been amended and notified as effective from 3rd May 2018.
56. *Ibid.*, Section 3(1).
57. *Ibid.*, Section 4(1) as per the Amendment Act 2018.
58. *Ibid.*, Section 5. Section 5(2) specifies that the Chief Justice shall nominate judges experienced in handling commercial disputes to the Appellate Division.
59. Law Commission (253rd Report, January 2015), above n. 14, at 52.

ter of commercial disputes.[60] However, the judiciary seems less inclined to adopt a wider meaning to this term. The Delhi High Court in *Qatar Airways Q.C.S.C.* v. *Airports Authority of India & Anr*[61] was reluctant to hold damage to an aircraft, attributable to the defendants, as a commercial dispute within the scope of the legislation despite the enumerated provision classifying all transactions relating to aircraft, aircraft engines, equipment and helicopters, including sales, leasing and financing of the same as commercial transactions.[62]

Expansive meaning has been attributed to term commercial dispute in a few other instances. In *Great Eastern Energy Corporation Ltd.* v. *Union of India,*[63] the Court held that dispute regarding the agreement between the parties requiring the petitioner to make a one-time payment of signature bonus is a commercial dispute as defined under Clause 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

Suits for the recovery of mesne profits against the tenant (the banking institution in this case) instituted by the landlord are categorised as commercial disputes within the enumerated list in Section 2(1)(c).[64]

Where a property has been notified as a commercial property, its non-utilisation for the said purpose would not affect its characterisation. In *Monika Arora* v. *Neeraj Kohli & Anr.,*[65] the Delhi High Court allowed a petition for transfer of the dispute to the Commercial Division as it involved an immovable property in a notified commercial location. The legislative provision is recalled here,

> 2. Definitions: (1) In this Act, unless the context otherwise requires:
> (c) commercial dispute means a dispute arising out of
> (vii) agreements relating to immovable property used exclusively in trade or commerce;
> Explanation: A commercial dispute shall not cease to be a commercial dispute merely because:
> a. it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;
> b. ….

The jurisprudence available from the commercial courts allows a few derivations regarding the classification of a commercial dispute.

1. Suits for specific performance of agreements related to the development of land are not classified as suits founded upon commercial dispute.[66]
2. The Delhi High Court in *Hindpal Singh* v. *Jabbar Singh*[67] held that the suit for cancellation of power of attorney, with respect to an immovable property used exclusively in trade and commerce and as part of the sale transaction of such property, would not constitute a commercial dispute within the meaning of Section 2(1)(c).
3. Suits for ejectment from the property, illegally used, exclusively for purposes of trade and commerce with the consent of the plaintiff, would still not entitled to be classified as a commercial dispute to be addressed within the commercial courts.[68]

It is hoped that the judiciary, as it works with the legislation, will take notice of the expansive nature of the definition of the commercial dispute and draw guidance from the Law Commission's recommendations. Allowing an application for correction of the valuation of the suit, the Delhi High Court observed that:

> It is a commercial dispute and the Court dealing with the commercial matters should not have the narrow approach, as the Court has to examine the application from commercial angle, though the same is subject to the condition that a valid case for amendment is made out, once the said condition is fulfilled, the prayer has to be allowed.[69]

4.2 Improved Access to Justice

The legislation prescribed a pecuniary jurisdiction for the commercial courts, suits of a specified value,[70] and a detailed procedure for its calculation.[71] The Amendment Act, 2018, reduced the value from INR10,000,000 (approx. USD150,000) to INR300,000 (approx. USD4,500). It appears that the intent is to meet the parameters used to gauge enforceability of contracts in World Banks's Ease of Doing Business Report that include claims worth 200% of income per capita or $5,000, whichever is greater. The change in the specified value would ensure that the work of commercial courts be considered for gauging enforceability of contracts, apart from furthering ease of dispute resolution.

Suits or applications related to commercial disputes (as per the Act) shall be transferred to the commercial courts, except where the final judgement has been reserved by the court where such suit or application is pending.[72] Parties to the dispute could also make an application to the Commercial Appellate Division for such transfer.[73]

Appeals shall be presented only to the jurisdictional Commercial Appellate Division.[74] Filing of civil revision applications or petitions for an interlocutory order,

60. Section 2(1)(c).
61. [2017] 240 DLT 731.
62. Section 2(1)(c)(iv).
63. [2016] SCC Online Del. 5873.
64. *Jagmohan Behl* v. *State Bank of Indore* [2017] SCC Online Del 10706.
65. [2016] SCC Online Del 5259.
66. *Ujwala Raje Gaekwar* v. *Hemaben Achyut Shah and Others* [2017] SCC Online Guj 583.
67. 2016 SCC Online Del 4901.
68. *Soni Dave* v. *Trans Asian Industries Expositions Pvt. Ltd.* [2016] AIR, Del 186.
69. *Jasper Infotech Pvt. Ltd.* v. *Deepak Anand & Others* (2015) SCC Online Del 14399.
70. Section 2(1)(i).
71. Section 12.
72. Sections 15(1) and (2).
73. Section 15(5).
74. Section 13(1).

including an order on a jurisdictional challenge of a Commercial Court are prohibited,[75] to prevent the disruption to case management schedules by the frequent filing of revision applications and petitions. The Law Commission had recommended limiting of the right to approach other courts for revision applications or interlocutory orders. It observed that limiting the right to approach other courts for revision processes would help ensure expedited disposal of the dispute in the commercial court.[76]

4.3 Innovative Features for Effective Dispute Resolution

4.3.1 Investing in Human Resources

The law specified constitution of commercial courts with judges experienced in commercial disputes resolution;[77] further State Governments shall invest in judicial training services for commercial courts.[78] Noting the importance of expeditious disposal of disputes to the businesses, the legislation streamlined the timetable for judges as well as litigants. For example, appeal from judgements and orders of the commercial court must be instituted within sixty days from the date of judgement.[79] The Commercial Appellate Division '*shall endeavour*' to dispose of an appeal within six months from the date of its institution.[80]

4.3.2 Cross-Referencing with the Law on Procedure

The legislation also ushered in changes to the Code of Civil Procedure, 1908. Litigating Parties appearing before the commercial courts are subject to stringent timelines such as an outer limit of 120 days for the defendant to file its written statement.[81] Further, all documents should be filed alongwith a party's first pleadings, *i.e.* the plaint for the claimant, and the written statement or counterclaim for the defendant, except in situations of urgent filings when leave to rely on additional documents may be sought.[82] The legislation allowed for summary judgements, founded only on documentary evidence.[83] Sections 16(3) and 21, read together, ensure that the provisions of the Civil Procedure Code, as amended through the Commercial Courts Act, would prevail in cases of conflict in the procedures envisaged within any other law or jurisdictional rules introduced into the Code of Civil Procedure.[84]

4.3.3 Costs

The Law Commission of India recommended[85] costs orders in civil suits/proceedings to prevent frivolous litigation and to discourage vexatious adjournments. It suggested that costs orders would help alleviate the loss for parties subjected to unjust dispute resolution and further contractual compliance.[86]

Taking a cue from the guidance provided by the Law Commission's Report that costs should follow the event as a meaningful deterrent against frivolous litigation,[87] the legislation provided detailed costs follow the event regime[88] as well as comprehensive provisions on interest.[89]

4.3.4 Remedies against State Entity

An interesting feature of this legislation is the availability of remedies against a State entity engaged in commercial activity. Sub-clause (b) to the Explanation within Section 2(1)(c) specified that the dispute shall not cease to be a commercial dispute merely because a contracting party happens to be a State or a State-owned/supported entity.

4.3.5 Case Management

The legislation also introduced case management – a feature that was first articulated by the Supreme Court,

> At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the court should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same [can] be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.[90]

A new legislative provision was added to the Code of Civil Procedure, providing for a 'Case Management Hearing' for framing the issues involved in the dispute, listing the witness and scheduling a calendar for the proceedings.[91]

4.3.6 Commercial Courts and Arbitration

The commercial courts also function as the courts of first instance for arbitration-related applications involving commercial dispute of specified value. Commercial Divisions within the High Courts exercising original civil jurisdiction have exclusive jurisdiction to hear applications related to international commercial arbitrations. Similarly, all applications and appeals relating to domestic arbitrations that have been filed on the original

75. Section 8.
76. *See*, Law Commission of India, above n. 53, at 48, para. 3.23.2.
77. Sections 3(3), 4(2) and 5(2).
78. Section 20.
79. Section 13(1).
80. Section 14.
81. Schedule, Commercial Courts Act, 2015.
82. *Ibid.*
83. *Ibid.*
84. *See*, for instance, *HPL (Ind) Limited & Ors.* v. *QRG Enterprises and Another* (2017) SCC Online Del 6955.
85. Law Commission of India, *Costs in Civil Litigation* (Report 240, 2012), available at: http://lawcommissionofindia.nic.in/reports/report240.pdf (last visited 18 July 2018).
86. *Ibid.*
87. Law Commission of India (253rd Report, January 2015), above n. 14, at 45, para. 3.21.1.
88. Schedule, Commercial Courts Act, 2015.
89. *Ibid.*
90. *Rameshwari Devi* v. *Nirmala Devi* (2011) 8 SCC 249, at para. 52.
91. Order XV-A – Case Management Hearing, Schedule, Commercial Courts Act, 2015.

side of the High Court shall be heard and disposed of by the Commercial Division, and applications and appeals that would ordinarily lie before any principal court of original jurisdiction in a district (that is not a High Court), shall be heard and disposed of by a Commercial Court. The Arbitration and Conciliation Act, 1996 (as amended in 2015), allows for applications to be made to the court[92] in the following areas:

– refer parties to arbitration[93] and appoint arbitrators on application by the parties[94]
– grant interim measures[95] when an arbitration tribunal has not yet been constituted[96]
– set aside arbitral awards (domestic arbitration)

The Report on the Commercial Courts Bill, 2015, noted that parties exercise their choice of forum for dispute resolution, *ab initio*, between commercial courts and arbitration.[97] However, there are instances that require parties to an arbitration agreement to resort to national courts – to the extent that national courts are accessed – the partnership between arbitration and the courts is not one of the equals, as national courts can exist and function without arbitration, but the converse is not a possibility.[98] The Commercial Courts Act and the amended Arbitration Act attempt to reduce judicial intervention in arbitration. The twin legislations[99] are expected to foster investor confidence and there has been interesting and encouraging response from institutions of governance and the business and legal communities.[100]

The twin legislations ushered important changes with regard to the forum that would hear applications related to International Commercial Arbitrations, including the enforcement of foreign arbitral awards. The amended Arbitration Act transferred the applications in support of international arbitration to be presented to the High Courts.[101] The Commercial Courts Act transferred the applications pending before the High Courts to the Commercial Division.[102] The amendments do not affect the right of the parties to appeal to the Supreme Court.

The Commercial Courts shall, on the application, provide judicial assistance to international arbitrations in the following areas:

– Interim relief – applications for interim relief in domestic and international arbitrations[103] may be made to the courts, until such time the tribunal is constituted; the tribunal-granted interim measures shall have the same effect as that of a civil court order under the Code of Civil Procedure, 1908.[104]
– Commercial courts could be approached for extension of time limits for completion of arbitral proceedings[105] – a twelve-month timeline has been statutorily fixed for completion of arbitrations seated in India. Parties could, at the completion of twelve months, agree for a six-month extension, and further extensions could be allowed based on application to the commercial court. Extensions are allowed based on a judicial appreciation of the existence of sufficient cause of the delay, else the mandate of the arbitral tribunal is terminated. The commercial court may also order reduction of tribunal's fees if the delay is attributable to the tribunal.
– The Arbitration Amendment Act, 2015, also imposed stringent timelines on the commercial courts – challenges to the arbitral award before the commercial court are to be decided within one year.[106]
– The new costs regime ushered in by the Arbitration Amendment Act, 2015, requires the commercial courts to take notice of parties conduct, especially with regard to applying to courts to delay arbitration proceedings, while deciding upon imposition of costs.[107]
– Concerns exist with regard to the judicial intervention in the enforcement of foreign arbitral awards via the route of public policy in India.[108] This, the literature[109] as well the reports of the Law Commission of India[110] noted, adversely effects contracts and their

92. Section 2(e), Arbitration and Conciliation Act, 1996.
93. Section 8, Arbitration and Conciliation Act, 1996.
94. *Ibid*., Section 11(5) and (6).
95. *Ibid*., Section 9(1).
96. *Ibid*., Section 9(2) as per the Amendment Act, 2015.
97. Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (Report No. 78, 2015), above, n. 14, at 27.
98. N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (6th edn, 2015), at 416.
99. Received Presidential assent on 31/12/2015, with retrospective effect from 23rd October 2015.
100. Among the interesting developments in the field of dispute resolution is the establishment of the Mumbai Centre for International Arbitration as a joint initiative of the government of the State of Maharashtra, domestic and international business and legal communities. The Maharashtra State Government has legislated that all government commercial contracts henceforth shall have a mandatory institutional arbitration clause. Further, the Government of India has formed a committee headed by a member of the Supreme Court to review the institutionalization of arbitration in India, available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 (last visited 12 July 2018).
101. Section 2(1)(e) as per Arbitration Amendment Act, 2015. The 1996 Arbitration Act vested the power to hear most applications related to international arbitrations in the district courts, which were by virtue of being courts of first instance in most disputes related to civil matters, burdened by a burgeoning caseload.
102. Section 15(1), Commercial Court Act, 2015.
103. Arbitration Act, Section 2(2) read with Section 9 of the Arbitration Amendment Act, 2015.
104. Section 17, Arbitration Amendment Act, 2015.
105. Section 29A, as per the Amendment of 2015, has fixed timelines for the completion of arbitral proceedings. It is inserted into Part I of the Arbitration Act, 1996, that is applicable to arbitrations seated in India.
106. Section 34(6), Arbitration Amendment Act, 2015.
107. Section 31A(3), Arbitration Amendment Act, 2015.
108. *See*, F. S. Nariman, 'Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture', 27(2) *Arbitration International* 115, at 115-27 (2011); *see, generally*, D. Mathew, 'Situating Public Policy Within Indian Arbitration Paradigm', 3 *Journal of the National Law University* 106-41 (2015).
109. *See, generally*, P. Nair, 'Surveying a Decade of the "New" Law of Arbitration in India', 23(4) *Arbitration International* 699, at 728-30 (2007); A. C. Rendeiro, 'Indian Arbitration and Public Policy', 89 *Texas Law Review* 699, at 709 (2011); N. Darwazeh and R. Linnane, 'The Saw Pipes Decision: Two Steps Back for Indian Arbitration?', 19 (3) *Mealey's International Arbitration Report* 34 (2004); S. Kachwaha, 'The Arbitration Law in India: A Critical Analysis' 1(2) *Asian International Arbitration Journal* 105 (2005).
110. The Law Commission of India in 176th Report on the Arbitration and Conciliation (Amendment) Bill 2001 suggested an amendment to the 1996 Act to nullify the effect of the *ONGC* v. *Saw Pipes* [2003] 5 SCC

enforceability. The Arbitration Amendment Act, 2015, and the judicial opinion that followed the amendment set to rest the well-founded fears regarding the porous nature of 'public policy' challenge to enforcement of foreign arbitral awards. 'Public policy' remains as an important ground for challenging enforcement applications; however, its connotation is now subjected to limited content – to circumstances where there has been fraud or corruption, or contravention of 'the fundamental policy of Indian law' or 'the most basic notions of morality or justice', thus clarifying that patent illegality – as an element thereof only applies to domestic arbitration.[111] The process of enforcement is also improved upon by revoking the automatic stay on enforcement of awards due to the commencement of setting aside proceedings of international arbitral awards.[112] Two recent judgements of the Delhi High Court seem to reinforce the commitment of the law towards the enforceability of contracts. In *Cruz City I Mauritius Holdings* v. *Unitech Limited*,[113] the Court held that where the contracting parties intended to attribute enforceability to their contract, they would not be able to allege at a later stage that the agreement or an arbitral award therefrom was unenforceable for being in contravention of foreign exchange regulations that were in force. In *NTT Docomo* v. *Tata Sons Ltd.*,[114] the Court upheld a 1.8BN USD award, rejecting objections by Reserve Bank of India for violation of the regulatory framework on remittances. The Court adopted a restricted approach to public policy grounds and upheld the sanctity of the contracts.

4.3.7 Introduction of Alternative Dispute Resolution Procedures

The Amendment Act, 2018, introduced a mandatory pre-institution mediation where a suit does not contemplate urgent interim relief; the plaintiff has to undergo pre-institution mediation.[115]

705 decision. It suggested that an explanation limiting the content of Section 34 to the three grounds mentioned in the ratio of *Renusagar Power Co. Ltd.* v. *General Electric Co.* [1994] AIR, S.C. 860, may be included in the amendment. The Justice B. P. Saraf Committee that was set up to inquire into the Recommendations of the Law Commission in its 176th Report regarding amendments of the Arbitration and Conciliation Act 1996 and the Amendments proposed by the Arbitration and Conciliation (Amendment) Bill, 1996, also supported the Law Commission suggestion.

111. A detailed explanation annexed to Section 34(2) in Arbitration Amendment Act, 2015, explicitly states that patent illegality as a ground for resisting enforcement shall not be available in international commercial arbitrations and when made available in arbitrations not international, such ground shall not be used to set aside awards merely for erroneous application of law or for a re-appreciation of the evidence by the court.
112. Section 36(2), Arbitration Amendment Act, 2015.
113. EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, 11 April 2017.
114. O.M.P.(EFA)(COMM.) 7/2016 & IAs 14897/2016, 2585/2017, 28 April 2017.
115. Section 12 A, the Commercial Courts (Amendment0) Act 2018.

5 Critique

An effective commercial dispute resolution mechanism, especially in the context of cross-border commerce, should effectively address the needs of its users while unflinchingly upholding its commitment to the rule of law. Sir William Blair identified a few pre-requisites for such an effective system:

1. the certainty, that is, the application of ascertainable legal principles to the underlying contractual or other dispute;
2. accessibility, being an absence of artificial barriers to bringing or defending claims;
3. predictability, in that the tribunal will apply known procedures;
4. transparency, so that the parties are aware of the whole process;
5. independence, underpinned by the transparency, so that there is no suspicion that the tribunal is other than independent;
6. experience and expertise in the tribunal;
7. efficient case management, so that the proceedings are properly handled; and
8. the effective outcome, including enforcement if necessary.[116]

As commercial dispute resolution went through a metamorphosis, questions continue to emerge requiring clarity and law reform. A significant concern related to the legislation is the level of cross-referencing that was attempted in the 2015 legislation when inter-linking with the arbitration law (including the arbitration amendment). In this context, the decision in *Kandla Export Corporation & Anr* v. *M/s OCI Corporation & Anr*[117] sheds light on the result from the cross-referencing of Section 50, Arbitration Act,[118] and Section 13(1), Commercial Courts Act. Avoiding an isolated reading of Section 13(1), the Supreme Court reaffirmed its commitment to the enforcement of foreign awards by reiterating that an appeal in cases of foreign awards would only apply on the grounds set out in Section 50 of the Act and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting the objections to enforcement.

Commercial courts, across India, ruled differently in the context of the retrospective application of the Arbitration Amendment Act, 2015, thereby causing concern related to the uncertainty of the law. Contradicting decisions exist with regard to the applicability of the amendments to arbitration proceedings that commenced before October 2015.[119]

116. *See*, generally, W. Blair, above n. 21, at 4.
117. Civil Appeal No. 1661-1163 of 2018, 7 February 2018.
118. Section 50, Arbitration Act 1996 allows parties to appeal against two types of orders:
    – an order refusing to refer parties to arbitration, and
    – an order refusing to enforce a foreign award
119. A sample of the cases with contradictory opinion – *Electro Steel Casting Limited* v. *Reacon (India) Pvt. Ltd.*, Calcutta High Court, Application No. 1710/2015, 14 January 2016; *Tufan Chatterjee* v. *Sri Rangan Dhar*,

Interpretation of the provisions of the legislation, especially with regard to disputes pending before the courts and their transfer to the commercial courts, has presented interesting articulation. The Delhi High Court in *Guinness World Records* v. *Sababbi Mangal*[120] explained the law on transfer of suits pending in the civil courts as per Section 7, Commercial Courts Act.[121] The Court ruled in favour of the transfer of the dispute, related to intellectual property rights, by reading the entirety of Section 7 in the context of its object and the legislative history. It held that IPR matters would be decided by the Commercial Division of the High Court irrespective of the Specified Value of the dispute being less than 1 crore INR (152,000 USD).

While the legislation and the legislative history reiterate a commitment to usher in the specialist forum for commercial disputes resolution, the practice does not conform to this reiteration. A review of the roster on the Bombay High Court shows that the same judges are seen alternating between their civil court duties and duties on the commercial division/commercial appellate division.[122] Thus, instead of specialised courts with judges with expertise in commercial disputes resolution, it has only increased the workload on an over-burdened judiciary.

An ambitious specialised dispute resolution system for commercial disputes ought to take notice of the importance of expeditious resolution and enlist technology support to achieve that. The Commercial Courts Act in India needs to adopt competitive practices such as e-filing, cross-examination of witnesses through video-conferencing, digital transcription services and such. It is encouraging to note that few courts in India, on their own initiative, have adopted the e-filing procedures.[123]

The discovery procedures, envisaged within the legislation[124] raise concern for dilatory and protracted procedures related to document production requests before the courts, thus not contributing to expeditious and efficacious dispute resolution.

Calcutta High Court, FMAT No. 47 [2016] 2 March 2016; *Board of Trustees of the Port of Mumbai* v. *Afcons Infrastructure Ltd.*, Bombay High Court, Arbitration Petition 868/2012, 23 December 2016; *Ardee Infrastructure Private Limited* v. *Ms. Anuradha Bhatia/Yashpal & Sons* Delhi High Court, 6 January 2017; *also see*, T. Shiroor & A. Rajan, 'India's Commercial Courts: An Examination Through Different Lenses', 15 *Transnational Dispute Management* (2018), available at: www.transnational-dispute-management.com/article.asp?key=2549 (last visited 10 July 2018).

120. CS(OS) No. 1180/2011, I.A. No. 17748/2015, 15 February 2016.
121. Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed or pending on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court […].
122. *See*, the roster list of the Bombay High Court, available at: http://bombayhighcourt.nic.in/sittinglist/PDF/sitlistbomos20170605182929.pdf (last visited 20 July 2018).
123. *See*, for instance, the statistics depicting the use of electronic services in the Delhi High Court, available at: http://delhihighcourt.nic.in/statistics.pdf (last visited 10 July 2018).
124. Commercial Courts Act, 2015 –Order XI Disclosure, Discovery and Inspection of Documents in Suits before the Commercial Division of a High Court or a Commercial Court.

6 Conclusion and Way Forward for Commercial Courts in India

Indian law and courts would need to evolve in their content and procedures before they could position themselves on the international dispute resolution hub. The road to that evolution is not a difficult tread although. Few important steps could help India's dispute resolution systems infuse confidence about its law and systems within the commercial world.

The law reform efforts need to factor the necessity of having Exclusive Commercial Courts. This would significantly impact the caseload of the commercial courts and thereby ensure speedy disposal of claims before it. Having a separate cadre of judges specialised in commercial disputes would impact the success of commercial courts, significantly. Going forward, India could also consider the segregation within the cadre-based on the specialisation of the judges within the categories of commercial disputes.

Similar to the UK's Commercial Courts, India would do well by adopting some of the best industry practices such as factoring the feedback gained through users' committees, industry associations and chambers of commerce through regular feedback procedures.

Integrating technological innovations into the dispute resolution process could further the cause of expeditious disposal of claims and ensure that case management procedure included in the legislation is adhered to. Whereas electronic records are admissible[125] before the courts and the Act described the details for their admissibility, the legislation does not allow electronic filing of applications related to commercial dispute and the electronic court proceedings.[126] The e-court service of India[127] portal has highly limited functionality with access restrictions. Appraising the performance of the courts with regard to the enforceability of contracts, specifically distance to finish, becomes very difficult. While the legislation mandated collection and disclosure of statistical information related to the number of suits, applications and appeals filed,[128] there is little access to such information, given that they are not maintained exclusively but as part of the data maintained by the High Courts in each federal unit.

As mentioned in the Law Commission's 188th and the 253rd Reports, the civil procedure rules that are applied to the commercial courts need to be revisited for mandating stringent adherence to timelines.

125. Schedule 1, Order XI (6) of the Commercial Court Act (2) at the discretion of the parties or where required (when parties wish to rely on audio or video content), copies of electronic records may be furnished in electronic form either in addition to or in lieu of printouts.
126. e-filing is available in the Supreme Court of India and some High Courts, available at: http://www.ecourts.gov.in/ecourts_home/ (last visited 2 November 2018).
127. Available at: http://www.ecourts.gov.in/ecourts_home/ (last visited 2 November 2018).
128. Section 17, the Commercial Courts Act 2015.

The Bar Council of India could lay down specific guidelines as directed by the Supreme Court[129] to specify the role of foreign lawyers for being classified as casual advice to Indian clients on matters of foreign law.

Were India to position itself as a hub for dispute resolution, apart from improving its legal infrastructure – the law, the institutions and the procedures, it also needs to focus on best of the industry practices. It could consider, similar to SICC and the DIFC, adopting a hybrid arbitration-litigation model that offers the best of both – choice of forum, IBA Rules of Evidence and such from the world of arbitration could be fused with the benefits offered by litigation like the joinder of third parties, for instance. It could also ponder on ensuring structural neutrality by allowing international judges. All this would come in when India would look towards unschackling itself from procedural delays and adapt itself to the requirements of specialised dispute resolution system.

The Commercial Courts Act is but a small beginning in taking heads on the justice delivery mechanism and making it more accountable to its users while ensuring the rule of law. There are interesting signs that hold promise for the future of dispute resolution systems for commercial disputes in India. While an international commercial court may not be a possibility in the immediate future, there are incremental steps towards making the world look at India. The Ministry of Commerce has taken the first steps towards opening India's legal and accounting sector to foreign players by deleting just five words 'excluding legal services and accounting' – from Rule 76 of the Special Economic Zones Rules, 2006.[130] The Standing Forum for International Commercial Courts held in London in June 2017 emphasised the importance of shared information about the practices of commercial courts across jurisdictions and said that it could help appraise and improve practices in their own jurisdictions.[131] It helps to re-state the same, in the context of India.

129. *Bar Council of India* v. *A. K. Balaji* Civil Appeal Nos.7875-7879 of 2015, 13 March 2018.
130. The Gazette of India, Ministry of Commerce and Industry, available at: http://sezindia.nic.in/upload/uploadfiles/files/1Rule76.pdf (last visited 5 September 2018).
131. The Eastern Caribbean Supreme Court, 'Inaugural Meeting of the Standing International Forum of Commercial Courts' (4th and 5th May 2017), available at: https://www.eccourts.org/inaugural-meeting-standing-international-forum-commercial-courts/ (last visited 10 September 2018).

The Court of the Astana International Financial Center in the Wake of Its Predecessors

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Abstract

The Court of the Astana International Financial Center is a new dispute resolution initiative meant to attract investors in much the same way as it has been done in the case of the courts and arbitration mechanisms of similar financial centers in the Persian Gulf. This paper examines such initiatives from a comparative perspective, focusing on their Private International Law aspects such as jurisdiction, applicable law and recognition and enforcement of judgments and arbitration awards. The paper concludes that their success, especially in the case of the younger courts, will depend on the ability to build harmonious relationships with the domestic courts of each host country.

Keywords: international financial centers, offshore courts, international business courts, Kazakhstan

1 Introduction

In May 2015, the former President of Kazakhstan, Nursultan Nazarbayev, announced the creation of the Astana International Financial Centre (AIFC), which was officially launched in July 2018. The AIFC is an area within the city of Astana where a 'special legal regime in the financial sphere' applies.[1] The AIFC could be classified as an offshore financial centre (OFC). Although the International Monetary Fund (IMF) has admitted that '[i]t has proven difficult to define an OFC using a widely-accepted description',[2] it also refers to them as 'any financial center where offshore activity takes place'.[3] 'Offshore finance is, at its simplest, the provision of financial services by banks and other agents to non-residents.'[4] The AIFC could also be classified as a financial free zone,[5] that is an entity with only a very small or nominal territory and whose goal is mainly the provision of offshore corporate and financial services.

As part of the AIFC, the AIFC Court[6] and the International Arbitration Center of the AIFC (IAC[7]) have also been created. Nine English judges have been hired, the president being the renowned Lord Woolf, former Lord Chief Justice of England and Wales, who also has extensive experience in similar dispute resolution projects, such as the Court of the Qatar Financial Center.

The AIFC is also one of Nazarbayev's '100 steps'[8] and part of his '2050 Strategy'[9] for the strengthening of Kazakhstan's legal system and the diversification of its economy, which is heavily dependent on its wealth of natural resources. The OECD or the American Chamber of Commerce have consistently called for solutions to the climate of corruption and disrespect for the rule of law in the country, although they also see that progress is being made.[10] Anti-bribery campaigns, projects to create special investment courts, to provide better

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1. Art. 1, Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, n. 438-V ZRK, 7 December 2005 (amended in 2017) (AIFC Constitutional Statute). The founding legal instruments of these financial centres are originally drafted in Arabic, Kazakh or Russian, and an unofficial translation into English is then provided by the financial centres themselves. Here, only references to the English translations are made. Laws and regulations made by the legislative and regulatory bodies of each financial centre, as well as their case law, are only in English or in English and Arabic. They can be found in the specific database of each centre's website, indicated below.
2. Offshore Financial Centers, 'A Report on the Assessment Program and Proposal for Integration with the Financial Sector Assessment Program, Monetary and Capital Markets Department and the Legal Department of the International Monetary Fund', 8 May 2008, at 17, available at: https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Offshore-Financial-Centers-Report-on-the-Assessment-Program-and-Proposal-for-Integration-PP4271.
3. International Monetary Fund, 'Offshore Financial Centers, IMF Background Paper', Monetary and Exchange Affairs Department, 23 June, 2000, Section II.A, available at: https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm.
4. *Ibid.*
5. *Infra*, nn. 20-22.
6. Available at: https://aifc-court.kz/legislation. So far, only one case has been filed before the Court of the AIFC, which will be heard by the AIFC Small Claims Tribunal.
7. Available at: https://aifc-iac.kz/.
8. Address by the President of the Republic of Kazakhstan, National Plan '100 Concrete Steps to Implement the Five Institutional Reforms', 11 November 2014, available at: https://strategy2050.kz/en/page/message_text2014/.
9. Address by the President of the Republic of Kazakhstan, 'Strategy Kazakhstan-2050: New Political Course of the Established State', 14 December 2012, available at: https://strategy2050.kz/en/multilanguage/.
10. OECD Investment Policy Reviews: Kazakhstan 2017, at 16, available at: https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-kazakhstan-2017_9789264269606-en#page17; American Chamber of Commerce White Paper, 2018, at 2, available at: https://drive.google.com/file/d/1zIxJi9rDF7sCybKz1J8jZR2dEdfo7EsZ/view.

training for judges and law enforcers,[11] a new but still imperfect Arbitration Law[12] and now the AIFC may all be part of this effort.

The '100 Steps' expressly mention that the AIFC is to be modelled on the Dubai International Financial Center (DIFC, established in the United Arab Emirates (UAE) in 2004[13]), whose own dispute resolution system has served as the model for the AIFC Court and the IAC. The DIFC has also influenced the creation of similar OFCs such as the Qatar Financial Center (QFC, established in Qatar in 2005[14]) and the Abu Dhabi Global Market (ADGM, established in UAE in 2013[15]). A comparison between the AIFC dispute resolution mechanisms and those of its Persian Gulf predecessors may highlight the AIFC's advantages and deficiencies and may also help to predict its future success or failure.

Concerning terminology, AIFC and DIFC courts are 'offshore courts' because they are established in an 'offshore jurisdiction' such as the AIFC or the DIFC and also because the use of such terminology helps to distinguish them from 'onshore courts', that is, the domestic courts of their host country, namely Kazakhstan and the UAE, respectively.[16] However, the term 'offshore courts' is also often used simply to refer to the domestic courts of places like Bermuda or the British Virgin Islands, because those jurisdictions are OFCs in their own right.[17]

2 Normative and Administrative Framework

The legal system of the AIFC, as well as that of the other centres, consists of laws and regulations produced by the legislative and regulatory authorities of the host country as well as of laws and regulations made by the legislative and regulatory bodies of the centres themselves.[18]

First, state domestic legislation creates the financial centres and describes their basic goals, structure and management. Reference has already been made to the Constitutional Statute establishing the AIFC.[19] In the case of the DIFC and ADGM, several federal norms first opened the possibility to set up financial free zones in each of the emirates[20] and then specific legislation – federal and of each emirate – created two financial centres, one in Dubai[21] and then one in Abu Dhabi.[22] In Qatar a law created the QFC in 2005.[23]

The founding legislation commonly provides for the existence of several bodies such as boards of directors, management councils and financial authorities, as well as the courts and the arbitration centres, which are autonomous and where the Chief Justice and the head of the arbitration centre play a pre-eminent role. There are also registrars with case management functions. In some centres there are judges specifically appointed for the enforcement of judgments and court orders.[24]

There is also a Small Claims Court or Division for disputes under a certain amount: US$100.000 in the case of the DIFC and ADGM and US$150.000 in the case of the AIFC. In the case of the DIFC, all dispute resolution services are under the umbrella of the DIFC Dispute Resolution Authority, which comprises the DIFC Courts, the DIFC-LCIA Arbitration Center, the DIFC Academy of Law and the Will & Probate Registry.[25]

In the case of the QFC there is also a Regulatory Tribunal that decides appeals against decisions made by QFC administrative bodies.[26] In the other centres, jurisdiction for these kinds of 'internal' administrative law disputes is conferred on the offshore courts themselves, along with their general jurisdiction for civil and commercial claims. In all cases there is a first instance court or circuit and a court of appeal, with the additional possibility of creating different divisions within the courts (e.g. an employment division in the ADGM Courts[27]).

ADGM Courts are modelled on Scotland's Court of Sessions, so that ADGM judges can sit in both the Court of First Instance and in the Court of Appeal, as

11. 100 Steps, Section II: 'Ensuring the rule of law', available at: https://strategy2050.kz/en/page/message_text2014/.
12. Law of the Republic of Kazakhstan No 488-V, 8 April 2016 on arbitration, available at: http://adilet.zan.kz/eng/docs/Z1600000488.
13. 100 Steps (Step 24); DIFC, available at: https://www.difc.ae/; DIFC Courts, available at: https://www.difccourts.ae/about-courts/legal-framework/.
14. QFC, available at: www.qfc.qa/en/Operate/Legal/Pages/default.aspx and Qatar International Court and Dispute Resolution Center, available at: www.qicdrc.com.qa.
15. ADGM, available at: www.adgm.com; ADGM Courts, available at: https://www.adgm.com/doing-business/adgm-courts/adgm-legal-framework/adgm-courts-legal-framework/.
16. DIFC, 'Enforcement Guide', 2018, para. 71, available at: https://issuu.com/difccourts/docs/enforcement_guide_combined_single__?e=29076707/61750336.
17. C. Luthi et. al., 'Bermuda: Offshore Case Digest: Issue No. 10 – Bermuda, The British Virgin Islands and The Cayman Islands', 6 March 2016, available at: www.mondaq.com. *See also*www.offshorealert.com, with case law from 'offshore' jurisdictions.
18. *Supra* nn. 1, 5, 6, and 12-15.
19. *Supra* n. 1. For the nature of constitutional statutes, *see* Art. 62.4 of the Constitution of the Republic of Kazakhstan, 1995, available at: www.akorda.kz/en/official_documents/constitution and Art. 1.12 of the Law of the Republic of Kazakhstan, 6 April 2016 NO 480-V LRK 'On legal acts', available at: http://adilet.zan.kz/eng/docs/Z1600000480.
20. Art. 121 UAE Constitution of 1971 (permanently adopted in 1996), as amended by Constitutional Amendment 1 of 2004, available at: https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf; UAE Federal Law 8 of 2004 Regarding Financial Free Zones.
21. UAE Federal Decree 35 of 2004, to establish a Financial Free Zone in Dubai; Dubai Law No. 9 of 2004 in respect of the Dubai International Financial Center (DIFC Law).
22. UAE Federal Decree No. 15 of 2013 concerning the establishment of a financial free zone in the Emirate of Abu Dhabi; Abu Dhabi Law No. 4 of 2013 Concerning the Abu Dhabi Global Market (ADGM Law).
23. Qatar Financial Center Law 7 of 2005 (amended by Law No. 2 of 2009 and Law No 14 of 2009) (QFC Law).
24. *Infra*, nn. 90, 109, and 122.
25. Art. 8 DIFC Law.
26. Art. 8.2 QFC Law.
27. Rule 3, ADGM Divisions and Jurisdiction (Court of First Instance) Rules of 2015 (ADGM Court Rules).

required, with the prohibition that they may not sit on appeal from their own first instance judgment.[28]

AIFC Courts are not a part of the judicial system of Kazakhstan.[29] However, the Constitution of Kazakhstan does not seem to allow for any 'parallel' judicial system where it indicates that 'The judicial system of the Republic shall be established by the Constitution of the Republic and the constitutional law. The establishment of special and extraordinary courts under any name shall not be allowed'.[30] A recent amendment to the constitution allows for a special financial regime in the AIFC but does not mention the AIFC Court as such.[31] Similarly, the creation of the DIFC and ADGM also needed a reform of the UAE Federal Constitution.[32] Some Kazakhstani academics question the constitutionality of the AIFC legal regime.[33] However, given the dubious separation of powers in Kazakhstan and the amount of resources and prestige invested by its government, there may be little risk that a 'moot technicality' will affect the functioning of the AIFC, at least for the time being.

3 Subject-Matter Jurisdiction

All of the courts examined here have jurisdiction in 'civil and commercial' matters.[34] Concerning the AIFC, its Constitutional Statute may shed some light on this expression by clarifying that AIFC bodies have legislative jurisdiction for the following kinds of relationships among the different types of AIFC bodies, participants and their employees: civil relationships; civil procedural relationships; financial relationships; administrative procedures.[35] However, as in the case of the ADGM, family disputes seem to be excluded.[36]

The four courts also have jurisdiction in employment disputes between employees and the centres' business establishments they work for.[37] Prior to an amendment of Article 5 of the DIFC Judicial Authority Law, introduced by Dubai Law No. 5 of 2017, it was unclear whether the DIFC Courts had jurisdiction in employment disputes.[38]

Jurisdiction in criminal matters is also excluded from all the courts.[39] This exclusion may significantly reduce the usefulness of the AIFC Court because it is in the context of tax and administrative law-related criminal proceedings in Kazakhstan that many investors' complaints materialise. It is not unheard of that relatively minor accounting differences are treated as serious accusations of accounting fraud where employees of foreign companies risk going to jail. It is not atypical, either, that violations of subsoil use or of environmental regulations are used as a means to put pressure on investors, in contract renegotiations with the government.[40] Nevertheless, the AIFC Court and the other three courts have the jurisdiction to interpret the laws enacted within each centre and to rule on the scope of their jurisdiction.[41] The only case found regarding jurisdiction in cases of a mixed nature – from the ADGM Courts – abstains from giving a solution.[42]

4 General Jurisdiction over AIFC 'Centre Participants'

The jurisdiction of the AIFC Court depends on whether the parties are established within or licensed by the financial centre and on whether the dispute arises out of activities carried out within the AIFC and regulated by AIFC law. The jurisdiction of the other offshore courts – especially the DIFC – is broader and focuses on whether contracts are performed within each financial centre and on whether there is at least one party to the dispute established within the centre. Additionally, the courts may also have jurisdiction under choice of court agreements. The laws and regulations of the centres also commonly include final catch-all provisions granting jurisdiction if any other future law or regulation of each centre so indicates.

AIFC rules grant 'exclusive jurisdiction' where all the parties to the dispute are either AIFC Participants, a managing body of the center and/or foreign employees,[43] regardless of where the contract is made; where

28. B. Reynolds, 'The Abu Dhabi Global Market: Legislative Framework, Approach and Methodology', 32(5) *J.I.B.L.R.* 197 (2017).
29. Art. 13 AIFC Constitutional Statute; Art. 3.5 and Art. 4 Constitutional Law of the Republic of Kazakhstan, 25 December 2000, N. 132, 'On the Judicial System and Status of Judges in the Republic of Kazakhstan', available at: http://adilet.zan.kz/eng/docs/Z000000132_.
30. Art. 75.4 Constitution of the Republic of Kazakhstan of 1995.
31. New Art. 2.3.1 introduced by the Constitutional law of the Republic of Kazakhstan N. 51-VI 3RK, 10 March 2017, available at: https://online.zakon.kz/Document/?doc_id=34929984#pos=1;-26.
32. *Supra* n. 20.
33. A. Shaikenov and V. Shaikenov, 'Is the AIFC constitutional and will amendments to the Constitution legitimize it?', *Forbes Kazakhstan*, 7 March 2017; interview of the author with Prof. Z. Kembayev, KIMEP University.
34. Art. 5.A, Dubai Law 16 of 2011 amending Law 12 of 2004 (DIFC Judicial Authority Law); Art. 8.3 QFC Law; Art. 26.2 AIFC Court Regulations.
35. Art. 4.3.
36. Rule 2.2.b ADGM Court Rules.
37. Art. 26.1.a) AIFC Court Regulations; Rule 3, ADGM Court Rules; Art. 9.1.3 QFC Court Rules.
38. H. I. Alustath, 'Choice of Law in respect of contracts in the United Arab Emirates and the European Union; and Related Aspects of Private International Law in Relation to the Dubai International Financial Center', (PhD Dissertation at University of Essex, 2015:153).
39. Art. 8 Second 6, DIFC Law; Art. 5 ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (ADGM Court Regulations); Art. 13.4 AIFC Constitutional Statute.
40. Personal interviews of the author with several local lawyers and business consultants.
41. Art. 8 Second, 7 DIFC Law; Art. 9.4 QFC Court Regulations and Procedural Rules of 2010 (QFC Court Rules); Art. 13.10 AIFC Constitutional Statute and Art. 26. 2 AIFC Court Regulations.
42. *Karim Berardo* v. *Stumpf Energy Ltd*, ADGM Court of First Instance, Employment Division, [2018] ADGMCFI 1, para. 6, available at: https://www.adgm.com/doing-business/adgm-courts/judgments/court-of-first-instance/.
43. Art. 13.1 AIFC Constitutional Statute; Art. 26.1.a) AIFC Court Regulations.

the place of performance of the contractual obligation is, within or without the AIFC; and also regardless of whether such dispute deals with the kind of services and activities for which the center was founded. In the absence of a submission agreement, disputes between an AIFC Participant and a non-AIFC Participant seem to be excluded unless they fall within one of the other heads of jurisdiction, as explained below.

The AIFC Court Regulations only mention 'foreign employees'[44] under this head of general jurisdiction, so that disputes involving employees who are nationals of Kazakhstan seem to fall solely within the jurisdiction of the onshore courts.

The grant of 'exclusive jurisdiction' – terminology also used by the DIFC rules – may reinforce the idea that the domestic courts of Kazakhstan cannot intervene in disputes where all parties are AIFC Center Participants and also in cases where the dispute relates to operations carried out within the AIFC and that are regulated by the law of the AIFC or, finally, where the parties have chosen the AIFC Courts.

For the purposes of jurisdiction, who the Center Participants are may be a little confusing because the English translation of the AIFC Constitutional Statute, – originally drafted in Russian – defines them as "legal entities registered under the Acting Law of the AIFC and legal entities recognized by the AIFC" whereas the AIFC Glossary,[45] – drafted in English –, defines them as "legal entities incorporated pursuant to the Acting law of the Center, and other legal entities accredited by the Center".

A reading of the remaining normative instruments may help to understand that Center Participants are legal entities incorporated under the law of the AIFC, as well as branches and representative offices of entities incorporated in Kazakhstan or abroad but that have received a commercial licence or 'order' to operate within the AIFC, such as authorised firms, authorised market institutions, ancillary service providers or recognised non-AIFC members.[46]

5 Specific Jurisdiction for Disputes Arising out of Operations Within the Centres

AIFC rules grant exclusive jurisdiction to AIFC Courts in disputes relating to 'operations carried out in the AIFC *and* regulated by the law' of the centre.[47] Regarding which type of 'operations' can be carried out within the AIFC and, therefore, be the subject matter of these claims, the AIFC Constitutional Statute indicates that the AIFC's purpose is to develop a market with respect to securities, insurance, banking, Islamic finance, financial technologies, electronic commerce and 'innovative projects', as well as financial and professional services.[48] Activities such as real estate and precious metals are also mentioned in the AIFC Glossary.[49] Significantly, given the important extracting industry of Kazakhstan, activities related to the oil and extracting industries are not mentioned.

For the purpose of clarifying their scope of application, the Financial Services Framework Regulations indicate that '[a] Person will be deemed to be carrying on activities in the AIFC' if 'that Person is a Center Participant and the day-to-day management of those activities (even if those activities are undertaken in whole or in part from outside the AIFC) is the responsibility of the Center Participant in its capacity as such; or that Person's head office is outside the AIFC but the activity is carried on from a branch maintained by it in the AIFC; or the activities are conducted in circumstances that are deemed to amount to activities carried on in the AIFC…'.[50]

Operations 'regulated by the law of the AIFC' probably do not mean the same as 'regulated activities' – investments, insurance, etc. – which are dealt with separately and for which a special authorisation is needed and specific regulations provided.[51] 'Regulated by the law of the AIFC' may be taken to mean that the activity or operation that is the subject matter of the dispute must be governed or regulated by any laws or regulations made by the AIFC legislative or regulatory bodies, including the AIFC Constitutional Statute, although this is actually a law of Kazakhstan.

Operations 'regulated by the law of the AIFC' probably do not mean, either, that the contract itself must be governed by AIFC law, in a contractual dispute. The AIFC has its own contract law,[52] but, in a financial transaction between AIFC Participants and non-AIFC Participants, the parties may well have chosen English law to govern their contract, while, at the same time, the financial operation itself may be subject to different AIFC regulations, financial or otherwise, in which case the AIFC Courts would have jurisdiction, even though they will apply English law to the rights and obligations of the parties under the contract.

Furthermore, depending on the extraterritorial reach of AIFC legislation, there may be cases where the operation may have taken place outside the AIFC, while at the same time being effectively 'regulated by the law of the AIFC'. However, the AIFC Court probably would not have jurisdiction in such cases because the operation must be carried out in the AIFC *and* be regulated by AIFC law.

44. Art. 26 AIFC Court Regulations.
45. AIFC Glossary, AIFC Act No. FR0017 of 2018 (Centre Participant).
46. *See* AIFC Glossary for these terms.
47. Art. 13.1 AIFC Constitutional Statute; Art. 26.1.b) AIFC Court Regulations.
48. Art. 2 AIFC Constitutional Statute.
49. AIFC Glossary (Designated Non-Financial Business and Profession).
50. Section 6 Financial Services Framework Regulations, AIFC Regulations No. 18 of 2017.
51. AIFC General Rules, AIFC Rules No. FR0001 of 2017.
52. AIFC Contract Regulations, AIFC Regulations No. 3 of 2017.

The AIFC Contract Regulations themselves provide for yet another head of jurisdiction. These Regulations 'govern contracts made between AIFC Participants, AIFC Bodies and AIFC Participants, and AIFC Bodies, unless otherwise expressly provided in a contract', and '[a]ny contract governed by these Regulations is subject to the jurisdiction of the Court unless otherwise expressly provided in a contract'.[53]

However, if there is at least one party to the contract who is not an AIFC Participant or AIFC Body, the Contract Regulations do not apply and, in the absence of an express choice of the AIFC Contract Regulations or a choice of the AIFC Courts, the latter would not have jurisdiction.

Therefore, a contract between two AIFC Participants may be subject to the jurisdiction of the AIFC Court, regardless of whether the 'operation' is carried out within the AIFC. Additionally, the AIFC Court may have jurisdiction where the only link to the AIFC is the parties' choice of the AIFC Contract Regulations, regardless of their being AIFC Participants, unless the parties have submitted to the jurisdiction of another court.

Regarding the conjunction '*and*' in the sentence 'operations carried out in the AIFC *and* regulated by the law' of the AIFC, it is also possible to imagine business operations that are carried out within the AIFC but that are not necessarily regulated by AIFC law (e.g. a cafeteria located inside the AIFC) and, conversely, there may be operations that are regulated by AIFC law but where all or part of its elements may not take place within the financial centre (e.g. a securities transaction where the depositary of the securities is located in Luxemburg). Therefore, '*and*' probably means that both conditions must be met and that there are not two different heads of jurisdiction.

The jurisdiction rules of the AIFC Court indicate that the reference to 'disputes' also includes 'incidences', which may grant the Court jurisdiction for tort claims, as long as the 'incidence' is also 'regulated by the law of the AIFC'.[54] The AIFC Regulations on Obligations regulate tort liability and are applicable 'in the jurisdiction of the' AIFC. This expression does not seem to be very helpful in those cases where it is difficult to determine whether all or any of the elements of the tort have taken place inside or outside of the centre.

Finally, although the AIFC jurisdiction rules clearly have in mind legal entities as parties to civil proceedings before the AIFC Court, natural persons – and not just employees in employment disputes – may also be parties in civil and commercial disputes in their capacity as corporate officials of a Participant, individual registered auditors, individual lawyers or also as individual entrepreneurs.

The jurisdiction of the DIFC Court of First Instance is broader than that of the AIFC.[55] It suffices that the DIFC itself or any of its bodies or any Center Establishment or Center Licensed Establishment is a party to the claim. Disputes where only one of the parties is either an entity incorporated within the DIFC or a licensed branch of a business incorporated elsewhere fall under the jurisdiction of the DIFC Courts, unless the parties have opted out. However, the doctrine of *forum non conveniens* may operate where there are no sufficient connections between the claim and the centre.[56]

The jurisdiction of the DIFC Court also encompasses claims 'arising from or related to' contracts made, concluded, carried out or supposed to be carried out, in whole or in part, within the DIFC, in accordance with the explicit or implicit terms of the contract and regardless of whether any of the parties to the contract is established within the DIFC.[57] This provision does not add – as the AIFC rules do – that such contracts must be regulated by the law of the DIFC.

DIFC Courts will also have jurisdiction for claims 'arising out of or relating to any incident or transaction which has been wholly or partly performed within [the] DIFC and is related to DIFC activities'.[58] For instance, the DIFC Courts would have jurisdictions for disputes arising out of torts or donations, provided that the place of the causal event or the place where the donation is made is within the DIFC and the tort or the donation is somehow related to the financial or ancillary activities for which the centre was founded.

QFC Courts have jurisdiction for any kind of civil and commercial disputes between business entities established within the QFC, regardless of the place of performance of the contractual obligation; between QFC management bodies and businesses established within the QFC; and between entities established within the centre and individual residents of Qatar or entities established in Qatar but outside the QFC, unless there is an express submission to other courts.[59]

QFC Courts also have jurisdiction for civil and commercial disputes between business entities established within the QFC 'and contractors therewith', that is, any individual or legal entity with which an entity established in the QFC enters into a contract and that does not fall into any of the categories in the other paragraphs.

53. Art. 7 AIFC Contract Regulations.
54. Art. 5, AIFC Regulations on Obligations, No. 16 of 2017.
55. Art. 5.A.1, DIFC Judicial Authority Law; P. Punwar, *The Rules of the DIFC Courts with Commentary & Materials* (London: Sweet & Maxwell) (2011).
56. *Corinth Pipeworks SA* v. *Barclays Bank Plc*, [2011] DIFC CA 002, para. 66, available at: https://www.difccourts.ae/2011/01/22/ca-0022011-corinth-pipeworks-sa-v-barclays-bank-plc/; *Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai* v. (1) *Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co. Ltd*, [2011] DIFC CA 003, para. 109, available at: https://www.difccourts.ae/2012/01/05/ca-0032011-1-mr-rafed-abdel-mohsen-bader-al-khorafi-2-mrs-amrah-ali-abdel-latif-al-hamad-3-mrs-alia-mohamed-sulaiman-al-rifai-v-1-bank-sarasin-alpen-limited-2-bank-sarasin-co-ltd/.
57. Art. 5.A.1.b; *CFI 018/2016 Standard Chartered Bank* v. *(1) Fal Oil Company Limited (2) Investment Group Private Limited*, para. 10, available at: https://www.difccourts.ae/2018/08/30/cfi-018-2016-standard-chartered-bank-vs-1-fal-oil-company-limited-2-investment-group-private-limited/.
58. Art. 5.A.1.c. DIFC Judicial Authority Law.
59. Art. 8.3 QFC Law; Art. 9.1 QFC Court Rules; McNair Chambers, 'The QFC Civil and Commercial Court: The Essentials', 2010, at 7, available at: https://www.mcnairchambers.com/client/publications/2010/McNair_QFC_Court_Guide_Second_Edition_September_2010.pdf.

Therefore, as in the case of the DIFC, the QFC Court will have jurisdiction to hear claims where only one of the parties is established within the centre, without regard to whether the contract deals with the activities of the QFC.[60]

Finally, QFC Courts also have jurisdiction for disputes between business entities established within the QFC 'and employees thereof', that is, employment disputes between QFC establishments and the expats working for them. However, if an employee files an employment claim before the QFC's Employment Standard's Office, he cannot appeal the Office's decision before the QFC Court.[61]

The Court of First Instance of the ADGM has jurisdiction in 'civil and commercial disputes arising out of or relating to a contract or a transaction conducted in whole or in part in the Global Market or to an incident that occurred in the Global Market',[62] unless they opt out of the jurisdiction. Therefore, the place where the parties to the dispute are established does not seem to play a role.

6 Express Submission

Choice of court agreements are also a common basis of jurisdiction, regardless of whether the parties to the agreement are centre participants or are licensed to operate in each of the centres.[63] This may indeed prove useful for those foreign investors that are already established in the host country and/or have business dealings with local entities owned or related to the host government, because such entities may be willing or allowed to submit to the jurisdiction of these 'local' offshore courts, but not to the jurisdiction of foreign courts or arbitration tribunals, without due authorisation.[64]

Although the AIFC Court Regulations grant jurisdiction for 'disputes transferred […] by agreement of the parties', they add that '[t]he Court shall consider the express accord of the parties to a case that the Court shall have jurisdiction and if the Court considers it desirable or appropriate, it may decline jurisdiction or may refer any proceedings to another Court within the Republic of Kazakhstan'. This seems to grant discretion to the AIFC Court in deciding whether to take jurisdiction if the case is not sufficiently connected with the AIFC. Even more ambiguously, the QFC rules indicate that 'the Court will take into account the expressed accord of the parties that the Court shall have jurisdiction'.[65]

DIFC and ADGM rules expressly establish that the submission agreement must be in writing, but nothing is stated about the written form in the case of the AIFC. The DIFC Courts Registry accepts claim forms filed by the parties if accompanied by choice of court agreements with the specific wording provided by a practice direction, subject to the right of the DIFC Courts to rule on their own jurisdiction once the proceedings have commenced.[66]

Finally, the defendant's acknowledgment of service does not make him forfeit his right to dispute the DIFC Court's jurisdiction, provided that the application to dispute the Court's jurisdiction is made within a specified period.[67]

7 Applicable Law

One of the issues that have raised more interest is the supposed application of English law within these four financial centres. The DIFC has been referred to as a 'common law oasis in a civil law ocean'.[68] 'Part-time' judges from common law jurisdictions have been hired, as in some English-speaking countries of the Caribbean, the style of litigation is clearly adversarial and some traditional common law litigation weapons such as quashing orders, freezing orders or search orders have also been adopted. However, the extent to which English law is actually applied varies significantly from centre to centre.

The provisions concerning the scope of AIFC law and the law to be applied by the AIFC Court are confusing. The procedural law is, basically, the AIFC Court Regulations and AIFC Court Rules, which closely follow the English Civil Procedure Rules.[69] Concerning both the procedural and the substantive law to be applied, '[t]he activities of the AIFC Court are governed by the resolution of the Council On the Court of Astana International

60. QFC Case 09/2010, *Nazim Omara* v. *Al Mal Bank LLC (in liquidation)*, para. 8, available at: https://www.qicdrc.com.qa/sites/default/files/s3/judgments/english/09.2010%2012%20Dec%202010.pdf.
61. QFC Case 01/2018, *Abdulla Jasim Al Tamimi* v. *QFC Financial Authority and Qatar Finance and Business Academy LLC*, paras. 16-18, available at: https://www.qicdrc.com.qa/sites/default/files/s3/judgments/english/case_no_1_of_2018_judgment_13_may_2018.pdf.
62. Art. 13.6 ADGM Law; H. Quinlan, et al., 'Abu Dhabi Global Market courts: framework, procedures and first judgment summary', *Practical Law Global Guide*, 2018, available at: https://uk.practicallaw.thomsonreuters.com/w-013-7809?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1.
63. Art. 26.1.c and 26.3 AIFC Court Regulations; Art. 5.A.2 DIFC Judicial Authority Law; Art. 16.2e) ADGM Court Regulations; Art. 9.2 QFC Court Rules.
64. Art. 8.10 Arbitration law of Kazakhstan; *supra* n. 12.
65. Art. 9.2 QFC Court Rules.
66. 'Practice Direction No. 2 of 2012 DIFC Courts' Jurisdiction', 2012, available at: https://www.difccourts.ae/2012/03/08/practice-direction-no-2-of-2012-difc-courts-jurisdiction/; D. P., Horigan, 'Consensual Jurisdiction of the DIFC Courts', Proceedings of 20th International Business Research Conference, Dubai, April 2013, at 5 et seq.
67. *E.g.* Part 12 of DIFC Court Rules.
68. M. Hwang, Deputy Chief Justice of the DIFC Courts, 'The Courts of the DIFC', Address at the Lawasia Conference, Kuala Lumpur, 1 November 2008, available at: https://www.difccourts.ae/2008/11/01/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/.
69. P. Fisher, 'Ambitions for Astana', *Practical Law Construction Blog*, 7 March 2018, at 4, available at: http://constructionblog.practicallaw.com/ambitions-for-astana/.

Financial Centre,[70] which is *based* on the principles and legislation of the law of England and Wales and the standards of leading global financial centres'. The AIFC Court is also 'bound by the Acting Law of the AIFC and may also take into account final judgements of the AIFC Court in related matters and final judgements of the courts of *other* common law jurisdictions'.[71]
The AIFC 'Acting Law' consists of

> [the AIFC] Constitutional Statute; AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts.[72]

Thus, the law of Kazakhstan plays only a residual role, and case law may only 'guide' the decisions of the court.
In line with the foregoing, the substantive law to be applied by the AIFC Court will therefore be the laws and regulations of the centre, such law as it is agreed on by the parties – unless it is contrary to the public order or public policy of Kazakhstan – *or* such law as it appears to the Court to be the most appropriate to the facts and circumstances of the dispute.[73]
The AIFC Regulation on AIFC Acts does help to clarify this issue.[74] Generally, Article 40.2 seems to call for the application of AIFC law in regulatory matters; otherwise, in subsidiary order, the applicable law is the law 'agreed between all the relevant Persons concerned in the matter', the law of the place 'most closely related to the facts of and the Persons concerned in the matter', and the law of Kazakhstan.
The AIFC Regulation on AIFC Acts also indicates that '[a]n express choice of a governing law in a contract is effective against all Persons affected by the choice'. Such law governs 'the existence, validity, effect, interpretation and performance of [the] contract, or any terms of [the] contract, including any requirements as to formality'. In the absence of an express choice, 'the contract is governed by the Acting Law of the AIFC'.
The capacity and authority of agents are governed by the applicable law to the contract. The rights and liabilities of the principal in relation to third parties are governed by the applicable law to the contract between the third parties and the agent, if the latter acts on behalf of the principal. There is also a provision on the law applicable to legal subrogation that is taken almost entirely from Article 15 of EU Regulation Rome I.[75]
The laws applicable in the DIFC are the centre's own laws and regulations.[76] Concerning the law applicable to the merits of a dispute, the DIFC Courts will apply the domestic law expressly chosen by the parties and, in the absence of choice, the DIFC's internal legislation, especially in regulatory matters and where such legislation is of a mandatory nature. In the absence of specific DIFC laws applicable to the dispute, the laws of England and Wales – or even those of other common law jurisdictions – may be imported, including the possibility to take into consideration rulings from other jurisdictions.[77]
There have been doubts about the availability of UAE domestic law as the law chosen by the parties in DIFC litigation.[78] This may be because the DIFC legal system was established as a separate legal system. But if the DIFC Courts can apply foreign domestic law, there is little reason why UAE law could not be applied too, if chosen by the parties.[79]
The law chosen by the parties in DIFC litigation shall not be applied where it conflicts with public policy and public morals.[80] This reference to public morals – in addition to public policy –turns into a reference to public order in the cases of the QFC[81] and the AIFC[82] and is probably an honest reminder that customs and traditions in some Muslim countries are different from those of the West.[83] Despite the fact that these centres are meant to attract many foreign employees and their corresponding families, the black letter of the law does not seem to provide for any accommodations for such an additional multicultural population. An express choice of law may also be disregarded if it is contrary to DIFC overriding mandatory rules, such as those with regulatory content.[84]
The ADGM provides for a general application of the law of England and Wales within the centre, 'as it stands from time to time', including English rules of equity.[85] Nevertheless, this daring incorporation of a whole for-

70. This resolution does not seem to be available; available at: https://aifc.kz/management/main.
71. Art. 13.5 and Art. 13.6 AIFC Constitutional Statute.
72. Art. 4.1 AIFC Constitutional Statute.
73. Art. 13.6 AIFC Constitutional Statute and Art. 29 AIFC Court Regulations.
74. Arts. 39 et seq. AIFC Regulations on AIFC Acts, AIFC Regulations No. 1 of 2017.
75. *Ibid*., Arts. 45 and 46.
76. Art. 13.1 DIFC Law.
77. Art. 8, DIFC Law 3 of 2004; Arts. 7.2, 8, 9 and 10, DIFC Law 10 of 2005; Art. 30, DIFC Law 10 of 2004 (DIFC Court Law) and Art. 6 DIFC Judicial Authority Law; Alustath, above n. 38, at 136-45.
78. *Rasmala Investments Limited* v. *Various Defendants*, [2009] DIFC CFI 001-006/2009, available at: https://www.difccourts.ae/2009/04/06/cfi-001-0062009-rasmala-investments-limited-v-various-defendants/; *National Bonds Corporation PJSC* v. *(1) Taaleem PJSC and (2) Deyaar Development PJSC*, [2011] DIFC CA 001, paras. 39 et seq., available at: https://www.difccourts.ae/2011/05/11/ca-0012011-national-bonds-corporation-pjsc-v-1-taaleem-pjsc-and-2-deyaar-development-pjsc/.
79. Alustath, above n. 38, at 141.
80. Art. 6 DIFC Judicial Authority Law.
81. Art. 11.1 QFC Court Rules.
82. Art. 29 AIFC Court Regulations.
83. Art. 7 of the UAE Federal Constitution provides that Sharia law is the 'main source of legislation in the UAE'; Art. 12 DIFC Law 9 of 2004 (prohibition of 'products and goods carrying inscriptions, drawings, trademarks or signs considered to contradict religious teachings and beliefs or public morals').
84. Alustath, above n. 38, at 142-43.
85. Arts. 1 and 3 ADGM Application of English Law Regulations of 2015.

eign legal system is subject to many qualifications. English law is meant to be applied 'so far as it is applicable to the circumstances of the' ADGM, 'subject to any modifications as those circumstances require', 'subject to any amendment thereof' made by the laws of the ADGM[86] and notwithstanding any changes made to the law of England after the enactment of ADGM regulations. Such changes will be applicable in the centre only once there is an express incorporation of each new English law into the legal system of the ADGM. Any contradictions between English law and the laws and regulations of the ADGM must be resolved in favour of the latter. Nothing is expressly said about choice of law agreements. However, it may be implied that English rules on choice of law agreements – including, for as long as the UK is part of the EU, any specific EU rules on this matter – are also applicable.

The founding law of the QFC indicates that the laws and regulations of the centre shall apply to the contracts, transactions and arrangements conducted by the entities established in, or operating from the QFC, with parties or entities located in the QFC or in Qatar but outside the QFC, unless the parties agree otherwise.[87] There is also an ambiguous reference to the fact that the QFC Court 'will ordinarily determine the dispute in accordance with' the law agreed on by the parties, although such choice will be disregarded if it is inconsistent with Qatar's public order, public policy or the QFC's consumer regulations.[88]

Concerning the status of foreign law and the procedure to prove it in court, the DIFC Court Rules provide that the party intending to put in evidence a finding on a question of non-DIFC law must give prior notice specifying the question on which the finding was made. The notice must indicate whether there is going to be expert evidence on the issue of the foreign law and provide a copy of the document where the foreign law is reported.[89] The ADGM Court Regulations provide for the possibility to give expert evidence on foreign law or, in certain cases, for filing judicial decisions where such point of law has been heard in application of foreign law.[90]

8 Recognition and Enforcement of Judgments and Other Judicial Decisions

An AIFC enforcement judge, in accordance with AIFC law, enforces judgments, orders and directions of the AIFC Court within the AIFC.[91] The AIFC Court 'may issue rules or practice directions for the further enforcement of other judgments and arbitration awards',[92] so one should expect that new guidelines and/or agreements with domestic or foreign courts will be issued in the future, for the purpose of recognition and enforcement, as in the case of the other centres. In fact, the AIFC Court is already a member of SIFoCC (Standing International Forum of Commercial Courts),[93] which may facilitate recognition and enforcement by means of memoranda of understanding (MoUs) and informal arrangements.

Enforcement of AIFC decisions in the territory of Kazakhstan is to be done 'in the same way and on the same terms' as decisions of the 'onshore' courts.[94] Parties must first apply for an 'execution order' from the AIFC Court and then translate the decision into Russian or Kazakh.[95] The AIFC Court has already concluded an MoU[96] with the Republican Chamber of Private Bailiffs[97] in charge of enforcing rulings from domestic courts. A legal reform is said to be in progress at the Senate of Kazakhstan, which would simply include the AIFC Court among the list of courts whose decisions and orders are to be enforced by such bailiffs, in accordance with domestic legislation.[98] Despite this future legal reform, there may still be difficulties in the enforcement process, especially if the AIFC Court grants remedies that are unknown in the legal system of Kazakhstan.

Decisions of the domestic courts of Kazakhstan 'are to be enforced in the AIFC in accordance with [the] legislation' of Kazakhstan.[99] This provision may simply mean that Kazakhstani judgments will have the same effects within the AIFC that they have in the rest of Kazakhstan. It probably does not mean that the AIFC Court has to apply the domestic Code of Civil Procedure[100] in these cases. It may also be an announcement of future domestic legislation concerning enforcement of AIFC Court decisions, or it may even be taken as a grant of jurisdiction to the 'onshore' courts in certain matters pertaining to enforcement, parallel litigation or *res judicata* issues.

Little is said about the recognition and enforcement of foreign judgments within the AIFC or about recogni-

86. Modifications have been made to English laws such as the Statute of Frauds of 1677, Law of Property Act of 1925, the Contracts (Rights of Third Parties) Act of 1999 and the Partnership Act of 1890; Reynolds, above n. 28, at 184.
87. Art. 18.3 QFC Law.
88. Art. 11.1.2 QFC Court Rules.
89. Rule 29.131 et seq. DIFC Court Rules.
90. Art. 73 ADGM Court Regulations.
91. Arts. 17 and 40 AIFC Court Regulations; Rule 30.4 AIFC Court Rules.
92. Art. 40.3 AIFC Court Regulations.
93. Available at: https://www.sifocc.org/countries/kazakhstan/.
94. Art. 13.8 AIFC Constitutional Statute.
95. Rule 30.2 AIFC Court Rules.
96. Available at: http://old.aifc.kz/ru/news/103.html.
97. Arts. 161 et seq. Law of the Republic of Kazakhstan, 'On Enforcement Proceedings and the Status of Enforcement Agents', 2 April 2010, No. 261-IV, available at: http://adilet.zan.kz/eng/docs/Z100000261_; B. Tukulov, 'On the Court and Arbitration at the Astana International Financial Center', at 2, available at: www.gratanet.com/up_files/AIFC%20Article%20Eng%2014%20Aug%202018.pdf.
98. Lecture given by Sir Jack Beatson, Justice of the AIFC Court at KIMEP University, Almaty, 19 April 2019.
99. Art. 13.9 AIFC Constitutional Statute.
100. Code of Civil Procedure No. 377-V, 31 October 2015 (as amended by Law of the Republic of Kazakhstan No. 489-V, 8 April 2016), available at: http://adilet.zan.kz/rus/docs/K1500000377.

tion of AIFC Court judgments abroad, other than the possibility to obtain a certified copy of the AIFC judgment.[101] With respect to enforcement abroad, it is significant that the AIFC Court is expressly excluded from the domestic judicial system of the host country because the architects of the AIFC could have done otherwise and because they have not followed the example of the DIFC in this specific point. This may mean that parties to AIFC Court proceedings cannot avail themselves of the very few treaties on recognition to which Kazakhstan is a party – mostly with Commonwealth of Independent States (CIS) countries – and that are applicable by Kazakhstani courts.[102]

If AIFC Court judgments cannot be characterised as judgments of a court of the Republic of Kazakhstan, not only may the aforementioned treaties not apply, but it is fair to ask whether, whenever AIFC Court judgments travel abroad, the country where recognition is sought may be able to apply its own internal provisions on recognition based on reciprocity because such provisions are commonly applicable to judgments issued by courts belonging to the judiciary of some country.

AIFC Court judgments – as opposed to IAC arbitral awards – cannot be characterised as arbitral awards, either, for the purposes of recognition under the New York Convention (NYCV), because the AIFC Courts are not arbitration tribunals. Submission to arbitration always needs an agreement of the parties – the AIFC Court may have jurisdiction without a choice of court agreement – and the parties to arbitration are the ones who appoint the arbitrators even if, under the NYCV, the term 'arbitral awards' includes 'those made by permanent arbitral bodies'.[103]

Even if Kazakhstan itself has denied the AIFC Courts their status as domestic courts, courts of third countries may take the view that the AIFC Courts are, after all, a judiciary body of a sovereign nation, with the same attributes as any other judiciary body, so that its rulings may be afforded the status of foreign judgments, for the purposes of recognition. A sovereign state may divide its territory internally any way it deems fit and may set up specialised adjudicatory bodies if it so wishes, while at the same time remaining a single political and legal unity, *vis à vis* the outside world.

Furthermore, '[i]f an international treaty ratified by the Republic of Kazakhstan provides rules different to those provided by the [AIFC] Constitutional Statute, the rules of the international treaty must be applied'.[104] This provision seems to guarantee the recognition and enforcement of foreign judgments and foreign arbitral awards within the AIFC, in accordance with the treaties ratified by Kazakhstan, but not *vice versa*, that is, the AIFC Court will have to act as a municipal court of Kazakhstan for the purposes of enforcing foreign court rulings inside the AIFC, but the recognition of AIFC Court decisions outside Kazakhstan may not benefit from those same treaties.

Finally, regardless of the nature and status of decisions made by the AIFC Court or by the arbitration panels of the IAC, the AIFC is clearly within and part of the territory of the Republic of Kazakhstan and under its full sovereignty, so if a judgment debtor has assets anywhere within that territory – including the AIFC – a foreign judgment creditor should be able to avail itself of the benefits of a valid and applicable treaty on recognition or of any future unilateral rules on recognition that are introduced in the legal system of the AIFC. As with any other country, Kazakhstan is bound by its international obligations with respect to its entire territory, 'unless a different intention appears from [a] treaty'.[105]

Furthermore, the domestic courts and other state bodies of Kazakhstan retain some residual jurisdiction over individuals and legal entities established within the AIFC with respect, for instance, to administrative and criminal matters.[106] This understanding of AIFC Courts as part of the judiciary of Kazakhstan may be reinforced by the fact that its budget derives from public state funds, as in the case of the other offshore courts. All this may indicate that the AIFC and the AIFC Court should not be seen as completely detached from the legal system of the host country.

The recognition and enforcement rules of the DIFC have been more tested in practice. The DIFC Courts, the courts of Dubai, other government bodies of the UAE and foreign judiciary bodies have signed several agreements, protocols, MoUs or memoranda of guidance (MoGs).[107] Although recognition and enforcement on the basis of MoGs seem to be effective, their legal nature remains an issue.[108] For instance, the MoG between the Supreme Court of Kazakhstan and the DIFC Courts provides that 'it has no binding legal effect' and that '[i]t does not constitute a treaty or act'.[109]

Enforcement of offshore judgments within the DIFC is also entrusted to a DIFC enforcement judge and is done entirely in accordance with the centre's internal laws and court rules.[110]

101. Rule 30.11 AIFC Court Rules.
102. *E.g.* Minsk Convention of 1993, Kiev Agreement of 1992, Kishiniev Convention of 2002 and some bilateral treaties with UAE, India, etc.
103. Art. 1.2 NYCV.
104. Art. 4.4, AIFC Constitutional Statute.
105. Art. 29 United Nations, 'Vienna Convention on the Law of Treaties', 23 May 1969, 1155 United Nations Treaty Series 331; Art. 4, International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', November 2001, Supplement No 10 (A/56/10), chp.IV.E.1; J. Abbot, 'Clifford Chance Client Briefing', March 2018, at 3, available at: https://www.cliffordchance.com/briefings/2018/03/emergence_of_a_regionalfinancialcentreastan.html.
106. *Supra*, n. 35.
107. Available at: https://www.difccourts.ae/courts-programmes/protocols-and-memorandums-of-understanding/.
108. For a thorough study of the nature and usefulness of MoGs, vid. Saito, Hikari, 'Paving the Way for Another Direction in Promotion of Enforcement of Foreign Judgments', (Masters' Thesis at Kobe University, submitted 30 January 2019).
109. 'Memorandum of Guidance as to Enforcement between Supreme Court of the Republic of Kazakhstan & DIFC Courts', 28 August 2015, para. 2, available at: https://www.difccourts.ae/2015/08/28/memorandum-of-guidance-as-to-enforcement-between-supreme-court-of-the-republic-of-kazakhstan-difc-courts/.
110. Art. 7.1 DIFC Judicial Authority Law; Part 45 DIFC Court Rules.

For the purposes of enforcement of DIFC Court judgments in Dubai, the judgment or judicial order must be final and executable, translated into Arabic and certified by the DIFC Courts. The enforcing party must obtain an execution letter from the DIFC Courts, addressed to the Chief Justice of Dubai; he must then file an application for enforcement to an execution judge of the 'onshore' Dubai courts, together with the execution letter and the official translation. The execution judge of the Dubai courts will deal with any challenges to the enforcement, but he may not reconsider the merits of the claim. Enforcement will be carried out in accordance with the procedural law of Dubai, as if they were judgments or orders issued by the onshore courts of Dubai.[111] Dubai onshore courts also enforce DIFC interim orders such as freezing orders but, so far, not search orders.[112]

Enforcement of DIFC judgments in other UAE emirates is governed by UAE procedural law, which provides that the competent execution judge of Dubai will refer the DIFC judgment or order to the execution judge of the territory of the UAE where enforcement is sought. This latter execution judge of another emirate is competent for any procedural objections raised and will transfer to the execution judge of Dubai any property received as a result of the execution sale. It is not fully clear whether, in practice, DIFC courts can submit DIFC judgments directly to the final UAE execution judge outside Dubai.[113]

Since DIFC Courts are part of the Dubai judicial system, their judgments and orders profit from those recognition treaties to which the UAE is a party.[114] The DIFC Courts can also be used as a 'conduit jurisdiction', so that recognition of foreign judgments and arbitral awards can be made within the DIFC and under DIFC law, for the purpose of enforcing them later on in Dubai or the UAE, but outside the DIFC.[115]

A further mechanism for the enforcement of DIFC Court judgments is that parties who have either submitted to the jurisdiction of the DIFC Courts or whose dispute falls, for any other reason, under the jurisdiction of DIFC Courts can agree – before or after a DIFC judgment has been issued – 'that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor, be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Center'.[116] This allows the enforcing party in DIFC litigation to transform its DIFC judgment into a DIFC-LCIA arbitration award, so as to have it recognised and enforced under the more favourable NYCV, to which many more countries are a party.

Alustath is sceptical about this last possibility because (a) a confirmatory award would not fall under the definition of arbitration, for the purposes of the NYCV, since arbitrators would not be settling any real substantive dispute; (b) there cannot be an '*exequatur* on an *exequatur*'; and (c) the confirmatory award would encroach on the foreign domestic courts which would otherwise have jurisdiction for the recognition and enforcement proceedings of the court judgment.[117] Arbitration tribunals can typically convert any parties' settlement agreements into arbitration awards, which are recognisable and enforceable under the NYCV, but such possibility is provided in the applicable arbitration laws and arbitration rules themselves.

The ADGM and the Abu Dhabi Judicial Department have also signed an MoG for the reciprocal enforcement of judgments, so ADGM Courts may put an enforcement judge of the Abu Dhabi Judicial Department in charge of enforcing ADGM Court judgments outside the ADGM. Alternatively, a judgment creditor may apply directly to the Abu Dhabi Judicial Department (ADJD) for the enforcement of ADGM Court judgments within Abu Dhabi.[118] With respect to judgments from other UAE emirates, recognition within the ADGM is granted only if a previous agreement or MoG has been signed.[119]

Concerning the recognition and enforcement of foreign judgments and foreign arbitral awards within the ADGM, the ADGM Courts will recognise and enforce such judgments and awards in accordance with treaties entered into by the UAE, as well as in accordance with its own internal procedural law.[120] Where judgments originate from countries that are not a party to a relevant treaty, the Chief Justice of the ADGM, after consultation with the Chairman of the Board of the ADGM, and after being satisfied that substantial reciprocity of treatment will be accorded, will order that such foreign courts be treated as 'recognized foreign courts', so that their money judgments – excluding tax payments or penalties – can be enforced within the ADGM.

The foreign judgment or foreign order for interim payment must be final and conclusive 'notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court'. Registration of the foreign judgments at the ADGM Courts must be effected within six years of the date of the judgment.

The ADGM Court will not re-examine the merits of the case and can only refuse recognition on very limited grounds: if the foreign judgment has been wholly or partially satisfied (partial enforcement is also possible);

111. Art. 7.3 DIFC Judicial Authority Law.
112. DIFC Enforcement Guide 2018, para. 15.
113. Art. 221 UAE Federal Civil Procedures Law (UAE Federal Law No. 11 of 1992); DIFC Courts Enforcement Guide 2018, paras. 16 et seq.
114. The UAE has entered into a number of multilateral treaties such as the GCC Convention of 1996, the Riyadh Convention of 1983 and bilateral treaties with Tunisia, France, Egypt, China and Kazakhstan.
115. DIFC Courts Enforcement Guide 2018, paras. 61 et seq.
116. DIFC Courts Practice Direction No. 2 of 2015 on Referral of Judgment Payment Disputes to Arbitration; DIFC Courts Enforcement Guide 2018, paras. 67 et seq.
117. Alustath, above n. 38, at 172-73.
118. Art. 13.11 ADGM Law and MoG between ADGM and ADJD, dated 11 February 2018, paras. 13 and 14.
119. MoG between the ADGM and the UAE Emirate of Ras Al Khaimah, dated 16 November 2017.
120. Rule 170 et seq, ADGM Court Regulations.

if the judgment could not be enforced in the country of origin; if the original court had no jurisdiction; if the debtor was not duly served; if the judgment was obtained by fraud; if the rights under the judgment are not vested in the person by whom the application for registration was made; if the judgment is contrary to the public policy of the ADGM or of Abu Dhabi; or if the subject matter of the case has also been the object of a final judgment of another court having jurisdiction over the matter.[121]

For the purposes of denial of recognition on the grounds of lack of jurisdiction, the foreign court of origin will be deemed to have jurisdiction in the following cases: (a) in actions *in personam*, if the debtor voluntarily appeared in the proceedings or was the claimant or counter-claimant; if the debtor was a resident in or, if it is a legal entity, was registered under the laws of the forum; or if the debtor had an office or place of business in the forum and the proceedings dealt with a transaction effected through that office or place; (b) in actions *in rem* for immovable or movable property, jurisdiction is also deemed to have existed if the property was situated in the forum at the time of the proceedings; (c) in any other cases where the laws and regulations of the ADGM expressly recognise the jurisdiction of the rendering court. If there is an appeal pending against the foreign judgment, the ADGM Court has the discretion to set aside the registration for recognition or to stay the application for setting aside.[122]

The QFC internal regulations establish that judgments and orders of the QFC Courts are judgments or orders of the courts of Qatar and therefore 'capable of enforcement and execution by the courts of Qatar as would be a judgment or order of any other Qatari court'.[123] The authorities of Qatar must provide as much cooperation to QFC Courts as it is necessary for enforcement. However, the QFC Court rules add that a QFC enforcement judge will be 'primarily responsible for the enforcement of the Court's judgments, decisions and orders'. Application for enforcement of QFC judgments must be made primarily to this enforcement judge, who can enforce it by the levy of fines, orders and also by referring the matter to the relevant competent agency or authority of Qatar, in which case a translation into Arabic is required.

There are no specific provisions concerning recognition of QFC judgments in other UAE emirates or abroad, or about the recognition of foreign judgments and judgments from other domestic courts of the UAE within the QFC. However, the reference to QFC judgments as domestic judgments of Qatar may imply that the former profit from all the advantages of being Qatari judgments and, vice versa, that QFC Courts must recognise foreign judgments on the same terms that Qatar courts do.

121. Rule 173 and 175, ADGM Court Regulations.
122. Rule 175 ADGM Court Regulations.
123. Art. 34, QFC Court Rules.

9 Powers of the Courts and International Judicial Cooperation

The courts of these financial centres can produce orders with respect to detention, custody, inspection, sale or preservation of relevant property, access to buildings, freezing orders and search orders, orders for the production of documents and preservation of evidence, appointment of a receiver or trustee or ordering a party to deliver its passport and interim payments, among other things. The list of possible interim remedies and orders of the AIFC Court Rules, as well as the procedure to grant them, mirrors the corresponding list of the DIFC Court Rules.[124]

The court rules of these centres also address the topic of international civil cooperation in different headings concerning applications for assistance from foreign requesting courts, including onshore courts of the host country but always for the purposes of civil proceedings that have already commenced or are about to commence.[125] With an appropriate application supported by evidence, these courts can issue several types of orders concerning examination of witnesses, requiring witnesses to make a deposition, production of documents or inspection of property.

The ADGM Court rules also provide that witnesses can be compelled to attend the trial, even if such witnesses are not within the jurisdiction of the ADGM Court but in Abu Dhabi. For this purpose, the ADGM Court can appoint an examiner or commissioner to take the evidence 'outside the jurisdiction'.[126] The ADGM Court rules also provide that 'any person appointed by a court or other judicial authority of any foreign state shall have the power to administer oaths in the ADGM for the purpose of taking evidence for use in civil proceedings'.[127]

10 The Relationship between the 'Offshore' Courts and the Arbitration Centres

Each of the four financial centres examined has established some sort of arbitration court or dispute resolution centre offering arbitration and/or mediation services as an alternative to its own offshore litigation system.[128] Such institutions function independently and

124. *See* Part 25 DIFC Court Rules; Part 15 AIFC Court Rules.
125. Art. 74 et seq. ADGM Court Regulations and Rule 18.62 et seq. AIFC Court Rules.
126. Arts. 40 and 77 ADGM Court Regulations.
127. Art. 77 ADGM Courts Regulations.
128. Art. 8 DIFC Law; Art. 14 AIFC Constitutional Statute; Art. 48 et seq. AIFC Arbitration Regulations of 2017; Law 2 of 2017 Promulgating the Civil and Commercial Arbitration Law of the QICDRC.

possess their own legal personality, their own budget and their own internal boards of trustees, chairperson and chief executive.[129] As in the case of the courts, world-renowned experts from common law jurisdictions have been appointed to those management and supervisory bodies. In some cases, each centre has established its arbitration mechanism through some sort of partnership with another, more experienced arbitration institution: the LCIA – in the case of the DIFC – and the ICC – in the case of the ADGM. However, the ADGM Arbitration Centre provides only certain services for arbitration hearings and is not a full-fledged arbitration institution that manages and oversees arbitration proceedings.

These arbitration mechanisms are independent of any other arbitration institution that may already exist in the host country and their arbitration laws, and rules are also different. The arbitration laws of the AIFC, ADGM and QFC expressly indicate that the arbitration legislation of their host country does not apply within the respective financial centre.[130]

The laws of the four financial centres provide for the enforcement – within the centre or within the host country – of arbitral awards made within each centre, as if they were judgments of the offshore Courts. For this purpose, the DIFC and AIFC courts may enter judgment in the terms of the award.[131] Conversely, within the AIFC and 'in accordance with' the domestic laws of Kazakhstan,[132] the AIFC Courts must recognise and enforce the awards made under the rules of other arbitration institutions of Kazakhstan.[133]

Awards made by the arbitration tribunals of these centres can be set aside in accordance with their own laws or regulations.[134] The only grounds for setting aside offshore arbitral awards are those of the UNCITRAL Model Law, but any references to domestic laws are references to the law of the centre, whereas references to a conflict with public policy are references to the public policy of the host country.

Concerning appeals against IAC arbitral awards, although the AIFC Court rules provide that AIFC awards will be enforced in Kazakhstan in the same way as AIFC Court judgments, the AIFC Constitutional Statute mentions that such awards are to be enforced 'in the same way, and on the same terms as, arbitration awards issued by arbitration institutions in the Republic of Kazakhstan'.[135] This apparent contradiction may have concerned some local practitioners, who fear that the domestic courts of this country may operate as appeal courts with respect to arbitration awards,[136] as it happened in the past.[137]

In accordance with their own procedural rules, the offshore courts may also enforce interim measures adopted by arbitration tribunals, as well as assist in the taking of evidence, for instance, by issuing witness summons.[138]

The offshore courts themselves, in accordance with each centre's internal norms and regulations, recognise foreign arbitral awards within each financial centre. The grounds for refusal of recognition usually mirror those of the NYCV.[139] However, in the cases of the DIFC and the AIFC, if Dubai or Kazakhstan are parties to an applicable treaty on recognition, that treaty will take precedence over the arbitration laws of these two financial centres and over their internal rules on recognition.[140]

11 Independence and Management of the Courts. Appointment and Removal of Judges

The success of any adjudicatory mechanism may depend on its funding and independence. A good way to test the independence of the courts under study may be to analyse the process of appointing, disciplining and removing judges (especially Chief Justices, given their key role in the management of the courts), court registrars and heads of arbitration centres. It is also important to analyse their financial independence and the process whereby the budget and annual financial statements are prepared and submitted to the authorities of the host country.[141] The laws and regulations of these courts also provide for some sort of immunity from liability for their judges.[142] Another way that independence and due

129. Art. 8 DIFC Law (DIFC Arbitration Institute); Art. 14 AIFC Constitutional Statute and AIFC Arbitration Regulations (AIFC International Arbitration Center).
130. Art. 7 AIFC Arbitration Regulations of 2017; Art. 3.2 ADGM Arbitration Regulations of 2015; Art. 2 QFC Arbitration Regulations of 2005.
131. Art. 27.49 AIFC Court Rules; Art. 43.75 DIFC Court Rules; Art. 34 Arbitration Law 2 of 2017 of QFC; Art. 180 ADGM Courts Regulations; Art. 56 ADGM Arbitration Regulations 2015; Art. 232 ADGM Court Procedure Rules of 2016.
132. Arts. 14.3 and 14.4, AIFC Constitutional Statute.
133. *E.g.* International Arbitration Court, available at: http://arbitration.kz/main; Atameken Arbitration Center of the National Chamber of Entrepreneurs, available at: https://aca.kz/site?lang=ENG.
134. Art. 41 DIFC Arbitration Law 1 of 2008 (amended in 2013) (DIFC Arbitration Law); Art. 44 AIFC Arbitration Regulations; Art. 33 Law 2 of 2017 Promulgating the Civil and Commercial Arbitration Law of the QICDRC.
135. Art. 14.3 AIFC Constitutional Statute.
136. Meeting of IAC officials with Almaty law firms and arbitration institutions, KIMEP University, 7 June 2018, Almaty.
137. A. Korobeinikov, *Baker McKenzie, 2017 Arbitration Yearbook Kazakstan* (2017) at 265, available at: https://globalarbitrationnews.com/wp-content/uploads/2017/06/Kazakhstan.pdf.
138. Art. 43.48 et seq. DIFC Court rules; Arts. 27.30 et seq. AIFC Court Rules; Arts. 27 and 28. ADGM Arbitration Regulations of 2015; and Art. 17 Law 2 of 2017 on Arbitration of the QFC.
139. The UAE (for Dubai and Abu Dhabi) ratified the NYCV in 2006, and Qatar did in 2002. Kazakhstan has been a party to the NYCV since 1995, but some scholars have misgivings about its applicability by the domestic courts of the country (L. Tieulina, *Legal Insight Magazine*, 6(42) August 2015).
140. Art. 45 AIFC Arbitration Regulations and Art. 42.1 DIFC Arbitration Law.
141. Art. 8 DIFC Law; Art. 10 ADGM Court Regulations; Art. 13.2 AIFC Constitutional Statute; Art. 9 AIFC Court Regulations; Schedules 5 and 6 QFC Law.
142. *E.g.* Art. 22.8 ADGM Law.

process is guaranteed is by ensuring the publicity of court proceedings.[143]

The Chief Justice of the AIFC Court and the remaining judges are appointed and removed by the President of the Republic of Kazakhstan on the recommendation of the Governor of the AIFC, who is also appointed and removed by the President himself.[144] The appointment of AIFC judges, other than the Chief Justice, is made in consultation with the latter. Removal of AIFC judges is possible in case of ill health, bankruptcy, criminal offence or serious misconduct, as it is also the case of the QFC. The AIFC provisions may add a measure of independence in this process of removal because its Chief Justice can establish a procedure of investigation to determine allegations of misconduct.[145]

The DIFC's Chief Justice and other judges are directly appointed by the sovereign of Dubai,[146] whereas in the case of the remaining courts the appointment process is done in consultation with other authorities, which may add a degree of independence. For instance, the Chief Justice of the ADGM Courts is appointed by the Board of Directors of this centre,[147] which is made up of no less than five members appointed by the Executive Council of Abu Dhabi, an advisory body to the Ruler of the Emirate, made up of members of different government departments and other local authorities. The remaining judges of the ADGM Courts are appointed by the ADGM Board but based on proposals made by the Chief Justice. The Chairmen and judges of the QFC Regulatory Tribunal and of its Civil and Commercial Court are appointed by the Council of Ministers of Qatar. They are removed by this same body in case of ill health, bankruptcy, criminal offence or serious misconduct.[148]

The AIFC has its own budget, but there is also a reference to the transfer of funds to the AIFC Courts 'in accordance with the budget legislation of the Republic of Kazakhstan'.[149] The Dispute Resolution Authority of the DIFC also has an independent budget that includes the Courts' budget.[150] Such budgetary independence is also the case for the ADGM.[151] The QFC Courts also have an independent budget, but, in this case, the budget laws of the Emirate are not applicable.[152]

The Chief Justices of these offshore courts are commonly in charge of preparing the budget of the court, as well as the annual financial accounts. Final approval of the courts' budget lies solely with a governmental body – in the case of the DIFC, ADGM and QFC – or with the centre's authorities – in the case of the AIFC. Remuneration of judges is typically entrusted to the same authorities or bodies that are competent for their appointment and removal. In the case of the AIFC, such remuneration cannot be reduced while the judges are in office.[153]

In countries with significant currency rate fluctuations – such as Kazakhstan – paying foreign judges in a hard currency, rather than in the local *tenge*, is an additional working benefit. However, as in the case of Kazakhstan, the domestic employment legislation may generally prohibit this, without specific legislation.

Chief Justices have other important functions, such as the appointment of registrars, execution judges and other officials and personnel of the courts, their day-to-day management and supervision, creating, or recommending the creation of, special court divisions and, in some cases, approving or providing advice in the making of court rules and other internal norms.

The number of judges employed may also be an important guarantee of efficiency. Nevertheless, sometimes there are only vague references to an amount that is 'sufficient to deal expeditiously with the cases pending before the Court', in the case of the AIFC.[154] There are also flexible requirements concerning the term for which judges are appointed, as well as for their renewal, the good character conditions necessary for appointment, English language skills, age limits and their knowledge and experience or qualifications in the law of a common law jurisdiction. Judges are also typically allowed to hold office in other jurisdictions at the same time that they are members of the courts of these financial centres.[155]

12 Conclusions

OFCs that also offer dispute resolution services have become increasingly common in jurisdictions eager to attract foreign investors and whose legal and judiciary systems are either defective or not attractive enough for those same future investors and for their legal advisors. However, it is fair to ask whether the effort of implementing such mechanisms would not be better invested in ordinary legal and judicial reforms for the whole country and whether these initiatives fit well into their complicated constitutional law systems, which still have some way to go in terms of their democratic deficit, separation of powers and respect for the rule of law. Where lawyers and businessmen usually trust the domestic court system, it may be more practical to just open English-speaking sections of ordinary commercial courts, with broad rights of audience for foreign lawyers, as is done in some European and South-East Asian jurisdictions.

AIFC law really tries to insulate its activities and its Participants from the rest of the country, but it may not

143. Rule 98 ADGM Court Regulations; Rule 23.79 DIFC Court Rules; Part 22 AIFC Court Rules; Art. 32 AIFC Court Regulation. All these provisions call for proceedings to be held in public.
144. Art. 10 and Art. 13.3 AIFC Constitutional Statute.
145. Art. 14 AIFC Court regulations.
146. Art. 8 DIFC Law.
147. Arts. 6 and 13 ADGM Law.
148. Schedules 5 and 6 QFC Law 7.
149. Art. 19 AIFC Court Regulations.
150. Art. 8 DIFC Law.
151. Art. 10 ADGM Law.
152. Art. 8.5 QFC Law.
153. Art. 16 AIFC Court Regulations.
154. Art. 10 AIFC Court Regulations.
155. Arts. 11 and 12, AIFC Court Regulations; Art. 9 DIFC Court Law; Art. 192 ADGM Court Regulations; Schedule 6, para. 2 QFC Law.

attract enough trust if there is uncertainty concerning its interpretation or concerning the relationship with onshore domestic courts. Contrary to the DIFC, where the UAE Federal Supreme Court and the Dubai Supreme Court have a coordinating role, the AIFC Court is expressly excluded from the domestic judicial system of Kazakhstan, so it remains to be seen if the Supreme Court of this country will properly assume that coordinating role on the basis of the constitutional law nature of the AIFC's founding legislation.[156] In this regard, one of the tasks assumed by the International Council of the Supreme Court of the Republic of Kazakhstan is to interact with the AIFC Court.[157] The AIFC Court is also very actively reaching out to the legal and academic world of the country.[158]

This degree of uncertainty may worry those Kazakhstani law firms that now have to advise their clients on the inclusion of choice of court and arbitration clauses providing for the jurisdiction of the AIFC Court and IAC, in any contracts presently being drafted and negotiated.[159]

Nevertheless, these offshore courts may yet prove to be a powerful tool that will in time drag the entire legal and judicial system of the country behind if there are good relations between the offshore and the onshore institutions. If such relations are harmonious and local courts do not see these new courts as 'uninvited guests', there could be very good reciprocal influences. If, on the other hand, local courts show themselves too jealous of their own jurisdiction, there could be complications.

The criticism that is sometimes made of international commercial and investment arbitration for being opaque and unaccountable may be unfair here because the rules of these new offshore courts seem to guarantee publicity and are under the guardianship of sovereign nations. However, it remains to be seen whether another common criticism – the elitism of international arbitration, to which only sophisticated parties have access – can also be made of these courts. That most disputes at the DIFC are employment related may point in the opposite direction.[160]

Courts staffed by English judges who apply English law sound like a good idea for the business community at large, especially in Persian Gulf countries, which have had a long relationship with the UK. Given the cosmopolitan population of the UAE and Qatar, it may have come as a relief for 'expats' to have English-speaking courts at their disposal, although it may also strengthen the Anglo-Saxon cultural grip on the world.

However, the foreign, English-speaking population of Kazakhstan is much smaller, and it remains to be seen how many foreign companies are lured by the calls of the charismatic President Nazarbayev, who continues to be an influential figure, despite his resignation last March. Some fear that this will be just another bluff, like the failed Almaty Financial District, where a bunch of people will again profit from the public funding devoted to this new ambitious project.[161] The procedural advantages of English-style litigation – such as discovery and the precedent system – may add to the attractiveness of these mechanisms but may be seen as discriminatory for potential litigants from the rest of the host country, who may not be able to afford to establish themselves within this new financial centre or voluntarily submit to its jurisdiction.

Offshore courts of OFCs are in practice 'jurisdictions of refuge' and, for many practical purposes, 'jurisdictions within jurisdictions'. They may provide another example of the flight from state justice, akin to arbitration, to be studied by the theories of delocalisation. Offshore courts and international business courts may show how the postmodern state is increasingly abandoning the rationalistic, egalitarian Napoleonic tenets of nineteenth-century justice and inadvertently moving back to the more interesting but more chaotic distribution of powers of Medieval Europe.

156. Art. 4.1 AIFC Constitutional Statute.
157. Art. 5.3 Regulation of the International Council of the Supreme Court of the Republic of Kazakhstan, as confirmed by the decision of the plenary session of the Supreme Court, 15 February 2016, available at: http://sud.gov.kz/rus/content/polozhenie-mezhdunarodnogo-soveta-pri-verhovnom-sude-respubliki-kazahstan.
158. Available at: http://aifc-court.kz/press-releases.
159. In a lecture given at KIMEP University (Almaty) on 19 April 2019, by Sir Jack Beatson, Justice of the AIFC Court, and by Mr Christopher Campbell-Holt, Registrar and Chief Executive of the AIFC Court, it was informed that, so far, choice of forum clauses choosing the AIFC Court have been inserted in 250 contracts. In addition, they were confident that, not only for legal reasons, but also owing to the good relationship that the AIFC enjoys with the Government and with the Supreme Court, the local judiciary will in no case attempt to review any AIFC rulings or arbitral awards.
160. Around 60% in 2017, available at: https://www.thenational.ae/business/difc-courts-cases-up-41-in-2017-led-by-small-claims-tribunal-1.706095.
161. Available at: https://www.fdiintelligence.com/Locations/Asia-Pacific/Kazakhstan/Is-Kazakhstan-s-new-financial-center-for-real.